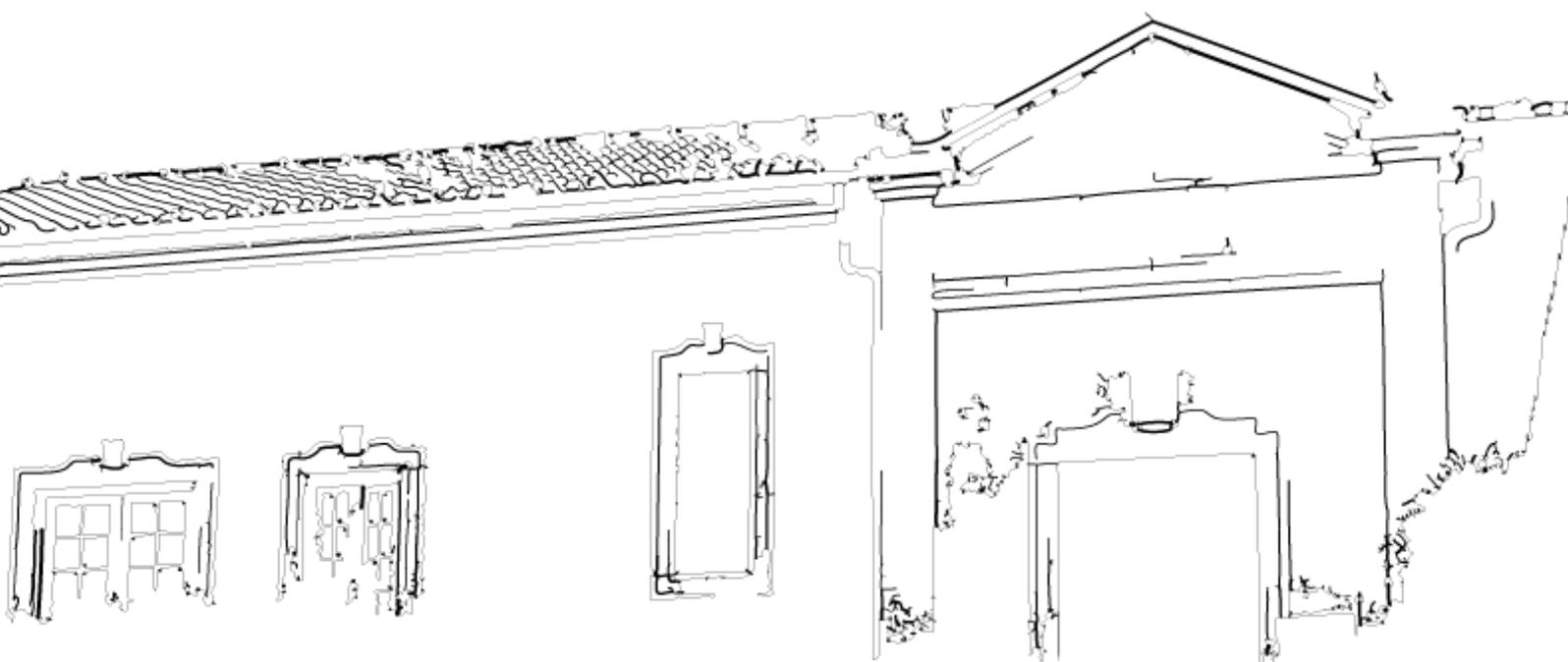


Coleção **Ações de Formação**

Imigração ilegal e tráfico de seres humanos:
investigação, prova, enquadramento jurídico e
sanções



Título: Imigração ilegal e tráfico de seres humanos: investigação, prova, enquadramento jurídico e sanções

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NOTA: É possível **clicar** nos itens do índice de modo a ser **redirecionado** automaticamente para o capítulo ou subcapítulo em questão.

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Ficha Técnica

Nome do curso: Imigração ilegal e tráfico de seres humanos: investigação, prova, enquadramento jurídico e sanções

Categoria: Ações de Formação Contínua

Data de realização: Lisboa, 02-03/02/2012

Coordenação da Ação de Formação: Plácido Conde Fernandes

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Ana Rita Gil (Mestre, Assessora do Gabinete de Juízes do Tribunal Constitucional e Investigadora da Faculdade de Direito da Universidade Nova de Lisboa)

Frederica Rodrigues (Mestre, Coordenadora de Projetos na Organização Internacional para as Migrações)

Duarte Miranda Mendes (Chefe de Gabinete da Alta Comissária, ACIDI – Alto Comissariado para a Imigração e Diálogo Intercultural)

Maria de Jesus Barroso Soares (Presidente da Fundação Pro Dignitate)

Albano Pinto (Procurador da República Coordenador de Leiria)

Luísa Maia Gonçalves (Inspetora Superior e Diretora do DCIPAI – Direção Central de Investigação, Pesquisa e Análise da Informação, do Serviço de Estrangeiros e Fronteiras)

Ana Varela (Jurista do JRS Portugal – Serviço Jesuíta aos Refugiados e Coordenadora do Projeto DEVAS-Portugal)

Joana Wrabetz (Mestre, Chefe de Equipa do OTSH – Observatório do Tráfico de Seres Humanos)

Plácido Conde Fernandes (Procurador Adjunto e Docente do CEJ)

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Margarida Blasco (Juíza Desembargadora, Tribunal da Relação de Lisboa)

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CEJ

Nota: Foram respeitadas as opções de todos os intervenientes na utilização ou
não do novo Acordo Ortográfico.

II Introdução e Objetivos

O curso “Imigração ilegal e tráfico de seres humanos: investigação, prova, enquadramento jurídico e sanções” tem como objetivos (i) refletir sobre a imigração ilegal em Portugal, as suas implicações políticas, económicas e sociais, na atualidade e no quadro da futura política europeia de imigração, sob o prisma do respeito pelos direitos humanos; Analisar o regime jurídico da detenção de estrangeiros em situação de irregularidade no território português e (ii) abordar as orientações das Nações Unidas – a Convenção de Palermo e o Manual da UNODC para Profissionais da Justiça – relativamente à investigação, recolha de prova, acusação e julgamento, dos crimes de auxílio à imigração ilegal e de tráfico de seres humanos, à luz da revisão penal de 2007.

Sessão de Abertura e Conferência Inaugural

Sessão de Abertura e Conferência Inaugural



Sessão de Abertura - António Pedro Barbas Homem



Conferência inaugural: Imigração ilegal e tráfico de seres humanos - António Vitorino

Direitos Humanos em Processo Migratório

Direitos Humanos em Processo Migratório

Ana Rita Gil

**IMIGRAÇÃO ILEGAL E TRÁFICO DE SERES HUMANOS:
INVESTIGAÇÃO, PROVA,
ENQUADRAMENTO JURÍDICO E SANÇÕES**

Direitos Humanos em Processo Migratório

Ana Rita Gil

I - Reconhecimento de direitos aos imigrantes em situação ilegal pelos Instrumentos de protecção dos Direitos do Homem

- Instrumentos de Protecção dos Direitos Humanos em geral:
 - a. Princípio da Universalidade
 - b. Irrelevância do estatuto legal
- Instrumentos de Protecção dos Direitos Humanos dos Imigrantes em Específico

II – Direitos dos Imigrantes em Processo Migratório

- Proibição de Expulsões Colectivas
- Garantias Específicas em caso de Detenção
- Proibição de tortura, de tratamentos desumanos ou degradantes
- Direito a não ser expulso devido ao respeito pela vida privada e familiar

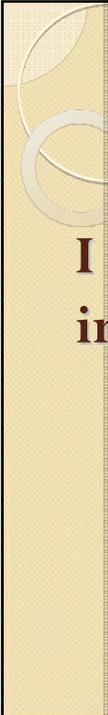
III - Direito e Política da União Europeia em matéria de Imigração Ilegal

- Principais instrumentos adoptados relativos à luta contra imigração ilegal
- A “Directiva do Retorno” em especial



Direitos Humanos em Processo Migratório

Ana Rita Gil
CEJ, 02/02/2012



I - Reconhecimento de direitos aos imigrantes em situação ilegal pelos Instrumentos de protecção dos Direitos do Homem

Princípio da Universalidade:

“Todos os “Seres Humanos” (DUDH)

“Todos os indivíduos” (PIDCP)

“Qualquer pessoa dependente da jurisdição” (CEDH)

Irrelevância do estatuto legal:

- CEDH – Tribunal Europeu dos Direitos Humanos:

- *Anakomba Yula c. Bélgica, 2009*

Exceções:

art. 1º do Protocolo Adicional n. 7 (garantias procedimento de expulsão)

art. 2º do Protocolo Adicional n.º 4 (direito de livre circulação)

Instrumentos de Protecção dos Direitos Humanos dos Imigrantes em Específico

- Declaração dos Direitos do Homem das Pessoas que não possuem a nacionalidade do país em que vivem (1985)
- Convenção das Nações Unidas sobre a protecção dos direitos de todos os trabalhadores migrantes e membros das suas famílias (1990)
- Convenções n.º 97 (1949) e 143 (1979) da OIT sobre os trabalhadores migrantes
- Carta Social Europeia e Convenção Europeia relativa ao estatuto jurídico do trabalhador migrante (1977)

II - Direitos dos Imigrantes em Processo Migratório

Proibição de Expulsões Colectivas

- Art. 4º do Protocolo n.º4 anexo à CEDH
- Art. 19.º, n.º1 da CDF UE

Garantias específicas em caso de detenção

Art. 5.º, n.º1, al. f) CEDH

*Detenção de Imigrantes: só para impedir entrada ilegal
ou em processos de expulsão*

- Legalidade
- Garantias Procedimentais (art. 5.º, n.º2)
- Acompanhamento jurídico, humanitário e social
- Duração razoável e necessária
- Controlo Judicial (art. 5.º, n.º4)
- Local e condições da detenção adequados

Proibição de tortura, de tratamentos desumanos ou degradantes

- art. 19.º, n.º 2 da CDF UE:

Ninguém pode ser afastado, expulso ou extraditado para um Estado onde corra sério risco de ser sujeito a pena de morte, a tortura ou a outros tratos ou penas desumanos ou degradantes.

Proibição de tortura, de tratamentos desumanos ou degradantes

- **Art. 3.º CEDH e Jurisprudência do TEDH:**
- **1) Abrange:**
 - Risco de perseguição
 - Situação de extrema pobreza
 - Doença Grave (excepcional) (*D. c. Reino Unido, 1997*)
 - Impossibilidade de viajar devido a condição física
 - Expulsões sucessivas de estrangeiros
- **2) Basta existir risco de mau trato**
- **3) Protecção varia:**
 - Natureza da punição
 - Forma e método de execução
 - Duração
 - Efeitos psíquicos e físicos
 - Sexo, idade, estado de saúde da vítima
 - Características sociais do país

Direito a não ser expulso devido ao respeito pela vida privada e familiar

◦ **Art. 8.º CEDH e Jurisprudência do TEDH:**

Factores a ponderar (Ac. *Boutif*, 2001 e *Üner*, 2006)

- Vida pessoal e familiar do imigrante;
- Nacionalidade / estatuto dos familiares;
- Menores envolvidos, idade e socialização no país
- Solidez dos laços sociais e culturais com o país de acolhimento;
- Laços com o país de origem;
- Natureza e gravidade do crime cometido, tempo decorrido desde a prática do crime e conduta do imigrante durante esse período.

III – Direito e Política da União Europeia em matéria de Imigração Ilegal

Direito e Política de Imigração da UE

Art. 79.º, n.º1 TFUE: A União desenvolve uma política comum de imigração destinada a garantir:

(...)

- um tratamento equitativo dos nacionais de países terceiros que residam legalmente nos Estados-Membros
- a prevenção da imigração ilegal e do tráfico de seres humanos e o reforço do combate a estes fenómenos
- Nota: Carta dos Direitos Fundamentais da UE – alguns direitos aplicam-se a *todas as pessoas*

Instrumentos sobre Imigração Ilegal

- Directiva 2001/40 sobre reconhecimento mútuo de decisões de afastamento
- Directiva 2001/51 sobre sanções das transportadoras
- Directiva 2002/90 relativa à definição do auxílio à entrada e residência irregulares
- Directiva 2004/81 - vítimas do tráfico de seres humanos ou de auxílio à imigração ilegal
- Directiva 2008/115 (Directiva do Retorno)
- Directiva 2009/52 sobre sanções para empregadores de imigrantes em situação ilegal

Directiva do Retorno

A estadia irregular de um nacional de país terceiro deve terminar através de um procedimento justo e transparente culminando em **expulsão** (art. 6.º)

- Quando confrontado com uma estadia irregular, o EM decide:

Conceder ao indivíduo um título de residência ou outra autorização que permita direito a permanecer no território por motivos humanitários ou outros (n.º4)



Emitir uma decisão de retorno + uma proibição de entrada e permanência no território de todos os EM (em princípio não excedendo 5 anos) – art. 11.º

Directiva do Retorno

Os EM devem ter em conta (art. 5.º)

- (a) O melhor interesse da criança;
- (b) A protecção da vida familiar;
- (c) O estado de saúde do imigrante em situação ilegal,
- (d) O respeito pelo princípio do *non refoulement*.

- O retorno voluntário deve ser preferido em relação ao retorno forçado, devendo fixar-se um período para se garantir a partida voluntária (art. 7.º)

(excepções: risco de fuga, ameaça à ordem pública, segurança pública e segurança nacional ou se um pedido de residência legal foi indeferido por ser manifestamente infundado ou fraudulento)

- Deve prever-se um direito a recurso da decisão de retorno (art. 13.º)

Directiva do Retorno

- **Detenção:**

Ultima ratio quando há risco de fuga ou o indivíduo se encontra a prejudicar o procedimento de retorno (art. 15.º, n.º1)

Salvaguardas respeitantes ao procedimento decisório, a recurso e a controlo judicial da detenção.

Limite de tempo- art. 15.º, n.º 5 e 6 - seis meses (pode ser estendido por mais doze meses)

Menores apenas podem ser detidos como medida de último recurso e pelo menor período de tempo possível (art. 17.º).

Obrigada

Rita.gil@fd.unl.pt



Videogravação da comunicação

A imigração em Portugal, processo migratório e integração

Imigração em Portugal: Enquadramento, Percepção, Intervenção

Frederica Rodrigues



2 Fevereiro 2012
Lisboa, CEJ

Assisting a World on the Move for 60 Years



Migration for the Benefit of All

Imigração em Portugal Enquadramento, Percepção, Intervenção

Frederica Rodrigues
IOM Lisbon



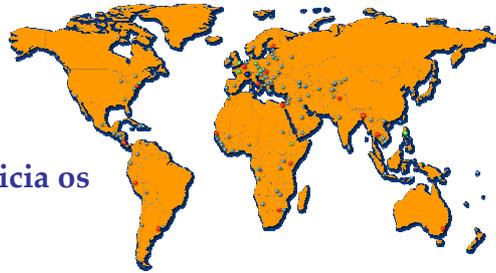
Estrutura da apresentação

- ❖ A OIM e a sua abordagem às migrações
- ❖ Alguns dados de enquadramento sobre PT
- ❖ Percepção da imigração
- ❖ Imigração irregular



A OIM e a sua abordagem às migrações

- Organização intergovernamental
- Presença global
- Princípio constitutivo:
a migração humana e digna beneficia os migrantes e a sociedade



Juntamente com os parceiros na comunidade internacional a OIM age para:

- ✓ Promover a dignidade e o bem estar dos migrantes
- ✓ Encorajar o desenvolvimento económico e social através das migrações
- ✓ Apoiar na resposta aos crescentes desafios operacionais da gestão das migrações
- ✓ Melhorar a compreensão das questões migratórias



A OIM e a sua abordagem às migrações

Migração e Desenvolvimento

Participação dos migrantes no desenvolvimento dos PdO

↓

Retorno de Quadros

Remessas

Diásporas

Microcrédito

Fuga e Aproveitamento de Cérebros

Facilitação da Migração

Mobilidade trabalhadores migrantes

↓

Recrutamento e Colocação

Documentação

Formação Linguística

Orientação Cultural

Serviços Consulares

Regulação da Migração

Apoio aos Govs na gestão das migrações e protecção/assistência directa aos migrantes

↓

Gestão de Fronteiras

Aplicações da tecnologia

Apoio ao Retorno e Reintegração

Migrantes Retidos

Combate ao Tráfico / Auxílio à Imigração Irregular

Migrações Forçadas

Assist. humanitária em cenários de crise/emergência e desastres naturais

↓

Reinstalação de Refugiados

Deslocados Internos

Catástrofes Naturais

Transição e Recuperação

Ex Combatentes



Alguns dados de enquadramento geral

Portugal como país de Imigração, Trânsito, Emigração

Em 2011:

- 435.000 estrangeiros residentes (SEF)

Em 2010:

- 445.262 estrangeiros residentes – 4,2% população total
- 50747 novos títulos de residência

