Irregular Migrants, Deprivation of Liberty and Restriction on Freedom of Movement

Legal Compilation

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Introduction

This compilation may serve for those who are searching for legal information related to certain aspects of detention of irregular migrants.[1] However, it was drafted, in particular, as a supporting material with the goal of submitting an intervention before the Constitutional Court of Romania, highlighting a discrepancy in the Romanian Aliens Law,[2] which, in Article 97, refers to "restriction on freedom of movement", whereas, in reality, irregular migrants in Romania are literally detained – "deprived of their liberty" – and, therefore, should be provided with basic procedural safeguards stipulated, *inter alia*, in Article 23 of the Romanian Constitution.[3] It cannot be accepted that irregular migrants "restricted on their freedom of movement" do not enjoy even the minimum safeguards provided for convicted criminals. The paper is strictly based on international and European legal documents, including jurisprudence and soft law recommendations.

This tool consists of two main parts. Part I seeks to clarify the distinction between "deprivation of liberty" and "restriction on freedom of movement". Part II briefly touches upon the procedural safeguards which should be, under international and European law, guaranteed for irregular migrants deprived of their liberty, and emphasizes some relevant case law,[4] especially from the European Court of Human Rights, in this regard. Individual chapters aim to highlight the most pertinent excerpts from various, primarily legal, sources related to the issues examined. With two exceptions,[5] all the chapters are divided into two sub-chapters, two layers of interest, summarizing the international and European legal framework. Excerpts in the sub-chapters are organized chronologically. If there is, however, a need or interest to elaborate on a specific issue, it suggests the use of interactive links for a full version view, which are

[1] For clarifications in terminology see the sub-chapter: The term "irregular migrant"
[2] Article 97(1) of the Emergency Ordinance No. 194 from 12 December 2002 on the status of aliens in Romania
[3] Article 23 of the Constitution deals with deprivation of liberty. It should be, however, highlighted that, according to para. 13 of this Article, "[t]he freedom deprivation sanction can only be based on criminal grounds."
[4] Explicitly referring to detention of irregular migrants
[5] Chapter 4 on national aliens legislation of other countries, and chapter 5 on examples of alternatives to detention

spread all over the text in footnotes. It should be noted that the compilation does not constitute an exhaustive material taking into consideration both the objective of the paper as well as a variety of sources in this particular field.

On the basis of the above mentioned goal, the paper examines under international and European human rights law two major areas, namely the distinction between "deprivation of liberty" and "restriction on freedom of movement", and the procedural safeguards for irregular migrants deprived of their liberty. Neither does this background material cover the conditions in facilities used for detention of migrants, nor directly the question of lawfulness of detention as such.[6] Similarly, this material does not intend to examine grounds for detention of migrants and the principle of necessity[7] and proportionality.

[6] Article 5(1) of the ECHR requires that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law". In addition to this, each sub-paragraph, including Article 5(1)(f), supposes that the detention is lawful. In practice, the Court sometimes merges its consideration of the two requirements, i.e. treating procedural as well as substantive requirements with a view to the single condition that a deprivation of liberty be lawful. In the case of *Bozano v. France*, the Court stated that "[t]he main issue to be determined is whether the disputed detention was "lawful", including whether it was in accordance with "a procedure prescribed by law". The Convention here refers essentially to national law and establishes the need to apply its rules, but it also requires that any measure depriving the individual of his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness. What is at stake here is not only the "right to liberty" but also the "right to security of person". (para. 54)"

[7] The European Court of Human Rights has accepted that States have a broader discretion when detaining a person under Article 5(1)f of the ECHR as compared to other interferences with the right to liberty. The Court stressed that in this case there is no requirement to examine that detention be reasonably considered necessary, for example, to prevent committing an offence or fleeing. ECtHR (Grand Chamber), *Saadi v. UK*, No. 13229/03, 29 January 2008 at 72-73. Recently, however, the Court has found a violation of Article 5.1(f) in the case of the detention of four children, one of whom was showing serious psychological and psycho-traumatic symptoms in a closed centre designed for adults and ill-suited to their extreme vulnerability, see ECtHR, *Muskhadzhiyeva and others v. Belgium*, No. 41442/07, 19 January 2010, paragraphs 69-75 concerning the detention of a Chechen family seeking asylum in the context of the Dublin procedure. See also ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006

The term "irregular migrant"

Global Commission on International Migration (GCIM): Irregular migration, state security and human security, 2005[8]

The term 'irregular' is conceptually problematic, as expanded in the following subsection. It is, nevertheless, considered preferable to the other term most commonly used in this context - 'illegal'. The use of the term 'illegal' can be criticised in at least three ways. First is its connotation with criminality. Most irregular migrants are not criminals. This has been emphasised by the UN Special Rapporteur on the Rights of Non-Citizens, whose final report recommends that: 'Immigrants…even those who are in a country illegally and whose claims are not considered valid by the authorities, should not be treated as criminals' (E/CN. 4/Sub. 2/2003/23 Para 29). Second, defining persons as 'illegal' can also be regarded as denying their humanity (Ochoa-Llidó 2004). It can easily be forgotten that such migrants are human beings who possess fundamental rights whatever their status (CDMG (2004) 29). Third, and of particular concern to the Office of the United Nations High Commissioner on Refugees (UNHCR), is the possibility that labelling as 'illegal' asylum seekers who find themselves in an irregular situation may further jeopardise their asylum claims. The two other terms that are often used in this context are 'undocumented' and 'unauthorised'. The former is avoided … because of its ambiguity. It is sometimes used to denote migrants who have not been documented (or recorded), and sometimes to describe migrants without documents (passports etc.). Neither situation applies to all irregular migrants, yet 'undocumented' is often used to cover them all. Similarly, not all irregular migrants are necessarily unauthorised, and so this term too is often used incorrectly. While therefore acknowledging the conceptual problems associated with the term 'irregular', it is nevertheless considered preferable to the other terms commonly used in this context, and as good as any alternative. Another reason why it is recommended … is that it used by most organisations with a competence in migration, including the Council of Europe, International Labour Organisation (ILO), International Organisation for Migration (IOM), the Organisation for Security and Cooperation in Europe (OSCE) and UNHCR. Indeed the European Union (EU) is the only significant international actor that persists in using the term 'illegal migration' (CDMG (2004) 29)… it is important to recognise that there are a variety of routes into irregularity (Uehling 2004). Irregular migration

[8] http://www.gcim.org/attachements/TP5.pdf

includes people who enter a country without the proper authority (for example through clandestine entry and entry with fraudulent documents); people who remain in a country in contravention of their authority (for example by staying after the expiry of a visa or work permit, through sham marriages or fake adoptions, as bogus students or fraudulently self-employed); people moved by migrant smugglers or human trafficking, and those who deliberately abuse the asylum system… Data on irregular migration – including both numbers and also demographic and socio-economic profiles - are scarce, often unreliable and usually incomparable between states and over time. The types of conceptual problems covered in the preceding subsection are one reason why: Different States, for example, define irregular migrants in different ways, and migrants can shift overnight between regular and irregular statuses.

UN International Law Commission (ILC), Report on the expulsion of aliens, 2006, A/CN.4/565[9]

127. The term "illegal alien" is generally understood as referring to an alien whose status is illegal as a result of failing to comply with the relevant national laws of the territorial State concerning the admission, the continuing presence, the permitted activities or the residence of aliens. Thus, an alien may be illegal from the moment of crossing the border of the territory of another State without complying with the national immigration laws concerning admission. In addition, an alien who is lawfully admitted to the territory of another State may acquire illegal status by subsequently failing to comply with the national laws governing the presence of aliens, for example by remaining in the territory beyond the period specified by the immigration officials at the time of entry or by engaging in activities not permitted by the visa or other entry document.[10] In some instances, an illegal alien may subsequently acquire lawful status.[11]

128. Although some treaties distinguish between legal and illegal aliens, they do not provide a definition of the term "illegal alien".[12]

129. The term "illegal alien"[13] and other similar terms are used in the national laws of several States to refer to aliens[14] who initially lack or subsequently lose their legal status, including "illegal immigrant",[15] "illegal foreigner",[16] "unlawful non-citizen",[17]

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[9] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/260/29/PDF/N0626029.pdf?OpenElement

[10] See, e.g. United States Ex Rel. Zapp. et al. v. District Director of Immigration and Naturalization, Circuit Court of Appeals, Second Circuit, 6 June 1941, Annual Digest and Reports of Public International Law Cases, 1941-1942, H. Lauterpacht (ed.), Case No. 91, pp. 304-308 (Aliens expelled because they no longer exercised the trade they were admitted to exercise); and Espaillat-Rodriguez v. The Queen, Supreme Court, 1 October 1963, International Law Reports, volume 42, E. Lauterpacht (ed.), pp. 207-210.

[11] For example, the status of an illegal alien may be regularized by, inter alia, remaining in the territory of the host State for a certain period of time. See Re Sosa, Supreme Court of Argentina, 23 March 1956, International Law Reports, 1956, H. Lauterpacht (ed.), pp. 395-397

[12] Some international treaties contain provisions on expulsion which apply only to aliens lawfully present in the territory of a State. See, in particular, International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, Treaty Series, vol. 999, No. 4668, p. 171, article 13; Protocol relating to the Status of Refugees, New York, 31 January 1967, United Nations, Treaty Series, vol. 606, No. 8791, p. 267, article 32; Convention relating to the Status of Stateless Persons, New York, 28 September 1954, United Nations, Treaty Series, vol. 360, No. 5158, p. 117, article 31, and European Convention on Establishment (with Protocol), Paris, 13 December 1955, United Nations, Treaty Series, vol. 529, No. 7660, p. 141, article 3.

"prohibited immigrant",[18] "prohibited person",[19] "forbidden individual"[20] and "immigration offender".[21] The term "illegal alien" and similar terms are defined in the legislation of some States based on an initial illegal entry or a subsequent illegal presence.[22]

[13] Honduras, 2003 Act, article 3(15).
[14] In Kenya, an illegal alien's dependent may also be given such status. Kenya, 1967 Act, article 3(1)(l).
[15] Belarus, 1998 Law, article 3; and Honduras, 2003 Act, article 3(15).
[16] South Africa, 2002 Act, article 1(1)(xviii).
[17] Australia, 1958 Act, articles 14-15.
[18] Kenya, 1967 Act, article 3(1); and Nigeria, 1963 Act, article 52(1).
[19] South Africa, 2002 Act, articles 1(1) (xxx) and 29.
[20] Belarus, 1993 Law, article 20(6).
[21] Republic of Korea, 1992 Act, article 2(13).
[22] Belarus defines "illegal immigration" as an entry into, or stay on, its territory in violation of its relevant law (Belarus, 1998 Law, article 3). Kenya classifies an alien's presence on its territory as unlawful unless the alien possesses a "valid entry permit or a valid pass," or is otherwise authorized to be present under Kenyan law (Kenya, 1967 Act, article 4). The United Kingdom defines an "illegal entrant" as a person who unlawfully enters or seeks to enter its territory in breach of a deportation order or of the immigration laws, or by means which include deception by another person (United Kingdom, 1971 Act, section 33(1), as amended by the Asylum and Immigration Act 1996, Sch. 2, para. 4). The United States defines an alien's presence as unlawful if the alien has not been "admitted or paroled" into its territory or remains after the expiration of the authorized stay (United States, INA, section 212(a)(9)(B)(ii)).

PART I – DEPRIVATION OF LIBERTY OR RESTRICTION ON FREEDOM OF MOVEMENT

Part I mirrors the main objective of this compilation, which is, as noted above, to prove under international and European human rights law that the Romanian Aliens Law should use the term "deprivation of liberty" of irregular migrants instead of "restriction on freedom of movement" which is currently applied. In order to achieve the desired goal, part I of the compilation provides various approaches on the issue and starts with defining both "deprivation of liberty" and "restriction on freedom of movement". The distinction is elaborated upon in chapter 3. Part I further examines whether there exists a similar discrepancy in aliens legislation of other European countries, and offers examples of alternatives to detention as genuine restrictions on freedom of movement.

Preliminary remarks: Romanian context

Both parts include in their "preliminary remarks" excerpts from Romanian legislation related to the issues examined.

Emergency Ordinance No. 194 from 12 December 2002 on the status of aliens in Romania

ART. 97 Transfer of aliens into public custody

*(1) Transfer into **public custody** is a measure of temporary **restriction of the freedom of movement** on the territory of the Romanian state, ordered by the magistrate against the alien who could not be removed under escort within the term provided by the law, as well as against the alien who has been declared undesirable or with regard to whom the court instance has ordered expulsion.*

ART. 98 Accommodation centres

*(2) The centres are **closed spaces**, especially equipped for this purpose, under administration of the Romanian Migration Office, and serve the purpose of **temporary accommodation** for aliens who have been declared undesirable or against whom the measures of return or expulsion have been ordered and they have been transferred into public custody.*

ART. 101 Special measures

*(2) As long as aliens mentioned by para. (1) are under public custody, their **transfer outside** the centre's premises shall be made **under escort**.*

A brief comparison

Restriction on freedom of movement according to the Aliens Law	Deprivation of liberty according to the Romanian Constitution
Article 97	*Article 23*
Public custody[23] ... for a period of 30 days ... ordered by a prosecutor…may not exceed 6 months…	*Preventive custody [arrest][24] ... ordered for 30 days ... by a judge …no longer than 180 days…*

[23] Definition of custody according to the Bouvier's Law Dictionary, Revised 6th Ed (1856): The detainer of a person by virtue of a lawful authority. To be in custody, is to be lawfully detained under arrest. Vide 14 Vin. Ab. 359; 3 Chit. Pr. 355

[24] "Preventive custody" was called "arrest" in the older version of the Romanian Constitution.

1 Meaning of deprivation of liberty

This chapter seeks to clarify the meaning of "deprivation of liberty" in light of international and European human rights law framework. As to European human rights law, particular emphasis is given to the "definition" of deprivation of liberty under the European Convention on Human Rights as interpreted by the European Court of Human Rights (ECtHR).

1.1 Deprivation of liberty under international law

Universal Declaration of Human Rights (UDHR)

Article 3

Everyone has the right to life, liberty and security of person

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

International Covenant on Civil and Political Rights (ICCPR)

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law…

UN Human Rights Committee, General Comment No. 8 on Article 9 of the ICCPR, 1982[25]

Article 9 which deals with the right to liberty and security of persons has often been somewhat narrowly understood in reports by State parties, and they have therefore given incomplete information. The Committee points out that ***paragraph 1 is applicable to all deprivations of liberty****, whether in criminal cases* ***or in other cases such as****, for example, mental illness, vagrancy, drug addiction, educational purposes****, immigration control, etc.***

[25] http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument

Declaration on the Human Rights of Individuals who are not nationals of the country in which they live (Adopted by General Assembly resolution Adopted by General Assembly resolution 40/144 of 13 December 1985)[26]

Article 5

(1) Aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligation of the State in which they are present, in particular the following rights:

(a) The right to life and security of person; no alien shall be subjected to arbitrary arrest or detention; no alien shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law;

UN General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: resolution / adopted by the General Assembly, 9 December 1988, A/RES/43/173[27]

(a) "Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;

*(b) "**Detained person**" means any person **deprived of personal liberty** except as a result of conviction for an offence;*

(c) "Imprisoned person" means any person deprived of personal liberty as a result of conviction for an offence;

*(d) "**Detention**" means the condition of detained persons as defined above;*

(e) "Imprisonment" means the condition of imprisoned persons as defined above;

United Nations Rules for the Protection of Juveniles Deprived of their Liberty; GA resolution 45/113 of 14 December 1990[28]

Rule 11(b)

***The deprivation of liberty means** any form of detention or imprisonment or the placement of a person in **a public** or private **custodial setting**, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.*

UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, December 1996, E/CN.4/1997/4[29]

*50. The real issue that requires consideration relates to **the true meaning of the term "detention"** in the context of the mandate of the Working Group. The specific question is whether the distinction between detention and imprisonment made in the context of the Body*

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[26] UN General Assembly, Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live : resolution / adopted by the General Assembly, 13 December 1985, A/RES/40/144, available at: http://www.unhcr.org/refworld/docid/3b00f00864.html

[27] http://www.unhcr.org/refworld/docid/3b00f219c.html

[28] http://www.un.org/documents/ga/res/45/a45r113.htm

[29] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G96/144/38/PDF/G9614438.pdf?OpenElement

of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly resolution 43/173) exists in all applicable international instruments…
70. The research carried out by the Working Group came to the following conclusion: ***the only international text that distinguishes between "detention" and "imprisonment" is the aforementioned Body of Principles****.*
71. ***All other texts*** [international instruments]*, as will be seen below (see paras. 75-85)* ***use the terms "detention" and imprisonment" as synonyms for deprivation of liberty, both pretrial and posttrial****.*
73. It is clear from this text [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment] *that the use of the terms has no general scope, as commonly thought, beyond the Body of Principles itself…*
79. From a study of national legislation it may be concluded that the terms "imprisonment" (" prisión "), "detention" (" detención ") and others are used ***indiscriminately to refer to deprivation of liberty****…*

UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999[30]
Guideline 1 …UNHCR considers ***detention as****: confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory. There is a qualitative difference between detention and other restrictions on freedom of movement. Persons who are subject to limitations on domicile and residency are not generally considered to be in detention. When considering whether an asylum-seeker is in detention, the cumulative impact of the restrictions as well as the degree and intensity of each of them should also be assessed.*

UN Office of the High Commissioner for Human Rights, Fact Sheet No. 26, Working Group on Arbitrary Detention 2000[31]
A. What is ***meant by "deprivation of liberty"****?*
Commission on Human Rights resolution 1991/42, under which the Working Group was set up, did not define the term "detention". This led to differing interpretations of the term, which were solved by adoption of Commission Resolution No. 1997/50.
International human rights instruments protect the right to personal liberty, in that no one shall be arbitrarily deprived of his liberty. There may accordingly be legitimate deprivations of liberty, such as of convicted persons or of those accused of serious offences.

[30] UN High Commissioner for Refugees, UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999, available at: http://www.unhcr.org/refworld/docid/3c2b3f844.html
[31] UN Office of the High Commissioner for Human Rights, Fact Sheet No. 26, The Working Group on Arbitrary Detention, May 2000, No. 26, available at: http://www.unhcr.org/refworld/docid/479477440.html

There may further be other forms of deprivation of liberty *attributable to administrative authorities, as in the case of mentally disturbed persons* **[or detention of migrants]**. *In addition, the right to personal liberty may suffer limitations during states of emergency, in accordance with article 4 of the International Covenant on Civil and Political Rights. In the latter instance, not judges but other authorities frequently justify arrests. Finally, there are deprivations of liberty which are per se prohibited, such imprisonment for debt.*
It must also be noted that ***international instruments do not always use the same terminology to refer to deprivations of liberty****: they may refer to "arrest", "apprehension", "****detention****", "incarceration", "prison", "reclusion", "****custody****", "remand", etc. For this reason the Commission on Human Rights, in its Resolution 1997/50, opted for the term "deprivation of liberty", term that eliminates any differences in interpretation between the different terminologies.*
This terminology was chosen since the objective entrusted to the Group relates to the protection of individuals against arbitrary deprivation of freedom in all its forms, and its mandate extends to deprivation of freedom either before, during or after the trial (a term of imprisonment imposed following conviction), as well as deprivation of freedom in the absence of any kind of trial (administrative detention). The Group also regarded as forms of detention measures of house arrest and rehabilitation through labour, when they are accompanied by serious restrictions on liberty of movement.

Association for the Prevention of Torture: Monitoring Places of Detention. A Practical Guide, April 2004[32]
Deprivation of liberty means *the placement of a person in a public or private setting which that person is not permitted to leave at will, by order of any judicial, administrative or other authority.*

1.2 Deprivation of liberty under European law[33]

European Convention on Human Rights[34]
Article 5
1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: …(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition…

[32] http://www.apt.ch/index.php?option=com_docman&task=cat_view&gid=58&Itemid=250&lang=en
[33] Relevant judgments of the courts in the UK are considered in the following chapter as well
[34] formally the Convention for the Protection of Human Rights and Fundamental Freedoms

Charter of Fundamental Rights of the European Union[35]

Article 6

Everyone has the right to liberty and security of person.

Legal Explanations

The rights in Article 6 are the rights guaranteed by Article 5 of the ECHR, and in accordance with Article 52(3) of the Charter, they have the same meaning and scope.

JUSTICE Commentary

*Most human rights can be said to deal with liberty in one form or another, e.g. freedom of expression, freedom of assembly, etc. The right to liberty itself under Article 6, though, is primarily concerned with '**liberty'** in its most immediate and **physical sense**.*[36] *However, **the right to liberty is concerned with more than mere restriction of movement**. It is most often engaged as a bar to arbitrary arrest and unlawful detention by the State.*[37] *It also has been interpreted to provide a number of procedural safeguards to ensure that persons detained or taken into custody by the State have the opportunity to seek their release.*

'Security of the person' should also be understood in the same context, rather than as a distinct concept. The right to security of the person, therefore, is not the source of the State's duty to protect persons from attack[38] *nor the source of a right to social security.*[39] *Rather, the reference to 'security of person' is meant to underline the prohibition against arbitrary detention by the State.*[40]

Although the right to liberty is not an absolute right, it ensures that a person can only be detained pursuant to law, and that any detention by the State must be subject to the strictest scrutiny. In this sense, the right to liberty can be understood as expanding upon the ancient common law right of habeas corpus – the requirement that the State show just cause why a person should be detained against their will. Moreover, the right to liberty entitles individuals to compensation where detention is not lawful.

*It is important to note that **not every restriction on liberty will be regarded as a 'deprivation' of liberty**, **nor is every 'deprivation' of liberty automatically unlawful** (e.g. someone who is convicted of a crime and sentenced to prison is lawfully deprived of liberty). The question of whether a deprivation of liberty has occurred, and whether that deprivation is lawful, will depend on **a range of factors**,*

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[35] http://www.eucharter.org/home.php?page_id=13

[36] Engel and Others v. Netherlands, 8 June 1976

[37] Engel and Others v. Netherlands, 8 June 1976; Bozano v. France, 18 December 1986; Van der Leer v. Netherlands, 21 February 1990

[38] X v. Ireland, 20 July 1973 (Decision)

[39] X v FRG, Application No 5287/71,b1 Digest 288 (1972)

[40] Bozano v. France, 18 December 1986;

***such as the kind of interference with liberty, its duration**,[41] **effect and the manner of its implementation**.[42] **The difference between 'deprivation' of liberty, as opposed to 'mere restriction' of liberty has been judged by the courts to be 'merely one of degree or intensity, and not one of nature or substance'**.[43]*

Detention

If arrest is the most common type of interference with liberty, detention is the most obvious. Classically, detention is most often associated with imprisonment. However, house arrest,[44] compulsory treatment in a mental health facility,[45] or being refused authorisation to leave a detention centre[46] are all examples of detention that may amount to 'deprivation of liberty'. More borderline examples include such situations as being required by court order to reside on a remote island for 16 months,[47] or being detained in a hotel room for an extended period.[48] However, the length of time is not itself determinative: even brief periods of detention amount to deprivation of liberty, e.g. detention for a period of less than two hours or detention for the purpose of effecting a blood test.[49]

*Establishing that a 'deprivation of liberty' has occurred is typically the first step in determining whether there has been a breach of the right to liberty and - generally speaking – **the ability to leave the area of confinement will typically** mean that a 'derpivation of liberty' has not been made out. For instance, a policy of housing asylum seekers in an airport transit area was held not to amount to detention as the asylum seekers were deemed to be free to leave at any time.[50]* **[cf. Amuur v. France, para. 48]**

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 (The EU Return Directive)[51]

Article 15

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[41] Nowicka v. Poland, 3 December 2002
[42] Guzzardi v. Italy, 6 November 1980; Amuur v. France, 25 June 1996, Riera Blume and Others v. Spain, 14 October 1999;
[43] Guzzardi v. Italy, 6 November 1980;
[44] Vittorio and Luigi Mancini v. Italy, 2 August 2001; the Greek case, 12 YB.
[45] Ashingdane v. United Kingdom, 28 May 1986
[46] Cyprus v. Turkey, 10 May 2001
[47] Guzzardi v. Italy, 6 November 1980
[48] Riera Blume and Others v. Spain, 14 October 1999;
[49] X v Austria, Application No 8278/78, 18 DR 154 (1979).
[50] S.S., A.M. and Y.S.M. v. Austria, 5 April 1993
[51] The transposition deadline for the Member States is 24.10.2010. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF

1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:
(a) there is a risk of absconding or
(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast), COM(2008) 820 final[52]
Section V. Detention for the purpose of transfer
Article 27 Detention
2. Without prejudice to Article 8(2) of Directive […/…/EC] [laying down minimum standards for the reception of asylum seekers], when it proves necessary, on the basis of an individual assessment of each case, and if other less coercive measures cannot be applied effectively, Member States may detain an asylum-seeker or another person as referred to in Article 18(1)(d), who is subject of a decision of transfer to the responsible Member State, to a particular place only if there is a significant risk of him/her absconding.

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

Commission's Proposal for a Directive[53]	**Final text**[54]
Article 2	*Article 2 Definitions*
*(l) "Detention" covers any confinement … by a Member State within **a restricted area** where the applicant's freedom of movement **is substantially curtailed**.*	*(k)"detention" shall mean confinement … by a Member State within a particular place, where the applicant is **deprived of** his or her freedom of movement;*

Vice-president of the CPT of the Council of Europe, Mauro Palma, stated that *"[t]he area of the deprivation of the liberty is more extensive of whatever thinks. That mainly includes above all the prison, that is the place to which it immediately takes the same idea to us of liberty deprivation; a place still and wherever barely is transparent, to grief that many national orderings anticipate the possibility of access to him of people who have an institutional roll. But the area of the liberty deprivation is not restricted single in*

[52] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0820:FIN:EN:PDF
[53] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001PC0181:EN:NOT
[54] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0009:EN:HTML

the jail. We spoke here of deprivation of the liberty ***whenever a subject is retained in a place on the part of a public authority*** *- and therefore he is not free to leave it voluntarily - independently of the cause that such place formally is defined and provided as cell or another place with possible lodging (the van that accompanies a person to police station is already then a place of deprivation of the liberty). The guarantees of protection of the fundamental rights of a liberty deprived person go off from the first moment of such deprivation. In particular, the notification to third of the deprivation of liberty happened, the access to the lawyer and a possible medical checkup, must be guaranteed from the first moment and no, as in more than an occasion some countries have tried to affirm, single from the moment of the formalization of the deprivation of the freedom."*

Jesuit Refugee Service (JRS) Europe: DEVAS Project's Glossary of Terms[55]

Administrative detention

A situation of "deprivation of liberty", not merely a "restriction upon liberty"*; an administrative measure and not a measure of the penal system, although its use takes on characteristics of criminal incarceration. Thus it is neither pre-trial detention on remand nor imprisonment after a court trial.*

Council of Europe (CoE): A guide to the implementation of Article 5 of the ECHR, Human Rights Handbooks No. 5, 2002[56]

3. What constitutes a deprivation of liberty?

… [A] law enforcement officer – whether or not force is actually used – makes it clear that a person either ***cannot leave a particular place*** *or is obliged to come with the officer to some other place … It is the existence of compulsion that is important so that, as the European Court of Human Rights made clear in* ***De Wilde, Ooms and Versyp v. Belgium****, it is of no consequence that the person may have surrendered him or herself voluntarily. Moreover it is probably irrelevant that the person deprived of liberty is unaware of this fact; it is sufficient that he or she is no longer free to leave … Article 5 is most commonly going to be relevant where the degree of confinement to a particular place is extreme in that the person affected* ***cannot move from a certain spot*** *– whether in the street or other open place … However,* ***the fact that a person has a degree of liberty within a particular place will not necessarily mean that Article 5 has no application****. Thus it was found in* ***Ashingdane v. the United Kingdom*** *to cover a person who, although being kept compulsorily in a mental hospital, was placed in a ward which was not locked and was allowed to leave the hospital grounds during the day and over the weekend without being accompanied. Similarly in* ***Guzzardi v. Italy*** *it was held applicable to a requirement that someone suspected of involvement in organised crime live in an unfenced area of 2.5 sq. km on a remote island with other such persons. Although his wife and child could live with him, the combination of constraint and isolation were sufficient in this case for it*

[55] http://www.jrseurope.org/DEVAS/DEVAS%20pdf/DEVAS_Glossary%20of%20Terms_DRAFT%20G1.pdf
[56] http://www.coe.int/T/E/human_rights/hrhb5.pdf

*to be treated as a deprivation of liberty. These factors are more significant than the place, so a requirement that a person stay in their home would engage Article 5, whether – as in **Giulia Manzoni v. Italy** – this was pending trial or – as in **Cyprus v. Turkey** – pursuant to a particularly strict form of curfew under which **persons could leave their homes only if escorted.***

UNHCR Manual on Refugee Protection and the ECHR, 2003, updated 2006[57]

Definition of detention in the context of Article 5(1) (f) of the ECHR

*2.1 Article 5 of the ECHR proclaims the right to liberty and security and does not give a definition of detention. The only indication is that **detention is a deprivation of liberty**. It is therefore the Court, through its jurisprudence, which has brought the necessary precision. As opposed to UNHCR, which in its Guidelines defines detention as a "confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where the only opportunity to leave this limited area is to leave the territory", the Court has no fixed definition. It uses a number of criteria which presence in a particular situation determine whether there is deprivation of liberty.*

…

*2.3 In the case of **Amuur v. France**, involving Somali asylum-seekers held in the transit zone at Paris-Orly airport, the Court noted that while the applicants were hosted in a hotel which formed part of the transit zone, they "were placed under **strict and constant police surveillance**" (para. 45). Responding to the argument of the French government, which said that the applicants were not detained since they could at any time have removed themselves from the transit zone by returning to the country they came from, the Court decided: **The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty**, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention. **Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in.** (para. 48)*

*It was therefore decided that "holding the applicants in the transit zone of Paris-Orly Airport was equivalent in practice, in view of the restrictions suffered, **to a deprivation of liberty**" (para. 49).*

*2.4 It must be pointed out that **the definition of the Court** **[Guzzardi v Italy, para. 92]** is less precise than that of UNHCR. It is, however, more flexible and adaptable to new situations. The two definitions are nonetheless compatible and overlap with each other.*

Neil Allen; Restricting Movement or Depriving Liberty?, Journal of Mental Health Law, Spring 2009[58]

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[57] UN High Commissioner for Refugees, UNHCR Manual on Refugee Protection and the European Convention on Human Rights (April 2003, Updated August 2006), August 2006, available at: http://www.unhcr.org/refworld/docid/3f4cd5c74.html

[58] Available at: http://personalpages.manchester.ac.uk/staff/Neil.Allen/Academic%20publications/Allen_Restricting_movement_or_depriving_liberty.pdf

[Freedom to leave]

A freedom to leave *a particular location is a useful indicator of the restrictive* ***regime's intensity****. Asylum-seekers kept in an airport transit zone, for example, were held to be deprived of their liberty despite being (at least theoretically) free to leave the country at any time, see Amuur v France; ECtHR 1996. Moreover, in JJ the suspected terrorists were free to leave their homes daily between 10am and 4pm, provided thay* ***remained within a designated area****. In* ***JE v DE****, Munby J. defined being free to leave "in the sense of removing [oneself] permanently in order to live where and with whom [one] chooses." In the case of* ***H.L. v United Kingdom****; ECtHR 2004, one's freedom to leave "may be tested by determining whether those treating and managing the person exercise complete and effective control over [their] care and movements." The ability to leave the country must be* ***more than a theoretical possibility****. According to Amuur v France, an asylum-seeker's ability to leave a country "becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in…*

19th General Report on the CPT's Activities (2008-2009); CPT/Inf (2009) 27[59]

76. … ***"Detained irregular migrants"*** *is the term used to denote persons who have been* ***deprived of their liberty under aliens legislation*** *either because they have entered a country illegally (or attempted to do so) or because they have overstayed their legal permission to be in the country in question.*

1.2.1 Jurisprudence

The ECtHR tends to approach the issue of whether a State has complied with Article 5 of the ECHR in two stages: First, it is determined whether there has there been a deprivation of liberty. If so, it is then determined whether it was justified under one of the enumerated sub-articles and in accordance with procedure prescribed by law. [60]

Engel and others v the Netherlands, ECtHR 1976[61]

[59] http://www.cpt.coe.int/en/annual/rep-19.pdf

[60] UN High Commissioner for Refugees, Alternatives to Detention of Asylum Seekers and Refugees, April 2006, POLAS/2006/03, available at: http://www.unhcr.org/refworld/docid/4472e8b84.html

[61] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695356&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

57. Military discipline, nonetheless, does not fall outside the scope of Article 5 para. 1 (art. 5-1) … the list of deprivations of liberty set out therein is exhaustive, as is shown by the words "save in the following cases". A disciplinary penalty or measure may in consequence constitute a breach of Article 5 para. 1 (art. 5-1)…

58. In proclaiming the "right to liberty", paragraph 1 of Article 5 (art. 5-1) is contemplating individual liberty in its classic sense, that is to say ***the physical liberty of the person****. Its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As pointed out by the Government and the Commission,* ***it does not concern mere restrictions upon liberty of movement*** *(Article 2 of Protocol no. 4) (P4-2). This is clear both from the* ***use of the terms "deprived of his liberty", "arrest" and "detention",*** *which appear also in paragraphs 2 to 5, and from a comparison between Article 5 (art. 5) and the other normative provisions of the Convention and its Protocols.*

59. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 (art. 5), the starting point must be his ***concrete situation****.*

63. Strict arrest, abolished in 1974, differed from light arrest and aggravated arrest in that non-commissioned officers and ordinary servicemen served it by day and by night locked in a cell and were accordingly excluded from the performance of their normal duties…It thus involved deprivation of liberty. It follows that the provisional arrest inflicted on Mr. Engel in the form of strict arrest had the same character despite its short duration.

64. …Privates condemned to this penalty following disciplinary proceedings were not separated from those so sentenced by way of supplementary punishment under the criminal law, and during a month or more they were not entitled to leave the establishment. The committal lasted for ***a period of three to six months*** *… Furthermore, it appears that Mr. Dona and Mr. Schul spent* ***the night locked in a cell*** *… For these various reasons, the Court considers that in the circumstances* ***deprivation of liberty occurred****.*

Guzzardi v. Italy, ECtHR 1980[62]
[Summary of the case][63] *The applicant had been arrested in connection with a criminal charge but the time for which he could lawfully be detained on remand had expired before the charges were ready to proceed. He was removed from the prison where he was*

[62] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695375&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

*being held and taken under court order to a small island off Sardinia to be **kept under "special supervision"**. Whilst the island as a whole covered 50 sq. km., the area reserved for persons such as Mr Guzzardi in **"compulsory residence"** represented an area of not more than 2.5 sq. km. The applicant was able to move freely around this area during the day but unable to leave his dwelling between 22.00 and 07.00. He had to report twice daily to the authorities and could only leave the island with prior authorisation and under strict supervision. His contact with the outside world was also supervised and restricted. The applicant lived under these conditions for sixteen months. **The Italian Government needed to succeed in their argument that he was not "deprived of his liberty"** since they were unable to demonstrate that this could be justified under any of the provisions of Article 5(1) a-f. The Court stated that it was not possible to establish a deprivation of liberty on the strength of any one aspect of his regime taken individually, but taken **cumulatively and in combination**, in the light of the factors set out above, it considered that the applicant had been deprived of his liberty and his case was to be **examined under Article 5 rather than Article 2 of Protocol 4**.*

[Excerpts from the judgment]

*92. The Court recalls that in proclaiming the "right to liberty", paragraph 1 of Article 5 (art. 5-1) is contemplating **the physical liberty of the person**; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As was pointed out by those appearing before the Court, the paragraph is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4 (P4-2) …In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 (art. 5), the starting point must be **his concrete situation** and account must be taken of **a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question** (see the Engel and others judgment of 8 June 1976, Series A no. 22, p. 24, par. 58-59).*

*95. The Government's reasoning … is not without weight. It demonstrates very clearly the extent of the difference between the applicant's treatment on Asinara and classic detention in prison or strict arrest imposed on a serviceman … **Deprivation of liberty** may, however, take **numerous other forms**. **Their variety is being increased by developments in legal standards** and in attitudes; and the Convention is to be interpreted in the light of the notions currently prevailing in democratic States … It is admittedly **not possible to speak of "deprivation of liberty" on the strength of any one of these factors** taken individually, **but cumulatively and in combination** they certainly raise an issue of categorisation from the viewpoint of Article 5 (art. 5).*

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[63] European Council on Refugees and Exiles, Immigration, Asylum and Detention, June 2004, available at: http://www.unhcr.org/refworld/docid/4158297d4.html

Van der Leer v. the Netherlands, ECtHR 1990[64]

27. The Court is not unmindful of the criminal-law connotation of the words used in Article 5 § 2 (art. 5-2). However, it agrees with the Commission that they should be interpreted "autonomously", in particular in accordance with the aim and purpose of Article 5 (art. 5), which are ***to protect everyone*** *from arbitrary deprivations of liberty. Thus* ***the "arrest" referred to in paragraph 2 of Article 5 (art. 5-2) extends beyond the realm of criminal-law measures****. Similarly, in using the words "any charge" ("toute accusation") in this provision, the intention of the drafters was not to lay down a condition for its applicability, but to indicate an eventuality of which it takes account.*

28. The close link between paragraphs 2 and 4 of Article 5 (art. 5-2, art. 5-4) supports this interpretation. Any person who is entitled to take proceedings to have the lawfulness of his detention decided speedily cannot make effective use of that right unless he is promptly and adequately informed of the reasons why he has been deprived of his liberty (see, mutatis mutandis, the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, p. 28, § 66).

Paragraph 4 (art. 5-4) does not make ***any distinction as between persons deprived of their liberty on the basis of whether they have been arrested or detained****. There are therefore no grounds for excluding the latter from the scope of paragraph 2 (art. 5-2).*

Riera Blume and others v. Spain, ECtHR 1999[65]

27. … As to the applicants' transfer from the Catalan police premises to the hotel, the Government pointed out that during it the applicants had been ***treated like people at liberty; at no time had they been handcuffed*** *or made to submit to any other measure appropriate for people under arrest.*

28. The Court reiterates that in proclaiming the right to liberty, paragraph 1 of Article 5 contemplates the physical liberty of the person; its aim is to ensure that no one should be deprived of that liberty in an arbitrary fashion. In order to determine whether someone has been deprived of his liberty within the meaning of Article 5, the starting-point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration and manner of implementation of the measure in question…

[64] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695497&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[65] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696198&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

29. ... From the undisputed account of the facts it appears that, in accordance with the judge's instructions, the applicants were ***transferred by Catalan police officers in official vehicles*** *to a hotel about thirty kilometres away from Barcelona. There they were handed over to their families and taken to* ***individual rooms under the supervision of people recruited for that purpose****, one of whom remained permanently in each room, and* ***they were not allowed to leave their rooms for the first three days****. The* ***windows of their rooms were firmly closed*** *with wooden planks and the panes of glass had been taken out. While at the hotel the applicants were allegedly subjected to a "deprogramming" process by a psychologist and a psychiatrist at Pro Juventud's request. On 29 and 30 June 1984, after being informed of their rights, they were questioned by C.T.R., the Assistant Director-General of Public Safety, aided by A.T.V., in the presence of a lawyer not appointed by the applicants. On 30 June 1984 the applicants left the hotel.*

30. The Court concludes that ***the applicants' transfer*** *to the hotel by the Catalan police and their* ***subsequent confinement*** *to the hotel for ten days amounted in fact, on account of the restrictions placed on the applicants, to* ***a deprivation of liberty****.*

33. ...From the applicants' statements it appears that their transfer to the hotel by the police did not take place with their consent but was imposed on them. The fact that they were not handcuffed during the journey cannot alter the fact that they were transferred under duress…

34. The fact that, once free, the applicants lodged a criminal complaint alleging false imprisonment and other offences against officials of the Catalan government and all others responsible clearly shows that they had been confined in the hotel against their will...

SSHD v MB, Court of Appeal, UK 2006, Court intervention submitted by the "Justice", the British section of the International Commission of Jurists[66]

8. ...In a number of cases the court [ECtHR] *has held that* ***house arrest for 24hrs a-day*** *constitutes a deprivation of liberty. Significantly in these cases there has* ***not been any aggravating or additional factors taken into account*** *and the detention has been of* ***limited duration****, pending trial (****Pekov v Bulgaria****, 30 March 1996, App. No. 50358/99;* ***Nikolova v Bulgaria*** *(No 2), 30 September 2004, App. No. 24952/94;* ***NC v Italy****, 11 January 2001, App. 24952/94). Moreover, in* ***Cyprus v Turkey*** *(1976) 4 EHRR 482, §278, 288, the Commission held that detention in a hotel with restricted leave to go shopping, visit church and take exercise* ***constituted a deprivation of liberty****…*

[66] http://www.justice.org.uk/images/pdfs/SSHDvGGandothersJUSTICEwrittensubmissions.pdf

Secretary of State for the Home Department v JJ, House of Lords 2008[67]

[Summary] *The Law Lords confirmed in this judgment, by a majority of three to two, that the 18-hour curfew which the Home Secretary had attempted to impose on one group of individuals amounted to a deprivation of liberty, and as such went beyond what the law authorized the Home Secretary to do. In this case, the Court held that the conditions imposed on these individuals – who had not been charged with any criminal offence – were in some ways more severe than those under which a prisoner convicted of a criminal offence would be held in an open prison.*

[Excerpts from the judgment]

24. …The effect of ***the 18-hour curfew****, coupled with the effective exclusion of social visitors, meant that the controlled persons were in practice in solitary confinement* ***for this lengthy period every day*** *for an indefinite duration, with very little opportunity for contact with the outside world […] Their lives were wholly regulated by the Home Office, as a prisoner's would be, although breaches were much more severely punishable. The judge's analogy with detention in an open prison was apt, save that the controlled persons did not enjoy the association with others and the access to entertainment facilities which a prisoner in an open prison would expect to enjoy."*

37. Why is deprivation of liberty regarded as so quintessential a human right that it trumps even the interests of national security? In my opinion, because it amounts to a complete deprivation of human autonomy and dignity. The prisoner has no freedom of choice about anything. He cannot leave the place to which he has been assigned. He may eat only when and what his gaoler permits. The only human beings whom he may see or speak to are his gaolers and those whom they allow to visit. He is entirely subject to the will of others. **[The paradigm case]**

43. …asks in more general terms, as in Guzzardi's case, ***whether his situation approximates sufficiently closely to being in prison****.*

57. What does it mean to be deprived of one's liberty? Not, we are all agreed, to be deprived of the freedom to live one's life as one pleases. It means to be deprived of one's physical liberty: Engel v The Netherlands (No 1)(1976) 1 EHRR 647, para 58. And what does this mean? ***It must mean being forced or obliged to be at a particular place where one does not choose to be****: eg X v Austria (1979) 18 DR 154…*

[67] http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071031/homejj-1.htm

35. *...The point about the right not to be deprived of one's liberty under article 5.1 is that, subject to the exceptions, it is unqualified. Such is the revulsion against detention without charge or trial, such is this country's attachment to habeas corpus, that the right to liberty ordinarily trumps even the interests of national security…*

58. ... It also appears that restrictions designed, at least in part, for the benefit of the person concerned are less likely to be considered a deprivation of liberty than are restrictions designed for the protection of society…

79. The key in both judgments to the meaning of deprivation of liberty is, I think, to be found in the majority's comparison of Guzzardi's situation with detention in an open prison or committal to a disciplinary unit and in Judge Fitzmaurice's phrase "illegitimate imprisonment, or ***confinement so close as to amount to the same thing****". It was in this context that the court referred to taking account of "a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question." In saying this the court was in my view doing no more than recognising that* ***the situations in which a person may be confined or restricted may vary in many ways from the archetypical case of imprisonment in a cell****, but* ***still amount to deprivation of liberty****...*

2 Meaning of restriction on freedom of movement

This chapter outlines the meaning of "restriction on freedom of movement" in light of international and European human rights law framework.

2.1 Restriction on freedom of movement under international law

Article 13(1) of the UDHR

Everyone has the right to freedom of movement and residence within the borders of each state.

Article 12 of the ICCPR

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

Article 5 (d)(i)
The right to freedom of movement and residence within the border of the State.

UN Human Rights Committee, General Comment No. 27 on Article 12 of the ICCPR, 1999[68]

*2. **The permissible limitations** which may be imposed on the rights protected **under article 12 must not nullify the principle of liberty of movement**, and are governed by the requirement of necessity provided for in article 12, paragraph 3, and by the need for consistency with the other rights recognized in the Covenant.*

*4. **Everyone lawfully** within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence ...The question whether an alien is "lawfully" within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations. In that connection, the Committee has held that an alien who entered the State illegally, but whose status has been regularized, must be considered to be lawfully within the territory for the purposes of article 12.*[69] *Once a person is lawfully within a State, any restrictions on his or her rights guaranteed by article 12, paragraphs 1 and 2, as well as any treatment different from that accorded to nationals, have to be justified under the rules provided for by article 12, paragraph 3.*[70] *It is, therefore, important that States parties indicate in their reports the circumstances in which they treat aliens differently from their nationals in this regard and how they justify this difference in treatment.*

Restrictions (para. 3)

*11. Article 12, paragraph 3, provides for exceptional circumstances in which rights under paragraphs 1 and 2 may be restricted. This provision authorizes the State to restrict these rights only to protect national security, public order (ordre public), public health or morals and the rights and freedoms of others. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be **consistent with all other rights** recognized in the Covenant (see paragraph 18 below).*

12. The law itself has to establish the conditions under which the rights may be limited. State reports should therefore specify the legal norms upon which restrictions are founded. Restrictions which are not provided for in the law or are not in conformity with the requirements of article 12, paragraph 3, would violate the rights guaranteed by paragraphs 1 and 2.

*13. In adopting laws providing for restrictions permitted by article 12, paragraph 3, States should always be guided by the principle that **the restrictions must not impair the essence of the right (cf. article 5, paragraph 1)**; the relation between right and restriction,*

[68] http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6c76e1b8ee1710e380256824005a10a9?Opendocument#3%2F%20General%20com

[69] Celepli v. Sweden, Human Rights Committee Communication No. 456/1991, U.N. Doc. CCPR/C/51/D/456/1991 (1994). para. 9.2.

[70] General Comment No. 15, para. 8, in HRI/GEN/1/Rev.3, 15 August 1997, p. 20

between norm and exception, must not be reversed. The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.

14. Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

15. The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.

16. States have often failed to show that the application of their laws restricting the rights enshrined in article 12, paragraphs 1 and 2, are in conformity with all requirements referred to in article 12, paragraph 3. The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality. These conditions would not be met, for example, if an individual were prevented from leaving a country merely on the ground that he or she is the holder of "State secrets", or if an individual were prevented from travelling internally without a specific permit. On the other hand, the conditions could be met by restrictions on access to military zones on national security grounds, or limitations on the freedom to settle in areas inhabited by indigenous or minorities communities.

17. A major source of concern is the manifold legal and bureaucratic barriers unnecessarily affecting the full enjoyment of the rights of the individuals to move freely, to leave a country, including their own, and to take up residence. Regarding the right to movement within a country, the Committee has criticized provisions requiring individuals to apply for permission to change their residence or to seek the approval of the local authorities of the place of destination, as well as delays in processing such written applications. States' practice presents an even richer array of obstacles making it more difficult to leave the country, in particular for their own nationals. These rules and practices include, inter alia, lack of access for applicants to the competent authorities and lack of information regarding requirements; the requirement to apply for special forms through which the proper application documents for the issuance of a passport can be obtained; the need for supportive statements from employers or family members; exact description of the travel route; issuance of passports only on payment of high fees substantially exceeding the cost of the service rendered by the administration; unreasonable delays in the issuance of travel documents; restrictions on family members travelling together; requirement of a repatriation deposit or a return ticket; requirement of an invitation from the State of destination or from people living there; harassment of applicants, for example by physical intimidation, arrest, loss of employment or expulsion of their children from school or university; refusal to issue a passport because the applicant is said to harm the good name of the country. In the light of these practices, States parties should make sure that all restrictions imposed by them are in full compliance with article 12, paragraph 3.

18. The application of the restrictions permissible under article 12, paragraph 3, needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination. Thus, it would be a clear violation of the Covenant if the rights enshrined in article 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In examining State reports, the Committee has on several occasions found that measures preventing women from moving freely or from leaving the country by requiring them to have the consent or the escort of a male person constitute a violation of article 12.

UNHCR, Alternatives to detention of asylum-seekers and refugees, 2006[71]

*33. **Article 12(1) of the ICCPR** obliges States parties to ensure that '**everyone lawfully** within the territory of the State shall, within that territory, have the right to liberty of movement and freedom of residence.' In this regard, it is **more restrictive than the article 9** protection against arbitrary detention which **applies to all persons, regardless of their status**. Thus, in order to understand the extent of the protection afforded by article 12 of the ICCPR, it is **necessary to examine first who is to be considered 'lawfully'** within the territory of a State party.*

2.1.1 Jurisprudence

Celepli v. Sweden, UN Human Rights Committee, examination of an individual complain, Communication No. 456/1991, U.N. Doc. CCPR/C/51/D/456/1991 (1994)[72]

[Summary of the case][73] *A Turkish citizen of Kurdish origin was granted permission to stay in Sweden but not refugee status. He was subsequently **subjected to a deportation order** on the grounds of suspicion of involvement in terrorist activities. The expulsion order, however, was not enforced as it was believed that he (and his fellow suspects) could be exposed to political persecution in Turkey if returned. Instead, the Swedish authorities prescribed **limitations and conditions concerning their place of residence**. The HRC found that the person concerned, having been allowed to stay in Sweden, albeit subject to conditions was considered to be lawfully in the*

[71] UN High Commissioner for Refugees, Alternatives to Detention of Asylum Seekers and Refugees, April 2006, POLAS/2006/03, available at: http://www.unhcr.org/refworld/docid/4472e8b84.html

[72] http://www1.umn.edu/humanrts/undocs/html/vws456.htm

[73] AI Migration-Related Detention: A research guide on human rights standards relevant to the detention of migrants, asylum-seekers and refugees. AI Index: POL 33/005/2007, available at: http://www.amnesty.org/en/library/asset/POL33/005/2007/en/f07d6dce-ad6b-11dc-a4b5-ef6c4a573348/pol330052007eng.pdf

territory of Sweden for the purposes of article 12. Sweden justified its restrictions on the ground of national security under article 12(3), which was accepted by the Committee. (para. 9.2)

[Relevant excerpts from the communication]

2.1 …The expulsion order was not, however, enforced as it was believed that the Kurds could be exposed to political persecution in Turkey in the event of their return. Instead, the Swedish authorities prescribed limitations and conditions concerning the Kurds' place of residence.

2.2 Under these ***restrictions****, the author was* ***confined to his home municipality (Västerhaninge, a town of 10,000 inhabitants, 25 kilometres south of Stockholm)*** *and had to* ***report to the police three times a week****; he could not leave or change his town of residence nor change employment without prior permission from the police.*

4.5 The State party argues that article 9 of the Covenant, protecting the right to liberty and security of the person, prohibits unlawful arrest and detention, but does not apply to mere restrictions on liberty of movement which are covered by article 12. The State party argues that the restrictions on his freedom of movement were not so severe that his situation could be characterized as a deprivation of liberty within the meaning of article 9 of the Covenant.

4.6 With regard to the author's claim that he is a victim of a violation of article 12 of the Covenant, the State party submits that the freedom of movement protected by this article is subject to the condition that the individual is ***"lawfully within the territory of a State"****. The State party contends that the author's stay in Sweden, after the decision was taken to expel him on 10 December 1984, was only lawful within the boundaries of the Haninge municipality…*

9.2 The Committee notes that the author's expulsion was ordered on 10 December 1984, but that this order was not enforced and that the author was allowed to stay in Sweden, subject to ***restrictions on his freedom of movement****. The Committee is of the view that, following the expulsion order, the author was lawfully in the territory of Sweden, for purposes of article 12, paragraph 1, of the Covenant,* ***only under the restrictions placed upon him*** *by the State party. Moreover, bearing in mind that the State party has invoked reasons of national security to justify the restrictions on the author's freedom of movement, the Committee finds that the restrictions to which the author was subjected were compatible with those allowed pursuant to article 12, paragraph 3, of the Covenant.*

2.2 Restriction on freedom of movement under European law

Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto[74]

[74] http://conventions.coe.int/treaty/en/treaties/html/046.htm

Article 2 - Freedom of movement
1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.
CoE, Explanatory report [Commentary] of the Protocol No. 4 is available at:
http://conventions.coe.int/Treaty/EN/Reports/Html/046.htm

EU Return Directive[75]
Article 7 Voluntary departure
3. Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or ***the obligation to stay at a certain place*** *may be imposed for the duration of the period for voluntary departure.*

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers[76]
Article 7
Residence and freedom of movement
1. Asylum seekers may move freely within the territory of the host Member State or within ***an area assigned to them*** *by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.*
2. Member States may ***decide on the residence*** *of the asylum seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application.*
4. Member States may make provision of the material reception conditions subject to actual residence by the applicants ***in a specific place****, to be determined by the Member States.*

[75] The transposition deadline for the Member States is 24.10.2010. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF
[76] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0009:EN:HTML

*5. Member States shall provide for the possibility of granting applicants temporary **permission to leave the place of residence** mentioned in paragraphs 2 and 4 and/or **the assigned area** mentioned in paragraph 1.*

Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast), COM(2008) 820 final[77]

Section V. Detention for the purpose of transfer

*3. When assessing the application of other less coercive measures for the purpose of paragraph 2, Member States shall take into consideration **alternatives to detention** such as regular reporting to the authorities, the deposit of a financial guarantee, **an obligation to stay at a designated place** or other measures to prevent the risk of absconding.*

CoE, A guide to the implementation of Article 5 of the ECHR, Human Rights Handbooks No. 5, 2002[78]

*Where there is **confinement to a particular area such as a village or district** but there is **no accompanying isolation** – as there was in the **Guzzardi** case – it is much more likely to be regarded as an interference with freedom of movement rather than a deprivation of liberty. Equally, restrictions on persons seeking entry to a country – such as a requirement that they stay in a particular area at the airport as opposed to being forcibly kept in a special detention centre for aliens – would not generally be regarded as a deprivation of liberty since they would still have the option of going to another country. However, such an option must be a realistic one and would not exist if either there were no other country that would admit them or, where the person concerned was seeking asylum, there were no other country offering protection comparable to the protection which he or she expected to find in the one where it was being sought. Such a situation arose in the case of **Amuur v. France**, where the only possible alternative was Syria and admission was not only subject to the "vagaries of diplomatic relations" but, as that was a country which was not bound by the Geneva Convention on the Status of Refugees, there was no guarantee that the persons concerned would not then be returned to the country in which they feared being persecuted.*

2.2.1 Jurisprudence

Aygun v. Sweden, European Commission of Human Rights, No. 14102/88 1989[79]

[77] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0820:FIN:EN:PDF
[78] http://www.coe.int/T/E/human_rights/hrhb5.pdf

In the present case, the applicant's ***liberty of movement is restricted to the municipality of Stockholm****. The Commission considers that, although the applicant's liberty is further restricted by the conditions attached to his stay in Stockholm, the* ***restrictions are not so severe that his situation can be characterized as a deprivation of liberty within the meaning of Article 5****. Consequently, there is no appearance of a violation of Article 5 of the Convention.*

S.F. v Switzerland, European Commission of Human Rights, No. 16360/90 1994[80]

The applicant complaints that he has been the victim of a deprivation of liberty within the meaning of Article 5 of the Convention on account of the fact that, as a result of the order prohibiting his entry into Swiss territory, he was obliged to remain in Campione d'Italia, an Italian enclave surrounded by Swiss territory.

…

The Commission notes that the applicant was not at any time incarcerated. He had liberty of movement within the territory of Campione d'Italia, ***although its area was small****, and he was* ***not subject to any supervision measure*** *there. Accordingly, it considers that the measure complained of cannot be regarded as a deprivation of liberty within the meaning of the provision mentioned.*

Raimondo v Italy, ECtHR 1994[81]

13. … Mr Raimondo was placed under ***special police supervision*** *… namely* ***a prohibition on leaving his home without informing the police; an obligation to report to the police on the days indicated to that effect; an obligation to return to his house by 9 p.m. and not to leave it before 7 a.m.*** *unless he had valid reasons for doing so and had first informed the relevant authorities of his intention.*

39. The Court considers in the first place that, notwithstanding the applicant's assertion to the contrary, the measure in issue did not amount to a deprivation of liberty within the meaning of Article 5 para. 1 (art. 5-1) of the Convention. The mere restrictions on the liberty of movement resulting from special supervision ***fall to be dealt with under Article 2 of Protocol No. 4*** *(P4-2) (see the Guzzardi v. Italy judgment, cited above, p. 33, para. 92).*

Ivanov v. Ukraine, ECtHR 2006[82]

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[79] http://cmiskp.echr.coe.int/tkp197/view.asp?action=open&documentId=822844&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[80] http://cmiskp.echr.coe.int/tkp197/view.asp?action=open&documentId=835557&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[81] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695747&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

83. The Government maintained that the applicant's freedom of movement had not been restricted as he had been able to apply to the court for permission to leave the place of his residence. Such permission, for instance, was given to the applicant from 2 to 20 October 2000. Moreover, in 2002 – 2003 the applicant left Ukraine without any permission, but he had not been punished for that.
84. The applicant disagreed. He recalled that this measure had imposed on him ***an obligation to report to the judge or investigator each time he wanted to leave his place of residence, and thus had restricted his liberty of movement****. He maintained that he had not been able to realise his plans to move to another city in Ukraine, to visit his friends and relatives as often as he wanted, and even to plan his holidays.*
85. The Court agrees with the applicant that ***the impugned measure restricted his right to liberty of movement in a manner amounting to an interference, within the meaning of Article 2 of Protocol No. 4 to the Convention*** *(see Raimondo v. Italy, judgment of 22 February 1994, Series A no. 281-A, p. p. 19, § 39). The Court dismisses the Government's argument that the applicant's freedom of movement was not restricted as he was given the permission to leave and was not sanctioned for unauthorised leave. The Court notes that an obligation to ask each time the authorities a permission to leave does not correspond to sense of the concept "freedom of movement".*

Hajibeyli v Azerbaijan, ECtHR 2008[83]
58. The Court notes that, as he was under the obligation not to leave his place of residence, the applicant was free to ***move only within the confines of the city*** *where he lived and was prohibited from changing his residence or leaving the city without the authorisation of the prosecuting authority. The Court considers that this constituted* ***a restriction on his freedom of movement*** *... In order to comply with Article 2 of Protocol No. 4, such a restriction should be "in accordance with the law", pursue one or more of the legitimate aims contemplated in paragraph 3 of the same Article, and be "necessary in a democratic society" (see* ***Raimondo v. Italy****, judgment of 22 February 1994, Series A no. 281-A, p. 19, § 39).*

[82] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=811172&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649
[83] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=837801&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

3 The distinction between deprivation of liberty and restriction on freedom of movement

This chapter focuses on the border line between "deprivation of liberty" and "restriction on freedom of movement" and provides, especially based on the jurisprudence of the ECtHR, certain factors which are to be examined in order to decide whether a particular case amounts to deprivation of liberty or constitutes "only" restriction on freedom of movement.