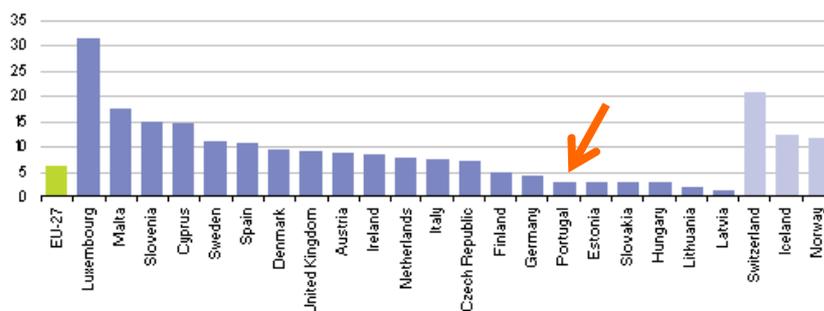
É também um país pelo qual passam muitos imigrantes a caminho do país de destino final (UE)



..... Perspectiva Europeia

Portugal está entre os países com a mais baixa percentagem de estrangeiros sobre o total da população

Estrangeiros em % sobre o total da população residente (EU)

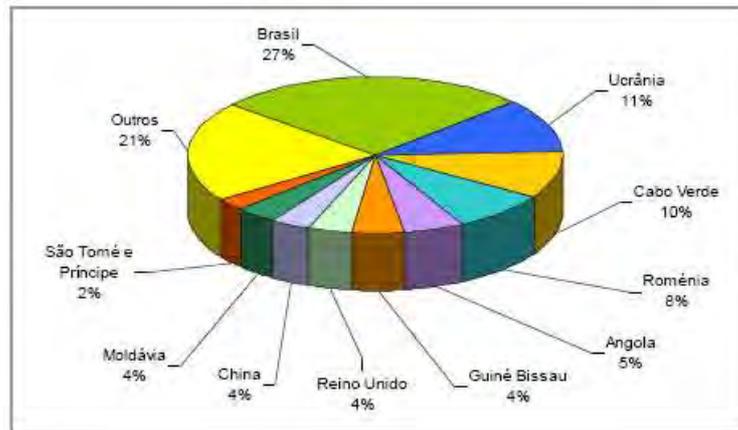


MPI Data Hub/EUROSTAT 2009



Alguns dados de enquadramento geral

Principais comunidades imigrantes (2010)



SEF 2010



Alguns dados de enquadramento geral

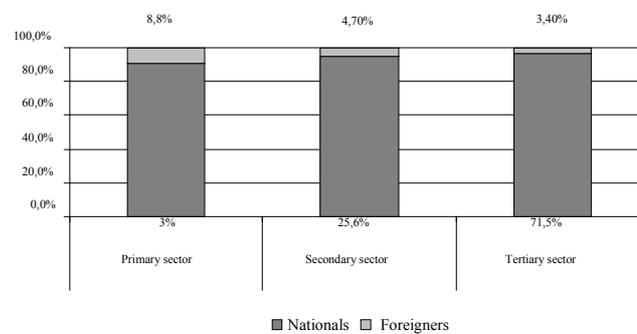
Peso dos imigrantes por sector económico e PIB

Sector primário –8,8% do total de trabalhadores;

Sector secundário –4,7% do total de trabalhadores;

Sector terciário –3,4% do total de trabalhadores;

Quadros de Pessoal (2009)





Alguns dados de enquadramento geral

Situação na profissão – nível de empreendedorismo

Situação laboral	2005		2009	
	Estrangeiros	Nacionais	Estrangeiros	Nacionais
Empregadores	3,0	7,5	4,5	7,4
Trabalhador familiar não remunerado	0,0	0,1	0,0	0,0
Empregados	96,9	92,3	95,2	91,9
Membro activo de cooperativas	0,0	0,1	0,0	0,0
Não especificado	0,1	0,1	0,3	0,6
Total	100	100	100	100

O empreendedorismo entre os imigrantes está a ganhar terreno

Fonte: MTSS/DGEEP, Quadros de Pessoal

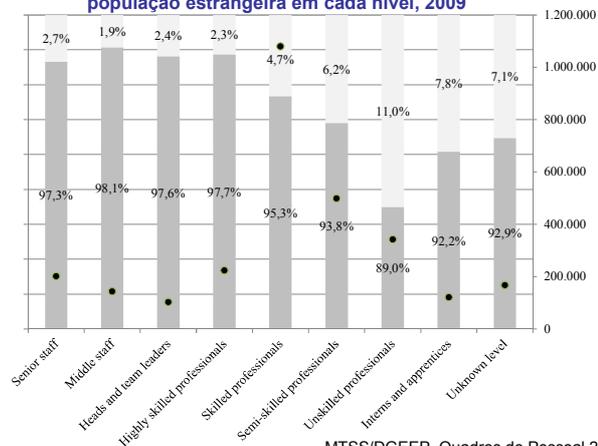


Alguns dados de enquadramento geral

Nível de qualificação

A maior parte dos imigrantes fazem trabalhos de baixa qualificação

Nº de empregados por nível de qualificação, e percentagem de população estrangeira em cada nível, 2009



Cinzeno escuro: nacionais
Cinzeno claro: imigrantes
Pontos: volume de trabalhadores em cada nível de qualificação em Portugal.

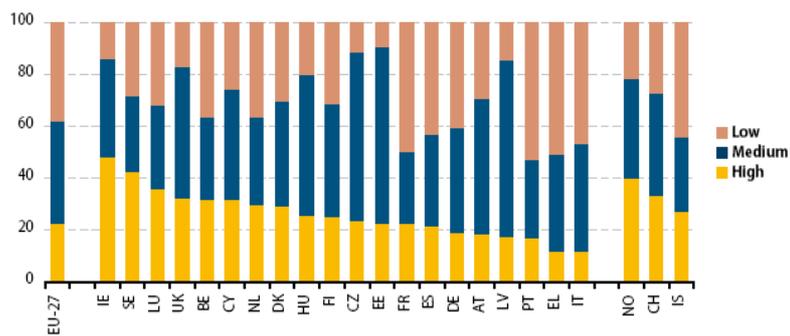
MTSS/DGEEP, Quadros de Pessoal 2009



... Perspectiva Europeia

...Está entre os países com a mais alta percentagem de imigrantes com baixo nível de educação

Figure 2.8: Foreign citizens aged 25–54 by educational attainment, 2008 (*)
(%)



EUROSTAT 2008



Alguns dados de enquadramento geral

Taxa de desemprego

Comparação taxa de desemprego entre nacionais e estrangeiros, período 2000-2010

	Nacionais	Estrangeiros	Estrangeiros de Países Terceiros
2000	3,9	8,7*	..
2005	7,9	12,2	12,8
2009	9,7	16,4	17,3
2010	11,1	18,9	19

Os imigrantes apresentam níveis de desemprego mais elevados

Fonte: Labour Force Survey (Eurostat), population aged 15-64.



Percepção da imigração

Há uma visão positiva

- ⇒ Os Portugueses estão menos preocupados com a imigração de que a média europeia.
Eurobarómetro 2009
- ⇒ Há a consciência de que os media não retratam os imigrantes de forma verdadeira e que contribuem para criar estereótipos negativos
- ⇒ Principalmente, reconhecem que os imigrantes contribuem positivamente para a sociedade
- ⇒ Imigrantes fazem trabalhos de baixa qualificação (construção civil, serviço doméstico, não qualificado) que os Portugueses não querem

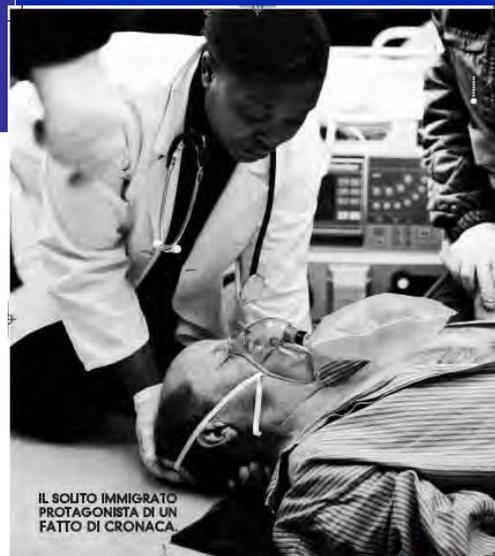
Eurobarómetro 2011



Percepção da imigração

Campanha da OIM de sensibilização sobre a migração

Quebrar estereótipos e evidenciar o lado positivo da imigração



IL SOLITO IMMIGRATO
PROTAGONISTA DI UN
FATTO DI CRONACA.

PIÙ DI UN MILEIONE E MEZZO LAVORA NEI SPAZZI, UN MILIONE NELL'INDUSTRIA, 200 MILI
NELLA PESCA E NELL'AGRICOLTURA E 200 MILI NEL COMMERCIO. GLI IMMIGRATI SONO UNA
RICERCA PER IL SISTEMA ECONOMICO ITALIANO. PER QUESTI IL TEMPI DI CIRCOLAZIONE
E INSERIMENTO NEL LORO VALORE. ECCO LA SICURA NOTIZIA.

International Organization for Migration
MIGRAZIONE E SVILUPPO



Migração irregular: Algumas observações

- ❖ Difícil recolher dados: notificações/expulsões, regularizações, recusas de entrada/controlo fronteiras
- ❖ O estatuto pode mudar várias vezes ao longo do tempo
- ❖ A nível mundial: 10 – 15% do total da população migrante (ILO)
- ❖ Em 2008 aponta-se para Portugal uma estimativa de 80.000 a 100.000 imigrantes irregulares – 20% (MPI 2011)



Migração irregular: Algumas observações

Categorias de imigrantes irregulares

- ❖ Pessoas que entram ilegalmente no país de destino
- ❖ Pessoas que entram legalmente mas que residem irregularmente (Overstayers)
- ❖ Vítimas de tráfico

A maior parte dos imigrantes irregulares entram *legalmente* no país de destino

(Clandestino Project – dados sobre UE)



Migração irregular: Algumas observações

Causas da migração irregular

- ❖ Factores que podem levar a migrar irregularmente
 - Falta de alternativa (situação económica)
 - Inexistência/ineficiência de canais de migração legal
 - Dificuldades burocráticas ao longo do processo
 - Requisitos excessivos
 - Falta de informação sobre o país de destino (mercado trabalho/requisitos permanência, etc)
 - Oportunidades de trabalho de baixa qualificação

- ❖ Papel das redes sociais (boca a boca) e da “indústria” da migração (redes de intermediação migratória)



Migração irregular: Algumas observações

Come se pode intervir positivamente para prevenir e combater a migração irregular?

- Controlo fronteiras
- Eficaz política de emissão de vistos
- Medidas repressivas/fiscalização dirigidas a empregadores, intermediários/agentes, auxiliares migração irregular, traficantes
- Campanhas de informação dirigidas a potenciais migrantes no país de origem
- Eficaz política de retorno
- Abertura de canais eficazes de migração legal



Videogravação da comunicação

A imigração em Portugal, processo migratório e integração

Duarte Miranda Mendes

**IMIGRAÇÃO ILEGAL E TRÁFICO DE SERES HUMANOS:
INVESTIGAÇÃO, PROVA,
ENQUADRAMENTO JURÍDICO E SANÇÕES**

Dr. Duarte Miranda Mendes

Chefe de Gabinete da Alta Comissária para a Imigração e Diálogo Intercultural, ACIDI

A imigração em Portugal, processo migratório e integração:

Breve enquadramento dos números da imigração em Portugal, como forma de introduzir a temática das políticas públicas de imigração na dimensão da integração e do trabalho que está a ser desenvolvido pelo instituto público com a missão de promover a integração dos imigrantes, das minorias étnicas (comunidades ciganas) e da promoção do diálogo entre as diversas culturas, etnias e religiões, o Alto-Comissariado para a Imigração e Diálogo Intercultural, nomeadamente, ao nível das redes e projectos de apoio à integração dos imigrantes e da promoção da interculturalidade.

Abordagem sumária de alguns aspectos do acesso aos direitos por parte dos estrangeiros no território de acolhimento como é o caso do acesso à saúde, educação, justiça e legislação especial de combate à discriminação racial.



Videogravação da comunicação

Mensagem da Dr.^a Maria Jesus Barroso Soares

MENSAGEM

Não podendo estar convosco no Seminário sobre “Imigração ilegal e Tráfico de seres humanos”, por razões de saúde, venho, por este modo, manifestar a minha inteira solidariedade e adesão a uma iniciativa do maior relevo, em que me seria tão grato participar, e que vai, certamente, contribuir para o melhor conhecimento de um fenómeno muito atual e preocupante na vida do nosso País, e, para a reflexão e a mobilização de vontades, com reflexos na vida das pessoas, e, em especial, na daquelas que são mais vulneráveis numa conjuntura de crise económica europeia e nacional, que atravessamos.

Caber-me-ia moderar o painel sobre “A imigração em Portugal, processo migratório e integração”, e, considerando, em particular, este aspeto da problemática das migrações, gostaria, nas breves palavras de saudação que vos dirijo, de começar por uma comparação entre o que hoje se passa dentro das nossas fronteiras e a realidade que conhecemos melhor e há muito mais tempo - a nossa própria diáspora em todos os continentes do mundo. Será importante partir dessa memória de duras experiências, de saudade, de isolamento, com casos tão numerosos de clandestinidade e exploração, - de que é exemplo recente a chamada “emigração a salto”, nos anos sessenta e setenta do século passado - mas também de aspetos mais positivos, sobretudo nas fases seguintes do ciclo migratório, depois da regularização de situações e da adaptação, que permitiram a realização humana e material dos expatriados, a criação de organizações de apoio mútuo e de convívio, a colaboração fraterna com outros imigrantes e com os povos que os receberam. Feito o balanço, a aventura coletiva de uma geração sofrida, (incluindo muitos homens e mulheres que foram obrigados pelas circunstâncias a entrar ilegalmente, nos países de destino, na Europa e em outros continentes) é uma história de coragem, de luta, de contribuição para o progresso económico e para o dinamismo inter cultural das sociedades estrangeiras de acolhimento. Por isso, com a lição da longa prática emigratória dos Portugueses, deveremos estar, naturalmente, mais abertos à compreensão das imensas potencialidades e do enorme enriquecimento que representam os trabalhadores estrangeiros entre nós, os imigrantes, desde que lhes saibamos dar as devidas condições de integração. Enriquecimento tanto do ponto de vista cultural como económico e até, também, do ponto de vista demográfico, num País, com tão baixas taxas de natalidade e uma população envelhecida.

Os estrangeiros que nos procuram, como nós tradicionalmente demandámos outras terras, chegam com a mesma capacidade de adaptação e interação, a mesma vontade de melhorar a sua condição, a mesma força de trabalho e de impulso a mudanças construtivas de que nós sempre demos abundantes exemplos.

A concretização das esperanças e dos projetos de fixação dos imigrantes dependem muito de nós, do ambiente de que soubermos rodeá-los, de um relacionamento humano que é a base da perfeita integração. A ligação ao novo país – sem evidentemente, esquecer o de origem – para além dos indispensáveis apoios de instituições públicas e privadas, de boas leis e de boas práticas, passa pela atitude das pessoas, de cada um de nós, pela simpatia e pela estima que formos capazes de lhes demonstrar, e a que eles não deixarão de corresponder.

Temos todas razões para pensar que a nossa sociedade saberá prosseguir o movimento de solidariedade com que, de uma forma discreta e espontânea, recebeu uma primeira inesperada e enorme vaga de imigrantes –os do leste europeu. De facto, nas décadas de oitenta e início de noventa, os imigrantes, de que já se falava bastante, vinham, em números relativamente modestos, gradualmente, e, na sua maioria, de países de língua portuguesa, das antigas colónias de África e do Brasil, pelo que a sua adaptação era muito facilitada pelo idioma comum. Em fins do século passado e no século XXI, a queda do muro de Berlim e um surto de desenvolvimento nacional, em boa parte ancorado em grandes obras públicas, atraiu a chamada "nova imigração"

de leste - dezenas de milhares, chegados num curtíssimo espaço de tempo, muitos em situação irregular, deparando com empregos abaixo das suas qualificações, e, sobretudo, com burocracias instaladas, ausência de ajuda e suporte institucional, impreparação geral para lidar com fenómeno de uma desmesurada extensão. E é significativo que as primeiras e decisivas formas de preocupação e auxílio tenham vindo dos próprios cidadãos, das organizações da sociedade civil, e, em particular, das ligadas à Igreja Católica, que se anteciparam ao Estado, numa relação de proximidade com os imigrantes. Só depois o Estado foi intervindo, nomeadamente através da criação do Alto-comissário para as Minorias Étnicas, atualmente ACIDI, um departamento dirigido por uma sucessão de notáveis personalidades, que, em conjunto com outros serviços públicos, muito tem contribuído para a tomada de consciência das realidades e para a materialização de medidas de proteção e desenvolvimento de políticas de imigração, hoje destacadas e reconhecidas, a nível internacional.

De entre os meios jurídicos de apoio à boa integração é de salientar a nova lei da nacionalidade, que deixou de ser fundada exclusivamente no "jus sanguinis", nos laços de sangue, para admitir, em determinado condicionalismo, também, o "jus solis", em benefício dos filhos dos imigrantes, das segundas gerações. A aceitação da sua pertença à sociedade portuguesa - assim como a dos pais, através da simplificação do processo de naturalização - são, a meu ver, poderosos fatores de enraizamento na terra de acolhimento, sobretudo quando conjugados com a permissão da dupla nacionalidade, (para não forçar, no plano jurídico, rupturas a pátria de origem). No mesmo sentido vão as leis que permitem a participação política, a começar pelo nível local.