3.1 International context

UN Human Rights Committee, General Comment No. 20, replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment, (Article 7 of the ICCPR), 1992[84]

*11. **To guarantee the effective protection of detained persons**, provisions should be made for detainees to be held in **places officially recognized as places of detention** and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned…*

UNHCR, Alternatives to detention of asylum-seekers and refugees, 2006[85]

22. Article 9 of the ICCPR protects individuals against arbitrary deprivation of liberty, whereas article 12 applies to restrictions on movement short of deprivation of liberty. Severe restrictions on movement may be considered a deprivation of liberty [see, e.g., **Celepli v Sweden**, HRC Case No. 456/1991, and **Karker v France**, HRC Case No. 833/1998]

UN Human Rights Council, Report of the Working Group on Arbitrary Detention, January 2008, A/HRC/7/4[86]

[84] http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument

[85] UN High Commissioner for Refugees, Alternatives to Detention of Asylum Seekers and Refugees, April 2006, POLAS/2006/03, available at: http://www.unhcr.org/refworld/docid/4472e8b84.html

Detention of non-citizens
43. … In practice some States ***misleadingly label immigration detention centres*** *as "transit centres" or "guest houses" and detention as "retention" in the absence of legislation* ***authorizing deprivation of liberty*** *…*

3.1.1 Jurisprudence

Nqalula Mpandanjila et al. v. Zaire, UN Human Rights Committee, Case No. 138/1983, 1986[87]
It has held that house arrest can constitute not only a restriction of movement contrary to Article 12 but also amount to detention within the meaning of Article 9 of ICCPR. See also **Mpaka-Nsusu v. Zaire,** UN Human Rights Committee, Case No. 157/1983[88]; **Birhashwirwa/Tshisekedi v. Zaire,** UN Human Rights Committee, Case Nos. 241/1987 and 242/1987.[89]

Vuolanne v. Finland, UN Human Rights Committee, Case No. 265/1987[90]
9.4 The Committee acknowledges that it is normal for individuals performing military service to be subjected to ***restrictions in their freedom of movement****. It is self-evident that this does not fall within the purview of article 9, paragraph 4. Furthermore, the Committee agrees that a disciplinary penalty or measure which would be deemed a deprivation of liberty by detention, were it to be applied to a civilian , may not be termed such when imposed upon a serviceman. Nevertheless, such penalty or measure may fall* ***within the scope of application of article 9, paragraph 4****, if it takes the form of restrictions that are imposed over and above the exigencies of normal military service and deviate from the normal conditions of life within the armed forces of the State party concerned. In order to establish whether this is so, account should be taken of* ***a whole range of factors*** *such as* ***the nature, duration, effects and manner of the execution of the penalty or measure in question****.*

9.5 In the implementation of the disciplinary measure imposed on him, Mr. Vuolanne was excluded from performing his normal duties and had to spend day and night for a period of 10 days in a cell measuring 2 x 3 metres. He was allowed out of his cell solely for purposes of eating, going to the toilet and taking air for half an hour every day … He served a sentence in the same way as a prisoner would. The sentence imposed on the author is of a significant length, approaching that of the shortest prison sentence that may be

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[86] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/100/91/PDF/G0810091.pdf?OpenElement
[87] http://www1.umn.edu/humanrts/undocs/session41/138-1983.htm
[88] http://www1.umn.edu/humanrts/undocs/session41/157-1983.htm
[89] http://www1.umn.edu/humanrts/undocs/session37/241-1987.html
[90] http://www1.umn.edu/humanrts/undocs/session44/265-1987.htm

imposed under Finnish criminal law. In the light of the circumstances, the Committee is of the view that this sort of solitary confinement in a cell for 10 days and nights is in itself outside the usual service and ***exceeds the normal restrictions*** *that military life entails. The specific disciplinary punishment led to* ***a degree of social isolation normally associated with arrest and detention within the meaning of article 9, paragraph 4****. It must, therefore, be considered* ***a deprivation of liberty by detention in the sense of article 9, paragraph 4.*** *In this connection, the Committee* ***recalls its General Comment No. 8*** *according to which most of the provisions of* ***article 9 apply to all deprivations of liberty****, whether in criminal cases or in other cases of detention as for example, for mental illness, vagrancy, drug addiction, educational purposes* ***and immigration control****. The Committee cannot accept the State party's contention that because military disciplinary detention is firmly regulated by law, it does not necessitate the legal and procedural safeguards stipulated in article 9, paragraph 4.*

3.2 European context

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987[91]

Article 1

There shall be established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter referred to as "the Committee"). The Committee shall, by means of visits, examine the treatment of persons ***deprived of their liberty*** **[The Committee, however, conducts visits to the Otopeni Center]** *with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.*

Explanatory Report [Commentary] to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987

Article 1

24. The notion of ***"deprivation of liberty" for the purposes of the present Convention*** *is to be understood* ***within the meaning of Article 5 of the European Convention on Human Rights as elucidated by the case law of the European Court and Commission of Human Rights.***

Draft European Parliament Legislative Resolution on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (COM(2005)0391 – C6-0266/2005 – 2005/0167(COD))[92]

[91] http://www.cpt.coe.int/en/documents/ecpt.htm

Amendment 10
Recital 11

*(11) The use of **temporary custody** should be limited and bound to the principle of proportionality. **Temporary custody** should only be used if necessary to prevent the risk of absconding and if the application of less coercive measures would not be sufficient.*	*(11) The use of **detention** should be limited and bound to the principle of proportionality. **Detention** should only be used if necessary to prevent the risk of absconding and if the application of less coercive measures would not be sufficient. **(This change applies throughout the text.)***

Justification
*'**Temporary custody**' should be changed **to 'detention'** because **that is what it in fact is, given the deprivation of freedom it entails and its duration, up to six months, which is far from temporary**. This change of terminology also applies to the whole of Chapter IV.*

Final text of the 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 (The EU Return Directive)[93]
*Article 15 **Detention***
1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process…

Charter of Fundamenal Rights of the European Union[94]
JUSTICE Commentary on Article 6
*It is important to note that **not every restriction on liberty will be regarded as a 'deprivation' of liberty**, nor is every 'deprivation' of liberty automatically unlawful (e.g. someone who is convicted of a crime and sentenced to prison is lawfully deprived of liberty). The question of whether a deprivation of liberty has occurred, and whether that deprivation is lawful, will depend on **a range of factors**, such as **the kind of interference with liberty, its duration**,[95] **effect and the manner of its implementation**.[96] **The difference between***

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[92] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2007-0339+0+DOC+PDF+V0//EN
[93] The transposition deadline for the Member States is 24.10.2010. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF
[94] http://www.eucharter.org/home.php?page_id=13
[95] Nowicka v. Poland, 3 December 2002
[96] Guzzardi v. Italy, 6 November 1980; Amuur v. France, 25 June 1996, Riera Blume and Others v. Spain, 14 October 1999;

'deprivation' of liberty, as opposed to 'mere restriction' *of liberty has been judged by the courts to be* ***'merely one of degree or intensity, and not one of nature or substance'****.*[97]

The CPT standards[98]

[The concern of the CPT regarding the detention of foreigners is well evidenced in its compilation of standards which includes a specific section on the treatment of foreigners detained under aliens legislation.]

IV. Foreign nationals detained under aliens legislation

Extract from the 7th General Report [CPT/Inf (97) 10]

B. Detention facilities

25. CPT visiting delegations have met ***immigration detainees in a variety of custodial settings****, ranging from holding facilities at points of entry to police stations, prisons and specialised detention centres. As regards more particularly transit and "international" zones at airports, the precise legal position of persons refused entry to a country and placed in such zones has been the subject of some controversy.* ***On more than one occasion, the CPT has been confronted with the argument that such persons are not "deprived of their liberty"*** *as they are free to leave the zone at any moment by taking any international flight of their choice.*

For its part, the CPT has always maintained that a stay in a transit or "international" zone can, depending on the circumstances, ***amount to a deprivation of liberty*** *within the meaning of Article 5 (1)(f) of the European Convention on Human Rights, and that consequently such zones* ***fall within the Committee's mandate****. The judgment delivered on 25 June 1996 by the European Court of Human Rights in the case of Amuur against France can be considered as vindicating this view.*

3.2.1 Jurisprudence

Guzzardi v. Italy, ECtHR 1980[99]

93. ***The difference*** *between deprivation of and restriction upon liberty is nonetheless merely* ***one of degree or intensity****,* ***and not one of nature or substance.*** *Although the process of classification into one or other of these categories sometimes proves to be no easy*

[97] Guzzardi v. Italy, 6 November 1980;

[98] http://www.cpt.coe.int/en/documents/eng-standards.doc#_Toc83607171

[99] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695302&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 (art. 5) depends.

UNHCR Manual on Refugee Protection and the ECHR, updated 2006[100] further adds to the *Guzzardi* case that *"[i]t considered a number of elements, such as **the extent of the area** to which the individual was confined, **the extent of the social contact** he was able to have, his inability to **leave** his dwelling **without** first **notifying** the authorities, **the reporting requirements** imposed on him, and the sanctions applied for violation of these obligations. In this case, it concluded that there was **deprivation of liberty**."*

Ashingdane v. United Kingdom, ECtHR 1985[101]
[Summary of the case][102] *[T]he European Court found that the compulsory confinement of a mentally ill patient in a mental hospital under a detention order invoked article 5 protections, even though he was in an 'open' (i.e. unlocked) ward and was permitted to leave the hospital unaccompanied during the day and over the weekend … Some parallels can be drawn from the facts of these cases and the practices of States in relation to asylum seekers…*

[Excerpts from the judgment]
*24. The differences between the two regimes and environments at Broadmoor and Oakwood as experienced by the applicant may be summarised as follows. Security is a major concern at Broadmoor Hospital. The hospital buildings and grounds are surrounded by a high perimeter wall with **a locked gate**. Each of the several blocks in the hospital is locked all the time, frequently there is further **security within the block** and **windows are barred**. No patient moves beyond his ward **without an escort** unless he is paroled. The applicant never achieved paroled status. He worked in the kitchen gardens and during the day he had **the relative freedom of this large, open area.** Escorted visits to the community or to members of a patient's family are effectively allowed only in exceptional compassionate circumstances and tend to be rare, not least because there are insufficient staff to undertake escort duties. During his stay at Broadmoor Hospital between 1971 and 1980, the applicant made **one escorted visit** to his mother and one to the neighbourhood of the hospital. Because of its relatively remote location and difficult communications, the possibility of visits to Broadmoor by members of the patient's family is limited. Moreover, such visits, at least in the time that the applicant was detained at*

[100] UN High Commissioner for Refugees, UNHCR Manual on Refugee Protection and the European Convention on Human Rights (April 2003, Updated August 2006), August 2006, available at: http://www.unhcr.org/refworld/docid/3f4cd5c74.html
[101] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695302&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649
[102] UN High Commissioner for Refugees, Alternatives to Detention of Asylum Seekers and Refugees, April 2006, POLAS/2006/03, available at: http://www.unhcr.org/refworld/docid/4472e8b84.html

Broadmoor, were rarely private. Ordinary psychiatric hospitals such as Oakwood house both voluntary and involuntary patients and no appreciable distinction is made in their regimes. Situated within the town of Maidstone, Oakwood Hospital is easily reached by public transport. There is ***no surrounding wall*** *and* ***neither the main entrance nor the reception area is locked****. As Dr. Sherry had recommended (see paragraph 20 above), the applicant was at first placed in* ***a closed ward*** *for sixteen patients, male and female, which was locked, at least at night. There was* ***no special security*** *but a high staff/patient ratio. The work available to him at Oakwood during this initial period, although similar to that at Broadmoor, was subject to less and eventually to no supervision. With effect from December 1980, he was allowed* ***freedom****, unescorted, in the hospital grounds* ***for two hours a day****. In the summer of 1981, he was moved to an open ward. Since then, regular, unescorted leave to visit his family has become a feature of his life at Oakwood. As at November 1984, he was going home every weekend from Thursday till Sunday and was free to leave the hospital as he pleased on Monday to Wednesday, provided only that he returned to his ward at night.*

41. According to the established case-law of the Court, Article 5 para. 1 (art. 5-1) is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4 (P4-2). In order to determine whether circumstances involve deprivation of liberty, the starting point must be ***the concrete situation*** *of the individual concerned and account must be taken of* ***a whole range of criteria*** *such as* ***the type, duration, effects and manner of implementation of the measure in question*** *(see, inter alia, the Engel and Others judgment of 8 June 1976, Series A no. 22, p. 25, paras. 58-59, and the Guzzardi judgment of 6 November 1980, Series A no. 39, p. 33, para. 92).* ***The distinction*** *between deprivation of and restriction upon liberty is merely one of* ***degree or intensity****, and not one of nature or substance (see the last-mentioned judgment, p. 33, para. 93).* **[Virtually the same formulation was adopted by the Court in Nielsen v Denmark (1988) at para. 67, in HM v Switzerland (2002) at para 42, in HL v United Kingdom (2004) at para 89 and in Storck v Germany (2005) at para 71.]**

42. In this regard, there were important differences between the two regimes at Broadmoor and at Oakwood (see paragraph 24 above). Mr. Ashingdane's transfer to Oakwood had a proximate connection with a possible recovery of liberty, in that, in the circumstances, it constituted an unavoidable staging post on the road to any eventual discharge into the community (see paragraph 20 above). Nonetheless, on being admitted to Oakwood Hospital in October 1980, he was, as expected from the outset, placed in ***a closed ward, where he remained for ten months until being moved to an open ward*** *(see paragraph 24, third sub-paragraph, above). The transfer from Broadmoor to Oakwood thus* ***involved going from one regime of hospital detention to another****, albeit different and more liberal.* ***Mr. Ashingdane has remained a detained patient during his stay at Oakwood in the sense that his liberty, and not just his freedom of movement****, has been circumscribed both in fact and in law (he has been continually subject to a restriction order under the 1959 Act), even though he has been permitted to leave the hospital on frequent occasions. It cannot therefore be said that, in*

being kept at Broadmoor between March 1979 and October 1980, he was being maintained in "detention" when he had been medically and administratively judged fit for a return to liberty.

Amuur v. France, ECtHR 1996[103]

[Summary of the case][104] *A group of asylum seekers from Somalia, who had arrived at the Paris-Orly Airport via Syria were held for 20 days in the international transit zone and a nearby hotel specifically adapted for holding asylum seekers. As in the Guzzardi case, in deciding* ***whether there was a deprivation of liberty or restriction of movement, the type, duration, effects and manner of the measure in question had to be examined****. The Court discussed whether there had been a restriction on liberty of movement or a deprivation of liberty. It decided that this was an issue of* ***"degree and intensity"****. The applicants had been held at the airport for twenty days under constant police surveillance, and for most of the time not provided with any legal and social assistance.[105] As in Guzzardi,* ***the Government had argued that there was no deprivation of liberty, only a restriction on freedom of movement****. The Government suggested that the applicants could at any time have removed themselves from the sphere of application of the measure in question, arguing that the transit zone was* ***"closed on the French side" but "open to the outside"****. The Court held that the mere fact that it was possible for asylum seekers to leave the country where they wished to seek refuge did not mean that there had not been a "restriction on liberty". (The use of the word "restriction" rather than "deprivation" is odd, as no complaint had been made under Article 2 of Protocol No. 4****.)*** ***The possibility became theoretical*** *if no other country offered protection comparable to that which they expected to find in the country where they were seeking asylum. In addition, in the case of Amuur, sending the applicants back to Syria in fact only became possible following negotiations between the French and Syrian authorities, and they had not been free to leave whenever they wanted as was alleged by the government. The Court therefore concluded that the applicants' detention in the transit zone amounted to a deprivation of liberty and that Article 5 was applicable. It is clear from this case law that an order that a person should reside in a particular place will not be enough to amount to a deprivation of liberty so as to attract the very stringent protection of Article 5.*

[Excerpts from the judgment]

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[103] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695865&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[104] Nuala Mole, Catherine Meredith; Asylum and the European Convention on Human Rights; CoE 2010

[105] It should be noted that the absence of access to legal and social assistance during a prolonged period of confinement – 20 days – of non-nationals to the transit zone at an airport has been regarded as a significant contributing factor in concluding that the Somali nationals were subject to restrictions equivalent to a deprivation of liberty.

21. The Constitutional Council, on an application by the Prime Minister under Article 61 of the Constitution, ruled on 25 February 1992 that section 8 of the Law of 6 September 1991 was unconstitutional for the following reasons:"It should be noted in this connection that holding an alien in the transit zone under the conditions laid down in Article 35 quater (I), inserted in the Ordinance of 2 November 1945 by section 8 (1) of the referred law, ***does not entail a degree of restriction of movement comparable with that which would result from placing him in a detention centre*** *under Article 35 bis of the Ordinance.* ***However, holding an alien in the transit zone does nevertheless, through the combined effect of the degree of restriction of movement it entails and its duration, impinge on the personal liberty of the person concerned*** *within the meaning of Article 66 of the Constitution. Although the power to order an alien to be held may be conferred by law on the administrative authorities, the legislature must make appropriate provision for the courts to intervene, so that they may carry out their responsibilities and exercise the supervisory power conferred on them.*
Whatever the safeguards under the provisions of Article 35 quarter as regards the holding of aliens in the transit zone, those provisions contain no requirement that the courts must intervene to decide whether or not a person should be held for longer, such as would enable them to determine, on the facts of the case, whether such a measure was necessary. In any event, a person cannot be held for more than a reasonable period. It follows that, as it confers on the administrative authorities the power to hold an alien in the transit zone for a lengthy period, without providing for speedy intervention by the courts, Article 35 quater, as inserted into the Ordinance of 2 November 1945 by section 8 (1) of ***the referred law, is, as it stands, unconstitutional****."*

43. Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is ***not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation****.* ***Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable*** *only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions.*
Such holding should not be prolonged excessively, otherwise there would be a risk of it ***turning a mere restriction on liberty*** *- inevitable with a view to organising the practical details of the alien's repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose is considered -* ***into a deprivation of liberty.*** *In that connection account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country.*

48. ***The mere fact that it is possible*** *for asylum-seekers* ***to leave voluntarily the country*** *where they wish to take refuge* ***cannot exclude a restriction on liberty*** [atteinte]*, the right to leave any country, including one's own, being guaranteed, moreover, by*

*Protocol No. 4 to the Convention (P4). Furthermore, **this possibility becomes theoretical** if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in.*
*49. The Court concludes that holding the applicants in the transit zone of Paris-Orly Airport **was equivalent** in practice, in view of the restrictions suffered, **to a deprivation of liberty**.*

JE v DE and Surrey County Council, EWHC 2006[106]
*76. In my judgment, the starting point, and the defining test, remains the principle laid down in the passages in **Guzzardi v Italy** (1980) 3 EHRR 333 and **Ashingdane v United Kingdom** (1985) 7 EHRR 528 which I set out in paragraphs [15] and [16] above…*

*77. Mr Bowen, for whose submissions on this point I am particularly grateful, submits that **the question whether a person is 'deprived of his liberty' within the meaning of Article 5(1) can be stated in the following propositions**:*

*i) There are **three elements** relevant to the question of whether in the case of an adult there has been a 'deprivation' of liberty engaging the State's obligation under Article 5(1) (different considerations may apply in the case of a child where a parent or other person with parental authority has, in the proper exercise of that authority, authorised the child's placement and thereby given a substituted consent):*
*a) **an objective element** of a person's confinement in a particular restricted space for a not negligible length of time (**Storck v Germany** (2005) 43 EHRR 96 at para [74]);*
*b) **a subjective element**, namely that the person has not validly consented to the confinement in question (**Storck v Germany** (2005) 43 EHRR 96 at para [74]);*
*c) the deprivation of liberty must be **imputable to the State** (**Storck v Germany** (2005) 43 EHRR 96 at para [89]).*
I need say no more about the third of these three matters for it is common ground that both the X home and the Y home are managed by SCC, a public authority.

*ii) As regards **the objective element**:*
*a) The starting point must be the concrete situation of the individual concerned and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The distinction between a deprivation of and a restriction upon liberty is merely one of degree or intensity and not one of nature or substance (**Guzzardi v Italy** (1980) 3 EHRR*

[106] http://www.bailii.org/ew/cases/EWHC/Fam/2006/3459.html

*333 at para [92], **Nielsen v Denmark** (1988) 11 EHRR 175 at para [67], **HM v Switzerland** (2002) 38 EHRR 314 at para [42], **HL v United Kingdom** (2004) 40 EHRR 761 at para [89] and **Storck v Germany** (2005) 43 EHRR 96 at para [42]).*
*b) In the type of case with which I am here concerned, the key factor is whether the person is, or is not, free to leave (**HL v United Kingdom** (2004) 40 EHRR 761 at para [91]). This may be tested by determining whether those treating and managing the person exercise complete and effective control over the person's care and movements (**HL v United Kingdom** (2004) 40 EHRR 761 at para [91]).*
*c) Whether the person is in a ward which is 'locked' or 'lockable' is relevant but not determinative (**HL v United Kingdom** (2004) 40 EHRR 761 at para [92]).*
...

Secretary of State for the Home Department v JJ, EWCA 2006[107]
*1. ...On 28 June 2006 Sullivan J ruled that the obligations imposed by those orders were so severe that they **amounted to deprivation of liberty** contrary to Article 5 of the European Convention on Human Rights ('the Convention'). A control order that has this effect cannot be made by the Secretary of State ... Accordingly Sullivan J ruled that the Secretary of State had had no power to make the orders and quashed them...*
2. Sullivan J's judgment has neutral citation reference [2006] EWHC 1623 (Admin)[108] *and reference should be made to that judgment for the facts of this case, the relevant statutory provisions and the judge's reasoning. A short summary follows.*
*3. Each of the respondents is a single man. Five are Iraqi nationals who have claimed asylum. They were arrested under the Terrorism Act 2000, released without charge, and then re-detained under immigration powers on notice of **intention to deport** on national security grounds. There is a dispute as to the identity of the sixth, LL, and as to whether he is an Iranian or an Iraqi national. He too was **detained pending deportation** on national security grounds. All deportation proceedings were discontinued on the making of the control orders.*
*4. The obligations imposed by the control orders are set out in Annex 1 to Sullivan J's judgment. They are essentially identical. Each respondent is required to **remain within his 'residence' at all times, save for a period of 6 hours between 10 am and 4 pm**. In the case of GG the specified residence is a one bedroom flat provided by the local authority in which he lived before his detention. In the case of the other five applicants the specified residences are one bedroom flats provided by NASS. During the curfew period the respondents are confined in their small flats and are not even allowed into the common parts of the buildings in which these flats are situated. Visitors must be authorised by the Home Office, to which name, address, date of birth and photographic identity must be*

[107] http://alpha.bailii.org/ew/cases/EWCA/Civ/2006/1141.html
[108] http://alpha.bailii.org/ew/cases/EWHC/Admin/2006/1623.html

supplied. The residences are subject to spot searches by the police. During the six hours when they are permitted to leave their residences, the respondents are confined to ***restricted urban areas, the largest of which is 72 square kilometres.*** *These deliberately do not extend, save in the case of GG, to any area in which they lived before. Each area contains a mosque, a hospital, primary health care facilities, shops and entertainment and sporting facilities. The respondents are prohibited from meeting anyone by pre-arrangement who has not been given the same Home Office clearance as a visitor to the residence.*

Do the orders amount to deprivation of liberty?

6. There is a degree of common ground between the parties:
i) The concept of 'deprivation of liberty' is autonomous.
ii) The best guidance in relation to ***the nature of 'deprivation of liberty' is provided by the decision of the Strasbourg Court in Guzzardi v Italy*** *(1980) 3 EHRR 333.*
iii) The difference between deprivation of liberty, contrary to Article 5, and restrictions upon liberty of movement, contrary to Article 2 to Protocol No 4, is ***one of degree or intensity****.*

7. Mr Sales for the Secretary of State submitted that the approach of the judge displayed five errors of principle:
i) The judge identified liberty with freedom to do as one wishes. The concept is much narrower than that.
ii) The judge erroneously had regard to the extent to which the obligations interfered with 'normal life'.
iii) The judge had regard to restrictions on other human rights.
iv) The judge extended the meaning of liberty beyond that identified in Guzzardi.
v) The judge concentrated excessively on the individual features of the idiosyncratic cases.

8. There is no merit in these attacks of principle. They reflect, we believe, the difficulties facing the Secretary of State in attempting to demonstrate that Sullivan J's judgment is unsound.

10. In accordance with Guzzardi Sullivan J placed the 'concrete situation' at the heart of his deliberation on the 'deprivation of physical liberty'. He said at paragraph 77: "In accordance with the principles established in Guzzardi I have considered the cumulative impact of the obligations and therefore the extent to which they restrict the respondents' liberty in the six hours when they are allowed out of their residences, as well as the effect of the 18 hour curfew and the obligations imposed on the respondents whilst they have to remain within their residences during that period. If I had to assess the impact of the obligations individually, I would consider that ***house arrest for 18 hours each day****, even if it was the only obligation (apart from obligations such as reporting and*

tagging to ensure that it was strictly observed) would be more ***realistically described as deprivation of liberty, and not as a restriction on liberty, if it prevented the individual from pursuing a normal "in at home/out at work" life cycle."***

11. Clearly, and correctly, Sullivan J took as his ***starting point the physical restriction*** *that confined each respondent to a small flat for eighteen hours a day. Such a restriction makes most serious inroads on liberty, even giving that word its most narrow meaning. But Guzzardi also required Sullivan J to weigh in the balance other material factors. We turn to consider whether, as Mr Sales suggested, the other factors that he weighed in the balance were not material.*

12. Mr Sales criticised Sullivan J for equating 'liberty' with the freedom to do as one wishes. He also criticised the judge for considering the extent to which the restrictions interfered with 'normal life'. Both these criticisms related to paragraph 54 of the judgment: "The extent to which he is subject to supervision, the extent to which he can make social contacts, the extent to which he has access to public facilities, and whether he is free to make telephone calls or otherwise to communicate with whomsoever he wishes, are all aspects of the broader question: to what extent is the individual subject to the obligations able to lead a life of his choice, which for convenience may be described as a "normal" life?, If one asks the question "deprived of liberty to do what?" the answer must be: deprived of the freedom to lead one's life as one chooses (within the law). That freedom is the antithesis of a life which is subject to the kinds of control to which a prisoner, whose "liberty to do anything is governed by the prison regime" is subject…"

13. If applied without starting with the 'concrete situation' of physical confinement, we can see that this passage might not be consistent with the Strasbourg concept of deprivation of liberty, but the judge did not so apply it. If one starts with that "concrete" situation, however, as the judge did, we do not consider that this passage of his judgment is at odds with the direction in Guzzardi to take account of "a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question".

18. We turn to Mr Sales' third criticism. He said that the judge should not have had regard to restrictions which engaged other Articles of the Convention, such as Articles 8 and 9. Those made provision for qualified rights, interference with which could be justified. It was wrong, he suggested, for Sullivan J to have had regard to:
a) the availability of one's home and/or intimacy of family life;
b) the ability to admit or refuse visitors to one's home;
c) restrictions on the ability to communicate by mobile telephone and/or the internet;
d) the ability to meet any person of one's choosing;
e) the freedom to attend whatever church, temple, mosque or synagogue one chooses.

19. These were all matters referred to by the judge, but they were not the principal factors that led him to conclude that the orders produced deprivation of liberty. We do not agree that he should have disregarded these matters merely because they could have been made the subject of complaint under other Articles of the Convention. The different Convention rights overlap, and it would be contrary to the approach of the Strasbourg court to consider them in watertight compartments. We need only point, by way of example, to the "particular importance" that the Commission attached in Guzzardi to "the possibilities of social contacts" – see the Report of the Commission adopted on 7 December 1978 at paragraph 94. The ECtHR also had regard to the "opportunities for social contact" – paragraph 95. These matters do not, of themselves, constitute deprivation of liberty. Where, however, they are features of a regime at the heart of which is physical confinement, they are relevant in considering whether the restrictions cross the boundary between restriction on the freedom of movement and deprivation of liberty.

20. Finally, we turn to Mr Sales' fourth criticism. He submitted that the facts in Guzzardi had been held by the ECtHR to be on the borderline between restriction of freedom of movement and deprivation of liberty. The judge's decision on the facts of this case extended the definition of deprivation of liberty beyond the Strasbourg jurisprudence in a manner which was impermissible…

*21. The judge gave careful consideration to the Strasbourg authorities on Article 5. He correctly concluded that these left a gap between "**24 hour house arrest seven days per week** (equals **deprivation of liberty**) and **a curfew/house arrest of up to 12 hours per day** on weekdays and for the whole of the weekend (equals **restriction on movement**)" – see paragraph 33.*[109] *He concluded, rightly, that while Guzzardi gave no direct guidance on how to fill this gap, it was necessary to apply the principles to be derived from that decision. We have rejected Mr Sales' attack on the way that the judge applied those principles.*

*23. The judge's conclusion in paragraph 73 was as follows: "I do not consider that this is a borderline case. The collective impact of the obligations in Annex 1 could not sensibly be described as mere restrictions upon the respondents' liberty of movement. In terms of **the length of the curfew period** (18 hours), t**he extent of the obligations and their intrusive impact on the respondents' ability to lead a normal life**, whether inside their residences within the curfew period, or for the six hour period outside it, **these control orders go far beyond the restrictions in those cases where the European Court of Human Rights has concluded that there has been a restriction upon but not a deprivation of liberty**."*
*…The orders **amounted to a deprivation of liberty contrary to Article 5**. For that reason the appeal against the decision of the judge… is unsuccessful.*

[109] http://alpha.bailii.org/ew/cases/EWHC/Admin/2006/1623.html

Austin (FC) (Appellant) & another v Commissioner of Police of the Metropolis (Respondent), House of Lords 2009[110]

15. The rights mentioned in article 2 of Protocol 4 are relevant only in so far as they indicate that there is a distinction, for Convention purposes, between conditions to which a person may be subjected which are a restriction on his movement and those which amount to a deprivation of his liberty. The European Court has said that under its established case law article 5 is not concerned with mere restrictions on liberty of movement. They are governed by article 2 of Protocol 4. This is an important distinction, even though the rights that this article describes are not binding on the United Kingdom. Article 2 of Protocol 4 is a qualified right. The protection that article 5(1) provides against a deprivation of liberty is absolute, subject only to the cases listed in sub-paragraphs (a) to (f). In ***McKay v United Kingdom*** *44 (2006) 44 EHRR 827, para 30, the court said: "Article 5 of the Convention is, together with articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of an individual and as such its importance is paramount. Its key purpose is to prevent arbitrary or unjustified deprivations of liberty."*

18. ...The point that is being made in the first sentence of para 93 [Guzzardi v. Italy], *which the court has repeated in many subsequent cases, is that it is not enough that what was done could be said in general or colloquial terms to have amounted to a deprivation of liberty. Except in* ***the paradigm case of close confinement*** *in a prison cell, where there is* ***no room for argument****, the absolute nature of the right requires a more exacting examination of the relevant criteria. There is a threshold that must be crossed before this can be held to amount to a breach of article 5(1). Whether it has been crossed must be measured by* ***the degree or intensity of the restriction.***

19. The same point was developed more fully by Sir Gerald Fitzmaurice in his dissenting opinion in Guzzardi. In para 5 he said that, while the question whether the conditions of the applicant's existence on the island were sufficiently stringent to amount to a sort of imprisonment was a matter of appreciation and opinion, what to him decisively tilted the balance was the fact of article 2 of Protocol 4 to the Convention. In para 6 he said that its existence showed that those who framed the Convention did not actually contemplate that article 5 should extend to mere restrictions on freedom of movement, or they would not have considered it necessary to draw up a separate Protocol about that. "The resulting picture is that article 5 of the Convention guaranteed the individual against illegitimate imprisonment, ***or confinement so close as to amount to the same thing*** *- in sum against deprivation of liberty stricto sensu - but it afforded no guarantee against restrictions (on movement or place of residence) falling short of that."*

[110] http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090128/austin-1.htm

*21. …it is helpful to have regard to how the case in hand compares with the core or **paradigm case**, which cannot be the subject of argument. The court seems to have had this mind in **Guzzardi v Italy**, para 95, when it referred to the difference between the applicant's treatment and classic detention in prison or strict arrest imposed on a serviceman, as in **Engel v The Netherlands** (No 1) (1976) 1 EHRR 647, para 63. Sir Gerald Fitzmaurice clearly did when he referred in para 6 of his opinion to "confinement so close as to amount to the same thing." …*

Al-Agha c. Roumanie, ECtHR 2010[111]

*48. Le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (« CPT ») a effectué plusieurs visites en Roumanie au **centre de rétention** de l'aéroport de Bucarest Otopeni…*

*80. Le Gouvernement souligne qu'au moment du placement du requérant au centre, une procédure d'expulsion était en cours et que la détention de ce dernier était "régulière". Il souligne que **la privation de liberté** du requérant avait une base légale en droit interne, à savoir les lois nos 25/1969 et 123/2001 et l'OUG no 194/2002, et que ces lois remplissaient les conditions de prévisibilité et d'accessibilité. Le Gouvernement estime que l'ordre no 779 et le rapport prolongeant le placement du requérant au centre constituaient des actes qui pouvaient faire l'objet d'une contestation par la voie du contentieux administratif et note que l'OUG no 194/2002 prévoyait une voie de recours spéciale.*

*82. La Cour rappelle qu'en proclamant le « droit à la liberté », le paragraphe 1 de l'article 5 vise la liberté physique de la personne ; il a pour but d'assurer que nul n'en soit privé de manière arbitraire (Aksoy c. Turquie, 18 décembre 1996, § 76, Recueil des arrêts et décisions 1996-VI). **Par ailleurs, pour déterminer si une personne se trouve privée de sa liberté au sens de l'article 5, il faut partir de sa situation concrète et prendre en compte un ensemble de critères, comme le genre, la durée et les modalités de l'exécution de la mesure considérée** (arrêts **Engel et autres c. Pays-Bas** du 8 juin 1976, série A no 22, §§ 58-59, **Guzzardi c. Italie** du 6 novembre 1980, série A no 39, § 92, et **Amuur c. France**, 25 juin 1996, § 42, Recueil des arrêts et décisions 1996-III).*

*83. La Cour note qu'en l'espèce le requérant a séjourné pendant trois ans et cinq mois environ dans le centre de rétention de l'aéroport de Bucarest-Otopeni, en attendant son éloignement du pays. **Le requérant n'était pas libre de ses mouvements et ne pouvait pas quitter le centre de rétention sans l'accord des autorités**. **La Cour conclut que le maintien du requérant dans le centre***

[111] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=860939&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

de rétention s'analyse, en raison des restrictions subies, en une privation de liberté *(voir également* ***Amuur****, précité, § 43 et Riad et Ibiad, précité, § 68).*

85. … Toutefois, la Cour rappelle que l'exigence que la privation de liberté soit effectuée « selon les voies légales » ne se borne pas à renvoyer au droit interne ; elle concerne aussi ***la qualité de la loi****, elle la veut compatible avec la prééminence du droit, notion inhérente à l'ensemble des articles de la Convention (Amuur, précité, § 50). Pareille qualité implique qu'une loi nationale autorisant une privation de liberté soit suffisamment accessible et ait une formulation assez* ***précise*** *pour permettre aux intéressés, en s'entourant, au besoin, de conseils éclairés, de prévoir, à un degré raisonnable dans les circonstances de la cause, les conséquences pouvant résulter d'un acte déterminé (Steel et autres c. Royaume-Uni, 23 septembre 1998, § 54, Recueil des arrêts et décisions 1998-VII et Baranowski c. Pologne, no 28358/95, § 52, CEDH 2000-III).*

87. La Cour note que l'ordre no 779, fondé sur l'article 20 de la loi no 25/1969, déclarant le requérant personne « indésirable » constituait pour les autorités la base légale de la privation de liberté. Or, la Cour observe que l'ordre en cause, qui n'a jamais été communiqué au requérant, ne prévoyait pas comme mesure le placement du requérant au centre de rétention ou sa privation de liberté. Qui plus est, en vertu de l'article 21 de la loi no 25/1969 en vigueur lors du placement du requérant dans le centre de rétention, les personnes qui ne pouvaient pas faire l'objet d'un éloignement immédiat du territoire devaient être assigné à résidence dans une certaine localité et non être privées de liberté comme ce fut le cas pour le requérant (paragraphe 38 ci-dessus). Dès lors, la Cour estime que lors du placement du requérant dans le centre de rétention l'ordre en cause ne pouvait pas constituer une base légale, conforme au droit interne, pour sa privation de liberté.

88. … La Cour constate qu'après l'entrée en vigueur de la loi no 123/2001 et de l'OUG no 194/2002, le placement dans ***un centre de rétention*** *d'une personne déclarée indésirable dont l'éloignement du territoire n'était pas possible dans l'immédiat était prévu par la loi…*

Ahmed c. Roumanie, ECtHR 2010[112]

7. Le même jour, le parquet près la cour d'appel de Bucarest ordonna, en vertu de l'article 93 de l'OUG no 194/2002, le placement du requérant pendant une durée de trente jours au Centre d'accueil, de transit et ***d'hébergement*** *Otopeni (ci-après « le centre de transit »), en vue de son éloignement du territoire roumain.*

[112] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=871161&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

10. Le 2 avril 2003, le ministère de l'Intérieur demanda au président de la cour d'appel de Bucarest la prolongation de la mesure de placement du requérant dans le centre de transit au motif que les autorités compétentes n'avaient pas été en mesure d'exécuter la mesure d'éloignement du sol roumain, le requérant n'étant pas en possession d'un document de transport valide.

11. Par un arrêt du 7 avril 2003, la cour d'appel de Bucarest fit droit à cette demande et prolongea la mesure de placement du requérant jusqu'au 8 juillet 2003. La cour d'appel jugea, d'une part, que l'ordonnance du 10 mars 2003 était toujours valable, n'ayant été annulée par aucune décision de justice, et d'autre part, que le requérant n'avait pas de document de voyage et faisait l'objet d'une procédure d'octroi du statut de refugié. Cet arrêt devint définitif le 12 février 2004, par le rejet du recours formé par le requérant contre l'arrêt précité de la cour d'appel.

26. ... [I]l [Le Gouvernement] *ne conteste pas que le placement du requérant dans le centre de transit ait* ***représenté une privation de liberté****, mais affirme que cette privation relevait des situations limitativement prévues à l'article 5 de la Convention. Selon le Gouvernement, la privation de liberté était prévue par la loi, à savoir l'OUG no 194/2002 et n'était pas une mesure arbitraire, ayant été prise par les autorités de l'État afin de lutter contre la migration illégale. Enfin, il ajoute que la prolongation de la mesure de placement dans le centre de transit a été justifiée par l'absence d'un titre de voyage et d'un visa pour effectuer son expulsion.*

31. En l'espèce, l'article 93 de l'OUG no 194/2002 disposait que, jusqu'à la mise à exécution de la mesure d'éloignement, les étrangers déclarés indésirables étaient hébergés dans ***des centres spécialement aménagés en vue de leur expulsion pour une période qui ne peut pas excéder six mois****. La Cour peut accepter que la mesure litigieuse avait une base en droit interne. Il reste à savoir si le droit interne répondait aux exigences d'accessibilité et de prévisibilité afin de protéger l'intéressé d'une privation de liberté arbitraire.*

33. ... Toutefois, toute personne qui fait l'objet d'une mesure basée sur des motifs de sécurité nationale ne doit pas être dépourvue de garanties contre l'arbitraire. Ainsi, le droit interne doit offrir une protection contre des atteintes arbitraires de la puissance publique aux droits garantis par la Convention. En effet, l'existence de garanties adéquates et suffisantes contre les abus, dont notamment celle de procédures de contrôle efficace par le pouvoir judiciaire, est d'autant plus nécessaire que, sous le couvert de défendre la démocratie, de telles mesures risquent de la saper, voire de la détruire (voir, mutatis mutandis, Rotaru c. Roumanie [GC], no 28341/95, §§ 55 et 59, CEDH 2000-V).

35. Pour ce qui est du devoir des autorités de communiquer les raisons à la base du placement des étrangers dans les centres de transit, si l'article 84 § 2 de l'OUG no 194/2002 interdisait une telle communication, l'article 95 de la même ordonnance, régissant les

droits des personnes ainsi détenues, contient l'obligation pour les autorités d'informer les étrangers placés dans ces centres des raisons de leur placement (cf. § 21 ci-dessus).

38. Le requérant n'ayant joui ni devant les autorités administratives ni devant les juridictions nationales du degré minimal de protection contre le risque d'arbitraire des autorités, la Cour estime que lors des prolongations successives, sa privation de liberté n'avait pas non plus une base légale suffisante en droit interne, dans la mesure où elle n'était pas prévue par « une loi » répondant aux exigences de la Convention. A cela s'ajoute également le délai de plus de six mois pendant lequel le requérant fut détenu dans le centre de transit, contrairement à la législation interne en vigueur à l'époque des faits, notamment au paragraphe 6 de l'article 93 de l'OUG no 194/2002.

39. Pour ce qui est des difficultés, invoquées par le Gouvernement roumain, concernant la délivrance d'un nouveau titre de voyage au nom du requérant, la Cour note que cette situation, dans les circonstances de l'espèce, ne saurait être imputable au requérant et ne saurait justifier, eu égard la conclusion figurant au paragraphe 38 ci-dessus, son placement pendant plus de six mois dans le centre de transit.

40. A la lumière de ce qui précède, elle conclut que la privation de liberté ininterrompue du requérant pendant plus de six mois ne répondait pas aux exigences de l'article 5 § 1 de la Convention.

Dès lors, il y a eu violation de cette disposition.

4 National aliens legislation of various countries[113]

This chapter collects excerpts from national aliens laws of various European countries which use the misleading terminology for detention of migrants. One may, therefore, compare the Romanian aliens law with national aliens legislation of other European countries. Aliens laws[114] of 29 countries[115] were reviewed. A majority of EU member states, including Belgium, the Czech Republic, Estonia, Finland, Hungary, Portugal, Slovakia and Sweden, refer in their national legislation on aliens explicitly to "detention"[116] of irregular migrants and usually provide specifically designated premises for such a purpose.[117] Countries using different terminology for the confinement of irregular migrants, e.g. "restriction on freedom of movement", are compiled below. It should be highlighted that the sub-chapter on Turkey may be of particular relevance.

UN International Law Commission (ILC), Report on the expulsion of aliens, 2006, A/CN.4/565[118]

726. National laws vary considerably with respect to the legality and the conditions of detention pending deportation. A State may detain an alien prior to deportation as a standard part of the deportation process,[119] or (1) when the alien has evaded or threatens to evade deportation, or has violated conditions of provisional release from detention;[120] (2) when the alien has committed certain

[113] For hyperlinks to national aliens' legislation of European countries translated, where available, into English please see pg. 100 of the FRA's report on detention of third-country nationals in return procedures, pg. 98. Available at: http://www.fra.europa.eu/fraWebsite/attachments/detention-third-country-nationals-report-092010_en.pdf

[114] The terminology slightly differs depending on the country and its legal system: Law on Aliens, Law on Foreigners, Immigration Law etc.

[115] Austria, Belgium, Bulgaria, the Republic of Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Turkey, Ukraine, the United Kingdom

[116] usually pending deportation

[117] However, in certain countries, such as Austria and Ireland, irregular migrants are held in prisons.

[118] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/260/29/PDF/N0626029.pdf?OpenElement

[119] Argentina, 2004 Act, articles 35, 70-72; Australia, 1958 Act, articles 196, 253, 255; Austria, 2005 Act, article 3.76(2); Belarus, 1998 Law, article 30; Bosnia and Herzegovina, 2003 Law, articles 28(3), 43(5), 68(1); Brazil, 1980 Law, article 60; Kenya, 1967 Act, article 12(2); Madagascar, 1962 Law, article 17; Malaysia, 1959- 1963 Act, articles 31, 34(1), 35; Nigeria, 1963 Act, article 23(2); Russian Federation, 2002 Law No. 115-FZ, articles 31(9), 34(5); and United States, INA, sections 241(a)(2), 507(b)(1), (2)(C), (c). Such detention may be specifically imposed on an alien allegedly involved in terrorism, and may include the period of the alien's criminal trial and the alien's fulfilment of a resulting sentence (United States, INA, section 507(b)(1), (2)(C), (c)).

[120] Belarus, 1993 Law, article 26; Bosnia and Herzegovina, 2003 Law, article 68(2); Columbia, 1995 Decree, article 93; Czech Republic, 1999 Act, section 124(1); Germany, 2004 Act, article 62(2); Greece, 2001 Law, article 44(3); Hungary, 2001 Act, article 46(1)(a)-(b); Italy, 1998 Law No. 40, article 11(6), 1996 Decree-Law, article 7(3); Japan, 1951 Order, article 55(1); Republic of Korea, 1992 Act, article 66, 1993 Decree, article 80; Poland, 2003 Act No. 1775, article 101(1); and Switzerland, 1931 Federal Law, article 13b(1)(c).

criminal or other violations, or threatens the State's ordre public or national security;[121] *(3) to allow the relevant authorities to determine the alien's identity or nationality, or to ensure the alien's posttransfer security;*[122] *or (4) when deemed necessary to fulfil the deportation, including with respect to the arrangement of transportation.*[123] *A State may (1) prohibit the alien's detention when the alien has been ordered to depart voluntarily;*[124] *or (2) permit the alien's detention or other restrictions on the alien's residence or movements prior to the alien's voluntary departure.*[125]

727. The relevant law may establish a detention's term, relevant procedures, or the rights and recourses available to the alien.[126] *A State may specifically provide for the detention of minors,*[127] *potentially protected persons,*[128] *or aliens allegedly involved in terrorism.*[129] *A State may allow for the alien to post bail.*[130] *A State may restrict the alien's residence or activities, or impose*

[121] Bosnia and Herzegovina, 2003 Law, article 68(2); Columbia, 1995 Decree, article 93; Czech Republic, 1999 Act, section 124(1); Greece, 2001 Law, article 44(3); Hungary, 2001 Act, article 46(1)(c)-(e), (2), (9); and United States, INA, section 241(a)(6).

[122] Austria, 2005 Act, article 3.80(4)(1); Brazil, 1980 Law, article 60; China, 2003 Provisions, article 184; Italy, 1998 Decree-Law No. 286, article 14(1), 1998 Law No. 40, article 12(1), 1996 Decree-Law, article 7(3); and Nigeria, 1963 Act, article 31(3).

[123] China, 2003 Provisions, article 184; Croatia, 2003 Law, article 58; France, Code, article L551-1; Germany, 2004 Act, article 62(1); Italy, 1998 Decree-Law No. 286, article 14(1), 1998 Law No. 40, article 12(1); Japan, 1951 Order, articles 13-2, 52(5); Kenya, 1967 Act, article 8(2)(b), (3)-(4); Republic of Korea, 1992 Act, article 63(1); Malaysia, 1959-1963 Act, article 34(1); Nigeria, 1963 Act, articles 31(3), 45; Panama, 1960 Decree-Law, articles 59, 83; Poland, 2003 Act No. 1775, article 101(4); Portugal, 1998 Decree-Law, articles 22(4), 124(2); Switzerland, 1931 Federal Law, article 13b(1)(a)-(b); and United States, INA, section 241(a)(1)(C). Such detention may be expressly permitted during wartime (Nigeria, 1963 Act, article 45).

[124] Portugal, 1998 Decree-Law, article 100(1).

[125] Japan, 1951 Order, articles 55-3(3); and Portugal, 1998 Decree-Law, article 123(2).

[126] Argentina, 2004 Act, articles 70-72; Australia, 1958 Act, articles 196, 253-54, 255(6); Austria, 2005 Act, articles 3.76(3)-(7), 3.78-80; Belarus, 1998 Law, article 30, 1993 Law, article 26; Bosnia and Herzegovina, 2003 Law, articles 65(4), 69-71; Brazil, 1980 Law, article 60; Croatia, 2003 Law, article 58; Czech Republic, 1999 Act, section 124(2); France, Code, articles L551-2, L551-3, L552-1, L552-2, L552-3, L552-6, L552-7, L552-8, L552-9, L552-10, L552-11, L552-12, L553-1, L553-2, L553-3, L553-4, L553-5, L553-6, L554-1, L554-2, L554- 3, L555-1, L555-2, L561-1; Germany, 2004 Act, article 62(1)-(3); Greece, 2001 Law, article 44(3); Hungary, 2001 Act, article 46(3)-(7); Italy, 1998 Decree-Law No. 286, article 14(1)-(5bis), (7), (9), 1998 Law No. 40, article 12(1)-(7), (9), 1996 Decree-Law, article 7(3); Japan, 1951 Order, articles 2(15)-(16), 13-2, 54, 55(2)-(5), 61-3, 61-3-2, 61-4, 61-6, 61-7; Republic of Korea, 1993 Decree, articles 77(1), 78; Malaysia, 1959-1963 Act, articles 34(1), (3), 35; Nigeria, 1963 Act, article 31; Panama, 1960 Decree-Law, article 59; Poland, 2003 Act No. 1775, article 101(1)-(2), (3)(1), (4)-(7); Russian Federation, 2002 Law No. 115-FZ, articles 31(9), 34(5); Sweden, 1989 Act, sections 6.18-31; Switzerland, 1931 Federal Law, articles 13b(2)-(3), 13c-d; and United States, INA, sections 241(g), 507(b)(2)(D), (c)(2), (d)-(e).

[127] Austria, 2005 Act, article 3.79(2)-(3); and Sweden, 1989 Act, sections 6.19, 6.22.

[128] Austria, 2005 Act, article 3.80(5); and Switzerland, 1931 Federal Law, articles 13a(a), (d), 13b(1)(d).

[129] United States, INA, section 507(b)(2)(D), (c)(2), (d)-(e).

[130] Belarus, 1998 Law, article 30; Japan, 1951 Order, articles 54(2)-(3), 55(3); Republic of Korea, 1992 Act, articles 65, 66(2)-(3), 1993 Decree, articles 79-80; Malaysia, 1959-1963 Act, article 34(1); and United States, INA, section 241(c)(2)(C).

supervision, in lieu of detention or without otherwise specifically providing for detention.[131] *… A State may expressly characterize the alien's removal as not constituting a detention.*[132]

4.1 Bulgaria

Law on the Foreigners in the Republic of Bulgaria[133]

Article 44

(6) The body [Directors of National Offices, Directors of Chief Directorates and Directors of Directorate "Migration" at the Ministry of Interior] *which has issued the order for compulsory taking to the border of the Republic of Bulgaria or for expulsion can, by his judgement,* ***accommodate*** *the foreigner* ***in a special home*** *for a period until the dropping of the obstacles for fulfilment of the compulsory administrative measure.*

(7) … special homes for temporary accommodation of foreigners…

Valeria Ilareva, Immigration Detention under International and EC Law[134]

…Practice however has already shown that ***"separate" or "special" facilities could be the same or even worse than prisons****. The official name of the detention centre in Bulgaria is* ***"Special Home for Temporary Accommodation of Foreigners". This terminology is misleading*** *and diverts public attention from uglier realities. In "accommodation" people are* ***deprived of*** *a fundamental human right –* ***the right to liberty****…The building where detention takes place has the infrastructure of a prison …*

4.2 Italy

Law No. 40 of 1998, Turco-Napolitano law[135]

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[131] China, 1986 Rules, article 15; France, Code, articles L513-4, L552-4, L552-5, L552-6, L552-7, L552-8, L552-9, L552-10, L552-11, L552-12, L555-1; Hungary, 2001 Act, article 46(8); Japan, 1951 Order, article 52(6); Republic of Korea, 1992 Act, article 63(2), 1993 Decree, article 78(2)-(3); Madagascar, 1962 Law, article 17; Nigeria, 1963 Act, article 23(2); and United States, INA, section 241(a)(3).

[132] Australia, 1958 Act, article 198A(4).

[133] http://www.mvr.bg/NR/rdonlyres/8C3CCC42-3E72-4CBB-900A-E8CB6DE82CAD/0/ZVPNRBGESChTS_EN.pdf

[134] The paper provides a detailed description of functioning of the immigration detention system in Bulgaria, including the jurisprudence of Bulgarian courts. Available at: www.lcri.hit.bg/LARC_paper_Ilareva.pdf

[135] Provisions Governing Immigration and Regulations Concerning the Status of Foreigners (Law No. 40) [Italy], 6 March 1998, available at: http://www.unhcr.org/refworld/docid/3fd9cc5e4.html

Art. 12 Execution of expulsion
1. When it is not possible to immediately enforce expulsion by escorting to the frontier, or rejection, because it is necessary to proceed to provide rescue aid, to carry out supplementary ascertainments regarding the foreigner's identity or nationality, or to obtain documents for the journey, or due to the non-availability of a carrier or other suitable means of transport, the head of police administration (questore) orders that the foreigner is ***to be detained*** *for the time strictly necessary at the nearest* ***temporary-stay and assistance facility****, chosen from amongst those identified or set up by decree of the minister of Internal Affairs, in concert with the minister for Social Solidarity and the Treasury…* **[Procedural safeguards follow]**

Amnesty International; The treatment of foreign nationals detained in 'temporary stay and assistance centres' (CPTAs); AI Index EUR 30/004/2005[136]
While awaiting their removal from Italy these individuals are deprived of their liberty and detained in 'temporary stay and assistance centres', where they may be held for up to a maximum of 60 days, until the orders can be carried out, or the maximum detention limit is reached. This report highlights Amnesty International's concerns about the situation of such people, in the light of numerous, consistent allegations which have emerged from the centres where they are detained of treatment and conditions which violate international human rights and refugee standards …The majority of those detained in the 'temporary stay and assistance centres' are irregular migrants, but some are asylum-seekers. ***The centres in which they are detained (the Italian authorities themselves maintain that these individuals are not technically 'detained' but are, rather, 'held', that is -- 'trattenuti')*** **[restraint]** *are commonly referred to in Italy as CPTAs, an acronym of the original Italian: Centri di Permanenza Temporanea e Assistenza …*

[Legal standards]
The CPTAs were first established in 1998 under Law 40/1998, the so-called Turco-Napolitano law, which was later merged into Legislative Decree No 286 of 25 July 1998 (the 'Single' or 'Consolidated' Text 'concerning immigration matters and standards concerning the condition of the alien'). The CPTAs were established in order to detain foreign nationals in an irregular situation (that is, with no right of entry to or residence in Italy, who had been issued with expulsion (espulsione) or refusal of entry (respingimento) orders stipulating that they should be removed from the country by being forcibly escorted to the border by law enforcement officers (accompagnamento alla frontiera a mezzo della forza pubblica). Those to be held in the CPTAs were those who could not be immediately removed…

[136] http://www.amnesty.org/en/library/asset/EUR30/004/2005/en/ab9dac74-d4e1-11dd-8a23-d58a49c0d652/eur300042005en.pdf

4.3 Slovenia

According to the Slovenian Ombudsman, the restriction of movement provided for in Article 56 of the Aliens Act which, although not termed as deprivation of liberty in domestic law, in practice is tantamount to detention.[137]

Aliens Act[138]

Article 56 ***Restriction of movement*** *of aliens who are obliged to leave the country*

1) An alien who fails to leave the country by the specified deadline and who for whatever reason can not be removed immediately shall be ordered by the police, by the time of his removal from the country, to stay in ***the Alien's Centre*** *(hereinafter referred to as: Centre) or outside it, but for no longer than six months.*

2) The provision of the preceding paragraph shall also be applied in cases where the identity of the alien is not known.

3) An alien specified in the first paragraph of this Article whom it is not possible ***to accommodate*** *at the Centre due to special reasons or needs may, in agreement with the social security office and with the costs borne by the Centre, be accommodated at a social security facility or provided with other appropriate institutional care.*

Global Detention Project: Slovenia[139]

Detention infrastructure

As of 2010, Slovenia's sole dedicated immigration detention centre **[Alien's Law refers to "the Alien's Centre"]** *was the Postojna Centre for Foreigners (JRS Slovenia 2007, p.110; Slovenian Police website). The centre, which was opened in 2002, is operated by the Slovenian Police under the auspices of the Interior Ministry (Slovenian Police website) … Observers have noted that the appearance of the centre bears* ***a striking resemblance to criminal incarceration facilities****, despite the fact that those detained in it are under administrative detention. One NGO that makes regular visits to the centre described it as "a prison-like facility, which was previously used for military purposes" (JRS Slovenia 2007, p.109). Security personnel constitute the majority of employees and all adult detainees are obliged to wear "prison-like uniforms" (CPT 2008, p.20)…*

[137] 12th Annual Report by the Slovenian Human Rights Ombudsmen, July 2007, p. 37, available at: http://www.varuh-rs.si/fileadmin/user_upload/pdf/lp/Varuh_LP_2006_ANG.pdf

[138] Aliens Act (consolidated as of 2007) [Slovenia], September 2007, available at: http://www.unhcr.org/refworld/docid/4c407cbd2.html

[139] http://www.globaldetentionproject.org/countries/europe/slovenia/introduction.html

4.4 Turkey

The Passport Law of 1950[140]

Art. 4 The foreign subject persons who came without passports or documents.
The foreign subject persons who come to Turkish borders without passport or documents or invalid passport or documents are returned.
The foreign subject persons who claim that they lost their passports or documents during the travel may be accepted, provided that they are sent to the closest government office if required and may be resided at the place shown by the local government director for the purpose of the procedure according to the award to be made for them until end of the investigation to be done by the Ministry of Interior.
Immigrants who come by the permission of the Government are accepted to Turkey even if they do not present passports provided they have a document issued by Turkish Consulates or by officers or delegations sent by the Government to the foreign countries to dispatch immigrants.
Generally, acceptable of the immigrants and the foreign persons who come for the purpose of settlement excluding the procedure concerning settlement whether they have passports or not depends on the award of the Ministry of Interior.

Law No. 5683 of 15 July 1950, Law on Residence and Travel of Foreigners in Turkey[141]

Article 23
Les personnes dont l'expulsion a été décidée et qui ne peuvent pas quitter la Turquie du fait qu'ils ne peuvent pas obtenir leur passeport ou pour d'autres raisons, sont obligées ***de séjourner dans les endroits qui leur sont indiqués par le Ministère de l'Intérieur****.*

Global detention project: Turkey[142]

… [T]he law is not clear about the grounds for confining non-citizens in administrative detention. The government frequently cites Article 4 of the Passport Law … and Article 23 of the Law on the Sojourn and Movement of Aliens [Law on Residence and Travel of Foreigners in Turkey] *… as grounds for* ***"accommodating" undocumented foreign nationals****. But various international bodies have argued that while* ***these articles do not provide for detention, the type of accommodation carried out by authorities on the basis of***

[140] http://www.globaldetentionproject.org/fileadmin/docs/Turkey_1950_Passport_Law.pdf
[141] Law No. 5683 of 15 July 1950, Law on Residence and Travel of Foreigners in Turkey [Turkey], Official Gazette No. 7564 dated 24 July 1950, 24 July 1950, available at: http://www.unhcr.org/refworld/docid/3ae6b4d11c.html
[142] http://www.globaldetentionproject.org/countries/europe/turkey/introduction.html

these laws amounts to a clear deprivation of liberty and that the facilities used for this purpose operate as detention centres *(for a detailed account of problems posed by administrative detention in Turkish law, see* ***Abdolkhani and Karimnia v. Turkey****, paras. 125-143; see also WGAD 2007*[143] *and ECHR* ***Z.N.S. v. Turkey****).*

Article 4 of the Passport Law provides that foreign nationals who arrive at the Turkish border without appropriate documentation are not admissible, and that those who claim to have lost their documents during travel must stay at a location indicated by the administrative head of the local government until the Ministry of the Interior (MOI) has completed an investigation. In addition, Article 34 provides that non-citizens who enter Turkey illegally can be fined and imprisoned for up to six months and then deported upon completion of their sentences. Article 33 provides similar penalties for anyone attempting to leave Turkey without the necessary travel documents.

Article 23 of the Law on the Sojourn and Movement of Aliens provides that non-citizens who have been issued a deportation order but whom the state cannot immediately deport must ***reside in a location assigned to them*** *by the MOI. Article 25 specifies that non-citizens who fail to adhere to asylum procedures, including leaving designated cities of residence without permission, can be charged.*

According to reports from various international organisations, NGOs, and government agencies, irregular non-citizens can be apprehended by the police or Gendarmerie and held briefly in police custody before being taken to a ***"guesthouse for foreigners,"*** *which are under the authority of the MOI (WGAD 2007,*[144] *p.14; Government of Turkey 2006a,*[145] *p.10; HCA 2007a*[146]*). The Tracing and Control Police of the Foreigners' Department of each City Security Directorate manages the operations of the guesthouses and is responsible for the non-citizens held in these locations (HCA 2007a, p.13).*

Because ***administrative detention is not recognized as such by Turkish authorities or under Turkish law****, there is no review of detention decisions. According to the Council of Europe's Commissioner for Human Rights (CHR), "Irregular entry, stay, or attempt to depart results in apprehension and detention … in a so called 'foreigners guesthouse,' based on an administrative ruling from the Ministry of the Interior which means that no court order is necessary and no judicial review exists" (CHR 2009,*[147] *p.14).*

The government has insisted that the practice of ***holding people prior to deportation does not amount to detention*** *because the* ***"expulsion process does not involve a judicial procedure"*** *(Government of Turkey 2006b, p.7). On the other hand, the UN Working Group on Arbitrary Detention (WGAD) has described the procedure as detention, stating in a 2007 report, "Foreigners who are in Turkey without the documents necessary … can be, and are in great numbers, arrested by the police or Gendarmerie. After a brief period in police custody they are taken to a so-called 'guest house' for foreigners run by the Ministry of the Interior, where they are—*

[143] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/106/46/PDF/G0710646.pdf?OpenElement
[144] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/106/46/PDF/G0710646.pdf?OpenElement
[145] http://www.abgs.gov.tr/files/tarama/tarama_files/24/SC24DET_ILLEGAL%20MIGRATION%20.pdf
[146] http://www.hyd.org.tr/staticfiles/files/rasp_detention_report.pdf
[147] https://wcd.coe.int/ViewDoc.jsp?id=1511197&Site=COE

in spite of the welcoming name of these institutions—to all effect ***locked up awaiting expulsion****. However, no written decision to this effect is issued to them" (WGAD 2007, p.22).*
In addition, the European Court of Human Rights (ECHR) has ruled in successive cases that government claims that guesthouses are not detention facilities are not valid, and that confinement in these facilities ***constitutes a clear deprivation of liberty*** *(****Abdolkhani and Karimnia v. Turkey****, paras. 125-127;* ***Z.N.S. v. Turkey****, paras. 54-57)…*

Abdolkhani and Karimnia v. Turkey, ECtHR 2010[148]

1. Existence of a deprivation of liberty

125. The Court notes that the Government contested the submission that the applicants were deprived of their liberty within the meaning of Article 5 of the Convention. The Court reiterates that, in proclaiming the right to liberty, Article 5 § 1 contemplates the physical liberty of the person and its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting-point must be his or her concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see Amuur v. France, 25 June 1996, § 42, Reports 1996-III).

126. In the present case the applicants were arrested by gendarmerie officers on 21 June 2008 and detained in the gendarmerie station until 23 June 2008 on the criminal charge of illegal entry into Turkey. On the latter date, they were convicted as charged but the execution of their sentence was deferred. Subsequently, on the same date they were placed in the Hasköy police headquarters where they were held until 26 September 2008, until their transfer to the Kırklareli Foreigners' Admission and Accommodation Centre, which is administered by the foreigners department of the Kırklareli police headquarters. The Court therefore observes that the applicants have been held by the police since 23 June 2008.