Integrar é, antes de mais, dar cidadania - reconhecer a pertença de facto e a igualdade jurídica àqueles que aqui estão para viver e que não mais devemos considerar e tratar como estrangeiros. Uma visão humanista da imigração é a única que dá a dimensão da qualidade da nossa gente e da nossa democracia - uma democracia abrangente, aberta aos imigrantes, que nela têm o seu lugar, a sua voz, o seu futuro.

Maria de Jesus Barroso Soares



Videogravação da mensagem

Criminalidade associada à imigração ilegal

Criminalidade associada à imigração ilegal

Albano Pinto

CRIMINALIDADE ASSOCIADA À IMIGRAÇÃO ILEGAL

Albano Pinto,
Procurador da República, Coordenador de Leiria

I

INTRODUÇÃO

«A vítima é tratada como uma coisa (...) quando se a transfere violenta, fraudulenta ou abusivamente para atender à procura de serviços que se produz noutro lugar. Mas também é tratada como uma coisa nos casos em que (...) toma a iniciativa da sua deslocação para emigrar ilegalmente colocando-se nas mãos daqueles que a organizam»

(Mercedes Garcia Arán, "Trata de personas y explotación sexual", p. 5))

Pode dizer-se que o tráfico de pessoas e a introdução clandestina de imigrantes, apesar, muitas vezes, do carácter comum das suas causas e de o primeiro, na maioria dos casos, pressupor esta introdução ou exigí-la mesmo como «conditio sine qua non» dos objectivos predefinidos, sobretudo, em situações de menor controle e capacidade de reacção dos países de destino, por isso expressamente escolhidos para a prossecução e desenvolvimento das respectivas actividades, representam duas perspectivas diferentes e autónomas do mesmo fenómeno, assente na transformação do homem em objecto de exploração e fonte de lucro.

A sociedade contemporânea cada vez mais exige que todo o ser humano, pelo

facto de o ser, não pode deixar de ser reconhecido e tratado como tal, sob pena de ser desprovido daquilo que ele tem de mais essencial e que, como já dizia Immanuel Kant, o permite distinguir dos animais: a dignidade humana.

A salvaguarda deste valor supremo não deixa, aliás, de inspirar e estar subjacente aos diversos instrumentos internacionais que versam sobre o referido fenómeno, nomeadamente, aos que iremos referir, enquanto, por um lado, o encaram em si, definindo-o e sugerindo medidas para o seu combate e, por outro, autonomizam, dentre estas, a necessidade de punição do branqueamento dos respectivos ganhos, com a consequente perda das vantagens e produtos obtidos em consequência dele e, simultaneamente e em ordem, desde logo, a evitar visões rígidas e ultrapassadas dos tribunais (ainda hoje, tantas e tantas vezes persistentes), traçam critérios de orientação de como ele deve ser percebido e compreendido, nomeadamente, ao nível probatório, realçando, a este respeito, a grande importância da prova indiciária e apontando e legitimando técnicas não usuais de recolha da mesma e dos demais meios respeitantes à demonstração dos factos .

Este tipo de preocupações deve, aliás, rodear todos os processos legislativos, não só por essenciais ao referido combate e, por isso, ao respeito e à protecção dos direitos de cada um, particularmente, dos que são vítimas dos fenómenos em causa, mas também, e ponderando as vezes em que as condutas subjacentes são produto de organizações criminosas internacionais, para uma melhor segurança e desenvolvimento mundiais, assentes, na esteira do defendido pelas resoluções das Nações Unidas, na “*universalidade, interdependência, indivisibilidade e inter-relação de todos os direitos humanos civis, políticos, económicos, sociais e culturais*” (cfr. Resolução E/CN.4/RES/2003/24, parágrafo 9, da Comissão de Direitos Humanos das Nações Unidas)

Como já dissemos noutro lugar, estamos perante duas faces de uma mesma moeda , cujo valor não é outro senão a exploração do ser humano medida pelo lucro que propicia.

Tanto assim que eles apenas se distinguem, abstraindo, como é óbvio, dos casos em que a intenção lucrativa não seja erigida em fim da actuação do agente que auxilia à introdução, trânsito ou permanência ilegais do imigrante e não haja transposição de fronteiras no tráfico de pessoas, pelos meios utilizados na sua prática.

Apenas nos cabe falar de uma dessas faces, mais precisamente, da do tráfico ilícito de imigrantes.

E iremos fazê-lo, abordando dois dos crimes com que a nossa lei (a Lei n.º 23/2007, de 4 de Julho, que aprova o Regime Jurídico de Entrada, Permanência, Saída e

Afastamento de Estrangeiros do Território Nacional, Regime que, doravante, designaremos como RJEPSAE), pretende reprimi-lo, ou seja:

- o auxílio à imigração ilegal e
- a associação criminosa para o auxílio à imigração ilegal.

Antes, porém, de o fazermos, pensamos ser oportuno indicar algumas bases e princípios de interpretação, ponderando a influência dos instrumentos internacionais na elaboração e interpretação daqueles crimes.

II

BASES E PRINCÍPIOS DE INTERPRETAÇÃO

«O Direito descobre-se, mas não se inventa»

(R. Dworkin , Law's Empire, New York, 1986, p. 5.
apud Ac. do TC n.º 371/91, de 10.10)

A) - AS FONTES

Nenhuma lei nasce do nada.

E quando nasce é com um propósito, para cumprir um objectivo, atingir um fim, ter, em suma, um telos, dar concretização ao “para quê” da sua promulgação.

Se este telos da norma deve ser encarado sob uma perspectiva subjectivista, sob a vontade do legislador histórico (interpretação teleológica-subjectiva) ou, pelo contrário, de um ponto de vista objectivo e, por isso, com um sentido autónomo do que ele teve em vista (interpretação teleológica-objectiva) é questão que não cumpre, aqui, abordar, tanto mais que, verdadeiramente, ela só deve ser suscitada quando, por deficiência de redacção, o legislador não consegue reflectir no texto os motivos que levaram à sua publicação, resultando dela um sentido não querido.

O que importa é reter que toda a norma jurídica, inclusive, a penal, tem um percurso histórico e que, para a sua interpretação teleológica, a sua génese, com a análise, nomeadamente, das suas fontes, dos trabalhos preparatórios e da exposição de motivos, assume uma importância decisiva, a par de outros elementos, como o sistemático.

Isto, sobretudo, quando, como acontece com os artigos 183º. e 184º. do RJEPSAE, eles surgem para satisfação de obrigações internacionais a que Portugal se vinculou e em cumprimento de actos legislativos da União Europeia, concretamente e no que concerne àqueles instrumentos:

- a) - a Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional, abreviadamente conhecida por Convenção de Palermo, por ter sido assinada em Palermo, Itália e que, a impulso, nomeadamente, da Fundação Giovanni Falcone, representa o primeiro tratado legal negociado globalmente para a luta contra o crime organizado transnacional; e
- b) - o Protocolo Adicional a essa Convenção contra o Tráfico Ilícito de Migrantes por Via Terrestre, Marítima e Aérea e cujas disposições, à semelhança das da Convenção anterior, devem ser vistas como imperativas de primeiro grau em tudo o que diga respeito a delitos praticados no âmbito de organizações criminosas transnacionais.

Relativamente à União Europeia:

- c) - a Acção Comum 98/733/JAI, de 21 de Dezembro de 1998, adoptada pelo Conselho com base no art. K.3 do TUE, relativa à incriminação da participação numa organização criminosa nos Estados-Membros da União Europeia;
- d) - a Directiva 2002/90/CE do Conselho de 28 de Novembro de 2002, relativa à definição do auxílio à entrada, ao trânsito e à residência irregulares; e
- e) - a Decisão-Quadro 2002/946/JAI do Conselho, de 28 de Novembro de 2002, relativa ao reforço do quadro penal para a prevenção do auxílio à entrada, ao trânsito e à residência irregulares.

Efectivamente, e lendo todos estes instrumentos, alguns citados pelo próprio RJEPSAE, não será difícil de constatar as correspondências, bem como, e no caso sobretudo do crime de auxílio à imigração ilegal, as semelhanças que, por vezes, existem entre as expressões das disposições que o prevêm e os artigos 3º., e 6º. do Protocolo, por um lado e os artigos 1º. e 2º. da Directiva 2002/90/CE, por outro.

Mas a consideração dos elementos anteriores na interpretação dos referidos crimes do RJEPSAE não se impõe apenas por razões históricas.

Impõe-se ainda pela sua eficácia no Direito interno, mesmo, adiante-se, desde já, que posteriores às disposições que prevejam aqueles, como acontece, por exemplo, com a Decisão-Quadro 2008/841/JAI do Conselho, de 24 de Outubro de 2008 relativa à luta contra a

criminalidade organizada e que revogou a referida Acção Comum.

Senão vejamos

B) - EFICÁCIA DOS INSTRUMENTOS DE DIREITO INTERNACIONAL CONVENCIONAL E DE DIREITO COMUNITÁRIO NO DIREITO INTERNO: O PRINCÍPIO DA INTERPRETAÇÃO CONFORME DAS DISPOSIÇÕES DESTE COM AS DOS ANTERIORES

1. DIREITO INTERNACIONAL CONVENCIONAL

Questão discutida na doutrina é a de saber a eficácia do Direito Internacional na ordem jurídica interna de cada Estado, seja nos casos em que ele deve ser considerado como parte integrante desta, independentemente da publicação de qualquer lei (interna), seja, sobretudo, quando esta integração exige uma adaptação das leis penais internas ou uma transposição dos comandos punitivos enunciados por aquele, caso em que alguns Autores afastam, expressamente, qualquer eficácia dos Tratados ou Convenções internacionais, mesmo que ratificados pelo respectivo Estado .

Isto, face à natureza "estatista" do Direito Penal , de este não poder desprender-se da força coerciva de cada Estado, de, fazendo parte do Direito Público interno de um determinado Estado ou sociedade politicamente organizada e traduzir-se no poder de estes declararem ilícitas e puníveis certas condutas e, como tal, perseguirem-nas e castigarem-nas , dever entender-se que ele exige que a norma internacional só possa ser aplicável na ordem interna depois da sua incorporação nesta, através de um acto de vontade do legislador nacional.

Por outro, à circunstância (geral) de as Constituições, salvo disposição em contrário, não receberem o Direito internacional como direito constitucional e o Estado, ao obrigar-se internacionalmente, não perder o seu poder de legislar, ficando apenas obrigado a utilizá-lo (com boa fé) nos termos em que se obrigou e sem que possa invocar as disposições do Direito interno para justificar o seu não cumprimento .

Continuando a colocar a questão fora do âmbito da tipicidade, na medida em que os instrumentos internacionais não contêm autênticos tipos penais, antes limitando-se a enunciar simples recomendações dirigidas aos Estados para que os adotem , ainda que indicando, por vezes, com precisão, as condutas que devem ser punidas e as sanções que lhes devem corresponder, pensamos que a mesma é, expressamente, resolvida pelo art. 8º. da CRP.

Primeiro, ao aceitar, sob o nº. 1, a incorporação automática das normas e princípios de Direito internacional geral ou comum (como sucede, por exemplo, com os constantes da Declaração Universal de Direitos do Homem), estabelecendo que eles fazem parte integrante do Direito português e afastando, desse modo, a subordinação da sua eficácia à sua publicação (interna) ou a uma actividade legislativa no sentido da sua transposição para a ordem interna (doutrina da recepção plena ou da recepção automática) .

Em segundo lugar, e embora já condicionando a vigência, por um lado, à publicação e, por outro, à permanência da vinculação internacional do Estado Português às correspondentes disposições (e não reconhecendo, portanto, a auto-exequibilidade prevista para os referidos princípios e normas), quando prescreve, sob o nº. 2, que também vigoram na ordem interna as normas constantes de convenções internacionais regularmente ratificadas ou aprovadas (v.g., Convenção Europeia dos Direitos do Homem e Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional).

Tanto num caso, como no outro, o Direito internacional, enquanto tal, é, pois, plenamente, válido na ordem jurídica portuguesa, integrando-a com o conteúdo e a extensão que possui, independentemente de qualquer acto relativo à sua “tradução” em lei ou transformação em Direito interno e só deixando de vigorar, nos casos do nº. 2, quando a convenção, regularmente ratificada e aprovada, deixe, por qualquer motivo, de vincular o Estado Português .

Daí que, fazendo parte do sistema jurídico e, diga-se, prevalecendo relativamente à legislação ordinária , seja esta anterior ou posterior (como resulta da circunstância de dever haver sempre recurso, por parte do MP, para o Tribunal Constitucional da decisão judicial que recuse a aplicação da disposição interna que o contrarie, estabelecendo-se, assim, um regime semelhante ao das normas cuja não aplicação resida na sua contraditoriedade com a Constituição: cfr. arts. 6º., 70º., nº. 1, al. i) e 72º., nº. 3, da Lei de Organização, Funcionamento e Processo do Tribunal Constitucional) , não possa, logo que passe a valer nele , deixar de influenciar a interpretação das disposições (penais) internas, fazendo com que estas, por força do princípio da unidade ou coerência do sistema jurídico, passem a reflecti-lo de forma harmoniosa, desde que, obviamente, os dizeres legais compreendam o sentido a que conduz, porventura, até aí, não aceite ou considerado minoritário .

Isto, repita-se, mesmo que não objecto de transposição.

Se esta tiver lugar, com a consequente alteração dos preceitos penais existentes ou a criação de outros até, então, inexistentes, é evidente que as novas

disposições têm, logicamente, que ser interpretadas sem se descurar a «ratio» do seu surgimento e, por via disso, as normas ou princípios internacionais que as inspiraram e conduziram à sua introdução no sistema jurídico, normas ou princípios que se impõem, assim, não apenas de um ponto de vista sistemático (art. 9º., nº. 1, do CC), mas também como constituindo a própria história dessas novas disposições, o seu modelo, se quisermos ("as *circunstâncias*" da sua elaboração, nas palavras daquele preceito) e, enquanto tal, isto é, como fonte material de direito, com o sentido próprio e comum que resulte do contexto dele e dos respectivos objecto e finalidade, ainda que, para o efeito, seja necessário o recurso aos chamados "meios complementares", designadamente, aos trabalhos preparatórios e às circunstâncias em que foram aceites como tais (o que deverá suceder sempre que aquele sentido seja ambíguo ou obscuro ou conduza a um resultado manifestamente absurdo ou incoerente: cfr. arts. 31º. e ss., da Convenção de Viena sobre o Direito dos Tratados, de 23 de Maio de 1969).

A interpretação, tanto num caso, como noutro, tem, pois, de ser conforme aos instrumentos internacionais, sob pena de o correspondente preceito penal, como se viu, dever ser tido como ilegal, o que, como é óbvio, sucederá sempre que o texto do preceito não comporte essa "interpretação conforme".

Comportando, há que considerá-la, pois é missão do intérprete, antes de mais, reconstituir a partir do texto o pensamento legislativo, tendo sobretudo em conta a unidade do sistema jurídico e as circunstâncias em que a lei é elaborada e nenhum legislador (razoável), querendo transpor um instrumento internacional, que vê como fonte de direito e adopta, por isso, como modelo, em respeito dos compromissos, com ele, assumidos (sob pena de responsabilidade internacional), nomeadamente, do ponto de vista do seu contributo para a universalização das regras no mesmo esculpidas, o faz para que a lei, que cria ou altera, tenha linhas ideológicas e normativas diferentes, leve, em suma, a um sentido contrário ao que resulte desse modelo.. Seria um verdadeiro absurdo, criar uma figura teratológica e ir contra o disposto no art. 9º., nº. 1, do CC.

2. DIREITO COMUNITÁRIO

O que se acaba de dizer vale, "mutatis mutandis", para o Direito comunitário.

Também aqui, com efeito, é inteiramente aplicável o princípio da interpretação conforme, agora, como é óbvio, com esse Direito, apesar de, tal como vimos para o Direito convencional, ele não ter igualmente aplicação directa no âmbito da jurisdição

penal (não obstante também a afectar), por força do princípio da reserva de lei (artigo 165º., nº. 1, alínea c), da Constituição) .

E isto não apenas por do artigo 8º., nº. 4, da nossa Constituição resultar que as normas emanadas das instituições da União Europeia, concretamente, as constantes de directivas, decisões e regulamentos (veja-se artigo 288º., do Tratado sobre o Funcionamento da União Europeia) têm validade na ordem interna (e, se se quiser, primazia sobre as desta, face à sua natureza „supraconstitucional“)

Igualmente por, no sentido exposto e embora com as excepções que iremos abordar, já ter decidido o Tribunal de Justiça da União Europeia (anteriormente, Tribunal de Justiça da Comunidade Europeia), em matéria de Directivas, através, nomeadamente, do Acórdão de 8.10.1987, proferido no processo 80/86 (caso contra Kolpinghuis Nijmegen BV) , de Regulamentos, com, por exemplo, o Ac. de 07.01.2004, proferido no processo C-60/02 (caso suscitado pelo Tribunal Regional de Eisenstadt, Áustria, no âmbito de um processo penal, nele instaurado, por contrafacção de marcas) e de Decisões-Quadro, pelo Acórdão de 16.06.2005, proferido no processo C-105/03 (caso contra Maria Pupino), decisões que os Tribunais nacionais de cada um dos Estados-Membros não podem deixar de obedecer, como resulta do artigo 280º. do Tratado sobre o Funcionamento da União Europeia .

No primeiro processo e como se verifica do respectivo Acórdão, ao TJCE foram colocadas quatro questões:

“1) Uma autoridade nacional (neste caso a autoridade encarregada de instaurar o processo penal) pode invocar contra os seus nacionais uma disposição de uma directiva relativamente à qual o Estado-Membro em questão não adoptou as medidas legislativas ou regulamentares para a sua aplicação?

2) Os órgãos jurisdicionais nacionais são obrigados a aplicar directamente as disposições de uma directiva que a isso se prestem, quando não tenham sido adoptadas medidas para dar cumprimento a essa directiva, mesmo no caso de o interessado não pretender invocar qualquer direito com base nessas disposições?

3) Quando um órgão jurisdicional nacional for chamado a interpretar uma norma de Direito nacional, deve ou pode, para tal interpretação, guiar-se pelo conteúdo de uma directiva aplicável?

4) Seria diferente a resposta à primeira, segunda e terceira questões, se o prazo fixado para a adaptação da legislação nacional pelo Estado-Membro em questão ainda não tivesse expirado na data pertinente (neste caso, 7 de

Agosto de 1984)?”

A estas questões, respondeu o Tribunal da seguinte forma:

- a) - “...o carácter obrigatório das directivas, em que se fundamenta a possibilidade de as invocar perante um órgão jurisdicional nacional, existe apenas relativamente «aos Estados-membros destinatários». Em consequência, uma directiva não pode, por si própria, criar obrigações para os particulares e, deste modo, as disposições de uma directiva não podem ser invocadas enquanto tais contra eles perante um órgão jurisdicional nacional. Assim, há que responder às duas primeiras questões prejudiciais que uma autoridade nacional não pode invocar contra um particular uma disposição de uma directiva cuja necessária transposição para o Direito nacional ainda não tenha sido efectuada”;
- b) - “Como foi declarado pelo Tribunal no seu acórdão de 10 de Abril de 1984 (Von Colson e Kamann, 14/83, Recueil 1984, p. 1891), a obrigação decorrente de uma directiva, para os Estados-membros, de alcançarem o resultado nela previsto, bem como o seu dever, por força do artigo 5.º do Tratado, de adoptarem todas as medidas gerais ou especiais adequadas a assegurar o cumprimento dessa obrigação, é imposta a todas as autoridades dos Estados-membros, inclusivamente, no âmbito da sua competência, às autoridades jurisdicionais. Desta forma, ao aplicar o Direito nacional, e em particular as disposições de uma lei nacional especialmente aprovada com a finalidade de dar cumprimento à directiva, o órgão jurisdicional nacional deve interpretar o seu Direito nacional à luz do texto e dos objectivos da directiva...”. No entanto, esta obrigação de o juiz nacional ter em conta o conteúdo da directiva ao interpretar as normas pertinentes do seu Direito nacional é limitada pelos princípios gerais de direito que fazem parte do Direito comunitário e designadamente os da segurança jurídica e da não retroactividade. Assim, o Tribunal declarou, no seu acórdão de 11 de Junho de 1987 («Pretore» de Salò/X, 14/86, Colect. 1987, p. 2545), que uma directiva não pode ter como efeito, por si própria e independentemente de uma lei interna adoptada por um Estado-Membro para a sua aplicação, determinar ou agravar a responsabilidade penal de quem quer que aja em violação das suas disposições”;

c) - *“A questão de saber se as disposições de uma directiva podem ser invocadas enquanto tais perante um órgão jurisdicional nacional apenas se deve colocar no caso de o Estado-Membro em causa não ter transposto a directiva para Direito nacional no prazo determinado ou de ter feito uma transposição incorrecta da mesma”, não sendo as respostas anteriores “diferentes, no caso de o prazo fixado ao Estado-Membro para adaptar a legislação nacional ainda não ter decorrido na data pertinente” (cfr. parágrafos 9 a 15).*

Do que se segue que, não resultando uma violação do princípio da legalidade (*“nulla poena sine lege”*), o princípio da interpretação conforme impõe-se sempre mesmo relativamente ao Direito Nacional anterior à Directiva, conforme, aliás, se decidiu, também inequivocamente e por exemplo, nos Acórdãos de 26.09.1996, proferido no processo C-168/95 (caso contra Luciano Arcaro) e 12.12.1996, proferido nos apensos C-74/95 e C-129/95 (caso suscitado pelo Ministério Público junto do Tribunal Distrital de Turim) .

Através, por sua vez, do Acórdão sobre o caso suscitado pelo Tribunal Regional de Eisenstadt, quanto à interpretação do Regulamento (CE) n.º 3295/94 do Conselho, de 22.12.1994, decidiu o Tribunal de Justiça que *“a obrigação de interpretação conforme do Direito nacional, à luz do texto e da finalidade do Direito comunitário, para atingir o resultado por ela prosseguido, não pode, por si só e independentemente de uma lei adoptada por um Estado-Membro, criar ou agravar a responsabilidade penal de um operador que tenha violado as prescrições do referido regulamento”* (cfr. parágrafo 4).

Isto, repare-se, apesar da aludida obrigatoriedade e não admitindo, dessa forma, o alargamento, ainda que por interpretação extensiva, do tipo penal do Direito interno, de modo a passar a punir o que não era proibido pela legislação nacional (o trânsito pelo território austríaco de mercadorias contrafeitas, se o referido Tribunal Regional viesse a concluir pela sua não proibição), mesmo que proibido, como acontecia no caso, por uma norma comunitária.

Com o Acórdão de 16.06.2005 (caso Maria Pupino), finalmente, e apesar de apenas se ter tido em vista o estatuto da vítima em processo penal, enquanto objecto da Decisão-Quadro 2001/220/JAI e versado, portanto, uma questão de natureza adjectiva -- mais precisamente, a de saber se, apesar de a lei, concretamente, a italiana, apenas permitir o incidente de produção antecipada de prova, fora dos casos do artigo 392.º, n.º. 1, do respectivo Código de Processo Penal , estando em causa crimes sexuais ou de cariz sexual e um menor de dezasseis anos (n.º. 1 bis do mesmo artigo), o juiz de instrução podia, em

observância dos artigos 2.º, 3.º e 8.º daquela Decisão-Quadro e para protecção da dignidade, intimidade e personalidade das crianças ainda em não idade escolar, admiti-lo relativamente a crimes de maus tratos, assegurando-lhes, deste modo, um nível adequado de protecção, exigido pela sua particular vulnerabilidade -- o TJCE não deixa de conter referências expressas ao Direito penal substantivo, tendo, assim, querido, lógica e manifestamente, que a sua doutrina não fosse apenas aplicada no âmbito apenas do Direito penal adjectivo.

De acordo com ele, o princípio da interpretação conforme, até aí entendido como aplicável, sobretudo, às Directivas , deveria também ter-se por válido para as Decisões-Quadro, face ao seu carácter obrigatório, atento o disposto no, então, artigo 34.º, n.º 2, alínea b), do Tratado da União Europeia (e apesar de apenas vincularem quanto ao resultado por elas tido em vista), pelo que as autoridades de cada Estado-Membro e, em especial, os seus órgãos jurisdicionais tinham a obrigação de respeitá-lo, interpretando o Direito interno, “*na medida do possível, à luz do teor e da finalidade*” dessas Decisões, a fim de atingirem o resultado por elas visado e conformando-se, assim, com o disposto no citado artigo .

Isto, sem prejuízo dos “*princípios gerais de direito, nomeadamente os da segurança jurídica e da não retroactividade*” e, portanto, de modo que essa obrigação nunca pudesse “*conduzir a desencadear ou a agravar, com base numa decisão-quadro e independentemente de uma lei adoptada para a sua aplicação, a responsabilidade penal de quem a violasse ...*” .

Com o que -- prossegue o Acórdão -- “*a obrigação de o juiz nacional fazer referência ao conteúdo de uma decisão-quadro quando procede à interpretação das regras pertinentes do seu Direito nacional cessa quando este último não possa ser objecto de uma interpretação que conduza a um resultado compatível com o pretendido por essa decisão-quadro. Por outras palavras, o princípio da interpretação conforme não pode servir de fundamento a uma interpretação contra legem do Direito nacional. No entanto, este princípio exige que o órgão jurisdicional nacional tome em consideração, sendo caso disso, o Direito nacional no seu todo para apreciar em que medida este pode ser objecto de uma interpretação que não conduza a um resultado contrário ao pretendido pela decisão-quadro*” .

À semelhança do que havia sucedido com o Acórdão de 8.10.1987, especificamente relativo, como se viu, a uma Directiva e sobre uma questão penal, distinguiu, pois, ele, claramente, entre a aplicação daquele tipo de instrumento enquanto tal ao caso concreto (sempre impossível, tal como sucede, em princípio, com as Directivas , por não conter este efeito e exigir a sua transposição para o Direito interno de cada um dos Estados

Membros) e o uso interpretativo que se deve fazer das suas disposições para efeitos do processo hermenêutico do Direito nacional, limitando esse uso, ou melhor, o princípio da interpretação conforme, apenas aos casos em que o mesmo conduza a uma interpretação contra legem ou leve a agravar a responsabilidade penal resultante da violação de uma norma nacional.

Quer dizer: apesar da falta de vigência, na ordem jurídica penal substantiva, de actos como os das Decisões-Quadro, a doutrina do caso Pupino veio reforçar o entendimento, que se deve ter por válido para todos os actos comunitários (sejam eles anteriores ou posteriores à norma interna a interpretar), no sentido de que estes apenas se devem ter por aplicáveis e interpretáveis com o respeito pelos princípios gerais de direito e, em especial, os da segurança jurídica e o da não retroactividade quando estejam em causa normas de direito substantivo e direito processual penal e que, seja qual for o caso, a interpretação do Direito nacional em conformidade com aqueles nunca pode servir de justificação a uma interpretação contrária ao mesmo, afirmando-se, assim, em ambos os casos (penal substantivo e processual penal) a prevalência do direito nacional e realçando-se a obrigação do órgão jurisdicional nacional, sobretudo, em casos de direito penal substantivo, abandonar a interpretação que conduza a um agravamento da responsabilidade penal.

Pode, por isso, afirmar-se que o princípio da legalidade penal impede que uma norma de Direito comunitário -- ainda que pertencente a um regulamento e, por isso, a um acto legislativo que não carece de transposição para o Direito interno de cada Estado-Membro, por ser, directamente, aplicável e obrigatório em todos os seus elementos (art. 288º. do Tratado sobre o Funcionamento da União Europeia) -- possa prever a tipificação de condutas ilícitas não especificamente previstas como tais no ordenamento jurídico interno de cada Estado-Membro e que o sentido e o alcance dessa norma apenas cabe neste quando possa ter-se como compreendido pelo sentido literal da disposição dele, ou por outras palavras, dentro das balizas traçadas pela sua letra .

O que significa que, apesar do dever que recai sobre o órgão nacional de “fazer *todo o possível*” para que, tendo em vista o alcance e a finalidade do acto comunitário, as disposições do Direito interno reflectam o resultado por este pretendido, atendo-se, desta forma, a ele, nunca poderá descurar, seja qual for a situação, que, em matéria penal e em corolário do referido princípio, não são também admissíveis, ao invés do que sucede em processo penal , interpretações extensivas (*nullum crimen, nulla poena sine lege scripta*) e, por isso, actuações relativas a condutas cuja punibilidade não resulte claramente da lei .

Se, em vez de a uma agravação da responsabilidade criminal , a

interpretação conforme conduzir a uma atenuação da mesma responsabilidade (inclusive, do ponto de vista da proporcionalidade das penas e não apenas tendo em conta as circunstâncias atenuantes que, porventura, preveja) ou a uma aplicação da lei penal mais favorável, é óbvio que já nada obstará a que do Direito comunitário se faça o devido uso interpretativo e, se for caso disso, se deva mesmo absolver o arguido ou arquivar o processo (se a respectiva disposição do acto comunitário tiver efeito directo, o que pode acontecer não apenas quando esse acto seja não só um regulamento, mas também uma Directiva, contanto, neste caso, aquela disposição seja precisa, clara, incondicional e não tenha sido transposta ou tenha sido de forma incorrecta e, para além de não requerer medidas complementares, de carácter nacional ou europeu, não deixe qualquer margem de manobra, por mínima que seja) com base na incompatibilidade da norma penal interna com ele, ainda que esta norma seja posterior e tenha, portanto, desrespeitado o acto legislativo comunitário que contradiz.

Colocadas estas considerações que achámos importantes para explicitar o nosso pensamento sobre a importância do Direito comunitário e da jurisprudência a ele relativa na interpretação dos crimes que iremos analisar, particularmente, quanto ao de associação ao auxílio à imigração ilegal, face à posição que os nossos Tribunais continuam a assumir, é altura de, muito sinteticamente, passarmos a analisar, para além desse crime, o de auxílio à imigração ilegal.

III

ANÁLISE DOS CRIMES DE AUXÍLIO À IMIGRAÇÃO ILEGAL E ASSOCIAÇÃO DE AUXÍLIO À IMIGRAÇÃO ILEGAL

“Cinquenta e quatro pessoas morreram sufocadas num camião que as transportava clandestinamente. Eram mais de 100, num contentor de 6 m por 2 m. Muitos dos sobreviventes encontram-se em estado grave em virtude da desidratação e da falta de oxigénio...”

(Notícia da BBC – “apud” Informação de Abril de 2009 da UNODC)

A) - CRIME DE AUXÍLIO À IMIGRAÇÃO ILEGAL

§ 1º. BEM JURÍDICO PROTEGIDO

1. Enunciação das posições

É discutida na doutrina e na jurisprudência a questão do bem jurídico protegido pelo crime de auxílio à imigração ilegal e a natureza deste mesmo bem jurídico, podendo distinguir-se quatro posições:

- a do interesse público de controlo dos fluxos migratórios,
- a do delito pluriofensivo,
- a da protecção dos direitos fundamentais dos estrangeiros e
- a da protecção da dignidade humana do imigrante.

Na segunda, podemos encontrar três variantes consoante a predominância dada ao interesse da protecção da ordem sócio-económica subjacente ao controlo dos fluxos migratórios.

Vejamos, muito sinteticamente, cada uma destas posições:

a) – Teoria do interesse público de controlo dos fluxos migratórios:

De acordo com esta posição, que preferimos designar pela forma enunciada, em vez de, por exemplo, teoria da protecção da soberania do Estado, com o crime de auxílio à imigração ilegal pretende-se proteger, precisamente, a soberania e a segurança daquele, em virtude de esta ser posta em causa com a violação das regras que regulam o acesso e a permanência de cidadãos estrangeiros (abrangidos pelo RJEPSAE) em território português e esta violação poder acarretar consequências graves ao nível da segurança interior.

Entende-se, com efeito, que, para além de representar um desrespeito pelo controlo dos fluxos migratórios e, por isso, do poder soberano do Estado de decidir quem entra ou não no seu território, a violação das referidas regras pode também levar à postergação do interesse sócio-económico subjacente à gestão e regulação desses fluxos, com a consequente colocação em perigo da própria segurança interior, ponderando os problemas sociais (v.g., marginalidade, delinquência, etc.) que podem ser causados, face à inexistência de alternativas no mercado de trabalho. Parecem perfilhar esta posição, entre outros, PAULO SOUSA MENDES, “Tráfico de pessoas”, em Revista do CEJ, 1.º Semestre de 2008, n.º 8 (Especial), p. 175 e os Acs. da RP, de 13/07/2005 (proc. 0540595) e da RC, de 11/10/2003 (CJ, XXXVIII, IV, 46).

b) – Teoria do delito pluriofensivo.

Conforme resulta da designação, defendem outros Autores que, com o crime em causa, não se protege apenas um bem jurídico, mas, e pelo menos, dois.

Um primeiro grupo é constituído por aqueles que, não pondo em causa a importância do referido controlo como elemento da ordem sócio-económica (bem supra-individual e de natureza imaterial), mas, e bem pelo contrário, considerando o interesse a ela relativo como bem jurídico protegido, pelas consequências que, como se viu, a violação desse controlo pode acarretar, não deixa igualmente de ponderar que, com a infracção das normas que regulam a entrada e permanência dos estrangeiros, violam-se ainda direitos básicos dos próprios imigrantes, os quais, do ponto de vista da protecção, devem considerar-se ao mesmo nível ou, pelo menos, num nível intermédio ou secundário.

Neste sentido, parece encontrar-se o Ac. do STJ, de 3 de Dezembro de 2009, proferido no proc. n.º. 187/09.7YREVR.S1, quando afirma que, no crime de auxílio à

imigração ilegal, o que está em causa é a *“necessidade de disciplinar a forma como se processa o trânsito de pessoas entre Estados e, nomeadamente, o interesse que tem o Estado em que tal fluxo obedeça a regras e disciplinas próprias”*, em virtude, inclusive, *“de obrigações comunitárias que o nosso País assumiu por força dos compromissos vigentes”*, para, logo de seguida, acrescentar que também se pretende *“evitar a situação de precariedade social e económica, quando não a própria fragilidade física, em que ficam aqueles que recorrem a instrumentos ilegais para assegurar a sua entrada no espaço nacional”*.