127. The Court further observes that the applicants have not been free to leave the Hasköy police headquarters or the Kırklareli Foreigners' Admission and Accommodation Centre. Besides, they are only able to meet a lawyer if the latter can present to the authorities a notarised power of attorney. Furthermore, access by the UNHCR to the applicants is subject to the authorisation of the Ministry of the Interior. In the light of these elements, the Court cannot accept the definition of "detention" submitted by the Government, which in fact is the definition of pre-trial detention in the context of criminal proceedings. ***In the Court's view, the applicants' placement in the aforementioned facilities amounted to a "deprivation of liberty" given the restrictions imposed on them by the administrative authorities despite the nature of the classification under national law. It therefore concludes that the applicants have been deprived of their liberty.***

[148] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=871876&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

2. Compliance with Article 5 § 1

128. The Court reiterates that Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds. One of the exceptions, contained in subparagraph (f), permits the State to control the liberty of aliens in the context of immigration controls (see ***A. and Others v. the United Kingdom*** *[GC], no. 3455/05, §§ 162 and 163, 19 February 2009;* ***Saadi v. the United Kingdom*** *[GC], no. 13229/03, § 43, ECHR 2008-...).*

129. Article 5 § 1(f) does not require the detention to be reasonably considered necessary, for example to prevent the individual from committing an offence or fleeing. Any deprivation of liberty under the second limb of Article 5 § 1(f) will be justified as long as deportation or extradition proceedings are in progress. However, if such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1(f) (see A. and Others, cited above, § 164).

130. The deprivation of liberty must also be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. It requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness. In laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5 § 1 primarily requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law. They also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention (see Amuur, cited above, § 50).

131. In the present case the applicants alleged that they were not detained with a view to deportation and that in any case their detention did not have any legal basis in domestic law. ***The Government submitted that the applicants were not detained within the meaning of Turkish law but were accommodated pursuant to section 23 of Law no. 5683*** *and section 4 of Law no. 5682 pending deportation proceedings.*

132. The Court notes at the outset that the applicants' detention in the Hasköy police headquarters between 23 and 30 June 2008, before Rule 39 was applied by the Court, may be considered as a deprivation of liberty with a view to deportation as the Muş Magistrates' Court noted in its judgment of 23 June 2008 that the applicants would be deported (see paragraph 17 above). In this connection the Court must ascertain whether the applicants' detention actually had a legal basis in domestic law.

133. The Court observes that the legal provisions referred to above by the respondent Government provide that foreigners who do not have valid travel documents or who cannot be deported are obliged to reside at places designated by the Ministry of the Interior. These provisions do not refer to a deprivation of liberty in the context of deportation proceedings. They concern ***the residence of***

certain groups of foreigners in Turkey, but not their detention. *Nor do they provide any details as to the conditions for ordering and extending detention with a view to deportation, or set time-limits for such detention. The Court therefore finds that the applicants' detention between 23 and 30 June 2008 did not have a sufficient legal basis.*

134. The same considerations are also applicable to the applicants' detention from 30 June 2008 onwards. The Government have failed to submit any argument or document indicating that the applicants' detention to date has had a strictly defined statutory basis in domestic law. What is more, following the Court's application of the Rule 39 measure on 30 June 2008, the Government could not have removed the applicants without being in breach of their obligation under Article 34 of the Convention (see Gebremedhin [Gaberamadhien], cited above, §§ 73 and 74). Therefore, any deportation proceedings carried out in respect of the applicants would have had to be suspended with possible consequences for the continued deprivation of the applicants' liberty for that purpose. While it is true that the application of Rule 39 does not prevent the applicants from being sent to a different country – provided it has been established that the authorities of that country will not send them on to Iran or Iraq – the Government did not make any submission to this effect either.

*135. In sum, in the absence of clear legal provisions establishing the procedure for ordering and extending detention with a view to deportation and setting time-limits for such detention, the deprivation of liberty to which the applicants were subjected was not circumscribed by adequate safeguards against arbitrariness (see **Nasrulloyev v. Russia**, no. 656/06, § 77, 11 October 2007; **Chahal**, cited above, § 118; **Saadi v. the United Kingdom**, cited above, § 74). The national system failed to protect the applicants from arbitrary detention and, consequently, their detention cannot be considered "lawful" for the purposes of Article 5 of the Convention.*

*The Court concludes that there has been **a violation of Article 5 § 1 of the Convention**.*

Z.N.S. v. Turkey, ECtHR 2010[149]

1. Existence of a deprivation of liberty and compliance with Article 5 § 1

*54. The Government maintained that the applicant was **not detained but accommodated** in the Kırklareli Foreigners' Admission and Accommodation Centre. The reason for the applicant's placement in this centre, which could not be defined as detention or custody, was the authorities' **need for the surveillance of aliens pending deportation proceedings**. The Government contended that this practice was based on **section 23 of Law no. 5683** and section 4 of Law no. 5682.*

55. The applicant submitted that she was detained and that her detention did not have a sufficient legal basis in domestic law. Nor had it been ordered by a court.

[149] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=861159&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

56. The Court reiterates that it has already examined the same grievance in the case of ***Abdolkhani and Karimnia*** *(cited above, §§ 125-135). It found that the placement of the applicants in the Kırklareli Foreigners' Admission and Accommodation Centre in that case constituted a deprivation of liberty and concluded that, in the absence of clear legal provisions establishing the procedure for ordering and extending detention with a view to deportation and setting time-limits for such detention, the deprivation of liberty to which the applicants were subjected was not "lawful" for the purposes of Article 5 of the Convention.*
57. The Court has examined the present case and finds no particular circumstances which would require it to depart from its findings in the aforementioned Abdolkhani and Karimnia judgment. There has therefore been ***a violation of Article 5 § 1 of the Convention****.*

UN Human Rights Council, Report of the Working Group on Arbitrary Detention, Addendum: Mission to Turkey, 2010, A/HRC/4/40/Add.5[150]

Detention of foreigners awaiting expulsion
86. Foreigners who are in Turkey without the documents necessary to allow them to stay lawfully in the country can be, and are in great numbers, arrested by the police or the Gendarmerie. After a brief period in police custody they are taken to a so-called ***"guest house"*** *for foreigners run by the Ministry of the Interior, where they are - in spite of the welcoming name of these institutions - to all effect* ***locked up awaiting expulsion****. However, no written decision to this effect is issued to them.*
87. Article 23 of the Law on Residence of Foreign Citizens, providing that foreigners who have been issued an expulsion decision but cannot be immediately expelled, shall ***reside in a location assigned to them*** *by the Ministry of the Interior,* ***does not constitute a sufficient legal basis for this practice****. Neither this law, nor any other, provides further details as to the preconditions for, modalities of or maximum duration of assignment to a residence for foreigners awaiting expulsion. As this is not a measure adopted within the criminal process, judges of the peace have no jurisdiction to rule on challenges against such measures. It would appear that administrative tribunals are competent. However, this remedy appears not to be exercised in practice. Challenges to the expulsion decision may have an impact also on the question of detention, but they simply do not constitute the remedy against the fact of deprivation of liberty required by article 9 (4) of ICCPR.*
89. Another aggravating aspect is that, according to information provided by the police, not only foreigners who are actually the subject of an expulsion decision are assigned to guest houses (i.e. deprived of their liberty), but also so assigned are many who - in the opinion of the police - are likely to receive an unfavourable outcome in expulsion proceedings initiated against them. This practice violates even article 23 of the Law on Residence of Foreign Citizens.

[150] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/106/46/PDF/G0710646.pdf?OpenElement

5 Examples of alternatives to detention

Most of the alternatives to detention are to be considered as restrictions on freedom of movement.[151] The section below provides only a brief summary of examples of alternatives to detention of foreigners, including of asylum-seekers,[152] and further focuses on one particular alternative, namely restriction of a person to a designated area. Issues, such as the obligation of states to first apply less invasive means – alternatives to detention – of achieving the same ends and therefore avoiding detention,[153] are not elaborated upon.

5.1 Various possibilities

This sub-chapter lists a wide range of alternatives to detention of foreign nationals, whereas the second sub-chapter is specifically focused on the obligation to remain in a particular area as a typical and most evident restriction on freedom of movement.

ECRE, Research Paper on Alternatives to Detention, 1997[154]
B. Categories of alternative measures **[For details on each category please see the link]**
B.1 Supervised release of children and young adults to local social services
B.2 Supervised release to an NGO
B.3 Supervised release to an individual citizen – release on "bail"

[151]The FRA's report on detention of third-country nationals provides on pg. 72 that "[t]hey [alternatives to detention] include a wide array of measures, most of which imply restrictions on freedom of movement." Available at: http://www.fra.europa.eu/fraWebsite/attachments/detention-third-country-nationals-report-092010_en.pdf

[152] ECRE would suggest that any alternatives implemented by European States should, as a minimum, conform to the United Nations Standard Minimum Rules for Non-Custodial Measures (the "Tokyo Rules"). The Tokyo Rules are the most comprehensive statement of principles relating to non-custodial sentencing in the criminal justice field. While emphasising that very few of the asylum seekers held in detention in Europe have committed offences other than illegal entry to the national territory, it is nevertheless enlightening to analyse how these standards of criminal justice could relate to any alternatives to detention of asylum seekers. The Tokyo Rules are the result of global discussion and exchange of experience, pursuant to Section XI of the Economic and Social Council Resolution 1986/10. They demonstrate an evolving understanding of the negative effects of imprisonment, which, in the case of an asylum seeker, may be compounded by the possibility of previous arbitrary detention and/or torture in the country of origin.

[153] Please see e.g. C. v. Australia, UN Human Rights Committee Communication No 900/1999: Australia. 13/11/2002, CCPR/C/76/D/900/1999, para. 8.2. See also Litwa v. Poland, ECtHR 2000, para. 78; EU Return Directive, Article 15(1); CoE's Parliamentary Assembly Report on the Detention of Asylum Seekers and Irregular Migrants in Europe, January 2010, Rapporteur: Mrs Ana Catarina MENDONÇA, Portugal, Socialist Group, para. 33; Report of the Working Group on Arbitrary Detention, January 2008, A/HRC/7/4 paras. 53 – 54; Report of the Working Group on Arbitrary Detention, February 2009, A/HRC/10/21, para. 67

[154] European Council on Refugees and Exiles, Research Paper on Alternatives to Detention; Practical Alternatives to the Administrative Detention of Asylum Seekers and Rejected Asylum Seekers, September 1997, available at: http://www.unhcr.org/refworld/docid/3c0273224.html

*B.4 General **restrictions on freedom of movement** or place of residence … This may be preferable to detention or compulsory residence in a large collective centre, but is nevertheless **a limitation upon the individual's human right to free movement** within the country…*
B.5 Reporting requirements
B.6 Open centres

CoE's Twenty Guidelines on Forced Return: Commentary on Guideline 6[155]
*3. … These measures may include the surrendering of the passport or other identity documents to the authorities, an obligation to reside in a particular place or within a certain district, an obligation to report at regular intervals to the authorities, for instance to the closest police station, bail or sureties. As these measures constitute restrictions to the right to move freely and to choose one's residence or to the right to respect for private life, they will have to respect the conditions defined **in Article 2(4) of Protocol No. 4** to the ECHR and Article 8(2) ECHR.*

UNHCR, Alternatives to detention of asylum-seekers and refugees, 2006[156]
*48. A range of regional standards determines what may be a permissible **restriction on freedom of movement intended to serve as an alternative to detention**. Article 2 of the Fourth Protocol to the ECHR, concluded in 1963, provides a right to freedom of movement very similar to that in the ICCPR. In addition to the grounds enumerated in Article 12(3) of the ICCPR, article 2(1)(3) of Fourth Protocol to the ECHR makes explicit reference to public safety and prevention of crime. Any restrictions must also be 'necessary in a democratic society'. Like article 12 of the ICCPR, article 2 of the Fourth Protocol is also **limited to those 'lawfully within'** the territory of a State party.*

*80. **The following alternatives** to detention…*
a) Release with an obligation to register one's place of residence with the relevant authorities and to notify them or to obtain their permission prior to changing that address;
b) Release upon surrender of one's passport and/or other documents;
c) Registration, with or without identity cards (sometimes electronic) or other documents;

[155] Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR); Comments on the Twenty guidelines on forced return; available at: https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2005)40&Language=lanEnglish&Ver=addfinal
[156] UN High Commissioner for Refugees, Alternatives to Detention of Asylum Seekers and Refugees, April 2006, POLAS/2006/03, available at: http://www.unhcr.org/refworld/docid/4472e8b84.html

d) Release with the provision of a designated case worker, legal referral and an intensive support framework (possibly combined with some of the following, more enforcement-oriented measures);
e) Supervised release of separated children to local social services;
f) Supervised release to (i) an individual, (ii) family member/s, or (iii) nongovernmental, religious or community organisations, with varying degrees of supervision agreed under contract with the authorities;
g) Release on bail or bond, or after payment of a surety (often an element in release under (f))
h) Measures having the effect of restricting an asylum-seeker's freedom of movement (that is, de facto restrictions) – for example, by the logistics of receiving basic needs assistance or by the terms of a work permit;
i) Reporting requirements of varying frequencies, in person and/or by telephone or in writing, to (i) the police, (ii) immigration authorities, or (iii) a contracted agency (often an element combined with (f));
j) Designated residence in (i) State-sponsored accommodation, (ii) contracted private accommodation, or (iii) open or semi-open centres or refugee camps;
k) ***Designated residence to an administrative district or municipality*** *(often in conjunction with (i) and (j)), or exclusion from specified locations;*
l) Electronic monitoring involving 'tagging' and home curfew or satellite tracking.

CoE's Parliamentary Assembly Report on the Detention of Asylum Seekers and Irregular Migrants in Europe, January 2010
Rapporteur: Mrs Ana Catarina MENDONÇA, Portugal, Socialist Group[157]
6. … [T]he significant number of reported problems associated with detention would suggest that current policies are not working and fail to comply with international legal standards.

39. The rapporteur considers it important to also note that alternatives to detention are not without human rights concerns and should in themselves not amount to an unjustified ***restriction on free movement****. The application of alternative measures must respect the individual's dignity and must comply with the principles of legality, necessity, proportionality and non-discrimination. States must take into account the particular situation of migrants and asylum seekers, as well as the particular vulnerabilities of certain groups, to ensure that the application of alternative measures does not result in discrimination against particular groups of non-nationals, whether on the basis of their nationality, religion, economic situation, immigration or other status. There must be the possibility of a review by an independent judicial or other competent authority.*

[157] http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12105.htm

40. From existing studies on alternatives[158] the rapporteur has collated examples of some of those most commonly used by states. This may be used as a mere starting point for further work at national and international level to ensure that the statement that "detention always be a matter of last resort" is not left in the realms of theory alone.

41. The rapporteur is aware that amongst the alternatives listed, some may be categorised as community-based alternatives[159] that allow freedom of movement (such as release on registration, bonding, etc.) and others are ***alternative forms of detention*** *(in special open establishments, monitoring, tagging, etc.)* ***which curtail freedom of movement****.*

[Examples of alternatives; paras. 42 - 52]

42. Comparative studies on alternatives to detention[160] have identified that the most common alternative to detention is the placement of asylum seekers in special establishments, which are usually open or in some cases semi-open (the asylum seeker must live in the centre but is allowed to leave the premises during the day and returns there at night). There is a spectrum of semi- or half-open facilities – some more open than others… These establishments are not without human rights concerns and must respect fully the rights of those persons placed in their confines and ***take into account the right to liberty and freedom of movement*** *of persons under international law.*

43. Release with registration and reporting requirements are some of the most common alternatives to detention. Registration requirements would entail the release from detention being conditional on fulfilling the obligation to register the individual's place of residence with the responsible authorities. Permission is required for all changes of address and, in addition, it may also be important to register with the authorities at the new address. Registration schemes and documentation requirements allow migrants and asylum seekers to be provided with official registration documents.[161] However, registration has also been provided without an identity card or other documents.

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[158] UNHCR, Alternatives to Detention of Asylum Seekers and Refugees, April 2006, POLAS/2006/03; The Regional Coalition 2006, Survey on Alternatives to Detention of Asylum Seekers in EU member states, www.alternatives-to-ddetention.org; see also the May 2009 report by Bail for Immigration Detainees "An evaluative report on the Millbank Alternative to Detention Pilot."

[159] For an interesting account of the use of community based alternatives, see International Detention Coalition. Case Management as an alternative to immigration detention. The Australian Experience. June 2009

[160] For an interesting account of the use of community based alternatives, see International Detention Coalition. Case Management as an alternative to immigration detention. The Australian Experience. June 2009

[161] Amnesty International, Migration-Related Detention A Global Concern, Index: POL 33/004/2008, December 2008; See also Amnesty International, Jailed without Justice: Immigration Detention in the USA, March 2009

44. Reporting requirements typically entail the duty to report regularly, either in person, over the telephone or in writing at the Police, Immigration Office or other special agency. In the alternative, reporting and/or registration duty can be applied simultaneously, which multiplies the alternatives to detention.[162] *Nearly all European Union countries allow for the use of reporting and/or registration as an alternative.*

45. Care must be taken when these alternatives are used to ensure that registration and reporting requirements are not excessive and do not in themselves amount to an undue restriction on free movement or otherwise obstruct persons carrying out their lives (for example, having to spend large amounts of time and money travelling to register and report). It is also necessary to have regard to the effect of such schemes on the family and private life of those who live with the released person.[163]

46. Release with ***duty to reside in a specific administrative area or municipality****. Detainees may be released with a duty to reside in a specific administrative area or address. Alternatively, they may be prohibited in residing in certain places. In some countries, this alternative is also used as a dispersal tool to distribute asylum seekers and migrants equally over the country and ensure burden-sharing by all regions.*

47. Release on bail/signing an agreement/provision of a guarantor or surety is an alternative, for example, available in the United Kingdom, Slovenia, Finland and Denmark. The decision maker must be satisfied that the surety or guarantor will provide necessary accommodation and can provide a sum of money (forfeited where the applicant fails to comply with the conditions set for bail). The applicant must also comply with conditions set including reporting requirements, and attending interviews with the authorities, which may be formalised in a written agreement. Where guarantees/sureties are used and the applicant defaults on any of the requirements, the guarantor/surety will have to forfeit the sum promised. In many cases, the threat of forfeit will incentivise compliance.[164] *The rapporteur notes that when these alternatives are used, they need to take reasonably into account the family ties available and the economic situation of those concerned.*

[162] The Regional Coalition 2006, Survey on Alternatives to Detention of Asylum Seekers in EU member states
[163] See A and Others v. the United Kingdom, Application No. 3455/05, Judgment [GC] 19 February 2009 and the regime of control orders which replaces that of the detention of foreign nationals suspected of having committed terrorist offences
[164] The Regional Coalition 2006, Survey on Alternatives to Detention of Asylum Seekers in EU member states; pg. 20, France

48. Controlled release to individuals/family members/NGOs/religious organisations.[165] *An individual may be released with mentorship, for example, under a social worker or an active support network. Alternatively there could be release under the supervision of other individuals, family members, relatives, or members of non-governmental, religious, or community organisations. The relevant person/group must provide a guarantor's assurance that the individual will attend meetings and appointments as required. Similar to release on bail, the guarantor must pay a financial penalty if the asylum seeker breaches his or her obligations on release. This alternative appears to work better in conjunction with other alternatives, including monitoring measures of varying and appropriate intensity, or reporting requirements. In Canada, almost 92% of releases under the supervision of an NGO have met with success.*[166]

49. Release combined with appointment of a special worker. Whilst this alternative is not often used in practice, it could provide an effective means of releasing an individual. The special worker may assist in monitoring the fulfilment of obligations but may also offer counselling and advice to the individual to help overcome difficult situations. Appointments with the special worker could replace reporting requirements and also assist in the monitoring of the removal process. Furthermore, in the case of children, release could be accompanied by court guardianship and/or the supervision of welfare and social services. This could be particularly effective given that numbers of children have disappeared from local authority care.

50. Release with the obligation to hand-over travel and/or other documents. Impoundment of documents is a requirement which has been used[167] *in order to prevent prospective secondary movement within Europe, for example, following the submission of an asylum claim (or application for residence). The requirement to hand over papers may work periodically – for example, as a weekly requirement – or it may be a surrender of such documentation for a temporary period, insofar as this is necessary in order to implement the safeguard measures. It is also used often in combination with other alternatives.*

51. Control measures on release could be implemented (e.g. the issuance of a temporary work permit or visa extension could be conditional on compliance with reporting requirements or attending meetings).[168]

[165] The Regional Coalition 2006, Survey on Alternatives to Detention of Asylum Seekers in EU member states, pg. 10, Slovenia
[166] Ms. Alice Edwards, Lecturer in British Human rights Law, University of Nottingham, Committee on Migration, Refugees and Population Hearing on detention of irregular migrants and asylum seekers, Paris, 14 December 1997, AS/Mig/Inf (2008) 02, 4 February 2008, aminf02_2008.
[167] The Regional Coalition 2006, Survey on Alternatives to Detention of Asylum Seekers in EU member states, France and Finland
[168] The Regional Coalition 2006, Survey on Alternatives to Detention of Asylum Seekers in EU member states, pg. 11, Czech Rep., Spain

52. Registration using special (electronic) documents or electronic monitoring is a familiar aspect of those released on bail from criminal custody. However in the administrative context, it could also provide a means of monitoring a person's movement. Commonly, electronic surveillance methods are used or other suitable means of monitoring movement, including satellite. Movements outside a specified permitted area alert the Police and the individual may be detained again, including that it would be noted that they attempted to abscond.[169] *In deciding to use such registration measures, careful consideration needs to be given to the human rights implications, including the proportionality and necessity of the measure and the need for review by an independent judicial or other competent authority – either to discharge or vary the conditions.*

CoE's Parliamentary Assembly Resolution 1707 (January 2010) on Detention of Asylum Seekers and Irregular Migrants in Europe[170]

9. In view of the above-mentioned considerations, the Assembly calls on member states of the Council of Europe in which asylum seekers and irregular migrants are detained to comply fully with their obligations under international human rights and refugee law, and encourages them to:

…

9.3. consider alternatives to detention and:

9.3.1. provide for a presumption in favour of liberty under national law;

9.3.4. commission and carry out empirical research and analysis on alternatives to detention, their use and effectiveness, and best practice, distinguishing between community-based alternatives that allow for freedom of movement and those which curtail freedom of movement. In this respect, the following alternatives can, inter alia, be taken into account:

9.3.4.1. placement in special establishments (open or semi-open);

9.3.4.2. registration and reporting;

9.3.4.3. release on bail/surety;

9.3.4.4. controlled release to individuals, family members, non-governmental organisations (NGOs), religious organisations, or others;

9.3.4.5. handover of travel and other documents, release combined with appointment of a special worker;

9.3.4.6. electronic documents or electronic monitoring.

[169] The Regional Coalition 2006, Survey on Alternatives to Detention of Asylum Seekers in EU member states, pg. 11, under discussion in Belgium

[170] http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1707.htm

5.2 Movement restricted to a designated area

This sub-chapter is focused on the obligation to remain in a designated area and seeks to demonstrate that such an alternative to detention is, in fact, one of the most evident restrictions on freedom of movement. It consists of excerpts from reports related to alternatives to detention for asylum-seekers and irregular migrants, which identify the obligation to remain in a designated area as a suitable alternative to detention restricting one's freedom of movement. Although this sub-chapter does not directly provide excerpts from relevant national laws of various countries, it includes references, on a number of places, to relevant provisions of these laws.

UNHCR, Alternatives to detention of asylum-seekers and refugees, 2006[171]

Germany

Germany operates a reception system that includes allocation to large collective accommodation centres as well as ***restrictions on movement to the district***[172] *of the federal state in which the centre is located. Exceptions to this rule are authorised. Practice varies by federal state, but generally asylum seekers are* ***not supposed to travel outside their district of assigned residence*** *(some districts are no larger than 15 sq km) without special permission from the competent local aliens authority. They are subject to detention as a penalty if they do so … In a 1997 decision, the German Constitutional Court held that* ***these limitations on the movement*** *of asylum seekers are* ***not disproportionate*** *and, therefore, are* ***in line with constitutional guarantees***.[173] *… A rejected asylum seeker, or any* ***foreign national****, under a final obligation to leave German territory, if not detained or sent to a Return Centre, may have her* ***freedom of movement restricted*** *as provided for in* ***section 42(5) Aliens Act****, irrespective of her former status…*

Italy

According to an old law, applicable both to aliens and Italian citizens, ***freedom of movement may be restricted*** *for the protection of public morals (traditionally, to prevent prostitution). This could, theoretically, be used* ***to confine an individual to a certain province*** *of Italy* ***as an alternative to detention****. To the knowledge of UNHCR Rome, these measures have never been applied to asylum seekers.*

Spain

[171] UN High Commissioner for Refugees, Alternatives to Detention of Asylum Seekers and Refugees, April 2006, POLAS/2006/03, available at: http://www.unhcr.org/refworld/docid/4472e8b84.html

[172] As provided for in Sections 56, 57, 58 and 59 Asylum Procedures Act.

[173] BVerfG, decision of 10 April 1997, BVerfGE 96, 10 ff.

*The Minister of the Interior may temporarily adopt **restrictions on free movement** on the basis of national security or public health.*[174] *The Minister has to provide reasons to justify the adoption of any such restrictions. These powers are exceptionally exercised. The **Asylum Law 9/1994** also expressly authorizes the Minister of the Interior **to impose compulsory residence (a restriction on freedom of movement, not detention)** for the duration of the asylum procedure for applicants who do not possess the documents required to reside in Spain. Again, this measure is rarely used in practice.*[175]

Switzerland
*Under **article 13e of the LSSA**,*[176] *the responsible cantonal authority can impose a condition on **a foreigner, without a stay or residence permit** and who disturbs or endangers public security and order, in particular by involvement in illegal dealing in narcotics, **not to leave an area designated to him or her** (containment) or not to enter a certain area ('exclusion'). According to the intention of the legislators, the notion of public security and order should not be interpreted narrowly. Moreover, non-compliance with an order under article 13e may have the consequence of detention, in so far as both 'preparatory detention' and 'deportation detention' may be applied, inter alia, to asylum seekers who leave an assigned area or entered a restricted area.*[177] *Measures taken under article 13e still need to be in conformity with the proportionality principle, that is, **restrictions to one's freedom of movement** need to be necessary for the aim pursued.*[178]

The Regional Coalition 2006: Survey on Alternatives to Detention of Asylum Seekers in EU Member States[179]
*Release with a duty **to reside in a specific administration area**.*
*Under this alternative, asylum seekers can be released on condition they reside at a specific address or in concrete administrative area. The application of this alternative can be perceived as more advantageous in comparison to the duty to reside in half-open centres. It nevertheless imposes very **significant restrictions on** the asylum seeker's **freedom of movement**. In some European*

[174] Art. 18(2), Implementing Decree 203/95 and art. 5(1), Asylum Law 1984 (as amended).
[175] Art. 4(3), Asylum Law and art. 14, Asylum Regulations, as approved by Royal Decree No. 203/1995
[176] The Federal Law on the Sojourn and Settlement of Aliens
[177] Pursuant to arts. 13a (b) or 13b(1)(b), LSSA or, if deportation is not possible (art. 13c(5), LSSA) pursuant to art. 23a , LSSA.
[178] See, on the application of containment and exclusion, the Circular by the Federal Office for Refugees and the Federal Office for Aliens of 31 January 1995: Lettre circulaire du 31 janvier 1995 sur l'application de la loi fédérale sur les mesures de contrainte en matière de droit des étrangers. On the proportionality principle regarding containment and exclusion see, for instance, Walter Kälin, Zwangsmassnahmen im Ausländerrecht: Materielles Recht, AJP/PJA 1995, p. 835 (852) with further references.
[179] http://www.detention-in-europe.org/images/stories/survey_on_alternatives_to_detention_of_asylum_seekers_in_eu_member_states%5B1%5D.pdf

*countries, this system is used not only as **an alternative to detention**, but also as a tool distributing asylum seekers equally over the territory of the country and ensuring burden- sharing by all regions. However, this system is being criticized for not taking sufficiently into account important factors such as family ties, potential support from concrete communities, job opportunities and individual needs. This alternative is very often combined with a duty to regularly report to the Police or to another authority.*
*COUNTRY EXAMPLES: **Denmark, Ireland***

Germany
*Departure facilities (**Section 61 of the Immigration Act**)*
*The Lander (federal countries) may establish departure **facilities for foreigners who are unappealably obliged to leave the Federal territory**. At such departure facilities, the willingness to leave the Federal territory voluntarily should be promoted through support and counselling and accessibility for authorities and courts and implementation of the departure procedure should be ensured. **The stay of a foreigner who is unappealably obliged** to leave the Federal territory shall **be restricted in geographic terms to the territory of the Land concerned**. Further conditions and requirements may be imposed.*

Ireland
*The Irish legislation provides for **standard alternatives to detention**. An immigration officer can order **aliens to reside or live in specific areas/districts** (in writing) or to report regularly to the immigration officer/Garda Síochána (the Police) member. The alien must observe these obligations.*

JRS Europe: Alternatives to detention, 2008[180]
Duty to remain in a designated administrative area
*The asylum seeker's **freedom of movement is restricted to a designated area**, such as a city or a district. Any exit from the area must previously be either notified or authorised, depending on the national legislation. Ancillary measures and penalties are usually provided for, as for the duty to remain in a designated residence. This alternative, often applied as an ancillary measure, is provided for and enforced in **Denmark, Ireland, Japan, Romania** and, with a significant success, in **Germany**. It is provided for but in practice not applied in Slovenia. The measure, clearly not costly, is considered in general as **a highly suitable alternative to detention**…*

JRS Europe: Becoming Vulnerable in Detention (DEVAS Report), 2010[181]

[180] http://www.detention-in-europe.org/images/stories/jrs%20europe%20paper_alternatives%20to%20detention.pdf

[Alternatives to detention]

Austria

The Aliens' Police may require that a person report daily to officials. These persons may be accommodated in specialised facilities.[182] *Alternatively,* ***some restrictions on the freedom of movement*** *can be applied, such as forcing asylum seekers* ***to remain within one administrative district*** *during their "admission procedure".*[183]

Hungary

The Act II of 2007 *on the Admission and Right of Residence of Third-Country Nationals,* ***Section 62*** *provides that the immigration authority shall have powers to order* ***the confinement of a third-country national in a designated place****, if the third-country national in question:*

"a) cannot be returned or expelled due to commitments of the Republic of Hungary conferred upon it in international treaties and conventions;

b) is a minor who should be placed under detention;

c) should be placed under detention, in consequence of which his/her minor child residing in the territory of the Republic of Hungary would be left unattended if he/she was to be detained;

d) is released from detention, however, there are still grounds for his/her detention;

e) has a residence permit granted on humanitarian grounds;

f) has been expelled, and is lacking adequate financial resources to support himself and/or does not have adequate dwelling."

Ireland

There are no formal alternatives to detention. However, ***the Refugee Act 1996, Section 9(5)****, provides some alternative options for asylum seekers. Under that section, an immigration officer or other authorised person may require an applicant for asylum* ***to reside or remain in particular districts or places in the country****, or, to report at specified times to an immigration officer or other designated person. All asylum seekers, including those who are initially detained, are housed in government-run hostels during the duration of their applications and any appeals. According to an interview with an NGO, the Garda National Immigration Bureau will permit some persons who are pending deportation to reside at home pending their removal. They may be required to report weekly to*

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[181] http://detention-in-europe.org/images/stories/DEVAS/jrs-europe_becoming%20vulnerable%20in%20detention_june%202010_public_updated%20on%2012july10.pdf

[182] Aliens Police Act (§ 77 FPG)

[183] Asylum Law (§12 Abs. 2 AsylG)

GNIB. In some cases, the GNIB officers may visit the home of the deportee. However, there are no written laws, regulations or procedures governing this practice.

The Netherlands
…alternatives to detention do exist in The Netherlands. However, the authorities often do not consider applying these alternatives before detention is ordered. They do not consider them to be serious alternatives. Especially at the border, detention is almost always issued without considering the alternatives provided by law. Therefore, detention cannot be said to be an ultimum remedium in The Netherlands. By law the basis for alternative measures, is laid down in ***art. 6 section 1 and art. 56 section 1 AA****. In policy guidelines this resulted in the following* ***alternatives to detention****:*
Aliens Circular par. A6/4.3.1
The Aliens Act *contains* ***five measures of freedom limitation****:*
· staying an alien whom is refused access in ***a designated*** *place or* ***area*** *(see art. 6 section 1 AA);*
· arrest and staying of persons in order to determine their identity, nationality and legal residential position. (See art. 50 section 1 AA);
· Keeping aliens who are legally staying in the country under art. 8 section f Aliens Act, available on a designated place (see art. 55 AA);
· Limiting the freedom of movement of aliens if the importance of the public order or national security requires so. (See art. 56 AA)
· Staying of aliens whose request for asylum has been denied in a designated place or area. (see art. 57 AA)
These alternatives *are applicable to asylum seekers* ***as well as to other irregular migrants****.*

FRA, Detention of third-country nationals in return procedures: Thematic Report, September 2010[184]
Alternatives to detention
Residence ***restrictions***
This includes the duty to stay at a particular address or ***the obligation to reside in a specific geographical area*** *of the country, often combined with regular reporting requirements. Designated places can be open or semi-open facilities run by the government or NGOs, hotels or hostels as well as private addresses provided by the person concerned. The regime imposed can vary, but usually persons have to stay at the designated location at certain times and absences may normally only be allowed if good reason is given.* [See Austria, Section 77.3 Aliens Police Act; Germany, Section 61.1 Residence Act; Denmark, Section 34.1 Aliens Act; Estonia, Section 10.1-2 of the OLPEA; France, Art. L 552-4 and L 552-5 CESEDA; Hungary, Section 62 TCN Act; Ireland, Section 14 (1) a)-

[184] http://www.fra.europa.eu/fraWebsite/attachments/detention-third-country-nationals-report-092010_en.pdf

b) Immigration Act 2004 and Section 5(4) Immigration Act 2003; Netherlands, Art. 57 Aliens Act; Poland, Art. 90.1(3) Act on Aliens; Portugal, Act 23/2007 Art 142.1; Slovenia Art 56 Aliens Act; UK, 1971 Immigration Act, Schedule 3, paragraph 2(5).]

PART II – SAFEGUARDS

This part addresses procedural safeguards, in particular the right to be informed, the right to legal assistance, the right to appeal and the periodic review of detention, and is, with certain exceptions, limited to legal information and recommendations explicitly referring to detention of irregular migrants. However, it is worth mentioning that of particular relevance to this part are basic rules and principles established generally for various types of detention and imprisonment, namely the 1955 UN Standard Minimum Rules for the Treatment of Prisoners,[185] the 1988 UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment,[186] the 1991 UN Basic Principles for the Treatment of Prisoners,[187] the 1985 Beijing Rules,[188] the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty,[189] the 2006 European Prison Rules,[190] as well as UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers.[191] It should be further noted that the compilation does not cover country specific information.[192] As regards the jurisprudence referred to below, the vast majority of cases specifically deal with detention of irregular migrants and their procedural safeguards.

[185] United Nations, Standard Minimum Rules for the Treatment of Prisoners, 30 August 1955, available at: http://www.unhcr.org/refworld/docid/3ae6b36e8.html
[186] UN General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment : resolution / adopted by the General Assembly, 9 December 1988, A/RES/43/173, available at: http://www.unhcr.org/refworld/docid/3b00f219c.html
[187] UN General Assembly, Basic Principles for the Treatment of Prisoners : resolution / adopted by the General Assembly, 28 March 1991, A/RES/45/111, available at: http://www.unhcr.org/refworld/docid/48abd5740.html
[188] UN General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") : resolution / adopted by the General Assembly., 29 November 1985, A/RES/40/33, available at: http://www.unhcr.org/refworld/docid/3b00f2203c.html
[189] UN General Assembly, United Nations Rules for the Protection of Juveniles Deprived of Their Liberty : resolution / adopted by the General Assembly., 14 December 1990, A/RES/45/113, available at: http://www.unhcr.org/refworld/docid/3b00f18628.html
[190] Council of Europe: Committee of Ministers, Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules, 11 January 2006, Rec(2006)2, available at: http://www.unhcr.org/refworld/docid/43f3134810.html
[191] UN High Commissioner for Refugees, UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999, available at: http://www.unhcr.org/refworld/docid/3c2b3f844.html
[192] For country specific information on procedural safeguards related to immigration detention, please see e.g. Detention of third-country nationals in return procedures: Thematic Report, September 2010, pg. 52 – 68. Available at: http://www.fra.europa.eu/fraWebsite/attachments/detention-third-country-nationals-report-092010_en.pdf

Preliminary remarks: Romanian context

Constitution of Romania[193]

Article 23 Individual freedom

(1) Individual freedom and security of a person are inviolable.

(2) Search, detainment, or arrest of a person shall be permitted only in the cases and under the procedure provided by law.

(3) Detention shall not exceed twenty-four hours.

(4) Preventive custody shall be ordered by a judge and only in the course of criminal proceedings.

(5) During the criminal proceedings, the preventive custody may only be ordered for 30 days at the most and extended for 30 days at the most each, without the overall length exceeding a reasonable term, and no longer than 180 days.

*(6) After the lawsuit has begun, **the court is bound**, according to the law, **to check, on a regular basis and no later than 60 days, the lawfulness and grounds** of the preventive custody, and to order at once the release of the defendant if the grounds for the preventive custody have ceased to exist or if the court finds there are no new grounds justifying the continuance of the custody.*

(7) The decisions by a court of law on preventive custody may be subject to the legal proceedings stipulated by the law.

*(8) Any person detained or arrested shall be **promptly informed, in a language he understands, of the grounds** for his detention or arrest, and notified of the charges against him, as soon as practicable; the notification of the charges shall be made only in the presence of a lawyer of his own choosing or appointed ex officio.*

(9) The release of a detained or arrested person shall be mandatory if the reasons for such steps have ceased to exist, as well as under other circumstances stipulated by the law.

(10) A person under preventive custody shall have the right to apply for provisional release, under judicial control or on bail.

(11) Any person shall be presumed innocent till found guilty by a final decision of the court.

(12) Penalties shall be established or applied only in accordance with and on the grounds of the law.

*(13) **The freedom deprivation sanction can only be based on criminal grounds**.*

Emergency Ordinance No. 194 from 12 December 2002 on the status of aliens in Romania

ART. 97 Transfer of aliens into public custody

(2) In case of aliens who could not be removed under escort within the term provided by the law, transfer to public custody shall be ordered by the specially designated prosecutor from the Prosecutor's Office within the Bucharest Court of Appeal, for a period of 30 days, upon request of the Romanian Migration Office or its territorial units.

[193] http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=2#t2c2s0a23

(5) Extension of the duration for transfer into public custody of aliens mentioned by para. (2), who could not be removed from the territory of Romania within 30 days shall be decided upon by the court of appeal in whose area of territorial competence the accommodation centre is situated, upon motivated request of the Romanian Migration Office. The court shall decide before the expiry of the term of transfer into public custody previously ordered, and the court decision shall be irrevocable.
(6) The maximum duration for public custody for aliens against whom a return measure has been ordered may not exceed 6 months.
(9) Aliens against whom the transfer into public custody has been ordered, under the conditions provided by para. (2), may submit, ***within a limit of 5 days, a complaint*** *to the Court of Appeal of Bucharest city, which has the obligation to process it within 3 days from the date of registration.*

ART. 99 Rights and obligations of the aliens accommodated in centres
(1) ***Aliens accommodated within centres enjoy rights*** *provided by the law, as well as those* ***mentioned by treaties and international agreements to which Romania is a party****.*
(2) aliens accommodated in centres have ***the right to legal****, medical and social* ***assistance*** *and to respect for their own opinion and traditions, with regard to religion, philosophy and culture.*
(3) Aliens accommodated within centres have ***the right to be informed****, immediately after having been delivered to such places,* ***in the language they speak or in a language they understand, about the main reasons*** *which have led to deciding this measure, as well as* ***about the rights and obligations*** *they have during their residence in the centres. The reasons for being taken into public custody, as well as the rights and obligations of the aliens accommodated within centres shall be* ***communicated in writing*** *by the persons designated to manage such centres…*

6 Procedural safeguards for irregular immigrants deprived of their liberty

The following chapter will analyse in more detail the right to be informed, the right to appeal, the right to access to a lawyer, and the right to a periodic review of detention.[194]

6.1 International context

Articles 2 and 9 of the ICCPR

Article 2

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 9

(2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

(4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

UN Human Rights Committee, General Comment No. 8 on Article 9 of the ICCPR, 1982[195]

1. … It is true that some of the provisions of article 9 (part of paragraph 2 and the whole of paragraph 3) are only applicable to persons against whom criminal charges are brought. But the rest, and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, ***applies to all persons deprived of their liberty*** *by arrest or detention… Furthermore, States parties have in accordance with article 2 (3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the Covenant.*

[194] The aim of procedural safeguards is, in general, to prevent arbitrary deprivation of liberty.

[195] http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument

4. Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), ***information of the reasons must be given*** *(para. 2) and* ***court control of the detention must be available*** *(para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.*

UN Human Rights Committee, General Comment No. 15 on the position of aliens under the Covenant, 1986[196]

9. Many reports have given insufficient information on matters relevant to article 13.[197] *That article is applicable to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise. If such procedures entail arrest,* ***the safeguards of the Covenant relating to deprivation of liberty*** *(arts. 9 and 10)* ***may also be applicable****.*

UN Human Rights Committee, General Comment No. 20, replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment, (Article 7 of the ICCPR), 1992[198]

11. To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available ***for purposes of judicial or administrative proceedings****. … The protection of the detainee also requires that* ***prompt and regular access*** *be given to doctors and* ***lawyers****…*

UN Commission on Human Rights: Report of the Working Group on Arbitrary Detention, 1999, E/CN.4/2000/4[199]

Deliberation No. 5 *concerning the situation regarding* ***immigrants*** *and asylum-seekers*

Guarantees concerning persons held in custody

Principle 3: Any asylum-seeker or ***immigrant placed in custody*** *must be brought* ***promptly before a judicial or other authority****.*

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[196] http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument

[197] Article 13 of the ICCPR provides as follows: "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority. "

[198] http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument

[199] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/165/70/PDF/G9916570.pdf?OpenElement

Principle 4: Any asylum-seeker or immigrant, when placed in custody, must enter his or her signature in a register which is numbered and bound, ***or affords equivalent guarantees****, indicating the person's identity, the grounds for the custody and the competent authority which decided on the measure, as well as the time and date of admission into and release from custody.*
Principle 5: Any asylum-seeker or immigrant, upon admission to a centre for custody, must ***be informed of the internal regulations*** *and, where appropriate, of the applicable disciplinary rules and any possibility of his or her being held incommunicado, as well as of the guarantees accompanying such a measure.*
Guarantees concerning detention
Principle 8: ***Notification*** *of the custodial measure must be given* ***in writing, in a language understood by the*** *asylum-seeker or* ***immigrant****, stating the grounds for the measure; it shall set out the conditions under which the asylum-seeker or immigrant must be able to apply for* ***a remedy*** *to a judicial authority, which shall* ***decide promptly*** *on the lawfulness of the measure and, where appropriate, order the release of the person concerned.*

UN, Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban Programme of Action, 2001, A/CONF.189/12[200]
Article 30 (d) Urges States: …
To ensure that ***migrants, regardless of their immigration status****, detained by public authorities are treated with humanity and in a fair manner, and receive* ***effective legal protection*** *and, where appropriate, the assistance of a competent* ***interpreter*** *in accordance with the relevant norms of international law and human rights standards, particularly during interrogation;*

Report of the UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, 2002, E/CN.4/2003/85[201]
15. ***Deprivation of liberty of migrants must comply*** *not only with national law, but* ***also with international legislation****. It is a fundamental principle of international law that no one should be subjected to arbitrary detention. International human rights norms, principles and standards define the content of that principle. Such norms, principles and standards* ***apply to all individuals, including migrants*** *and asylum seekers, and to both criminal and* ***administrative proceedings****.*

Recommendations
75. When this [abolishing all forms of administrative detention] *is not immediately possible, Governments should take measures to ensure respect for the* ***human rights of migrants in the context of deprivation of liberty****, including by:…*

[200] http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/cb95dc2388024cc7c1256b4f005369cb/$FILE/N0221543.pdf
[201] http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/$FILE/G0216255.pdf

(c) ***Ensuring that procedural safeguards and guarantees established by international human rights law and national law*** *in case of criminal proceedings are applied to any form of detention. In particular, deprivation of liberty should be allowed only on the basis of criteria established by law. A decision to detain should only be taken under clear legal authority, and all migrants deprived of their liberty, whether under administrative proceedings or in cases of preventive detention for reasons of public security, should be entitled to* ***bring proceedings before a court****, so that the court can decide on the lawfulness of the detention.* ***Migrants in detention shall be assisted, free of charge, by legal counsel and by an interpreter*** *during administrative proceedings;*
(d) [Governments should take measures to ensure] that migrants deprived of their liberty are ***informed*** *in a language they understand, if possible in writing, of the reasons for the deprivation of liberty…*
(e) Facilitating migrants' exercise of their rights, including by providing them with lists of lawyers offering pro bono services, telephone numbers of all consulates and organizations providing assistance to detainees and by creating mechanisms, such as toll-free numbers, to inform them of the status of their case. Efforts should be made to conclude agreements with NGOs, universities, volunteers, national human rights institution and humanitarian and other organizations to provide basic services, such as translation and legal assistance, when they cannot otherwise be guaranteed;
(g) The decision to detain should be ***automatically reviewed periodically*** *on the basis of clear legislative criteria.*
(h) Avoiding the use of detention facilities and of legal mechanisms and methods of interception and/or deportation that curtail judicial control of the lawfulness of the detention and other rights, such as the right to seek asylum;

UN Commission on Human Rights: Report of the Working Group on Arbitrary Detention, 2004, E/CN.4/2004/3[202]
Recommendations
84. … [I]n all circumstances deprivation of liberty must remain consistent with the norms of international law.
85. The Working Group considers that ***the right to challenge the legality of detention*** *or to petition for a writ of habeas corpus or remedy of amparo is a personal right, which must in all circumstances be guaranteed by the jurisdiction of the ordinary courts.*
86. The Working Group considers that, ***even where illegal immigrants*** *and asylum-seekers are concerned, any decision to place them in detention must be* ***reviewed by a court or a competent, independent and impartial body*** *in order to ensure that it is necessary and in conformity with the norms of international law and that, where people have been detained, expelled or returned without being provided with legal guarantees, their continued detention and subsequent expulsion are to be considered as arbitrary.*

UN Commission on Human Rights: Report of the Working Group on Arbitrary Detention (Visit to Argentina), 2004, E/CN.4/2004/3/Add.3[203]

[202] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/170/72/PDF/G0317072.pdf?OpenElement

Recommendations
*75. **An effective judicial remedy** should be provided for **administrative orders for the detention of foreigners** with a view to their expulsion from the country. **Any person detained for reasons related to immigration** should have an opportunity **to request a court** to rule on the legality of his or her detention before the expulsion order is enforced…*

UN Human Rights Council: Report of the Working Group on Arbitrary Detention, February 2009, A/HRC/10/21[204]
Detention of immigrants in irregular situations
66. The Working Group has also publicly expressed, together with other mandate holders of special procedures, its concern regarding a law-making initiative of a regional organization comprising mainly receiving countries which would allow concerned States to detain immigrants who are in an irregular situation for a period of time of up to 18 months, pending removal. It would also be permitted to detain unaccompanied children, victims of human trafficking, and other vulnerable groups.
*67. … Grounds for detention must be clearly and exhaustively defined and the legality of detention must be open for **challenge before a court and regular review within fixed time limits**. Established time limits for judicial review must even stand in "emergency situations" when an exceptionally large number of undocumented immigrants enter the territory of a State. Provisions should always be made to render detention unlawful if the obstacle for identifying immigrants in an irregular situation or carrying out removal from the territory does not lie within their sphere, for example, when the consular representation of the country of origin does not cooperate or legal considerations - such as the principle of non-refoulement barring removal if there is a risk of torture or arbitrary detention in the country of destination - or factual obstacles - such as the unavailability of means of transportation - render expulsion impossible.*

UN Human Rights Council: Report of the Working Group on Arbitrary Detention, January 2010, A/HRC/13/30[205]
Detention of immigrants in an irregular situation
*54. … **All country mission reports contain a chapter on administrative immigration detention**. Some of the fact-finding missions were exclusively focused on the issue of the detention of migrants and asylum-seekers.*
57. Three Opinions, 45/2006,[206] 18/2004,[207] and 34/1999,[208] provided the Working Group with the opportunity to express itself specifically on whether or not the detention of the concerned migrant was arbitrary.

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[203] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/172/81/PDF/G0317281.pdf?OpenElement
[204] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/110/43/PDF/G0911043.pdf?OpenElement
[205] http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.30_en.pdf
[206] A/HRC/7/4/Add.1
[207] E/CN.4/2005/6/Add.1

61. Further guarantees include the fact that a maximum period of detention must be established by law and that upon expiry of this period the detainee must be automatically released. Detention must be ordered or approved by a judge and there should be ***automatic, regular and judicial, not only administrative, review*** *of detention in each individual case. Review should extend to the lawfulness of detention and not merely to its reasonableness or other lower standards of review. The procedural guarantee of article 9 (4) of the International Covenant on Civil and Political Rights requires that migrant detainees enjoy* ***the right to challenge*** *the legality of their detention before a court. Established time limits for judicial review must be obtained in "emergency situations" when an exceptionally large number of undocumented immigrants enter the territory of a State. All detainees* ***must be informed as to the reasons for their detention and their rights****, including* ***the right to challenge*** *its legality,* ***in a language they understand*** *and must have* ***access to lawyers****.*

6.1.1 Jurisprudence

Daniel Dillon (U.S.A.) v. United Mexican States, Mexico-U.S.A. General Claims Commission, Award of 3 October 1928, United Nations, Reports of International Arbitral Awards, vol. IV, pp. 368-371, at p. 369[209]

... [T]he keeping of the claimant ***incommunicado and uninformed about the purpose of his detention****, constitute in the opinion of the Commission a maltreatment and a hardship unwarranted by the purpose of the arrest and amounting to such a degree as to make the United Mexican States* ***responsible under international law****.*

Vuolanne v. Finland, UN Human Rights Committee, Case No. 265/1987[210]

2.6 Concerning his military confinement, the author considers it "evident that Finnish military confinement in the form of close arrest imposed in a disciplinary procedure is a deprivation of liberty covered by the concepts 'arrest or detention' in article 9, paragraph 4, of the Covenant"...

9.3 ...It [the Committee] *observes that* ***as a general proposition, the Covenant does not contain any provision exempting from its application certain categories of persons****. According to article 2, paragraph 1, "each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social*

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[208] E/CN.4/2001/14/Add.1

[209] In http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/260/29/PDF/N0626029.pdf?OpenElement

[210] http://www1.umn.edu/humanrts/undocs/session44/265-1987.htm

origin, property, birth or other status". The all-encompassing character of the terms of this article leaves no room for distinguishing between different categories of persons, such as civilians and members of the military, to the extent of holding the Covenant to be applicable in one case but not in the other. Furthermore, the travaux préparatoires as well as the Committee's general comments indicate that the purpose of the Covenant was to proclaim and define certain human rights for all and to guarantee their enjoyment. It is, therefore, clear that the Covenant is not, and should not be conceived of in terms of whose rights shall be protected but in terms of what rights shall be guaranteed and to what extent. ***As a consequence the application of article 9, paragraph 4, cannot be excluded in the present case****.*

9.6 The Committee further notes that ***whenever a decision depriving a person of his liberty is taken by an administrative body or authority, there is no doubt that article 9, paragraph 4, obliges the State party concerned to make available to the person detained the right of recourse to a court of law.*** *In this particular case it matters not whether the court would be civilian or military. The*
9.7 The Committee observes that article 2, paragraph 1, represents a general undertaking by States parties in relation to which a specific finding concerning the author of this communication has been made in respect to the obligation in article 9, paragraph 4. Accordingly, no separate determination is required under article 2, paragraph 1.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the communication discloses a violation of article 9, paragraph 4, of the Covenant, because Mr. Vuolanne was unable to challenge his detention before a court.

Torres v. Finland, UN Human Rights Committee, Case No 291/1988[211]
[Summary of the case] *Torres, a Spanish citizen, asylum-seeker, was detained in Finland whilst his asylum claim was assessed and rejected and pending the execution of an extradition order to Spain. The author made a complaint inter alia under Article 9(4) regarding the fact that he was not provided the right of recourse to a judicial body, and that the judicial proceedings were unreasonably prolonged.*

[Committee's views]
In its decision the Human Rights Committee found that article 9, paragraph 4. . . envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control. The Committee further notes

[211] Torres v. Finland, CCPR/C/38/D/291/1988, UN Human Rights Committee (HRC), 5 April 1990, available at: http://www.unhcr.org/refworld/docid/47fdfaf5d.html

that while the author was detained under orders of the police, he could not have the lawfulness of his detention reviewed by a court. Review before a court of law was possible only when, after seven days, the detention was confirmed by order of the Minister. As no challenge could have been made until the second week of detention, the author's detention . . . violated the requirement of article 9, paragraph 4…

A. v. Australia, UN Human Rights Committee, Case No. 560/1993[212]
[Summary of the case] *The author, a Cambodian asylum-seeker, arrived in Australia and shortly thereafter applied for refugee status. His asylum application was refused and later 'A' appealed this decision and was detained for over four years whilst his refugee status was being determined. The author argued inter alia that he had been detained arbitrarily within the meaning of article 9(1).*

[Committee's views]
9.4. The Committee observes however, that ***every decision to keep a person in detention*** *should be* ***open to review periodically*** *so that the grounds justifying the detention can be assessed…*
9.5 … In the Committee's opinion, ***court review*** *of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release,* ***is not limited to mere compliance of the detention with domestic law.*** *While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects,* ***real and not merely formal.***

6.2 European context

Article 5 and 13 of the ECHR
Article 5
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Article 13

[212] http://www1.umn.edu/humanrts/undocs/html/vws560.html

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Charter of Fundamental Rights of the European Union[213]

Article 47

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

… Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

EU Return Directive[214]

Article 13[215]

*4. Member States shall ensure that **the necessary legal assistance** and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.*[216]

Article 15

2. Detention shall be ordered by administrative or judicial authorities. Detention shall be ordered in writing with reasons being given in fact and in law. When detention has been ordered by administrative authorities, Member States shall:

*(a) either provide for **a speedy judicial review** of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention;*

(b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case

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[213] http://www.eucharter.org/home.php?page_id=13

[214] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF

[215] Article 20 of the Return Directive stipulates that "[m]ember States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 24 December 2010. In relation to Article 13(4), Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 24 December 2011. They shall forthwith communicate to the Commission the text of those measures."

[216] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF

*Member States **shall immediately inform** the third-country national concerned about the possibility of taking such proceedings. The third-country national concerned shall be released immediately if the detention is not lawful.*
*3. In every case, detention shall be **reviewed at reasonable intervals** of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.*

Article 16
*2. Third-country nationals in detention shall be allowed — on request — to establish in due time contact with **legal representatives**, family members and competent consular authorities.*

Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast), COM(2008) 820 final[217]
Section V. Detention for the purpose of transfer
Article 27
Detention
*2. Without prejudice to Article 8(2) of Directive […/…/EC] [laying down minimum standards for the reception of asylum seekers], when it proves necessary, on the basis of an individual assessment of each case, and if other less coercive measures cannot be applied effectively, Member States may **detain** an asylum-seeker or **another person** as referred to in Article 18(1)(d), **who is subject of a decision of transfer** to the responsible Member State, to a particular place only if there is a significant risk of him/her absconding.*
4. Detention pursuant to paragraph 2 may only be applied from the moment a decision of transfer to the responsible Member State has been notified to the person concerned in accordance with Article 25, until that person is transferred to the responsible Member State.
6. Detention pursuant to paragraph 2 shall be ordered by judicial authorities. In urgent cases it may be ordered by administrative authorities, in which case the detention order shall be confirmed by judicial authorities within 72 hours from the beginning of the detention. Where the judicial authority finds detention to be unlawful, the person concerned shall be released immediately.
*7. Detention pursuant to paragraph 2 shall be ordered in writing with reasons in fact and in law, in particular specifying the reasons on the basis of which it is considered that there is a significant risk of the person concerned absconding as well as the time period of its duration. Detained persons shall **immediately be informed of the reasons for detention, the intended duration of the detention***

[217] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0820:FIN:EN:PDF

and the procedures *laid down in national* ***law for challenging the detention order, in a language they are reasonably supposed to understand****.*
8. In every case of a detained person pursuant to paragraph 2, the continued detention shall be ***reviewed by a judicial authority at reasonable intervals*** *of time either on request by the person concerned or ex-officio. Detention shall never be unduly prolonged.*
9. Member States shall ensure ***access to legal assistance*** *and/or representation in cases of detention pursuant to paragraph 2 that shall be free of charge where the person concerned cannot afford the costs involved. Procedures for access to legal assistance and/or representation in such cases shall be laid down in national law.*

CoE, A guide to the implementation of Article 5 of the ECHR, Human Rights Handbooks No. 5, 2002[218]
In imposing the obligation to give reasons, Article 5 (2) refers to a person who is "arrested" and to the existence of a "charge". This wording should not lead to the conclusion that the need to give reasons only arises in the context of criminal proceedings. It is now well established that reasons must be given in ***any situation where someone has been deprived of his or her liberty*** *… The obligation in Article 5 (4) applies* ***whatever ground for detention is given****. The domestic authorities must provide recourse to courts in all cases including in those justified under Article 5 (1). The express reference to a court in Article 5 (4) excludes any debate as to whether this is a matter that can be determined by a prosecutor. … It is …* ***an inevitable consequence*** *that a detainee should be allowed* ***access to legal assistance*** *for the purpose of* ***mounting a challenge****.*

CoE Parliamentary Assembly's Resolution 1509 on Human Rights of Irregular Migrants, 2006[219]
12. In terms of civil and political rights, the Assembly considers that the European Convention on Human Rights provides a minimum safeguard and notes that the Convention requires that its contracting parties take measures for the effective prevention of human rights violations against vulnerable persons such as ***irregular migrants****. The following minimum rights merit highlighting:*
12.4. Detention of irregular migrants … Detainees should ***have the right to contact anyone of their choice (lawyers****, family members, NGOs, UNHCR, etc.), have access to adequate medical care and* ***access to an interpreter and free legal aid where appropriate****;*
12.5. Detention of irregular migrants must be judicially authorised. Independent judicial scrutiny of the legality and need for continued detention should be available. Those detained should be ***expressly informed****, without delay and* ***in a language they understand****,* ***of their rights and the procedures applicable to them****. They should be entitled to take proceedings before a court to* ***challenge speedily*** *the lawfulness of their detention;*

[218] http://www.coe.int/T/E/human_rights/hrhb5.pdf
[219] http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/eres1509.htm#1

CoE Parliamentary Assembly's Resolution 1707 on Detention of Asylum Seekers and Irregular Migrants in Europe, 2010[220]

*4. Conditions and **safeguards** afforded to immigration detainees, who have committed no crime, are **often worse than those in respect of prisoners in criminal custody.** … [T]he regime is often inappropriate or almost entirely absent (activities, education, access to the outside and fresh air). … This all has a negative impact on the mental and physical well-being of persons detained both during and after detention.*

*5. … **The European Union Return Directive**, which provides for a maximum length of detention for irregular migrants of up to eighteen months, **can be criticised**[221] for adopting the lowest common standard with regard to length of detention thereby allowing European Union member states to practice long-term detention, and increasing the possibility for states to increase their minimum duration of detention.*

*7. … **[N]ational laws** and regulations are often **insufficient** (leaving too much discretion to immigration officials), detention policies non-transparent (leaving individuals open to abuse or arbitrariness), detainees' **access to lawyers limited** and empirical data concerning detention lacking. In addition, there must be a clear, accessible framework, governing the operation of centres and the conditions afforded, which must also be subject to **judicial review.***

9. In view of the above-mentioned considerations, the Assembly calls on member states of the Council of Europe in which asylum seekers and irregular migrants are detained to comply fully with their obligations under international human rights and refugee law, and encourages them to:

*9.1. follow **10 guiding principles** governing the **circumstances in which the detention of** asylum seekers and **irregular migrants** may be **legally permissible**. These principles aim to ensure that:* [222]

…

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[220] Resolution is available at: http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1707.htm

[221] See UN press release, UN experts express concern about proposed EU Return Directive, 18 July 2008; UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, 16 June 2008, p. 2. See also joint press release by ECRE and Amnesty International, Returns' Directive: European Parliament and Member States risk compromising respect for migrants' rights, 20 May 2008 as well as the attached letter to European Parliament Members, available at http://www.ecre.org/files/ECRE%20AI%20Joint%20PR%20Returns%20Directive.pdf

[222] The 10 guiding principles together with explanations on each of the principles are provided in full in Appendix 1 to CoE's Parliamentary Assembly Report on the detention of asylum seekers and irregular migrants in Europe, available at: http://assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc10/EDOC12105.htm#P218_26629

9.1.3. detention shall be carried out by a procedure prescribed by law, authorised by a judicial authority and subject to ***periodic judicial review****;*

…

Note from Rapporteur's report:[223] *It is important to recognize that these principles apply during all stages and all types of procedures concerning detention of irregular migrants and asylum seekers.* ***These may be linked, for example, to transfers under the Dublin II Regulation*** *(in European Union states), admissibility procedures, border procedures,* ***or any other distinct procedure****.*

9.2. put into law and practice ***15 European rules*** *governing* ***minimum standards of conditions of detention for migrants*** *and asylum seekers to ensure that:*[224]

…

9.2.3. all detainees ***must be informed promptly, in simple, non-technical language that they can understand****, of the essential legal and factual grounds for detention, their rights and the rules and complaints procedure in detention; during detention, detainees must be provided with the opportunity to make a claim for asylum or complementary/subsidiary protection, and effective access to a fair and satisfactory asylum process with full procedural safeguards;*

…

9.2.9. detainees shall be guaranteed effective access to ***legal advice, assistance and representation of a sufficient quality****, and* ***legal aid*** *shall be provided* ***free of charge****;*

9.2.10. detainees must be able ***periodically*** *to effectively* ***challenge*** *their detention before a court and decisions regarding detention should* ***be reviewed automatically at regular intervals****;*

…

9.2.14. detainees shall have ample opportunity to make requests or complaints to any competent authority and be guaranteed confidentiality when doing so;

Note from Rapporteur's Report:[225] *In the view of the rapporteur,* ***it is unacceptable that immigration detainees are often not afforded even the same rights as criminal detainees and are unable to point to their own minimum standards*** *or rules pertaining to*

[223] CoE's Parliamentary Assembly Report on the detention of asylum seekers and irregular migrants in Europe; January 2010; Rapporteur: Mrs Ana Catarina MENDONÇA, Portugal, Socialist Group; available at: http://assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc10/EDOC12105.htm#P218_26629

[224] The 15 European rules are provided in full in Appendix 2 to CoE's Parliamentary Assembly Report on the detention of asylum seekers and irregular migrants in Europe, available at: http://assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc10/EDOC12105.htm#P218_26629

detention. The rapporteur is of the opinion that the time has now come to consolidate the work carried out by the CPT and others by putting together a series of minimum standards for conditions in detention, perhaps in the form of rules … To assist the Committee of Ministers in this task, the rapporteur has distilled 15 European rules governing minimum standards of conditions of detention which could be transformed into rules. These are based on previous recommendations of the Assembly, the CPT, the Commissioner for Human Rights, the standards set out in the European Prison Rules and the jurisprudence of the European Court of Human Rights.