Já no sentido de que o controlo dos fluxos migratórios deve considerar-se como o interesse preferentemente protegido parece apontar o actual Cód. Penal Espanhol, enquanto da Parte XII do preâmbulo da Lei Orgânica 5/2010, de 22 de Junho e a propósito do *“delito de inmigración clandestina”* previsto pelo artigo 318º. bis desse Código, resulta que, com a redacção a ele introduzida pela mesma Lei, se visou, precisamente, atribuir predominância à *“defensa de los intereses del Estado”* naquele controlo, distinguindo-o, também desta forma, do de tráfico de pessoas.

Para outros, os referidos direitos já devem, pelo contrário, ser considerados prevaletentes, divergindo apenas se devem ser entendidos como pertencendo a um grupo ou como insusceptíveis de serem separados das pessoas dos seus titulares.

Numa terceira variante da teoria em causa e por último, encontram-se aqueles que, como, por exemplo, GABRIEL CATARINO e ANDRÉS PALOMO DEL ARCO, encaram o interesse no controlo dos fluxos imigratórios do ponto de vista do perigo que resulta para ele do aproveitamento dos movimentos migratórios por grupos mafiosos de criminalidade organizada, considerando que, para além desse interesse, se pretende também defender o interesse na protecção colectiva e, ao mesmo tempo, individual da liberdade, segurança e dignidade dos cidadãos estrangeiros.

c) – Teoria da protecção dos direitos fundamentais

Outros, indo ainda mais longe, rejeitam, pura e simplesmente, a defesa, por qualquer forma, do interesse relativo ao controlo dos fluxos migratórios como bem jurídico protegido e vêem este constituído pelo direito do imigrante à sua plena integração social ou por todos os direitos dele que podem ser postos em causa com o auxílio à imigração ilegal e, portanto, quer os que o estrangeiro é titular em plena igualdade com o cidadão nacional, quer os que lhe cabem enquanto entra regularmente no Estado receptor, quer os que ele pode ser titular em consequência, nomeadamente, de tratados. Também nesta posição, há quem encare a protecção como assumindo carácter individual, enquanto que outros a encaram

como supra-individual, como dizendo respeito ao interesse (colectivo) de um “grupo” (o dos cidadãos estrangeiros).

d) – Teoria da protecção da dignidade humana

Entende, finalmente, um grupo de Autores que, mais do que os direitos fundamentais do imigrante, o que está em causa é a sua própria dignidade humana, concretamente, nos casos em que, durante o processo imigratório e seja qual for a fase deste, ele é tratado como um objecto, uma mercadoria susceptível de potenciar um maior ou menor lucro.

2. Posição adoptada

Por qual das posições adoptar?

Pensamos que pela teoria do delito pluriofensivo, vendo o auxílio à imigração ilegal como um crime que protege, fundamentalmente, a dignidade e os direitos fundamentais do imigrante e, subsidiariamente, o interesse da protecção da ordem sócio-económica subjacente ao controlo dos fluxos migratórios.

Efectivamente, se antes do actual RJEPSAE se poderiam suscitar dúvidas sobre o âmbito da protecção do Dec.-Lei nº. 244/98, de 8 de Agosto, essas dúvidas dissiparam-se, senão com a punição da “intenção lucrativa”, a partir do Dec.-Lei nº. 34/2003, de 25 de Fevereiro, pelo menos, com a desse Regime.

Afigura-se-nos, com efeito, que ao mandar agravar a punição sempre que as condutas dos nºs. 1 e 2 do artigo 183º. sejam praticadas mediante transporte ou manutenção do cidadão estrangeiro em condições desumanas ou degradantes ou pondo em perigo a sua vida ou causando-lhe ofensa grave à integridade física ou a morte, o legislador português acentuou a natureza pessoal dos interesses jurídicos protegidos, deixando, assim, de lado também qualquer construção que partisse da defesa dos direitos dos cidadãos estrangeiros como bem jurídico colectivo.

É que para isto aponta não só o facto de, como bem salienta JOSÉ DE MELO ALEXANDRINO, com o auxílio à imigração ilegal poder estar-se a criar ou a criar mesmo a situação de um ser humano passar a ser ou ser tratado como um ser com menos direitos (ou mesmo um “sem direitos” ou uma pessoa cujo estatuto é o de uma “essencial sujeição”), mas também várias disposições do Regime em análise e que nos levam, como acima se começou por dizer, a considerar o tráfico ilícito de imigrantes, a par do tráfico de pessoas, indiscutivelmente um crime contra a dignidade humana, como uma das faces da mesma moeda.

§ 2º. NATUREZA

Salvo nos casos do nº. 3, o crime é de perigo abstracto, presumindo, pois, a lei (presunção “juris et de jure”), que as situações de favorecimento ou facilitação da entrada, trânsito ou permanência ilegais do cidadão estrangeiro envolvem, só por si, o perigo de virem a ser violados os direitos fundamentais deste, senão mesmo a sua dignidade como ser humano, a par da política imigratória.

Naqueles casos, já se exige algo mais, concretamente, um resultado (a provocação da ofensa grave à integridade física ou a morte), uma aptidão ou perigosidade (o transporte ou manutenção do cidadão estrangeiro em condições desumanas ou degradantes) ou a concreta ou real verificação do perigo (a colocação em perigo da vida), variando, por isso, a natureza do crime consoante a situação: crime de resultado, de aptidão ou de perigo concreto.

§ 3º. ELEMENTOS OBJECTIVOS

Como se verifica dos nºs. 1 e 2 do artigo 183º do RJEPSAE, comete o crime aquele que favorecer ou facilitar, por qualquer forma, a entrada ou o trânsito ilegais de cidadão estrangeiro em território nacional, ainda que sem intenção lucrativa e, havendo esta intenção, também no caso de o favorecimento ou a facilitação visarem a permanência do mesmo cidadão.

Havendo transporte ou manutenção do cidadão estrangeiro em condições desumanas ou degradantes ou sendo colocada em perigo a sua vida ou causadas ao mesmo a ofensa grave à integridade física ou a morte, a pena é agravada nos termos do nº. 3 do mesmo artigo.

Analisemos cada um dos elementos.

1. Cidadão estrangeiro

Conforme resulta do artigo 4º., nº. 1. do mesmo diploma, não é a qualquer cidadão estrangeiro que ele se aplica, mas apenas ao que, não sendo cidadão de um Estado-Membro da União Europeia, de um Estado Parte no Espaço Económico Europeu ou de um Estado terceiro com o qual a União tenha concluído um acordo de livre circulação de pessoas:

- não tenha residência em território nacional na qualidade de refugiado, beneficiário de protecção subsidiária ao abrigo das disposições reguladoras do asilo ou beneficiário de protecção temporária; ou
- não seja membro da família de cidadão português ou de um dos

cidadãos estrangeiros anteriormente referidos.

A delimitação é, pois, pela negativa.

E do conceito de cidadão estrangeiro poderão ainda ser excluídos, para efeito de verificação do crime, todos aqueles que vieram a ser referidos nos mecanismos a que se reporta o artigo 5º., já que as disposições do RJEPSAE, segundo o mesmo artigo, cedem perante as desses mecanismos.

2. Entrada, permanência e trânsito ilegais

a) – A entrada é ilegal quando efectuada em violação do disposto nos artigos 6º., 9º. e 10º. e nos n.ºs 1 e 2 do artigo 32 (artigo 181º., nº. 1).

Assim, e tendo em conta, por exemplo, o primeiro destes artigos, é ilegal a entrada de cidadão estrangeiro sem o controlo das autoridades portuguesas, contanto que efectuada por indivíduo provindo ou com destino a Estado que não seja Parte na Convenção de Aplicação (do Acordo de Shengen de 14 de Junho de 1985), seja porque tem lugar fora dos postos de fronteira qualificados para o efeito e durante as horas do respectivo funcionamento (sem prejuízo do disposto na Convenção, nomeadamente, no seu art. 3º., nº. 1), seja porque, tendo lugar por um destes postos, aquele se subtrai, por qualquer forma, ao referido controlo, inclusive, quando utilize um troço interno de um voo com origem ou destino em um daqueles Estados (art. 6º., nºs. 1 a 3).

Considerando, agora, a remissão do art. 181º., nº. 1, para o art. 10º., nºs. 1 e 2, também a título de exemplo, ilegal será ainda a entrada do cidadão estrangeiro que, apesar de portador de documento de viagem válido, não seja titular de visto válido e adequado à finalidade da deslocação concedido nos termos, nomeadamente, dos arts. 45º. e ss. ou pelas competentes autoridades dos Estados Partes na Convenção de Aplicação.

O que significa que, salvo nos casos dos arts. 10º., nº. 3 e 29º., para que um estrangeiro possa entrar em Portugal não basta que ele seja titular de um qualquer visto válido. É preciso ainda que tenha um visto adequado ao fim que tem em vista com a sua deslocação, sob pena de a sua entrada ser ilegal (art. 181º., nº. 1).

Sob esta perspectiva, deve ter-se por ilegal a entrada (e, como se irá ver já de seguida, a permanência) do cidadão estrangeiro que, estando dispensado de visto em determinadas condições, como sucede, v.g., com os cidadãos brasileiros que pretendam deslocar-se a Portugal para fins culturais, empresariais, jornalísticos ou turísticos (cfr. art. 7º., nº. 1, do Tratado de Amizade, Cooperação e Consulta entre a República Portuguesa e a República Federativa do Brasil), aproveitem essa dispensa para uma finalidade diferente da

que a isenção de visto permite.

Daí que nos pareça incorrecta a doutrina do Ac. da RP, de 13/07/2005, proc. 0540595, quando, perante o caso de um arguido que favorecia a entrada de cidadãs brasileiras para as colocar, *«além do mais, a trabalhar como alternadeiras no seu estabelecimento e alcançar o lucro que lhe adviria com a actividade delas»*, obviamente sem visto de trabalho, alterou a decisão da primeira instância, considerando cometido o crime de angariação de mão de obra ilegal, por, segundo se defendeu, não se poder considerar ilegal a entrada.

A doutrina que se tem como boa veio já a ser acolhida no Ac. do mesmo Tribunal de 15.02.2006 (proc. 0545889) e no Ac. da RC, de 11/10/2003, em CJ, XXVIII, 4, 46 e ss. e, diga-se, é observada em outros Países do espaço de Shengen, nomeadamente, em Espanha, onde o Supremo Tribunal do mesmo País, em sessão plenária da sua 2ª. Sala e face à ausência de uma norma como a do art. 181º., nº. 1, decidiu, por Ac. de 3/10/2005, que *“o facilitar um bilhete de ida e volta a estrangeiros que carecem de autorização de trabalho e residência em Espanha, para poder entrar em Espanha como turistas quando não o eram e pô-los a trabalhar, constitui um delito de imigração clandestina”*.

b) – A permanência, por sua vez, deve ter-se por ilegal quando não tenha sido autorizada de harmonia com o disposto no RJEPSAE ou na lei reguladora do direito de asilo, bem como quando se tenha verificado a entrada ilegal em conformidade com o nº. 1 do artigo 181º. (cfr. nº. 2 deste artigo)

Nestes termos, e porque a permanência não pode considerar-se autorizada de acordo com o RJEPSAE, deve ter-se por ilegal, como resulta do exposto, a estada de cidadão estrangeiro que, tendo entrado sem visto em consequência de um acordo do seu País com o Estado Português (por se deslocar pelo período de tempo e fins previstos nesse acordo que não o do exercício de uma actividade profissional) ou tendo obtido um visto, para um determinado fim não laboral, resolve, posteriormente, trabalhar ou manter a sua estada para além do tempo permitido.

A conduta, aliás, de quem auxilia esse cidadão não é outra senão a que o artigo 6º., nº. 1, alínea c), do referido Protocolo pretende como (segundo) objecto de tipificação criminal, ou seja e como se refere no Guia legislativo para a aplicação desse instrumento, o de incluir no crime de tráfico ilícito de imigrantes *«os casos em que o próprio esquema de introdução clandestina consiste em obter a entrada de migrantes através de*

meios legais, como a emissão de vistos de turismo ou outros, mas em que depois se recorre a meios ilegais para permitir que eles fiquem por outras razões que não as invocadas para justificar a entrada ou por mais tempo do que o permitido pelas respectivas autorizações de entrada.

O acto que tem de ser criminalizado é simplesmente toda a acção conducente a permitir a residência ilegal, quando o(s) residente(s) em causa carecem do estatuto jurídico ou das autorizações necessárias. O requisito inclui especificamente as infracções relacionadas com documentos, referidas na alínea b), mas poderia também abranger outros actos, como esconder ou dar abrigo e empregar migrantes ilegais....».

São, por outro lado, casos de permanência ilegal, em virtude de a permanência não ter sido autorizada de harmonia com o disposto no RJEPSAE, aqueles em que ela seja subsequente, v.g., à caducidade dos prazos dos vistos de trânsito (arts. 50º., nº. 2 e 67º., nº. 2) ou curta duração (arts. 51º., nº. 2 e 67º., nº. 2).

Deve, finalmente, considerar-se como ilegal, por não autorizada de acordo com a lei reguladora do direito de asilo, a permanência do estrangeiro depois de indeferido o respectivo pedido e decorrido o prazo para impugnação da correspondente decisão (arts. 11º., 21º. e 22º. da Lei nº. 27/2008).

c) – Trânsito ilegal, por último, ocorre quando o cidadão estrangeiro não tenha garantida a sua admissão no país de destino (artigo 181º., nº. 3).

E porque só se pode falar de ilegalidade de trânsito quando a entrada no país de destino não esteja garantida, deve ter-se como permanência ilegal (nos termos do art. 181º., nº. 2), a estada do cidadão estrangeiro que, sendo titular de um visto de trânsito, se mantém em Portugal para além do prazo que o legislador considerou como suficiente para que ele possa continuar a viajar em direcção ao país de destino, ou seja, o prazo de cinco dias a que se reporta o art. 50º., nº. 2.

3. Favorecer ou facilitar, por qualquer forma, a entrada, permanência ou o trânsito ilegais

Favorecer é possibilitar, servir, dar ajuda, apoio ou protecção à entrada, permanência ou trânsito do cidadão estrangeiro.

Assim, haverá favorecimento, por exemplo, se o agente actua como intermediário ou, sabendo que no navio, de que é piloto, se esconderam pessoas que pretendem imigrar, deixa-as manter escondidas e entrar no país de destino.

Facilitar a entrada, a permanência ou o trânsito, por sua vez, é remover obstáculos ou facultar meios para que sejam possíveis estes actos, intervir para que eles tenham lugar ou sejam conseguidos, inclusive, através da cooperação na realização ou execução deles -- o que, no fundo, vem a traduzir-se numa modalidade de favorecimento (em sentido amplo).

É o que acontece, por exemplo, quando o agente transporta o cidadão estrangeiro, colabora através da vigilância da fronteira, indicando-lhe a melhor altura para a entrada ou lhe paga as viagens, ainda que mais tarde venha a descontar o respectivo preço nas remunerações que, porventura, venha a pagar-lhe ou falsifica o passaporte, para ele poder entrar em Portugal.

É indiferente que o favorecimento ou a facilitação tenham lugar directa ou indirectamente. A lei não distingue, nem há razões para distinguir. Antes, refere expressamente que essas acções podem ter lugar “*por qualquer forma*”.

E também é indiferente que elas ocorram no início ou durante o desenvolvimento do processo de imigração. O que importa é que digam respeito a situações de entrada, permanência ou trânsito que se processem em condições de ilegalidade e, pelo menos, nos casos de permanência, adiante-se, desde já, que às mesmas acções presida o “*animus lucrandi*”.

Há facilitação ou favorecimento directos quando o agente realiza qualquer das acções juridicamente relevantes. A facilitação ou o favorecimento serão indirectos quando haja uma participação em cadeia, isto é, quando se leva a cabo um acto no processo de imigração ilegal a que, por sua vez, também se segue uma participação no facto típico: pede-se a intervenção de outro para que ajude ou incite outrem a ajudar numa determinada fase ou em determinadas fases do processo de imigração ilegal, conhecendo-se os intervenientes. Devem, por isso, ser punidos como autores o angariador do cidadão estrangeiro, o que se limita, depois, a contactá-lo, indicando-lhe as condições de entrada, trânsito ou permanência, o que o introduz no território nacional, recorrendo à intervenção de um terceiro, este próprio se souber que a sua intervenção é um patamar do processo do auxílio à imigração ilegal, etc., etc.,

Em resumo, favorecer ou facilitar (de forma directa ou indirecta), são formas de participação na acção típica que, normalmente, seriam encaradas como acessórias, mas que o legislador, face à necessidade de reprimir o tráfico ilícito de imigrantes, entendeu elevar à categoria de autoria, o que não significa que, por isso, deixe de ser admissível a cumplicidade, aliás, uma exigência dos artigos 2º., al. b), da Directiva 2002/90/CE e 6º., nº. 2,

al. b), do Protocolo Adicional à Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional contra o Tráfico Ilícito de Migrantes por Via Terrestre, Marítima e Aérea, a par da autoria mediata...

4. Transportar ou manter o cidadão estrangeiro em condições desumanas

É proporcionar condições inapropriadas a todo e qualquer ser humano, tratar o cidadão estrangeiro como uma coisa, como um simples meio para a obtenção de um fim, negando-lhe, desta forma, a sua integridade moral, o seu direito a ser tratado como pessoa, o que, normalmente, anda associado à sua sujeição a sofrimentos físicos ou psíquicos de especial intensidade (por exemplo, transportá-lo em condições gélidas ou de elevadíssimo calor; transportar várias pessoas num compartimento com largura insuficiente, de modo que uns fiquem em cima dos outros) ou à falta de compaixão (Acs. do STJ, de 28-05-1998, proc. nº. 209/98, in “Sumários dos Acórdãos do Supremo Tribunal de Justiça”, Bol. 21º e 30-04-2008, proc. nº. 07P3331).

5. Transportar ou manter o cidadão estrangeiro em condições degradantes

É sujeitá-lo a circunstâncias humilhantes ou de aviltamento, que o rebaixam, desprezam, o reduzem à situação de um mero objecto, de tal forma sem o mínimo de condições que o cidadão comum não as aceitaria (v.g., transportá-lo em condições de higiene e saúde deploráveis, nomeadamente, juntamente com animais, levá-lo a pernoitar numa pocilga).

Aqui o que está em causa é mais a humilhação, o rebaixamento e não tanto o sofrimento físico.

6. Pôr em perigo a vida do cidadão estrangeiro

Como resulta da própria expressão, o perigo tem de verificar-se, ser real, efectivo.

Por outro lado, o perigo há-de resultar dos próprios factos típicos e não das condições de transporte ou manutenção.

O preceito é claro a este respeito: “se os *factos forem praticados (...)* *pondo em perigo...*”.

O que, porém, não significa que essas condições sejam irrelevantes

É que, tanto a entrada ou o trânsito, como a permanência, podem ter na sua base meios de tal modo perigosos que o perigo efectivo se deve ter por conatural aos mesmos, absolutamente inseparável deles, de tal forma que a sua utilização nunca pode deixar de envolver a sua concreta verificação e, desta forma, ter-se o mesmo como concretamente verificado e demonstrado por essa utilização.

Assim, e por exemplo, ninguém contestará que, sendo o cidadão estrangeiro transportado em condições elevadas de humidade e com temperaturas negativas, o perigo deve ter-se por verificado.

7. Causar ao cidadão estrangeiro uma ofensa grave à integridade física ou a morte

O conceito de ofensa grave à integridade física é dado, como é sabido, pelo artigo 144º. do Cód. Penal, pelo que para ele remetemos.

§ 4º. ELEMENTO SUBJECTIVO

No crime do nº. 1, basta o dolo genérico em qualquer das suas modalidades, inclusive, o dolo eventual, o que sucederá, por exemplo, se aquele que fornece transporte ao cidadão estrangeiro prevê a possibilidade de ele não estar autorizado a entrar em Portugal, considerando-a indiferente para a realização da acção.

No do nº. 2, porém, já se torna necessário o “animus lucrandi”, não sendo, por isso, possível, o dolo eventual. Age com este “animus” aquele que procede com o objectivo de obter uma vantagem, uma contraprestação, um benefício ou ganho na realização de qualquer das actividades previstas pelo tipo, seja ele financeiro ou económico (como sucede, por exemplo, quando o agente transporta gratuitamente um dos cidadãos estrangeiros que o ajuda a manter a ordem no seio dos demais), seja outro de natureza material (para utilizarmos a expressão do art. 3º., al. a), do Protocolo contra o Tráfico Ilícito de Migrantes por Via Terrestre, Marítima e Aérea).

É irrelevante que o agente venha a obter, efectivamente, o benefício e, muito mais, que ele seja obtido directa ou indirectamente.

O fundamento da agravante, alicerçado nos instrumentos internacionais a que já fizemos referência, está, não tanto (ou tão só) na maior reprovabilidade da conduta de quem, com o crime, pretende obter um interesse financeiro ou económico, mas, e como também já se disse, na defesa do pessoa do estrangeiro, com tudo o que esta defesa envolve

ao nível dos seus direitos fundamentais e da sua própria dignidade como ser humano.

E foi também, sobretudo, esta defesa, a par da respeitante ao poder do Estado de decidir quem deve permanecer no seu território em conformidade com as regras que estabelece, que levou o legislador português, em cumprimento dos mesmos instrumentos – particularmente, dos artigos 1º., alínea b), da Directiva 2002/90/CE e 6º., nº. 1, al. c), do Protocolo Adicional à Convenção de Palermo contra o Tráfico Ilícito de Migrantes por Via Terrestre, Marítima e Aérea (no mesmo sentido) –, a punir o auxílio à permanência ilegal de cidadão estrangeiro sempre que (e só quando) a ele presida o “animus lucrendi”, independentemente, da importância do acto destinado a possibilitar essa permanência.

Daí que não tenhamos como válida a doutrina do Ac. da RC, de 11-10-2006, proc. nº. 8/00.6ZRCBR.C1, quando pretende restringir o tipo de modo a não considerar por ele abrangidos casos como o que analisou, ou seja, o de indivíduos que, com manifesto intuito lucrativo, alojavam e procuravam arranjar e arranjavam mesmo emprego a cidadãos estrangeiros que sabiam não ter visto de trabalho e que, por vezes, eram por eles esperados à chegada a Portugal, onde entravam sem auxílio

Verificando-se qualquer das agravantes do nº. 3, não pode o dolo ou, pelo menos, a negligência, relativamente a qualquer dos resultados da parte final do mesmo preceito (cfr. art. 18º. do CP), deixar de abranger a circunstância ou circunstâncias que estiverem em causa, dolo que pode ser, inclusive, o eventual mesmo no crime de perigo concreto aí previsto, contanto, como é óbvio, o agente preveja a verificação do perigo para a vida do cidadão estrangeiro, nomeadamente, pelas condições que lhe faculta para o transporte e se conforme com essa verificação.

§ 5º. CONSUMAÇÃO

Para que o crime se possa ter por consumado não basta que o agente favoreça ou facilite a entrada, o trânsito ou permanência ilegais do cidadão estrangeiro, antes se tornando necessário que este venha a entrar, a transitar ou permanecer em território nacional, pelo que, enquanto não se verificar qualquer destes actos, estar-se-á perante uma forma imperfeita da sua execução.

§ 6º. TENTATIVA

É sempre punível (nº. 4 do artigo 183º.).

Trata-se de uma exigência do art. 2º., al. c), da Directiva 2002/90/CE, bem como do art. 6º., nº. 2, al. a), do Protocolo Adicional à Convenção de Palermo contra o Tráfico Ilícito de Migrantes por Via Terrestre, Marítima e Aérea.

§ 7º. SUJEITO ACTIVO

Pode ser qualquer pessoa, inclusive, um estrangeiro ilegal (que auxilia outro), um estrangeiro a que não se aplique o RJEPSAE ou uma pessoa colectiva ou entidade equiparada (quanto a estas, art. 182º., nº. 1), não sendo preciso que o agente pratique todos os actos conducentes à entrada, permanência ou trânsito do imigrante.

Basta que ele intervenha em qualquer das múltiplas tarefas que sejam necessárias à realização da respectiva acção, pelo que, como resulta do que acima se disse, não pode deixar de ser punido pelo crime aquele que se limita a financiar a operação, a arranjar a embarcação onde devem ser transportados os imigrantes, a pilotar esta, a actuar como intermediário, como transportador, etc.

§ 8º. SUJEITO PASSIVO

Para além do Estado (português) e da própria União Europeia, o estrangeiro a quem o RJEPSAE seja aplicável e seja, como é óbvio, vítima de uma das acções a que fizemos referência.

§ 9º. UNIDADE E PLURALIDADE DE INFRACÇÕES

1. Aceitando-se que, com o crime em análise, protegem-se, prevalentemente, bens jurídicos pessoais, o número de crimes deve sempre ser determinado pelo número de cidadãos estrangeiros cuja entrada, trânsito ou permanência ilegais o agente favoreça ou facilite, só se podendo falar, conseqüentemente, da possibilidade de crime continuado relativamente ao mesmo cidadão que seja vítima do crime (cfr. art. 30º., nº.s. 1 e 2, do Cód. Penal) .

2. O crime pode estar em concurso aparente com o de tráfico de pessoas, caso em que se deve recorrer ao princípio da consunção para o resolver.

O concurso já será, porém, real se o tráfico for posterior ao auxílio à imigração ilegal, independentemente de o agente de ambos os crimes ser ou não o mesmo.

Casos de concurso real são também os do concurso do crime, por exemplo, com os de lenocínio, extorsão (como forma de obtenção do pagamento exigido pela

introdução ilegal do estrangeiro no País), tráfico ilícito de estupefacientes, contrabando ou associação criminosa para o auxílio à imigração ilegal (cfr. Ac. do STJ, de 3/12/2009), face à diversidade de bens jurídicos protegidos.

B) - CRIME DE ASSOCIAÇÃO DE AUXÍLIO À IMIGRAÇÃO ILEGAL

Se há crime onde, na nossa opinião, mais se faz sentir a eficácia interpretativa dos instrumentos que apontámos como fontes, particularmente, a Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional (na medida em que a Acção Comum 98/733/JAI, apesar de anterior à aprovação da mesma Convenção, não deixou de pretender ir de encontro às conclusões a que vinham, entretanto, chegando, entre outros, os grupos de trabalho daquela Convenção), é, precisamente, o do artigo 184º. do RJEPSAE, que, só por esse facto, não pode deixar de ser visto como um crime especial, sobretudo, se se continuar a enveredar por uma interpretação restritiva do artigo 299º. do Cód. Penal e, desta forma, a não atribuir relevo às alterações a ele introduzidas pela Lei n.º 59/2007 de 4 de Setembro e ao objectivo que presidiu às mesmas.

Mas analisemos o crime de associação de auxílio à imigração ilegal.

§ 1º. BEM JURÍDICO PROTEGIDO

Como resulta, claramente, da epígrafe do artigo e do disposto no seu n.º. 1, apenas se punem os grupos, organizações ou associações que tenham por fim o auxílio à imigração ilegal, em qualquer das modalidades que o crime do art. 183º. pode revestir (favorecimento ou facilitação à entrada ou trânsito ilegais, com ou sem intenção lucrativa ou permanência ilegal, com esta intenção) e com ou sem qualquer das agravantes nele previstas.

O tipo está, pois, estritamente, ligado ao desse ilícito e já não, por exemplo, ao do art. 186º., que prevê o de casamento por conveniência.

Daí que os bens jurídicos protegidos pelo crime do art. 183º. se reflectam no dele e, deste modo, levem ao entendimento de que, para além do interesse social comum a todos os crimes de associação criminosa de evitar o perigo para a paz pública que advém do crime organizado, com a conseqüente garantia não só da soberania do Estado, mas também da segurança interna e, desta forma, como contributo para a efectiva existência de um espaço (comum) de liberdade, segurança e justiça, com o presente crime de associação criminosa pretende-se igualmente obviar aquele outro perigo que, também em abstracto, mas, agora, para o grupo dos cidadãos estrangeiros, resulta da actuação de grupos criminosos tendo por objecto a imigração ilegal (ainda que como actividade secundária), nomeadamente, ao nível

da sua liberdade, segurança e dignidade, obstando-se, por via disso, ao aproveitamento das situações que os levam a imigrar e que, neste aproveitamento, os mesmos sejam tratados, sobretudo, como simples mercadoria, com evidente lesão da sua integridade moral e da sua dignidade como seres humanos.

§ 2º. NATUREZA

Como resulta do que se acaba de expor, crime de perigo abstracto.

§ 3º. ELEMENTOS OBJECTIVOS

São elementos constitutivos objectivos do crime de associação de auxílio à imigração ilegal:

- a) - a existência de um grupo, organização ou associação (elemento organizativo) e
- b) – a actividade (fim) de favorecimento ou facilitação, por parte do mesmo grupo, organização ou associação, da entrada ou trânsito ilegais de cidadãos estrangeiros (nos termos que definimos), com ou sem intenção lucrativa ou, existindo esta intenção, da permanência ilegal dos mesmos cidadãos (elemento finalístico).

1. Conceito de grupo, organização ou associação

Estamos perante um grupo, organização ou associação destinados à realização do referido fim sempre que diversas pessoas se unam para o concretizarem, acordem na sua realização, seja o acordo explícito, isto é, revelado por uma clara manifestação de vontade nesse sentido, ou implícito e, portanto, ainda que ele apenas se deduza das actividades univocamente reveladoras da união (por exemplo, pluralidade de crimes praticados por um grupo de indivíduos da mesma forma, nomeadamente, ao nível da utilização de meios ou da distribuição de tarefas).

Se, para o efeito, bastam duas pessoas, como sucede, ainda hoje, relativamente ao crime de associação criminosa do art. 28º. do Decreto-Lei n.º 15/93, de 22 de Janeiro (Lei da Droga) ou se são necessárias, pelo menos, três, como exige o art. 299º., n.º. 5, do Cód. Penal, desde a redacção da Lei n.º 59/2007, é questão que o artigo não esclarece.

Pensamos, porém, que, sendo o crime em causa o resultado do cumprimento das exigências dos instrumentos internacionais acima referidos, mal se compreenderia outra solução interpretativa que não a da conformidade com os mesmos instrumentos.

Daí que, exigindo estes instrumentos, concretamente e então, o artigo 1º., da Acção Comum de 21 de Dezembro de 1998 e o artigo 2º., alínea a), da Convenção de Palermo, mais de duas pessoas, na expressão do primeiro (e corrigindo o erro de tradução de que enferma a versão portuguesa) ou “*três ou mais pessoas*”, nas palavras do segundo, se torne necessário o acordo de, pelo menos, três pessoas, para que estejamos perante um grupo, organização ou associação.

E porque há que efectuar uma interpretação conforme do artigo 184º. com os mesmos instrumentos, já não se deve exigir que, da referida união, nasça “*uma realidade autónoma, diferente e superior às vontades e interesses dos singulares membros*” ou, como também se diz, “*um centro autónomo de imputação fáctica das acções prosseguidas em nome e no interesse do conjunto*”, centro este que há-de também ser um centro de motivação .

Basta, conforme resulta dos mesmos instrumentos, que o agrupamento tenha apenas alguma estrutura, isto é e utilizando a definição do art. 2º., al. c), da Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional, que seja formado de maneira não fortuita para a prática imediata de uma infracção e cujos membros não tenham necessariamente funções formalmente definidas, podendo não haver continuidade na sua composição nem dispor de uma estrutura desenvolvida.

E que é este o sentido que se deve atribuir, resulta não só da letra dos instrumentos em causa, mas também de posições das Instituições que os produziram, concretamente, e no que concerne à Acção Comum, da Posição Comum de 29 de Março de 1999 definida pelo Conselho com base no artigo K.3 do TUE, relativa à proposta de convenção das Nações Unidas contra a criminalidade organizada e, quanto à Convenção, das reuniões do Comité Especial intergovernamental criado pela Resolução da Assembleia-Geral das Nações Unidas nº. 53/111, de 9 de Dezembro de 1998, para a elaboração do projecto que veio a dar origem à mesma Convenção, como evidencia, por exemplo, a nota 2 inserida pela Secretaria-Geral das Nações Unidas nos Trabalhos Preparatórios das Negociações da Convenção em causa e seus Protocolos (com a força interpretativa do já citado artigo 32º. da Convenção de Viena sobre o Direito dos Tratados, assinada em 23 de Maio de 1969).

Aí, com efeito, e a propósito, precisamente, da discussão sobre o que deveria entender-se por “*grupo estruturado*” e a alteração da redacção do actual texto da Convenção utilizado para o definir, decidiu-se que os referidos trabalhos deveriam incluir uma nota interpretativa que esclarecesse que essa expressão “*devia ser utilizada num sentido amplo para que inclísse tanto os grupos com uma estrutura hierarquizada ou outro tipo de*

estrutura complexa como a dos grupos não hierarquizados nos quais não é necessário definir expressamente a função dos seus membros”, para, depois, se acrescentar que “não é necessário que haja continuidade na composição do grupo”, embora o “termo” já não inclua “os grupos formados especialmente para a comissão imediata de um delito, por exemplo os grupos constituídos ocasionalmente no decurso de um distúrbio da ordem pública” .

No mesmo sentido, e já no “Guia Legislativo para a Aplicação da Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional e seus Protocolos”, versão de 2004 da Divisão para Assuntos de Tratados do Gabinete das Nações Unidas contra a Droga e o Crime, mais precisamente, no seu n.º 28, salienta-se que “*‘grupo estruturado’ não corresponde necessariamente às características de um tipo oficial de organização, com uma estrutura (...) e uma definição dos papéis e funções dos seus membros*”, abarcando, desta forma, a norma “*todos os casos de delitos que impliquem algum elemento de preparação organizada*”.

Ainda no mesmo sentido, e a não se quererem extrair consequências da alteração do artigo 299.º., enquanto através dela se quis estabelecer o traço distintivo entre participação e associação criminosa no período temporal da acção concertada (e não, portanto, na criação ou não de uma realidade autónoma a funcionar como centro de motivação e imputação) encontra-se a Decisão-Quadro 2008/841/JAI, ao adoptar um conceito semelhante ao da Convenção de Palermo, colmatando, assim, a lacuna que existia na Acção Comum no que concerne ao conceito de “*associação estruturada*”.