The CPT Standards[226]

IV. Foreign nationals detained under aliens legislation
Extract from the 7th General Report [CPT/Inf (97) 10]
Safeguards during detention
30. Immigration detainees should ***- in the same way as other categories of persons deprived of their liberty -*** *be entitled, as from the outset of their detention,* ***to inform a person of their choice*** *of their situation and to have* ***access to a lawyer*** *and a doctor. Further, they should be* ***expressly informed, without delay and in a language they understand, of all their rights and of the procedure*** *applicable to them.*
The CPT has observed that these requirements are met in some countries, but not in others. In particular, visiting delegations have on many occasions met immigration detainees who manifestly had not been fully informed in a language they understood of their legal position. In order to overcome such difficulties, immigration detainees should be ***systematically provided with a document explaining the procedure applicable to them and setting out their rights****. This document should be available* ***in the languages most commonly spoken*** *by those concerned and, if necessary,* ***recourse*** *should be had to* ***the services of an interpreter****.*

31. ***The right of access to a lawyer*** *should apply* ***throughout the detention period*** *and include both the right to speak with the lawyer* ***in private*** *and to have him present* ***during interviews*** *with the authorities concerned.*

Extract from the 13th General Report [CPT/Inf (2003) 35]
Deportation of foreign nationals by air

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[225] CoE's Parliamentary Assembly Report on the detention of asylum seekers and irregular migrants in Europe; January 2010; Rapporteur: Mrs Ana Catarina MENDONÇA, Portugal, Socialist Group; available at: http://assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc10/EDOC12105.htm#P218_26629
[226] http://www.cpt.coe.int/en/docsstandards.htm

41. Operations involving the deportation of immigration detainees must be preceded by measures to help the persons concerned organise their return, particularly on the family, work and psychological fronts. It is essential that ***immigration detainees be informed sufficiently far in advance of their prospective deportation****…*

Extract from the 19th General Report [CPT/Inf (2009) 27]
Safeguards for irregular migrants deprived of their liberty
78. … The 2006 European Prison Rules apply to those irregular migrants who are detained in prisons. However, it is stressed in the Commentary to the Rules that immigration detainees should in principle not be held in prison. Therefore, the Rules do not address the special needs and status of irregular migrants, such as those issues related to the preparation and execution of deportation procedures. It should be noted here that in accordance with Article 5 (1) f of the European Convention on Human Rights, irregular migrants may be deprived of their liberty either when action is being taken with a view to deportation or in order to prevent an unauthorised entry into the country. The purpose of deprivation of liberty of irregular migrants is thus significantly different from that of persons held in prison either on remand or as convicted offenders.

[Basic rights at the initial stages of deprivation of liberty]
81. The CPT considers that detained irregular migrants should, ***from the very outset of their deprivation of liberty****,* ***enjoy three basic rights, in the same way as other categories of detained persons****. These rights are: (1)* ***to have access to a lawyer****, (2) to have access to a medical doctor, and (3) to be able to inform a relative or third party of one's choice about the detention measure.*
82. The right of access to a lawyer should include the right to talk with a lawyer ***in private****, as well as to have* ***access to legal advice for issues related to residence, detention and deportation****. This implies that when irregular migrants are not in a position to appoint and pay for a lawyer themselves, they should benefit from access to* ***legal aid*** *…*
84. It is essential that newly arrived irregular migrants be ***immediately given information*** *on* ***these rights in a language they understand****. To this end, they should be* ***systematically provided with a document explaining the procedure applicable to them*** *and* ***setting out their rights in clear and simple terms****. This document should be available* ***in the languages most commonly spoken by the detainees*** *and, if necessary,* ***recourse*** *should be had to* ***the services of an interpreter****.*

[General safeguards during deprivation of liberty]
85. Every instance of deprivation of liberty should be covered by ***a proper individual detention order****, readily* ***available in the establishment*** *where the person concerned is being held; and the detention order should be drawn up at the outset of the deprivation of liberty or as soon as possible thereafter. This basic requirement* ***applies equally to irregular migrants*** *who are deprived of their liberty. Further, the fundamental safeguards of persons detained by law enforcement agencies are reinforced if a single and*

comprehensive custody record is kept for every such person, recording all aspects of his/her custody and all action taken in connection with it.

86. Detained irregular migrants should benefit from ***an effective legal remedy*** *enabling them to have the lawfulness of their deprivation of liberty* ***decided speedily by a judicial body****. This judicial review* ***should entail an oral hearing with legal assistance****, provided free of charge for persons without sufficient means,* ***and interpretation*** *(if required). Moreover, detained irregular migrants should be* ***expressly informed of this legal remedy****. The need for continued detention should be* ***reviewed periodically by an independent authority****.*

87. Arrangements should be made enabling detained irregular migrants ***to consult a lawyer*** *or a doctor* ***on an ongoing basis****, and to receive visits from NGO representatives, family members or other persons of their choice, and to have telephone contact with them.*

88. It is in the interests of both irregular migrants and staff that there be clear house rules for all detention facilities, and ***copies of the rules should be made available in a suitable range of languages****. The house rules should primarily be informative in nature and* ***address the widest range of issues, rights and duties*** *which are relevant to daily life in detention. The house rules should also contain disciplinary procedures and provide detainees with the right to be heard on the subject of violations that they are alleged to have committed, and* ***to appeal to an independent authority against any sanctions imposed****. Without such rules, there is a risk of an unofficial (and uncontrolled) disciplinary system developing…*

89. ***Independent monitoring of detention facilities*** *for irregular migrants is an important element in the prevention of ill-treatment and, more generally, of ensuring satisfactory conditions of detention. To be fully effective, monitoring visits should be* ***both frequent and unannounced****. Further, monitoring bodies should be* ***empowered to interview irregular migrants*** *in private and should examine all issues related to their treatment (material conditions of detention, custody records and other documentation, the exercise of detained persons' rights, health care, etc.).*

[Other important safeguards]

95. In line with the Twenty guidelines on forced return adopted by the Committee of Ministers on 4 May 2005, removal orders should be issued in each and every case based on a decision following national laws and procedures, and in accordance with international human rights obligations. The removal order should be handed over in writing to the person concerned. Moreover, there should be the possibility to appeal against the order, and the deportation should not be carried out before the decision on any appeal has been delivered. ***The assistance of a lawyer and an interpreter should be guaranteed also at this stage of the procedure****.*

CoE's Commissioner for Human Rights, Issue paper on Criminalization of Migration in Europe: Human Rights Implications[227]

Recommendations

*…**Every migrant's detention** should be subject to an effective **judicial review**.*

Any place of detention must provide conditions of detention which meet the needs of the individuals and fulfill the requirements set out by the Council of Europe standards…

UNHCR Manual on Refugee Protection and the ECHR, 2003, updated 2006[228]

5. Procedural guarantees

*a. **The obligation to inform**, Article 5(2)*

5.4 The information provided to the individual must have three essential qualities:

- *it must be delivered promptly*
- *it must provide the reasons for detention*
- *it must be understandable by the individual*

[See below the sub-chapter on the jurisprudence of the ECtHR, in particular the case of ***Fox, Campbell and Hartley***, paras. 40 - 42]

*b. **The obligation to review** the lawfulness of detention, Article 5(4)*

5.13 Certain guarantees are … considered essential in the context of detention pending deportation or upon entry. According to the jurisprudence, these are: at least written and adversarial proceedings; legal assistance when the applicant is a foreigner who does not understand the procedure; the necessary time and facilities to prepare the case, and the possibility of reasserting the remedy at regular intervals if release is initially refused.

[See below the sub-chapter on the jurisprudence of the ECtHR, e.g. ***Chahal v. the United Kingdom*** and ***Conka v. Belgium***]

5.17 While it may be difficult to provide a standard time limit for review, The Court nevertheless considers that the word "speedily" contains two separate requirements. Firstly, a detained person must have access to a remedy immediately upon detention or speedily thereafter and secondly, a remedy, once availed of, must proceed speedily.

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[227] http://www.statewatch.org/news/2010/feb/coe-hamm-criminalisation-of-migration.pdf

[228] UN High Commissioner for Refugees, UNHCR Manual on Refugee Protection and the European Convention on Human Rights (April 2003, Updated August 2006), August 2006, available at: http://www.unhcr.org/refworld/docid/3f4cd5c74.html

CoE, Twenty Guidelines on Forced Return, September 2005[229]

Chapter III – Detention pending removal

Guideline 6. Conditions under which detention may be ordered

*2. The person detained **shall be informed promptly, in a language which he/she understands,** of the legal and factual **reasons** for his/her detention, and **the possible remedies**; he/she should be given **the immediate possibility of contacting a lawyer**, a doctor, and a person of his/her own choice to inform that person about his/her situation.*

Guideline 8. Length of detention

*2. In every case, **the need to detain an individual shall be reviewed at reasonable intervals of time**. In the case of prolonged detention periods, such reviews should be subject to the supervision of a judicial authority.*

Guideline 9. Judicial remedy against detention

1. A person arrested and/or detained for the purposes of ensuring his/her removal from the national territory shall be entitled to take proceedings by which the lawfulness of his/her detention shall be decided speedily by a court and, subject to any appeal, he/she shall be released immediately if the detention is not lawful.

*2. This **remedy shall be readily accessible and effective and legal aid should be provided for** in accordance with national legislation.*

Guideline 10. Conditions of detention pending removal

*5. National authorities should ensure that the persons detained in these facilities have **access to lawyers** … in accordance with the relevant national regulations…*

*7. Detainees should be **systematically provided with information** which explains **the rules applied in the facility and the procedure applicable to them** and sets out **their rights and obligations**. This information should be available **in the languages most commonly used by those concerned** and, if necessary, **recourse should be made to the services of an interpreter**. Detainees should be **informed***

[229] Council of Europe: Committee of Ministers, Twenty Guidelines on Forced Return, 4 May 2005, available at: https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2005)40&Language=lanEnglish&Ver=addfinal The Committee of Ministers … Believing that guidelines not only bringing together the Council of Europe's standards and guiding principles applicable in this context, but also identifying best possible practices, could serve as a practical tool for use by both governments in the drafting of national laws and regulations on the subject and all those directly or indirectly involved in forced return operations … none of the guidelines imply any new obligations for Council of Europe member states. When the guidelines make use of the verb "shall" this indicates only that the obligatory character of the norms corresponds to already existing obligations of member states. In certain cases however, the guidelines go beyond the simple reiteration of existing binding norms. This is indicated by the use of the verb "should" to indicate where the guidelines constitute recommendations addressed to the member states.

of their entitlement to contact a lawyer *of their choice, the competent diplomatic representation of their country, international organizations such as the UNHCR and the International Organization for Migration (IOM), and non-governmental organisations. Assistance should be provided in this regard.*

Chapter V – Forced removals
Guideline 15. Cooperation with returnees
1. In order to limit the use of force, host states should seek the cooperation of returnees at all stages of the removal process to comply with their obligations to leave the country.
2. In particular, where the returnee is detained pending his/her removal, he/she should as far as possible be ***given information in advance about the removal arrangements*** *and the information given to the authorities of the state of return. He/she should be given an opportunity to prepare that return, in particular by making the necessary contacts both in the host state and in the state of return, and if necessary, to retrieve his/her personal belongings which will facilitate his/her return in dignity.*

CoE's Commentary on Guidelines 6, 8 - 10 and 15[230]
[Commentary on Guideline 6]
This Guideline is based on Article 5 ECHR. At the time being [May 2005] *there is no case-law of the European Court of Human Rights addressing detention issues in the course of removal operations involving several States. However, the Court has said that the notion of "deprivation of liberty" includes the detention in a transit (international) zone, which the alien may leave if he/she departs for another country willing to accept him/her…*
Paragraph 2:
1. The second paragraph is based on Article 5(2) ECHR… The need to offer this information requires either that it is described ***in written form in a translated document*** *or that* ***an oral interpretation be provided into a language the person concerned understands***. *The need to inform the person arrested pending his/her removal from the territory about the remedies against the lawfulness of his/her detention derives from Article 5(4) ECHR. Further information on remedies against detention is given in Guideline 9.*
2. Member states are ***advised to ensure*** *that the person detained* ***be promptly informed of his/her*** *rights as granted under the national regulations****, beyond the minimal information that must be provided under Article 5(2) ECHR***. *This requirement can be identified per analogy from the recommendations made by the CPT with respect to persons taken into custody because of a suspicion that they*

[230] Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR); Comments on the Twenty guidelines on forced return; available at: https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2005)40&Language=lanEnglish&Ver=addfinal

may have committed an offence. The CPT notes in this regard that "Rights for persons deprived of their liberty will be of little value ***if the persons concerned are unaware of their existence****" (extracts from the 12th General Report of Activities of the CPT (2002), CPT/Inf (92)3, para. 44). This is also* ***valid with respect to persons put into detention to ensure that they will be effectively removed from the national territory****. The CPT has taken the view that "immigration detainees should be systematically provided with a document explaining the procedure applicable to them and setting out their rights. This document should be available in the languages most commonly spoken by those concerned and, if necessary, recourse should be had to the services of an interpreter" (7th General Report (CPT/Inf(97)10, para. 30).*

3. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has repeatedly ***insisted on the need to recognise a right of access to a lawyer from the very outset of custody*** *... Finally, the CPT considers that a detained person should have a right to have the fact of his/her detention notified to a third party, from the very outset of police custody. The CPT considers that "the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest" (see the extracts from the 12th General Report of Activities of the CPT (2002), CPT/Inf (92)3, para. 40-43). Where a person is arrested with a view to carrying out the removal of that person from the territory, the immediate possibility of accessing right of access to a lawyer also serves another function, which is to ensure that the remedy available against the deprivation of liberty will be effective: this is important considering that Article 5(4) ECHR requires a speedy process for challenging the lawfulness of detention. It will be noted at last that the possibility for the person arrested with a view to enforcing the expulsion delivered against him/her to* ***contact a lawyer*** *and a third person to inform that person of the arrest, is* ***of even higher importance here****, because of the* ***potentially irreversible character of the execution against that person of the removal order****; therefore, any security concerns, or concerns for the effectiveness of the investigation, which may justify that certain limitations be brought to this right with regard to persons arrested upon the suspicion that they have committed criminal offences, will not normally be present here, or will normally not have the same weight.*

[Commentary on Guideline 8]

This Guideline seeks to draw the consequences from the fact that the deprivation of liberty of the alien with a view to his/her removal must not be arbitrary (Article 5 ECHR). The detention of a person, under Article 5(1), (f), ECHR, may be justified by the need to ensure that the returnee will comply with the removal order. The national authorities are under an obligation to exercise due diligence to ensure that this period of detention is limited to the shortest possible time. Although it is not required under Article 5 ECHR that a decision to detain a person be taken by a judge, it nevertheless requires that there must be a possibility ***to challenge it before a judicial authority****. This has been confirmed by the European Court of Human Rights in the case of* ***Shamsa v. Poland*** *(Eur. Ct. HR (3d sect.),* ***Shamsa v. Poland*** *judgment of 27 November 2003 (Appl. No. 45355/99 and no. 45357/99), para. 58-59).*

[Commentary on Guideline 9]

1. This Guideline follows immediately from the case-law of the European Court of Human under Article 5 of the Convention.

*2. Regarding **the "accessibility" of the remedy** referred to in the second paragraph, it could be recalled that in the case of **Conka v. Belgium**, the European Court of Human Rights identified **a number of factors which, in its view, "undoubtedly affected the accessibility of the remedy**". "These include the fact that the information on the available remedies handed to the applicants on their arrival at the police station was printed **in tiny characters** and **in a language they did not understand**; **only one interpreter was available to assist the large number of Romany families** ... **he did not stay with them at the closed centre**; in those circumstances, the applicants **undoubtedly had little prospect of being able to contact a lawyer** ... with the help of the interpreter and, although they could have contacted a lawyer by telephone from the closed transit centre, they would no longer have been able to call upon the interpreter's services; despite those difficulties, **the authorities did not offer any form of legal assistance** at either the police station or the centre.*

3. With regard to legal aid, reference can be made to comments laid down under Guideline 5.

[Commentary on Guideline 10]

*4. The fifth paragraph contains requirements which may be partly derived from Article 5(4) ECHR. In particular, the possibility for the persons detained in a centre **to contact a lawyer is essential for the effectiveness of the right to request a judicial review** of the detention. In the CPT's views "the right of access to a lawyer should apply **throughout the detention period** and include **both the right to speak with the lawyer in private and to have him present during interviews** with the authorities concerned" (7th General Report (CPT/Inf(97)10), para. 31). With a view to ensuring that this right can be exercised, various practical measures should be taken.*

7. The last paragraph is in line with the general approach of these Guidelines, which emphasize the transparency of the return procedures and the accountability of all the agents involved. For a returnee to have access to adequate information about his rights and about available opportunities is an essential condition for being able to exercise these rights effectively and to benefit from these opportunities.

[Commentary on Guideline 15]

*2. The second paragraph of this Guideline is best explained by quoting from the 13th General Report of the CPT (CPT/Inf(2003)35, para. 41): "Operations involving the deportation of immigration detainees must be preceded by measures to help the persons concerned organise their return, particularly on the family, work and psychological fronts. It is essential that **immigration detainees be informed sufficiently far in advance of their prospective deportation**, so that they can begin to come to terms with the situation psychologically and are able to inform the people they need to let know and to retrieve their personal belongings. The CPT has*

observed that a constant threat of forcible deportation hanging over detainees who have received no prior information about the date of their deportation can bring about a condition of anxiety that comes to a head during deportation and may often turn into a violent agitated state. In this connection, the CPT has noted that, in some of the countries visited, there was a psycho-social service attached to the units responsible for deportation operations, staffed by psychologists and social workers who were responsible, in particular, for preparing immigration detainees for their deportation (through ongoing dialogue, contacts with the family in the country of destination, etc.). Needless to say, the CPT welcomes these initiatives and invites those States which have not already done so to set up such services".

CoE's Commissioner for Human Rights: The Human Rights of Irregular Migrants in Europe, CommDH/IssuePaper(2007)1[231]
*The Optional Protocol to the UN Convention against Torture ['OP CAT'] **requires states to establish 'visiting bodies'** for the prevention of torture. This provides **an additional safeguard for migrants** at the national level, in addition to CPT visits.*

6.2.1 Jurisprudence

De Wilde, Ooms and Versyp v. Belgium, ECtHR 1971[232]
*73. Although the Court has not found in the present cases any incompatibility with paragraph (1) of Article 5 (art. 5-1) (see paragraphs 67 to 70 above), this finding does not dispense it from now proceeding to examine whether there has been any violation of paragraph (4) (art. 5-4). **The latter is, in effect, a separate provision, and its observance does not result eo ipso from the observance of the former**: "everyone who is deprived of his liberty", lawfully or not, is entitled to a supervision of lawfulness by a court; a violation can therefore result either from a detention incompatible with paragraph (1) (art. 5-1) or from the absence of any proceedings satisfying paragraph (4) (art. 5-4), or even from both at the same time.*

75. The applicants were detained in execution of the magistrates' orders: their arrest by the police was merely a provisional act and no other authority intervened in the three cases (see paragraph 67 above).
A first question consequently arises. Does Article 5 (4) (art. 5-4) require that two authorities should deal with the cases falling under it, that is, one which orders the detention and a second, having the attributes of a court, which examines the lawfulness of this

[231] https://wcd.coe.int/ViewDoc.jsp?id=1237553&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679#P336_50304
[232] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695483&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

measure on the application of the person concerned? Or, as against this, is it sufficient that the detention should be ordered by an authority which had the elements inherent in the concept of a "court" within the meaning of Article 5 (4) (art. 5-4)?

76. At first sight, the wording of Article 5 (4) (art. 5-4) might make one think that it guarantees the right of the detainee always to have supervised by a court the lawfulness of a previous decision which has deprived him of his liberty. The two official texts do not however use the same terms, since the English text speaks of "proceedings" and not of "appeal", "recourse" or "remedy" (compare Articles 13 and 26 (art. 13, art. 26)). Besides, it is clear that the purpose of Article 5 (4) (art. 5-4) is to assure to persons who are arrested and detained the right to a judicial supervision of the lawfulness of the measure to which they are thereby subjected; the word "court" ("tribunal") is there found in the singular and not in the plural. ***Where the decision depriving a person of his liberty is one taken by an administrative body****, there is no doubt that Article 5 (4) (art. 5-4)* ***obliges the Contracting States to make available to the person detained a right of recourse to a court****; but there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. In the latter case* ***the supervision required by Article 5 (4) (art. 5-4) is incorporated in the decision****; this is so, for example, where a sentence of imprisonment is pronounced after "conviction by a competent court" (Article 5 (1) (a) of the Convention) (art. 5-1-a). It may therefore be concluded that Article 5 (4) (art. 5-4) is observed if the arrest or detention of a vagrant, provided for in paragraph (1) (e) (art. 5-1-e), is ordered by a "court" within the meaning of paragraph (4) (art. 5-4).*
It results, however, from the purpose and object of Article 5 (art. 5), as well as from the very terms of paragraph (4) (art. 5-4) ("proceedings", "recours"), that in order to constitute such a "court" ***an authority must provide the fundamental guarantees of procedure applied in matters of deprivation of liberty****. If the procedure of the competent authority does not provide them, the State could not be dispensed from making available to the person concerned a second authority which does provide all the guarantees of judicial procedure.*
In sum, the Court considers that the intervention of one organ satisfies Article 5 (4) (art. 5-4), but on condition that the procedure followed has ***a judicial character*** *and gives to the individual concerned* ***guarantees appropriate to the kind of deprivation of liberty in question****.*

77. The Court has therefore enquired whether in the present cases the magistrate possessed the character of a "court" within the meaning of Article 5 (4) (art. 5-4), and especially whether the applicants enjoyed, when appearing before him, the guarantees mentioned above.
There is no doubt that from an organisational point of view the magistrate is a "court"; the Commission has, in fact, accepted this. The magistrate is independent both of the executive and of the parties to the case and he enjoys the benefit of the guarantees afforded to the judges by Articles 99 and 100 of the Constitution of Belgium.

The task the magistrate has to discharge in the matters under consideration consists in finding whether in law the statutory conditions required for the "placing at the disposal of the Government" are fulfilled in respect of the person brought before him. By this very finding, the police court necessarily decides "the lawfulness" of the detention which the prosecuting authority requests it to sanction. The Commission has, however, emphasised that in vagrancy matters the magistrate exercises "an administrative function" and does not therefore carry out the "judicial supervision" required by Article 5 (4) (art. 5-4). This opinion is grounded on the case-law of the Court of Cassation and of the Conseil d'État (see paragraph 37 above). The Commission had concluded from this that the provision of a judicial proceeding was essential.

78. It is true that the Convention uses the word "court" (French "tribunal") in several of its Articles. It does so to mark out one of the constitutive elements of the guarantee afforded to the individual by the provision in question (see, in addition to Article 5 (4), Articles 2 (1), 5 (1) (a) and (b), and 6 (1) (tribunal) (art. 5-4, art. 2-1, art. 5-1-a, art. 5-1-b, art. 6-1). In all these different cases it denotes bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case (see Neumeister judgment of 27th June 1968, Series A, p. 44, paragraph 24), but also ***the guarantees of judicial procedure***. ***The forms of the procedure required by the Convention need not, however, necessarily be identical in each of the cases*** *where the intervention of a court is required.* ***In order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place***. *Thus, in the Neumeister case, the Court considered that the competent courts remained "courts" in spite of the lack of "equality of arms" between the prosecution and an individual who requested provisional release (ibidem); nevertheless, the same might not be true in a different context and, for example, in another situation which is also governed by Article 5 (4) (art. 5-4).*

X. v. the United Kingdom, ECtHR 1981[233]

52. Furthermore, as the Government themselves pointed out, the content of the obligation imposed on the Contracting States by Article 5 par. 4 (art. 5-4) will not necessarily be the same in all circumstances and as regards every category of deprivation of liberty (see, mutatis mutandis, the above-mentioned ***De Wilde, Ooms and Versyp*** *judgment, pp. 41-42, par. 78). ... [T]he* ***Winterwerp*** *judgment noted, to a consequence of some importance (p. 23, par. 55): "... it would be contrary to the object and purpose of Article 5 (art. 5) ... to interpret paragraph 4 ... (art. 5-4) as making this category of confinement immune from subsequent review of lawfulness merely provided that the initial decision issued from a court. The very nature of the deprivation of liberty under consideration would appear to require a review of lawfulness to be available* ***at reasonable intervals****."*

[233] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695479&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

Zamir v. the United Kingdom, the European Commission of Human Rights 1983[234]

113. In proceedings concerning the liberty of the individual Art. 5(4) clearly requires that decisions concerning ***legal aid be taken speedily*** *where such a decision is a prerequisite for the initiation of or the continued conduct of the proceedings. In the opinion of the Commission, it would have been unreasonable to expect the applicant to present his own case in the light of the complexity of the procedures involved and* ***his limited command of English***. [Seven weeks to hear *habeas corpus* application a breach for this reason]

Sanchez-Reisse v. Switzerland, ECtHR 1986[235]

51. In the Court's opinion, Article 5 para. 4 (art. 5-4) required in the present case that Mr. Sanchez-Reisse be provided, in some way or another, with the benefit of an adversarial procedure.

Giving him the possibility of submitting written comments on the Office's opinion would have constituted an appropriate means, but there is nothing to show that he was offered such a possibility. Admittedly, he had already indicated in his request the circumstances which, in his view, justified his release, but this of itself did not provide the "equality of arms" that is indispensable: the opinion could subsequently have referred to new points of fact or of law giving rise, on the detainee's part, to reactions or criticisms or even to questions of which the Federal Court should have been able to take notice before rendering its decision.

The applicant's reply did not, however, necessarily have to be in writing: the result required by Article 5 para. 4 (art. 5-4) could also have been attained if he had appeared in person before the Federal Court.

*The possibility for a detainee "****to be heard either in person or, where necessary, through some form of representation****" (see the above-mentioned* ***Winterwerp*** *judgment, Series A no. 33, p. 24, para. 60) features in certain instances among the "****fundamental guarantees of procedure applied in matters of deprivation of liberty****" (see the* ***De Wilde, Ooms and Versyp*** *judgment of 18 June 1971, Series A no. 12, p. 41, para. 76). Despite the difference in wording between paragraph 3 (right to be brought before a judge or other officer) and paragraph 4 (right to take proceedings) of Article 5 (art. 5-3, art. 5-4), the Court's previous decisions relating to these two paragraphs have hitherto tended to acknowledge the need for a hearing before the judicial authority (see, inter alia, in addition to the above-mentioned Winterwerp judgment, the Schiesser judgment of 4 December 1979, Series A no. 34, p. 13, paras. 30-31). These decisions concerned, however, only matters falling within the ambit of sub-paragraphs (c) and (e) in fine of paragraph 1 (art. 5-1-c, art. 5-1-e). And, in fact, "the forms of the procedure required by the Convention need not ... necessarily be identical in*

[234] http://cmiskp.echr.coe.int/tkp197/view.asp?action=open&documentId=857825&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[235] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695448&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

each of the cases where the intervention of a court is required" (see the above-mentioned De Wilde, Ooms and Versyp judgment, Series A no. 12, pp. 41-42, para. 78).

55. It remains to be established whether these periods comply with the requirement of Article 5 para. 4 (art. 5-4) that decisions be taken ***"speedily"****. In the Court's view,* ***this concept cannot be defined in the abstract; the matter must*** *- as with the "reasonable time" stipulation in Article 5 para. 3 and Article 6 para. 1 (art. 5-3, art. 6-1) (see the established case-law) -* ***be determined in the light of the circumstances of each case****.* [According to this case, periods of 31 and 46 days taken to rule on the release of a person detained pending extradition under Article 5(1)(f) were in breach of Article 5(4)]

Fox, Campbell and Hartley, 1990 ECtHR[236]

40. Paragraph 2 of Article 5 (art. 5-2) contains ***the elementary safeguard****[237]* ***that any person arrested should know why he is being deprived of his liberty****. This provision is an integral part of the scheme of protection afforded by Article 5 (art. 5): by virtue of paragraph 2 (art. 5-2)* ***any person arrested must be told****,* ***in simple, non-technical language that he can understand, the essential legal and factual grounds*** *for his arrest, so as to be able, if he sees fit,* ***to apply to a court to challenge*** *its lawfulness in accordance with paragraph 4 (art. 5-4) (see the* ***van der Leer*** *judgment of 21 February 1990, Series A no. 170, p. 13, § 28). Whilst this information must be conveyed* ***"promptly"*** *(in French: "dans le plus court délai"), it* ***need not be*** *related in its entirety by the arresting officer* ***at the very moment*** *of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.*

41. On being taken into custody, Mr Fox, Ms Campbell and Mr Hartley were simply told by the arresting officer that they were being arrested under section 11 (1) of the 1978 Act on suspicion of being terrorists (see paragraphs 9 and 13 above). This ***bare indication of the legal basis for the arrest, taken on its own, is insufficient for the purposes of Article 5 § 2*** *(art. 5-2), as the Government conceded.*

However, following their arrest all of the applicants were interrogated by the police about their suspected involvement in specific criminal acts and their suspected membership of proscribed organisations (see paragraphs 9, 10, and 14 above). There is no ground to suppose that these interrogations were not such as to enable the applicants to understand why they had been arrested. The reasons why they were suspected of being terrorists were thereby brought to their attention during their interrogation.

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[236] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695598&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[237] See also, the Admissibility Decision of the Court in *Kerr v. United Kingdom*, Appl. No. 40451/98, 7 Dec. 1999, which defines Article 5(2) as representing an "elementary safeguard" and as forming "an integral part of the scheme of protection afforded by Article 5".