Em suma, e pelo menos para efeitos do artigo 184.º., a expressão “*grupo, organização ou associação*” deve ser entendida num sentido amplo, dispensando-se requisitos mais compatíveis com a referida “*realidade autónoma*” como seja a hierarquia, a definição das funções de cada membro e a própria continuidade na composição, tão essencial à solidez e coesão necessárias à existência dessa realidade.

No conceito de “*grupo, organização ou associação*” (do artigo em análise) – e por força dos instrumentos internacionais que se fizeram referência –, cabem, assim, não só as verdadeiras organizações criminosas, nomeadamente, aquelas que dispõem de uma estrutura sofisticada, de cariz ou não transnacional e em que os seus fins são o produto de uma série de comportamentos humanos, dificilmente imputáveis a determinadas pessoas, surgindo os crimes praticados como meio de alcançar (apenas) o lucro económico, mas também as próprias associações ou grupos que, por exemplo, trabalhos legislativos como o Projecto de Resolução Legislativa do Parlamento Europeu sobre a Proposta de Decisão-Quadro do Conselho relativa à luta contra a criminalidade organizada [a Proposta

(COM(2005)0006)], posteriormente aprovado pela Resolução de 26 de Outubro de 2005 [Resolução P6_TA(2005)0405)], designam como “associações de malfeitores” para as distinguirem das anteriores (cfr. justificação da alteração 10), já que, também estas, põem igualmente em causa o “espaço de liberdade, justiça e segurança”, contribuindo, inequivocamente, para a falta ou diminuição do controlo de pessoas e vigilância eficaz da passagem das fronteiras externas e, “ipso facto”, para uma não menos eficaz gestão dos fluxos migratórios (inclusive, do ponto de vista da paz pública e da segurança), quer como política comum dos Estados-Membros, quer como política interna de cada um dos mesmo Estados.

Trata-se, na nossa opinião, da única posição compatível com o princípio da interpretação conforme, pelo que, pelo menos, em matéria de tráfico ilícito de imigrantes, se impõe o abandono da interpretação restritiva que, nos últimos anos, tem sido predominante no nosso ordenamento jurídico, a qual, precisamente, por não passar de uma interpretação, não pode ser invocada contra a aplicação daquele princípio.

2. Finalidade do grupo, organização ou associação

Como resulta do exposto e do artigo 184º., a actividade da associação deve traduzir-se na prática de crimes de auxílio à imigração ilegal.

Não de um só, de apenas uma actividade que se esgote numa conduta de auxílio ilegal determinada, mas de uma pluralidade de “auxílios” a efectuar, pois, de outra forma, estar-se-á perante uma situação de comparticipação.

Aliás, também a este respeito os apontados instrumentos internacionais são claros.

E, tal como o artigo, também o são quando não exigem que o grupo tenha em vista uma modalidade de crime. Assim, e tendo em conta que apenas os referidos crimes podem ser os ilícitos fins da associação criminosa do artigo em causa, esta não deixa de existir ainda que seja constituída apenas para favorecer ou facilitar a permanência ilegal de cidadãos estrangeiros e não, v.g., a sua entrada.

§ 4º. ELEMENTO SUBJECTIVO

Basta o dolo genérico em qualquer das suas modalidades (art. 14º. do CP)

§ 5º. SUJEITO ACTIVO

Sujeito activo pode ser qualquer pessoa (imputável), inclusive, um cidadão estrangeiro que não esteja autorizado a entrar, transitar ou permanecer em Portugal.

Por força do art. 182º., nº. 1, as pessoas colectivas e entidades equiparadas são também criminalmente responsáveis, traduzindo a sua punição o cumprimento das exigências dos arts.10º. da Convenção e 3º. da Acção Comum 98/733/JAI.

§ 6º. SUJEITOS PASSIVOS

Sujeitos passivos são o Estado Português e a própria União Europeia enquanto interessada no desenvolvimento e protecção do espaço de liberdade, de segurança e de justiça, a partir da competência partilhada com Portugal e das políticas comuns por ela criadas em termos, nomeadamente, do combate à imigração ilegal: cfr. arts. 3º., nº. 2, da versão consolidada do TUE e 4º., nº. 2, al. j), 67º. e ss. e 77º. e ss. (dentre estes, art. 79º., sobretudo) da versão consolidada do TFUE

§ 7º. FORMAS DE PARTICIPAÇÃO

O artigo distingue diversas formas de participação, mais precisamente, entre:

- o fundador (nº. 1),
- o que “faz parte” (nº. 2) e
- o chefe (nº. 3).

Não há diferenças relativamente ao artigo 299º. do CP, já abundantemente tratado na doutrina e jurisprudência, razão pela qual nos dispensamos de tecer quaisquer considerações.

Apenas diremos e já no que concerne à comparticipação, que, ao invés do que defendem alguns autores, se deve admitir a cumplicidade, já que a situação não deve ser encarada apenas do ponto de vista das acções em si de fazer parte ou chefiar, mas também enquanto através das mesmas acções se contribui para a existência do grupo, organização ou associação e se mantém, portanto, a prática do crime, independentemente da execução das actividades criminosas a que a associação se destine e do tipo de actividade concretamente realizada.

§ 8º. CONSUMAÇÃO

O crime consuma-se logo que o grupo, organização ou associação sejam criados, não sendo necessário o cometimento de qualquer crime.

Para os que deles venham, posteriormente, a fazer parte, a consumação tem lugar com a sua entrada.

Porque se está perante um crime permanente, a consumação só cessa quando a união deixe de existir (ainda que por o número de pessoas deixar de ser o mínimo exigível), sem prejuízo de a acção de cada um dos membros dever ter-se por terminada no preciso momento em que a sua vontade deixe de convergir para aquela (mesmo que a associação prossiga com outros) e, portanto, logo que a situação antijurídica resultante da sua (constante) intervenção deixe de persistir.

Havendo, em qualquer dos casos, sucessão de leis penais, deverá ser aplicável a vigente no momento da cessação da consumação, por a prática do crime ter persistido durante a sua vigência.

§ 9º. CONCURSO COM OUTROS CRIMES

Face à diversidade de bens jurídicos protegidos, não há que falar de concurso aparente entre, por exemplo, o crime de associação de auxílio à imigração ilegal e o de auxílio à imigração ilegal, razão pela qual se deve ter o concurso como efectivo (cfr. Ac. do STJ, de 3 de Dezembro de 2009, proc. nº. 187/09.7YREVR.S1).





**PROTOCOLO ADICIONAL À CONVENÇÃO
DAS NAÇÕES UNIDAS CONTRA A
CRIMINALIDADE ORGANIZADA
TRANSNACIONAL**

**RELATIVO À PREVENÇÃO, À REPRESSÃO
E À PUNIÇÃO DO TRÁFICO DE
PESSOAS, EM ESPECIAL DE
MULHERES E CRIANÇAS**

**ACÇÃO COMUM 98/733/JAI, DE 21 DE
DEZEMBRO DE 1998**

**RELATIVA À INCRIMINAÇÃO DA PARTICIPAÇÃO
NUMA ORGANIZAÇÃO CRIMINOSA NOS
ESTADOS-MEMBROS DA UNIÃO EUROPEIA**

**DIRECTIVA 2002/90/CE DO CONSELHO
DE 28 DE NOVEMBRO DE 2002**

**RELATIVA À DEFINIÇÃO DO AUXÍLIO À ENTRADA, AO
TRÂNSITO E À RESIDÊNCIA IRREGULARES**

**DECISÃO-QUADRO 2002/946/JAI DO
CONSELHO, DE 28 DE NOVEMBRO
DE 2002**

**RELATIVA AO REFORÇO DO QUADRO PENAL PARA A
PREVENÇÃO DO AUXÍLIO À ENTRADA, AO
TRÂNSITO E À RESIDÊNCIA IRREGULARES**

**DECISÃO-QUADRO 2008/841/JAI
DO CONSELHO, DE 24 DE
OUTUBRO DE 2008**

**RELATIVA À LUTA
CONTRA A CRIMINALIDADE ORGANIZADA**



**PRINCÍPIO DA
INTERPRETAÇÃO CONFORME**





**DIREITO INTERNACIONAL
CONVENCIONAL**
(princípio da interpretação conforme)

- Eficácia do Direito Internacional na ordem jurídica interna de cada Estado
- A natureza "estatista" do Direito Penal
- A não recepção do direito internacional como direito constitucional

DIREITO INTERNACIONAL CONVENCIONAL

(princípio da interpretação conforme)

- Os instrumentos internacionais não contém tipos penais
- O artigo 8º. da Constituição da República Portuguesa:
 - ✓ Incorporação automática das normas e princípios de direito internacional geral ou comum (nº. 1)
 - ✓ Vigência na ordem interna das normas constantes de convenções internacionais regularmente ratificadas ou aprovadas (nº. 2)
- ✓ Prevalência do direito internacional convencional, enquanto vincular o Estado Português

DIREITO INTERNACIONAL CONVENCIONAL

(princípio da interpretação conforme)

- Princípio da interpretação conforme com o direito internacional convencional, tanto do direito interno posterior e, sobretudo, do que é uma transposição dele, como do anterior, sob pena de o preceito penal dever ser tido como ilegal





DIREITO COMUNITÁRIO

(princípio da interpretação conforme)

➤ Concretamente:

- Ac. de 8.10.1987, proferido no processo 80/86 (caso contra Kolpinghuis Nijmegen BV), em matéria de Directivas;
- Ac. de 07.01.2004, proferido no processo C-60/02 (caso suscitado pelo Tribunal Regional de Eisenstadt (Austria), no âmbito de um processo penal, nele instaurado, por contrafacção de marcas), no que concerne aos Regulamentos e
- Acórdão de 16.06.2005, proferido no processo C-105/03 (caso contra Maria Pupino, em relação às Decisões-Quadro.



DIREITO COMUNITÁRIO

(princípio da interpretação conforme)

➤ Duas das questões colocadas no primeiro processo:

- Quando um órgão jurisdicional nacional é chamado a interpretar uma norma de direito nacional, deve ou pode, para tal interpretação, guiar-se pelo conteúdo de uma directiva aplicável?
- A resposta à questão anterior será diferente se o prazo fixado para a adaptação da legislação nacional pelo Estado-Membro em questão ainda não tiver expirado quando o Tribunal nacional é chamado a pronunciar-se?



DIREITO COMUNITÁRIO

(princípio da interpretação conforme)

➤ Respostas:

- Ao aplicarem o direito nacional, todas as autoridades, inclusive, as jurisdicionais, devem interpretá-lo à luz do texto e dos objectivos da Directiva relativa ao caso, ainda que não tenha terminado o prazo para a sua transposição a data em que são chamadas a intervir ou ela tenha sido transposta deficientemente, salvo se a interpretação conduzir a um resultado contrário aos princípios gerais de direito que fazem parte do direito comunitário, designadamente os da segurança jurídica e da não retroactividade



DIREITO COMUNITÁRIO

(princípio da interpretação conforme)

- Acórdão do processo de contrafacção de marcas do Tribunal Regional de Eisenstadt, relativo à aplicação do Regulamento (CE) n.º 3295/94 do Conselho, de 22.12.1994:
 - É também afirmada “a obrigação de interpretação conforme do direito nacional, à luz do texto e da finalidade do direito comunitário, para atingir o resultado” por este prosseguido, salvo nos casos em que é criada ou agravada a responsabilidade penal de quem viole as prescrições do regulamento



DIREITO COMUNITÁRIO

(princípio da interpretação conforme)

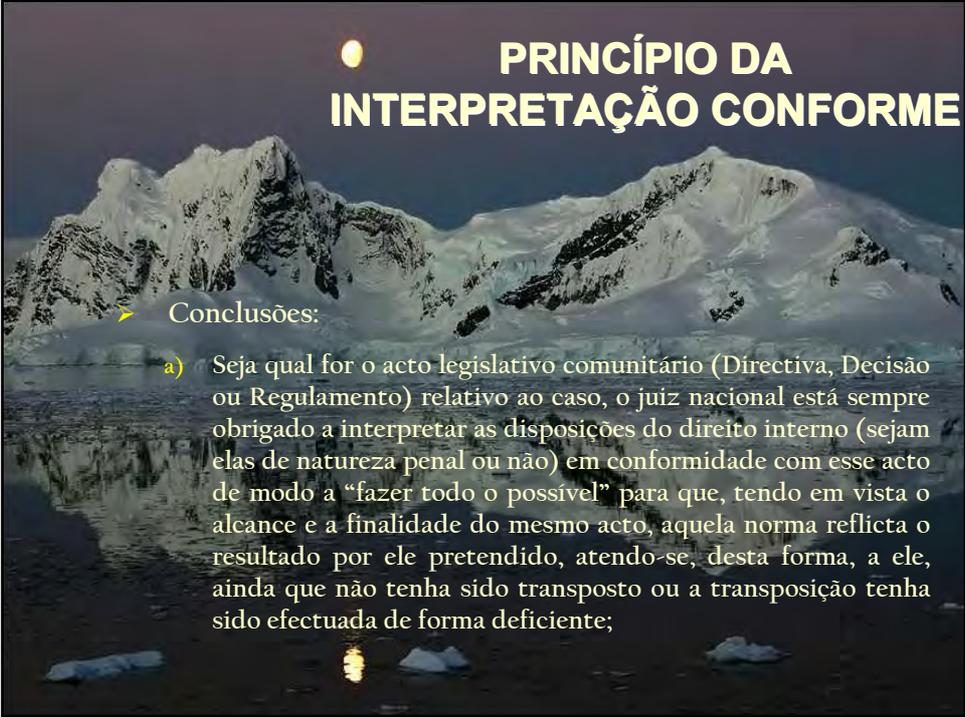
- Acórdão sobre o caso “Maria Pupino”:
 - Assume relevo tanto para o Direito Processual Penal, como para o Direito Penal Substantivo, apesar de recair sobre um caso daquele;
 - Defende a obrigação de os órgãos jurisdicionais nacionais respeitarem o princípio da interpretação conforme, inclusive, quanto às Decisões-Quadro e, desta forma, de interpretarem o direito interno, “na medida do possível, à luz do teor e da finalidade” dessas Decisões, a fim de atingirem o resultado por elas visado, conformando-se, assim, com ele.



DIREITO COMUNITÁRIO

(princípio da interpretação conforme)

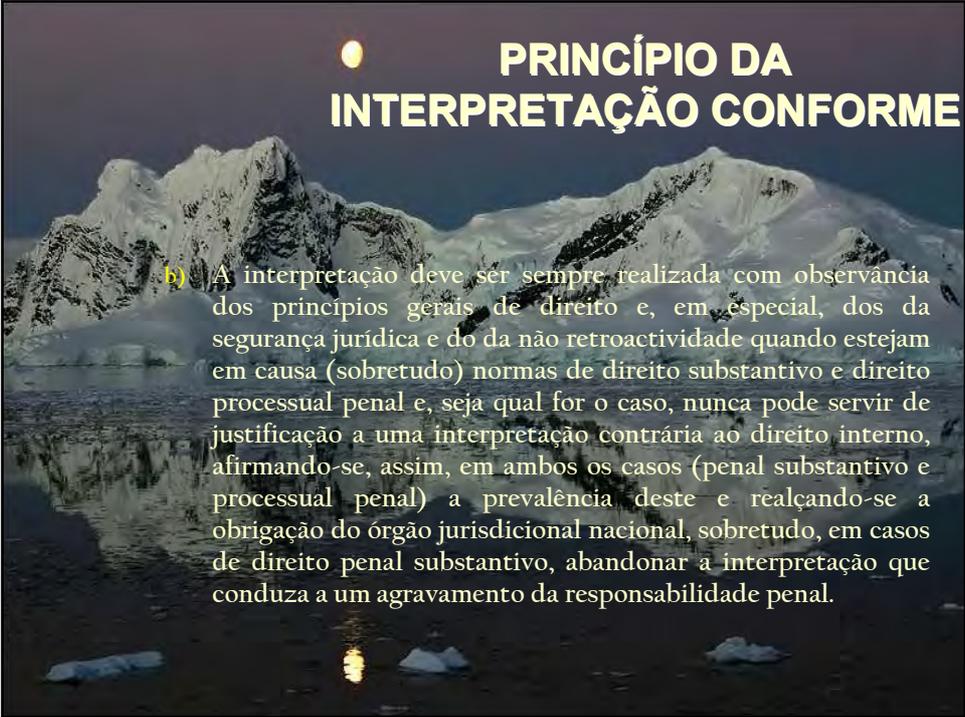
- Acórdão sobre o caso “Maria Pupino” (continuação):
 - Ressalva, porém, a interpretação “contra legem” do direito nacional
 - Reafirma a distinção que, sempre, se deve fazer entre a aplicabilidade das disposições do acto legislativo comunitário enquanto tais ao caso concreto (impossível nas Decisões-Quadro, por não terem efeito directo) e o uso do princípio da interpretação conforme.