*42. … **[I]ntervals of a few hours cannot be regarded as falling outside the constraints of time imposed by the notion of promptness** in Article 5 § 2 (art. 5-2).*
*43. In conclusion there was therefore **no breach of Article 5 § 2** (art. 5-2) in relation to any of the applicants.*

Chahal v. United Kingdom; ECtHR 1996[238]
*113. … [A]ny deprivation of liberty under Article 5 para. 1 (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with **due diligence**,[239] the detention will cease to be permissible under Article 5 para. 1 (f)*
*126. The Court recalls, in the first place, that Article 5 para. 4 (art. 5-4) provides a lex specialis in relation to the more general requirements of Article 13 (art. 13) (see the **De Jong, Baljet and Van den Brink v. the Netherlands** judgment of 22 May 1984, Series A no. 77, p. 27, para. 60). It follows that, irrespective of the method chosen by Mr Chahal to argue his complaint that he was denied the opportunity to have the lawfulness of his detention reviewed, the Court must first examine it in connection with Article 5 para. 4 (art. 5-4).*
*127. The Court further recalls that the notion of "lawfulness" under paragraph 4 of Article 5 (art. 5-4) has the same meaning as in paragraph 1 (art. 5-1), so that **the detained person is entitled to a review of his detention in the light not only of the requirements of domestic law but also of the text of the Convention**, the general principles embodied therein and the aim of the restrictions permitted by Article 5 para. 1 (art. 5-1) (see the **E. v. Norway** judgment of 29 August 1990, Series A no. 181-A, p. 21, para. 49). **The scope of the obligations under Article 5 para. 4 (art. 5-4) is not identical for every kind of deprivation of liberty** (see, inter alia, the **Bouamar v. Belgium** judgment of 29 February 1988, Series A no. 129, p. 24, para. 60); this applies notably to the extent of the judicial review afforded. Nonetheless, it is clear that Article 5 para. 4 (art. 5-4) does not guarantee a right to judicial review of such breadth as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. **The review should**, however, **be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5 para. 1** (art. 5-1) (see the above-mentioned **E. v. Norway** judgment, p. 21, para. 50).*
129. The notion of "lawfulness" in Article 5 para. 1 (f) (art. 5-1-f) does not refer solely to the obligation to conform to the substantive and procedural rules of national law; it requires in addition that any deprivation of liberty should be in keeping with the

[238] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695881&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649
[239] For more details on the concept of "due diligence" see e.g. Detention of third-country nationals in return procedures: Thematic Report, September 2010, pg. 31 – 33. Available at: http://www.fra.europa.eu/fraWebsite/attachments/detention-third-country-nationals-report-092010_en.pdf

purpose of Article 5 (art. 5) (see paragraph 118 above). The question therefore arises whether the available proceedings to challenge the lawfulness of Mr Chahal's detention and to seek bail provided an adequate control by the domestic courts.
130. The Court recollects that, because national security was involved, the domestic courts were not in a position to review whether the decisions to detain Mr Chahal and to keep him in detention were justified on national security grounds (see paragraph 121 above). Furthermore, although the procedure before the advisory panel undoubtedly provided some degree of control, bearing in mind that Mr Chahal was not entitled to legal representation before the panel, that he was only given an outline of the grounds for the notice of intention to deport, that the panel had no power of decision and that its advice to the Home Secretary was not binding and was not disclosed (see paragraphs 30, 32 and 60 above), the panel could not be considered as a "court" within the meaning of Article 5 para. 4 (art. 5-4) (see, mutatis mutandis, the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, p. 26, para. 61).

Amuur v. France, ECtHR 1996[240]
43. ... Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is ***not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation****. Such confinement,* ***accompanied by suitable safeguards for the persons concerned****... Although by the force of circumstances the decision to order holding must necessarily be taken by the administrative or police authorities,* ***its prolongation requires speedy review by the courts****, the traditional guardians of personal liberties.*

50. ... In laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5 para. 1 (art. 5-1) primarily requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law; like the expressions "in accordance with the law" and "prescribed by law" in the second paragraphs of Articles 8 to 11 (art. 8-2, art. 9-2, art. 10-2, art. 11-2), ***they also relate to the quality of the law****, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention.*
In order to ascertain whether a deprivation of liberty has complied with the principle of compatibility with domestic law, it therefore falls to the Court to assess not only the legislation in force in the field under consideration, but also the quality of the other legal rules applicable to the persons concerned. ***Quality in this sense implies that where a national law authorises deprivation of liberty*** *- especially in respect of a foreign asylum-seeker -* ***it must be sufficiently accessible and precise****, in order to avoid all risk of*

[240] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695865&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

arbitrariness. These characteristics are of fundamental importance with regard to asylum-seekers at airports, particularly in view of the need to reconcile the protection of fundamental rights with the requirements of States' immigration policies.

53. ... At the material time ***none of these texts*** [French legislation] ***allowed the ordinary courts to review the conditions under which aliens were held*** *or, if necessary, to impose a limit on the administrative authorities as regards the length of time for which they were held.* ***They did not provide for legal****, humanitarian and social* ***assistance****,* ***nor did they lay down procedures and time-limits for access to such assistance*** *so that asylum-seekers like the applicants could take the necessary steps.*

Al-Nashif v. Bulgaria, ECtHR 2002[241]

90. The first applicant complained under Article 5 § 4 of the Convention that Bulgarian law ***did not provide for judicial review*** *against his detention and that he was detained* ***incommunicado and could not see a lawyer****.*

91. The Government submitted that ***detention pending deportation*** *was intended to be so short that no judicial review would normally be called for and that the Bulgarian authorities had not been responsible for the fact that Mr Al-Nashif could not be deported immediately after his arrest.*

92. The Court reiterates that ***everyone who is deprived of his liberty is entitled to a review*** *of the lawfulness of his detention by a court,* ***regardless of the length of confinement****. The Convention requirement that an act of deprivation of liberty be amenable to independent judicial scrutiny is of fundamental importance in the context of the underlying purpose of Article 5 of the Convention to provide safeguards against arbitrariness. What is at stake is both the protection of the physical liberty of individuals as well as their personal security.*
The person concerned should have ***access to a court and the opportunity to be heard either in person or through some form of representation*** *(see the* ***De Wilde, Ooms and Versyp v. Belgium*** *judgment of 18 June 1971, Series A no. 12, §§ 73-76, the* ***Winterwerp v. the Netherlands*** *judgment of 24 October 1979, Series A no. 33, §§ 60 and 61, the* ***Kurt v. Turkey*** *judgment of 25 May 1998, Reports of Judgments and Decisions 1998-III, § 123, and* ***Varbanov v. Bulgaria****, no. 31365/96, ECHR 2000-X, § 58).*

[241] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=698399&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

94. National authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved (see the ***Chahal v. the United Kingdom*** *judgment of 15 November 1996, Reports 1996-V).*

95. In the Chahal case, the Court found that even if confidential material concerning national security was used the authorities were not free from effective judicial control of detentions ...

98. In the present case, however, Mr Al-Nashif was ***not provided with elementary safeguards and did not enjoy the protection required by Article 5 § 4*** *of the Convention in cases of deprivation of liberty.*

Case of Conka v. Belgium, ECtHR 2002[242]

Alleged violation of Article 5(4)

They submitted that the only remedy available to them to challenge their detention was an appeal to the committals division of the criminal court under section 71 of the Aliens Act. However, that remedy did not satisfy the requirements of Article 5 § 4, since the committals division only carried out a very limited review of detention orders made under section 7 of the Aliens Act. That review was confined to the procedural lawfulness of the detention and the committals division did not have regard to the proportionality of the detention, that is to say to the issue whether, in the light of the special facts of each case, detention was justified. Furthermore, the circumstances of the applicants' arrest in the instant case were such that no appeal to the committals division would have been possible (see paragraph 36 above).

42. The Court reiterates that the list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision (see, mutatis mutandis, K.-F. v. Germany, judgment of 27 November 1997, Reports 1997-VII, p. 2975, § 70). In the Court's view, that requirement must also be reflected in the reliability of communications such as those sent to the applicants, ***irrespective of whether the recipients are lawfully present in the country or not****. It follows that, even as regards overstayers, a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by* ***misleading them about the purpose of a notice*** *so as to make it easier to deprive them of their liberty is not compatible with Article 5.*

[242] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=697903&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

43. That factor has a bearing on the issue to which the Court must now turn, namely the Government's preliminary objection, which it has decided to join to the merits. In that connection, the Court reiterates that by virtue of Article 35 § 1 of the Convention normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. ***The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness*** *(see, among other authorities, Akdivar and Others v. Turkey, judgment of 16 September 1996, Reports 1996-IV, p. 1210, § 66).*

44. In the instant case, ***the Court identifies a number of factors which undoubtedly affected the accessibility of the remedy*** *which the Government claim was not exercised. These include the fact that the information on the available remedies handed to the applicants on their arrival at the police station was printed in tiny characters and in a language they did not understand; only one interpreter was available to assist the large number of Roma families who attended the police station in understanding the verbal and written communications addressed to them and, although he was present at the police station, he did not stay with them at the closed centre. In those circumstances, the applicants undoubtedly had little prospect of being able to contact a lawyer from the police station with the help of the interpreter and, although they could have contacted a lawyer by telephone from the closed transit centre, they would no longer have been able to call upon the interpreter's services; despite those difficulties, the authorities did not offer any form of legal assistance at either the police station or the centre.*

45. Whatever the position – and ***this factor is decisive in the eyes of the Court*** *– as the applicants' lawyer explained at the hearing without the Government contesting the point, he was only informed of the events in issue and of his clients' situation at 10.30 p.m. on Friday 1 October 1999, such that any appeal to the committals division would have been pointless because, had he lodged an appeal with the division on 4 October, the case could not have been heard until 6 October, a day after the applicants' expulsion on 5 October. Thus, although he still regarded himself as acting for the applicants (see paragraph 21 above), he was unable to lodge an appeal with the committals division.*

46. The Convention is intended to guarantee rights that are ***not theoretical or illusory, but practical and effective*** *(see, mutatis mutandis,* ***Matthews v. the United Kingdom*** *[GC], no. 24833/94, § 34, ECHR 1999-I). As regards* ***the accessibility of a remedy*** *within the meaning of Article 35 § 1 of the Convention, this implies, inter alia, that the circumstances voluntarily created by the authorities must be such as to afford applicants* ***a realistic possibility of using the remedy****. That did not happen in the present case and the preliminary objection must therefore be dismissed.*

Consequently, there has been a violation of Article 5 § 1 of the Convention.

50. As to the merits, the Court reiterates that ***paragraph 2 of Article 5 contains the elementary safeguard*** *that* ***any person*** *arrested should know* ***why he is being deprived of his liberty****. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 any person arrested must be told,* ***in simple, non-technical language that he can understand, the essential legal and factual grounds*** *for his arrest, so as to be able, if he sees fit, to apply to a court* ***to challenge*** *its lawfulness in*

*accordance with paragraph 4. Whilst this information must be conveyed **"promptly"** (in French: "dans le plus court délai"), it **need not** be related in its entirety by the arresting officer **at the very moment** of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features (see, mutatis mutandis, **Murray v. the United Kingdom**, judgment of 28 October 1994, Series A no. 300-A, p. 31, § 72).*
54. The Government, on the other hand, considered that the remedy satisfied all the requirements of Article 5 § 4.
*55. The Court considers, firstly, that the fact that the applicants were released on 5 October 1999 in Slovakia does not render the complaint devoid of purpose, since the deprivation of liberty in issue lasted five days (cf. **Fox, Campbell and Hartley v. the United Kingdom**, judgment of 30 August 1990, Series A no. 182, p. 20, § 45). It notes, however, that the Government's submissions on this point are the same as those on which they relied in support of their preliminary objection to the complaints under Article 5 §§ 1, 2 and 4 of the Convention (see paragraphs 37 and 49 above). Accordingly, the Court refers to its conclusion that **the applicants were prevented from making any meaningful appeal** to the committals division (see paragraph 46 above). Consequently, it is unnecessary to decide whether the scope of the jurisdiction of the committals division satisfies the requirements of Article 5 § 4.*
In conclusion, there has been a violation of Article 5 § 4 of the Convention.

Shamsa c. Pologne, ECtHR 2003[243]
58. La Cour estime ensuite que le fait de détenir un individu dans cette zone durant une période indéterminée et imprévisible sans que cette détention se fonde sur une disposition légale concrète ou sur une décision judiciaire valable, est en soi contraire au principe de la sécurité juridique, qui est implicite dans la Convention et qui constitue l'un des éléments fondamentaux de l'Etat de droit.

59. A cet égard, la Cour souligne également qu'aux fins de l'article 5 § 1, la détention qui s'étend sur une période de plusieurs jours et qui n'a pas été ordonnée par un tribunal ou par un juge ou par toute autre personne « habilitée (...) à exercer des fonctions judiciaires » ne saurait passer pour « régulière » au sens de cette disposition. Si cette exigence n'est pas explicitement formulée à l'article 5 § 1, elle peut se déduire de l'article 5 pris dans sa globalité, en particulier du libellé du paragraphe 1 c) (« en vue d'être conduit devant l'autorité judiciaire compétente ») et du paragraphe 3 (« doit être aussitôt traduite devant un juge ou un autre magistrat habilité par la loi à exercer des fonctions judiciaires »). En outre, la garantie d'habeas corpus que contient l'article 5 § 4 vient également appuyer l'idée que la détention qui est prolongée au-delà de la période initiale envisagée au paragraphe 3 appelle l'intervention d'un « tribunal » comme garantie contre l'arbitraire (Baranowski c. Pologne, arrêt du 28 mars 2000, Recueil 2000-III).

[243] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=703905&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

60. En conclusion, la Cour estime que la détention des requérants n'était pas « prévue par la loi » et « régulière » au sens de l'article 5 § 1 de la Convention. Dès lors, il y a eu violation de cette disposition.

Saadi v. the United Kingdom, ECtHR 2008[244]

*84. The Chamber found a violation of this provision, on the ground that **the reason for detention was not given sufficiently "promptly"**. It found that **general statements – such as the parliamentary announcements in the present case – could not replace the need under Article 5 § 2 for the individual to be informed of the reasons for his arrest or detention**. The first time the applicant was told of the real reason for his detention was through his representative on 5 January 2001 (see paragraph 14 above), when the applicant had already been in detention for 76 hours. Assuming that the giving of oral reasons to a representative met the requirements of Article 5 § 2 of the Convention, the Chamber found that **a delay of 76 hours in providing reasons for detention was not compatible with the requirement of the provision that such reasons should be given "promptly"**.*

85. The Grand Chamber agrees with the Chamber's reasoning and conclusion. It follows that there has been a violation of Article 5 § 2 of the Convention.

Hussain v Romania, ECtHR 2008[245]

[Summary of the case][246] *The Court found a violation of Article 5 in the case of the administrative detention for expulsion purposes of an Iraqi national in Romania on **the grounds that the reasons for the detention, the rights and duties of the detainee, and the duration of the detention were not notified to the applicant**. The Government argued that even in absence of a particular notification to the immigrant about his own detention, the law established the competent authority, the duration of detention, and other details, and that therefore this was sufficient. However the Court concluded that the Government did not fulfill the requirements of Romania's internal legislation, which required notification.*

Abdolkhani and Karimnia v. Turkey, ECtHR 2010[247]

3. Compliance with Article 5 § 2

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[244] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=806640&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[245] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=828970&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[246] Valeria Ilareva, Immigration Detention under International and EC Law, pg. 19, available at: www.lcri.hit.bg/LARC_paper_Ilareva.pdf

[247] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=871876&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

136. The Court reiterates that Article 5 § 2 contains the elementary safeguard that ***any person*** *arrested* ***should know why he or she is being deprived of liberty****. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of Article 5 § 2 any person arrested must be told,* ***in simple, non-technical language that can be easily understood, the essential legal and factual grounds*** *for the arrest, so as to be able, if he or she sees fit,* ***to apply to a court to challenge*** *its lawfulness in accordance with Article 5 § 4. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.* ***The Court notes there is no call to exclude the applicants in the present case from the benefits of paragraph 2, as paragraph 4 makes no distinction between persons deprived of their liberty by arrest and those deprived of it by detention*** *(see* ***Shamayev and Others v. Georgia and Russia****, no. 36378/02, §§ 413 and 414, ECHR 2005-III).*

137. The Court observes that the applicants were arrested on 21 June 2008 and subsequently detained in police custody. On the same day they signed a document according to which they had been informed of the reason for their arrest. On 23 June 2008 they were convicted of illegal entry. Yet they were not released from the Hasköy police headquarters. Thus, from 23 June 2008 onwards they have not been detained on account of a criminal charge, but in the context of immigration controls. The Court must therefore assess whether, from that date, the applicants were informed of this detention in accordance with the requirements of Article 5 § 2 of the Convention.

138. The Court notes that the Government were explicitly requested to make submissions as to whether the applicants had been informed of the reasons for their detention and to provide the relevant documents in support of their response. The Government failed to do so however. In the absence of a reply from the Government and any document in the case file to show that the applicants were informed of the grounds for their continued detention, the Court is led to the conclusion that the reasons for the applicants' detention from 23 June 2008 onwards were never communicated to them by the national authorities.

There has therefore been a violation of Article 5 § 2 of the Convention.

3. Compliance with Article 5 § 4

139. The Court reiterates that the purpose of Article 5 § 4 is to guarantee to persons who are arrested and detained ***the right to judicial supervision*** *of the lawfulness of the measure to which they are thereby subjected (see, mutatis mutandis,* ***De Wilde, Ooms and Versyp v. Belgium****, 18 June 1971, § 76, Series A no. 12).* ***A remedy must be made available during a person's detention*** *to allow the individual to obtain* ***speedy judicial review*** *of its lawfulness. That review should be capable of leading, where appropriate, to release. The existence of the remedy required by Article 5 § 4* ***must be sufficiently certain, not only in theory but also in practice****, failing which it will lack the accessibility and effectiveness required for the purposes of that provision (see, mutatis mutandis,* ***Stoichkov v. Bulgaria****, no. 9808/02, § 66 in fine, 24 March 2005;* ***Vachev v. Bulgaria****, no. 42987/98, § 71, ECHR 2004-VIII;* ***Chahal****, cited above, § 127).*

140. The Court observes that the Government failed to make any submission relevant to the present case demonstrating that the applicants had at their disposal any procedure through which the lawfulness of their detention could have been examined by a court.
*141. Moreover, the Court has already found that the applicants have not been informed of the reasons for the deprivation of their liberty from 23 June 2008 onwards and that they were denied access to legal assistance during their detention in the Hasköy police headquarters (see paragraph 114 above). It considers that these facts in themselves meant that the applicants' right to appeal against their detention was deprived of all effective substance (see **Shamayev and Others**, cited above, § 432). The Court therefore considers that the second applicant's request to the national authorities for release (paragraph 27 above) cannot provide him with a remedy possessing the guarantees required by Article 5 § 4 of the Convention.*
*142. Accordingly, the Court concludes that Turkish legal system did not provide the applicants with a remedy whereby they could obtain judicial review of the lawfulness of their detention, within the meaning of Article 5 § 4 of the Convention (see **S.D. v. Greece**, no. 53541/07, § 76, 11 June 20094).*
There has therefore been a violation of Article 5 § 4 of the Convention.

Z.N.S. v. Turkey, ECtHR 2010[248]
2. Compliance with Article 5 § 4
*58. The Government submitted that an application to administrative courts for the annulment of the decisions to **place individuals in foreigners' admission and accommodation centres** was an effective remedy within the meaning of Article 5 § 4 of the Convention.*
59. The applicant submitted, at first, that she could not apply to administrative courts as she was unable to appoint an advocate in the absence of any valid identity documents. In her submissions dated 16 April 2009 she contended that, following her recognition as a refugee under the UNHCR's mandate, she could now empower an advocate to take proceedings on behalf of her with a notarised power of attorney. Accordingly, her advocate applied to Ankara Administrative Court and requested her release. In her submissions made in May and June 2009, the applicant maintained that the proceedings in question were not sufficiently speedy.
*60. The Court reiterates that the purpose of Article 5 § 4 is to guarantee to persons who are arrested and detained **the right to the judicial supervision** of the lawfulness of the measure to which they are thereby subjected (see, mutatis mutandis, **De Wilde, Ooms and Versyp v. Belgium**, 18 June 1971, § 76, Series A no. 12). A remedy must be made available during a person's detention to allow that person to obtain **a speedy judicial review** of its lawfulness. That review should be capable of leading, where appropriate, to release. The existence of the remedy required by Article 5 § 4 must be **sufficiently certain, not only in theory but also in practice**, failing*

[248] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=861159&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

*which it will lack the accessibility and effectiveness required for the purposes of that provision (see, mutatis mutandis, **Stoichkov v. Bulgaria**, no. 9808/02, § 66 in fine, 24 March 2005; and **Vachev v. Bulgaria**, no. 42987/98, § 71, ECHR 2004-VIII).*
61. The Court first observes that the applicant's representative lodged a case with the Ankara Administrative Court on 14 April 2009, requesting the annulment of the decision of the Ministry not to release his client and to order a stay of execution of that decision pending the proceedings. The request was refused and the subsequent appeal was dismissed on 24 June 2009. Moreover, according to the information in the case file, the proceedings are still pending before that court. The initial review by the administrative courts thus lasted two months and ten days.
*62. The Court refers to its findings under Article 5 § 1 of the Convention about **the lack of legal provisions governing the procedure for detention in Turkey pending deportation**. The proceedings in issue did not raise a complex issue. The Court considers that the Ankara Administrative Court was in an even better position than the Court to **observe the lack of a sufficient legal basis for the applicant's detention**. The Court therefore finds that the judicial review in the present case cannot be regarded as a "speedy" reply to the applicant's petition (see **Khudyakova v. Russia**, no. 13476/04, § 99, 8 January 2009; and **Kadem v. Malta**, no. 55263/00, §§ 43-45, 9 January 2003, where the Court held that periods of 54 and 17 days, respectively, for examining an appeal against detention pending extradition proceedings had been too long).*
*63. Accordingly, the Court concludes that Turkish legal system **did not provide the applicant with a remedy** whereby she could obtain speedy judicial review of the lawfulness of her detention, within the meaning of Article 5 § 4 of the Convention (see **S.D. v. Greece**, no. 53541/07, § 76, 11 June 2009; and **Abdolkhani and Karimnia**, cited above, § 142).*
There has therefore been a violation of Article 5 § 4 of the Convention.

Al-Agha c. Roumanie, ECtHR 2010[249]
90. …[T]oute personne qui fait l'objet d'une mesure basée sur des motifs de sécurité nationale ne doit pas être dépourvue de garanties contre l'arbitraire. Ainsi, le droit interne doit offrir une protection contre des atteintes arbitraires de la puissance publique aux droits garantis par la Convention. En effet, l'existence de garanties adéquates et suffisantes contre les abus, dont notamment celle de procédures de contrôle efficace par le pouvoir judiciaire, est d'autant plus nécessaire que, sous le couvert de défendre la démocratie, de telles mesures risquent de la saper, voire de la détruire (voir, mutatis mutandis, Rotaru c. Roumanie [GC], no 28341/95, §§ 55 et 59, CEDH 2000-V).

[249] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=860939&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

92. La Cour attache également de l'importance au fait que les juridictions nationales ne pouvaient exercer qu'un examen purement formel des décisions constatant que le requérant avait été déclaré indésirable et prolongeant son placement au centre (voir également les paragraphes 104-111 ci-dessous).

101. La Cour rappelle que l'article 5 § 4 reconnaît aux personnes arrêtées ou détenues le droit d'introduire un recours pour faire contrôler le respect des exigences de procédure et de fond nécessaires à la « légalité », au sens de la Convention, de leur privation de liberté.

102. L'exigence d'équité procédurale découlant de l'article 5 § 4 n'impose pas l'application de critères uniformes et immuables indépendants du contexte, des faits et des circonstances de la cause. Si une procédure relevant de l'article 5 § 4 ne doit pas toujours s'accompagner de garanties identiques à celles que l'article 6 prescrit pour les litiges civils ou pénaux, elle doit revêtir un caractère judiciaire et offrir à l'individu mis en cause des garanties adaptées à la nature de la privation de liberté dont il se plaint (A. et autres précité, § 203).

103. La Cour a déjà reconnu que l'utilisation d'informations confidentielles pouvait se révéler inévitable dans les affaires où la sécurité nationale était en jeu, tout en précisant que cela ne signifiait pas que les autorités nationales étaient exemptées du contrôle effectif des juridictions internes dès lors qu'elles affirmaient que l'affaire touchait à la sécurité nationale et au terrorisme (Chahal précité, §§ 130 et 131). Devant cet organe de contrôle, la personne concernée doit bénéficier d'une procédure contradictoire afin de pouvoir présenter son point de vue et réfuter les arguments des autorités (Al-Nashif précité, §§ 123 et 124). Elle a déjà constaté l'existence dans certains pays de techniques permettant de concilier, d'une part, les soucis légitimes de sécurité quant à la nature et aux sources de renseignements et, de l'autre, la nécessité d'accorder en suffisance au justiciable le bénéfice des règles de procédure (Al-Nashif précité, § 95).

104. La Cour note que le Gouvernement indique la voie du contentieux administratif comme étant un recours efficace pour faire contrôler la légalité de la privation de liberté du requérant. Il mentionne également que l'OUG no 194/2002 prévoyait une voie de recours spéciale.

105. Pour ce qui est du recours administratif, la Cour note qu'en vertu des dispositions légales en vigueur, le délai pour contester un acte administratif commençait à courir à partir de sa communication à l'intéressé, obligation qui incombait aux autorités. Or, en l'espèce, l'ordre en cause n'a jamais été communiqué au requérant en raison de son caractère secret. Par ailleurs, dans son arrêt du

19 septembre 2000, le tribunal départemental de Bucarest a constaté que le requérant ne pouvait pas contester l'ordre no 779, faute pour celui-ci de lui avoir été communiqué (paragraphe 13 in fine ci-dessus).

106. Pour ce qui est du recours prévu par l'article 93 de l'OUG 194/2002 (paragraphe 43 ci-dessus), la Cour note qu'il ressort du libellé de l'article précité que ce recours était limité aux situations prévues par l'article 93 § 2. Or, la mesure ordonnée contre le requérant le 31 janvier 2003 visait une situation différente fondée sur l'article 93 § 4 de l'OUG 194/2002. Par ailleurs, la Cour note que l'exemple de jurisprudence fourni par le Gouvernement concerne le recours d'une personne contre laquelle la mesure de retour et de placement avait été ordonnée en vertu de l'article 93 § 2 de l'OUG 194/2002.

107. En tout état de cause, la Cour estime que tant le recours administratif que celui prévu par l'OUG 194/2002 ne pouvaient pas constituer des voies de recours efficaces contre les décisions de placement du requérant dans le centre de rétention pour les raisons qui suivent.

108. La Cour constate que le requérant n'a été informé qu'oralement de l'existence de l'ordre qui l'avait déclaré personne indésirable, sans que les raisons justifiant cette mesure lui soient communiquées.

109. En outre, il ressort de la jurisprudence interne en la matière, ainsi que du contenu des lois successives qui ont régi le régime des étrangers, que la compétence des tribunaux lors de l'examen de la légalité d'un ordre déclarant une personne indésirable était limitée à vérifier si les normes de procédures avaient été respectées et si l'autorité publique n'avait pas commis une erreur grave dans l'exercice de son droit d'appréciation (paragraphe 43 ci-dessus et, mutatis mutandis, Lupsa c. Roumanie, no 10337/04, §§ 58-60, CEDH 2006-VII). A cet égard, elle observe que le parquet n'a fourni aux juridictions nationales aucune précision quant aux faits reprochés au requérant. Dès lors, ce recours purement formel ne pouvait pas offrir à l'intéressé la possibilité de présenter valablement son point de vue et de réfuter les arguments des autorités.

110. La Cour note enfin l'entrée en vigueur de la loi no 56/2007 (paragraphe 44 ci-dessus) qui prévoit expressément qu'il appartient à la cour d'appel de rendre une décision déclarant une personne indésirable après avoir examiné les motifs qui justifiaient une telle mesure et après avoir informé l'intéressé des faits reprochés. Il reste que ces changements législatifs, qu'il convient de saluer, sont largement postérieurs aux faits dénoncés par le requérant et ne sont pas en mesure de remédier à sa situation.

111. Dans ces conditions, la Cour estime que le requérant n'a pas été en mesure d'opposer une véritable contestation au grief qui le visait et n'a pas bénéficié d'un recours effectif.

Dès lors, il y a eu violation de l'article 5 § 4 de la Convention.

Ahmed c. Roumanie, ECtHR 2010[250]

35. Pour ce qui est du devoir des autorités de communiquer les raisons à la base du placement des étrangers dans les centres de transit, si l'article 84 § 2 de l'OUG no 194/2002 interdisait une telle communication, l'article 95 de la même ordonnance, régissant les droits des personnes ainsi détenues, contient l'obligation pour les autorités d'informer les étrangers placés dans ces centres des raisons de leur placement (cf. § 21 ci-dessus).

36. En l'espèce, bien qu'une communication ait été faite au requérant le jour de son placement, celle-ci contenait les références à l'ordonnance initiale du 7 mars 2003, déclarant le requérant personne indésirable sur le territoire roumain, sans aucune référence aux faits reprochés (cf. § 8 ci-dessus). Or, le requérant avait contesté, sans succès, l'ordonnance du 7 mars 2003, reposant sur les mêmes raisons (cf. §§ 12-14 ci-dessus).

37. La Cour est d'avis qu'une deuxième contestation ayant pour objet les mêmes raisons formelles que celles invoquées dans l'ordonnance initiale, du 7 mars 2003, rejetée par les tribunaux internes en raison du caractère secret des informations était vouée à l'échec et partant ne constituait pas en l'occurrence une voie effective susceptible de remédier à la situation dénoncée. A cet égard, les décisions internes présentées par le Gouvernement ne sont pas de nature à confirmer l'existence d'une jurisprudence bien établie sur l'efficacité de telles voies de recours.

38. Le requérant n'ayant joui ni devant les autorités administratives ni devant les juridictions nationales du degré minimal de protection contre le risque d'arbitraire des autorités, la Cour estime que lors des prolongations successives, sa privation de liberté n'avait pas non plus une base légale suffisante en droit interne, dans la mesure où elle n'était pas prévue par « une loi » répondant aux exigences de la Convention. A cela s'ajoute également le délai de plus de six mois pendant lequel le requérant fut détenu dans le centre de transit, contrairement à la législation interne en vigueur à l'époque des faits, notamment au paragraphe 6 de l'article 93 de l'OUG no 194/2002.

[250] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=871161&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

39. Pour ce qui est des difficultés, invoquées par le Gouvernement roumain, concernant la délivrance d'un nouveau titre de voyage au nom du requérant, la Cour note que cette situation, dans les circonstances de l'espèce, ne saurait être imputable au requérant et ne saurait justifier, eu égard la conclusion figurant au paragraphe 38 ci-dessus, son placement pendant plus de six mois dans le centre de transit.

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