PRINCÍPIO DA INTERPRETAÇÃO CONFORME

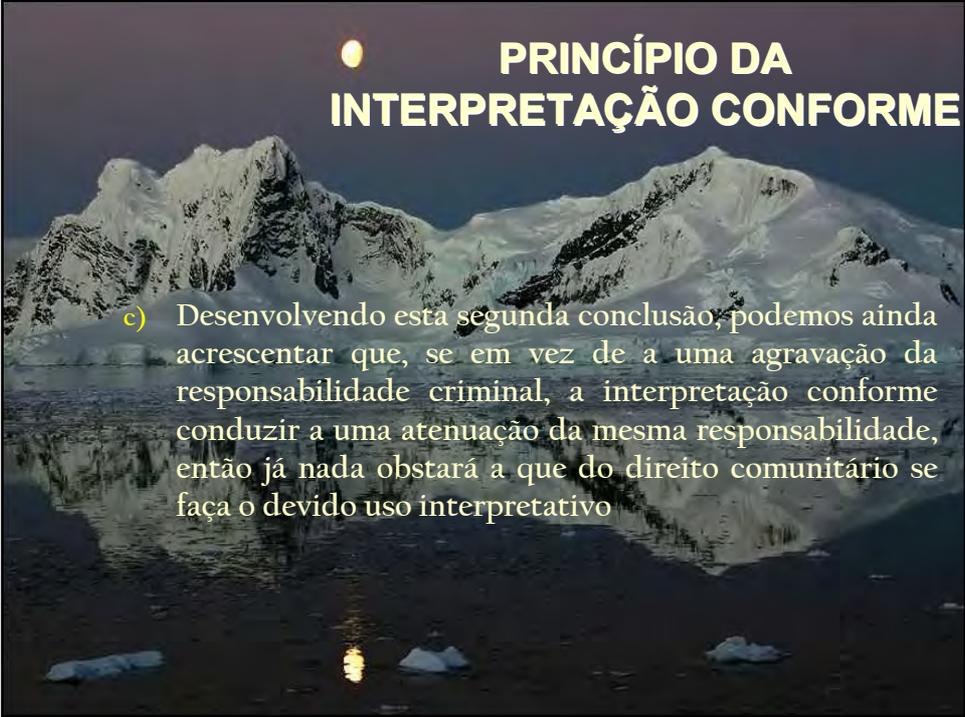
Conclusões:

- a) Seja qual for o acto legislativo comunitário (Directiva, Decisão ou Regulamento) relativo ao caso, o juiz nacional está sempre obrigado a interpretar as disposições do direito interno (sejam elas de natureza penal ou não) em conformidade com esse acto de modo a “fazer todo o possível” para que, tendo em vista o alcance e a finalidade do mesmo acto, aquela norma reflecta o resultado por ele pretendido, atendo-se, desta forma, a ele, ainda que não tenha sido transposto ou a transposição tenha sido efectuada de forma deficiente;



PRINCÍPIO DA INTERPRETAÇÃO CONFORME

- b) A interpretação deve ser sempre realizada com observância dos princípios gerais de direito e, em especial, dos da segurança jurídica e do da não retroactividade quando estejam em causa (sobretudo) normas de direito substantivo e direito processual penal e, seja qual for o caso, nunca pode servir de justificação a uma interpretação contrária ao direito interno, afirmando-se, assim, em ambos os casos (penal substantivo e processual penal) a prevalência deste e realçando-se a obrigação do órgão jurisdicional nacional, sobretudo, em casos de direito penal substantivo, abandonar a interpretação que conduza a um agravamento da responsabilidade penal.



PRINCÍPIO DA INTERPRETAÇÃO CONFORME

- c) Desenvolvendo esta segunda conclusão, podemos ainda acrescentar que, se em vez de a uma agravação da responsabilidade criminal, a interpretação conforme conduzir a uma atenuação da mesma responsabilidade, então já nada obstará a que do direito comunitário se faça o devido uso interpretativo



CRIME DE AUXÍLIO À IMIGRAÇÃO ILEGAL

“Cinquenta e quatro pessoas morreram sufocadas num camião que as transportava clandestinamente. Eram mais de 100, num contentor de 6 m por 2 m. Muitos dos sobreviventes encontram-se em estado grave em virtude da desidratação e da falta de oxigénio...”

(Notícia da BBC – “apud” Informação de Abril de 2009 da UNODC)



BEM JURÍDICO PROTEGIDO

- ✓ É discutida na doutrina e na jurisprudência a questão do bem jurídico protegido pelo crime de auxílio à imigração ilegal e a natureza deste mesmo bem, podendo distinguir-se quatro posições:
 - ✓ a do interesse público de controlo dos fluxos migratórios,
 - ✓ a do delito pluriofensivo,
 - ✓ a da protecção dos direitos fundamentais dos estrangeiros e
 - ✓ a da protecção da dignidade humana do imigrante.



BEM JURÍDICO PROTEGIDO

a) Teoria do interesse público de controlo dos fluxos migratórios:

- ✓ O interesse protegido é o da soberania e segurança do Estado, em virtude de, com a violação das regras que regulam o acesso e a permanência de cidadãos estrangeiros (abrangidos pelo RJEPSAE) em território português, ser desrespeitado o poder (soberano) do Estado de decidir quem entra ou permanece no seu território e essa violação poder acarretar consequências graves ao nível da segurança interior.
 - ✓ PAULO SOUSA MENDES, “Tráfico de pessoas”, em Revista do CEJ, 1.º Semestre de 2008, n.º 8 (Especial), p. 175 e
 - ✓ Acs. da RP, de 13/07/2005 (proc. 0540595) e da RC. de 11/10/2003 (CJ, XXXVIII, IV, 46



BEM JURÍDICO PROTEGIDO

b) Teoria do delito pluriofensivo:

Para além do controlo dos fluxos migratórios, considerado não em si (como exigindo o respeito pelas regras administrativas que regulam a entrada, trânsito e permanência de estrangeiros), mas enquanto a sua postergação pode afectar a ordem sócio-económica, violam-se também direitos básicos dos próprios imigrantes, os quais, do ponto da vista da protecção, devem considerar-se ao mesmo nível ou, pelo menos, num nível intermédio ou secundário, mas nunca de forma indirecta;

- Ac. do STJ, de 3 de Dezembro de 2009, proferido no proc. nº. 187/09.7YREVR.SI e
- Artigo 385º. bis, nº. 1, do Cód. Penal Espanhol, na sua actual redacção Para outros, pelo contrário, devem considerar-se num plano superior, embora como pertencendo a um grupo, a uma entidade abstracta.



BEM JURÍDICO PROTEGIDO

b) Teoria do delito pluriofensivo (continuação):

✓ O interesse no controlo dos fluxos imigratórios apenas deve ser visto do ponto de vista do perigo que resulta para ele do aproveitamento dos movimentos migratórios por grupos mafiosos de criminalidade organizada, considerando que, para além desse interesse, se pretende também defender o interesse na protecção colectiva e, ao mesmo tempo, individual da liberdade, segurança e dignidade dos cidadãos estrangeiros

- GABRIEL CATARINO, "Aspectos jurídico-penais e processuais do Regime Jurídico de Entrada, Permanência, Saída e Afastamento de Estrangeiros", em "Julgare on line e
- ANDRÉS PALOMO DEL ARCO, "Criminalidad organizada y la inmigración ilegal", "Cuadernos de Derecho Judicial", nº. 2, 2001



BEM JURÍDICO PROTEGIDO

c) Teoria da protecção dos direitos fundamentais :

- ✓ O interesse protegido é o direito do imigrante à sua plena integração social ou todos os direitos dele que podem ser postos em causa com o auxílio à imigração ilegal

d) Teoria da protecção da dignidade humana .

- ✓ O que está em causa é a própria dignidade humana do imigrante, concretamente, nos casos em que, durante o processo migratório e seja qual for a fase deste, ele é tratado como um objecto, uma



BEM JURÍDICO PROTEGIDO

➔ Posição que se defende:

- ✓ Delito pluriofensivo, através do qual se pretende proteger, fundamentalmente, a dignidade e os direitos fundamentais do imigrante e, subsidiariamente, o interesse da protecção da ordem socio-económica subjacente ao controlo dos fluxos migratórios



NATUREZA

- Salvo nos casos do n.º 3, o crime é de perigo abstracto
- Nesses casos já se exige algo mais, concretamente:
 - um resultado (a provocação da ofensa grave à integridade física ou a morte),
 - uma aptidão ou perigosidade (o transporte ou manutenção do cidadão estrangeiro em condições desumanas ou degradantes) ou
 - a concreta ou real verificação do perigo (a colocação em perigo da vida),variando, por isso, a natureza do crime consoante a situação: crime de resultado, de aptidão ou perigo concreto



ELEMENTOS CONSTITUTIVOS

- Como se verifica dos n.ºs. 1 e 2 do artigo 183º do RJEPSAE, comete o crime aquele que favorecer ou facilitar, por qualquer forma, a entrada ou o trânsito ilegais de cidadão estrangeiro em território nacional, ainda que sem intenção lucrativa e, havendo esta intenção, também no caso de o favorecimento ou a facilitação visarem a permanência do mesmo cidadão.
- Havendo transporte ou manutenção do cidadão estrangeiro em condições desumanas ou degradantes ou sendo colocada em perigo a sua vida ou causadas ao mesmo a ofensa grave à integridade física ou a morte, a pena é agravada nos termos do n.º. 3 do mesmo artigo



ELEMENTOS CONSTITUTIVOS

- **Entrada ilegal:**
 - É a efectuada em violação do disposto nos artigos 6.º, 9.º e 10.º e nos n.ºs 1 e 2 do artigo 32 (artigo 181.º, n.º 1)
 - Assim, e, por exemplo:
 - Entrada sem o controlo das autoridades portuguesas
 - Entrada de cidadão estrangeiro que, pretendendo vir trabalhar para Portugal, não obtém o devido visto de trabalho e entra, por exemplo, ao abrigo de um acordo com o seu País que dispensa os nacionais do mesmo de visto em determinadas condições.
 - Rejeição da doutrina do Ac. da RP, de 13/07/2005, proc. 0540595
 - Defesa da doutrina dos Acs. da RP de 15.02.2006 (proc. 0545889) e da RC, de 11/10/2003, em CJ, XXVIII, 4, 46 e ss.



ELEMENTOS CONSTITUTIVOS

- **Permanência ilegal:**
 - É a que não tenha sido autorizada de harmonia com o disposto no RJEPSAE (vejam-se os seus artigos 45.º e ss. e 71.º e ss) ou na lei reguladora do direito de asilo, bem como a subsequente à entrada ilegal em conformidade com o n.º 1 do artigo 181.º (cfr. n.º 2 deste artigo).
 - Assim, por exemplo, e na esteira do disposto no art. 6.º, n.º 1, alínea c), do Protocolo contra o Tráfico Ilícito de Imigrantes, é ilegal a permanência de estrangeiro que entra para trabalhar sem o respectivo visto, aproveitando-se da dispensa para outros fins de um Acordo com o seu País.



ELEMENTOS CONSTITUTIVOS

- O “animus lucrandi”
 - Age com este “animus” aquele que procede com o objectivo de obter uma vantagem, uma contraprestação, um benefício ou ganho na realização de qualquer das actividades previstas pelo tipo, seja ele financeiro ou económico (como sucede, por exemplo, quando o agente transporta gratuitamente um dos cidadãos estrangeiros que o ajuda a manter a ordem no seio dos demais), seja outro de natureza material (ver art. 3º., al. a), do Protocolo contra o Tráfico Ilícito de Migrantes por Via Terrestre, Marítima e Aérea)



ELEMENTOS CONSTITUTIVOS

- O fundamento da sua exigência, alicerçado nos instrumentos internacionais a que fizemos referência, está, não tanto (ou tão só) na maior reprovabilidade da conduta de quem, com o crime, pretende obter um interesse financeiro ou económico, mas, e como também já se disse, na defesa do pessoa do estrangeiro, com tudo o que esta defesa envolve ao nível dos seus direitos fundamentais e da sua própria dignidade como ser humano
 - Rejeição da doutrina do Ac. da RC, de 11-10-2006, proc. nº. 8/00.6ZRCBR.CI



ELEMENTOS CONSTITUTIVOS

- **Favorecer ou facilitar, por qualquer forma, a entrada, permanência ou o trânsito ilegais**
 - Favorecer é possibilitar, servir, dar ajuda, apoio ou protecção à entrada, permanência ou trânsito do cidadão estrangeiro (v.g., fornecer trabalho, actuar como intermediário).
 - Facilitar é remover obstáculos ou facultar meios para que sejam possíveis os actos de entrada, permanência ou trânsito ilegais, intervir para que estes tenham lugar ou sejam conseguidos, inclusive, através da cooperação na realização ou execução deles (v.g., transportar o cidadão estrangeiro, pagar-lhe as viagens, etc.)



ELEMENTOS CONSTITUTIVOS

- **Favorecer ou facilitar directamente:**
 - O agente realiza qualquer das acções juridicamente relevantes.
- **Favorecer ou facilitar indirectamente:**
 - Há uma participação em cadeia, isto é, leva-se a cabo um acto no processo de imigração ilegal a que, por sua vez, também se segue uma participação no facto típico: pede-se a intervenção de outro para que ajude ou incite outrem a ajudar numa determinada fase ou em determinadas fases do processo de imigração ilegal, conhecendo-se os intervenientes.



CRIME DE ASSOCIAÇÃO DE AUXÍLIO À IMIGRAÇÃO ILEGAL

- *“Resolvemos proteger as nossas sociedades da delinquência organizada em todas as suas formas, através de medidas legislativas estritas e eficazes e de instrumentos operacionais, que sejam em tudo conformes com os direitos humanos e as liberdades fundamentais internacionalmente reconhecidos”*

“(Declaração de Nápoles de 1994)”



CRIME DE ASSOCIAÇÃO DE AUXÍLIO
À
IMIGRAÇÃO ILEGAL

BEM JURÍDICO PROTEGIDO

- Para além do interesse social comum a todos os crimes de associação criminosa de evitar o perigo para a paz pública que advém do crime organizado, o de obviar àquele outro perigo que, igualmente em abstracto, mas, agora, para o grupo dos cidadãos estrangeiros, resulta da actuação de grupos criminosos tendo por objecto a imigração ilegal (ainda que como actividade secundária), nomeadamente, ao nível da sua liberdade, segurança e dignidade

NATUREZA

- Crime de perigo abstracto

ELEMENTOS OBJECTIVOS

- São **elementos constitutivos objectivos** do crime de associação de auxílio à imigração ilegal:
 - a existência de um grupo, organização ou associação (elemento organizativo) e
 - o fim de favorecimento ou facilitação, por parte do mesmo grupo, organização ou associação, da entrada ou trânsito ilegais de cidadãos estrangeiros (nos termos que definimos), com ou sem intenção lucrativa ou, existindo esta intenção, da permanência ilegal dos mesmos cidadãos (elemento finalístico)



ELEMENTOS OBJECTIVOS

Conceito de grupo, organização ou associação

- **União de pessoas** com vista à realização do referido fim, ainda que através de acordo implícito.
- **Quantas pessoas?**
 - Pelo menos, três:
 - Acção comum 98/733/JAI:
 - “Entende-se por «organização criminosa» a associação estruturada de mais de duas pessoas...” (art. 1º., corrigindo o erro de tradução da versão portuguesa)
 - Convenção de Palermo:
 - ““Grupo criminoso organizado” - um grupo estruturado de três ou mais pessoas...” (art. 2º., al. a))
 - Decisão-Quadro 2008/841/JAI:
 - «“Organização criminosa”, a associação estruturada de mais de duas pessoas...” (art. 1º., nº. 1),



ELEMENTOS OBJECTIVOS

Conceito de grupo, organização ou associação

- Será necessário que da união, nasça “uma realidade autónoma, diferente e superior às vontades e interesses dos singulares membros” ou, como também se diz, “um centro autónomo de imputação fáctica das acções prosseguidas em nome e no interesse do conjunto”, centro este que há-de também ser um centro de motivação?
 - Parece que não.

ELEMENTOS OBJECTIVOS

Conceito de grupo, organização ou associação

➤ **Argumentos:**

1) **Art. 2º., alíneas a) e c), da Convenção de Palermo:**

- "Grupo criminoso organizado" - um grupo estruturado de três ou mais pessoas, existindo durante um período de tempo e actuando concertadamente com a finalidade de cometer um ou mais crimes graves ou infracções estabelecidas na presente Convenção, com a intenção de obter, directa ou indirectamente, um benefício económico ou outro benefício material;
- "Grupo estruturado" - um grupo formado de maneira não fortuita para a prática imediata de uma infracção e cujos membros não tenham necessariamente funções formalmente definidas, podendo não haver continuidade na sua composição nem dispor de uma estrutura desenvolvida.

ELEMENTOS OBJECTIVOS

Conceito de grupo, organização ou associação

➤ **Argumentos (continuação):**

2) **Art. 1º. da Decisão-Quadro 2008/841/JAI do Conselho:**

- "Organização criminosa", a associação estruturada de mais de duas pessoas, que se mantém ao longo do tempo e actua de forma concertada, tendo em vista a prática de infracções passíveis de pena privativa de liberdade ou medida de segurança privativa de liberdade cuja duração máxima seja, pelo menos, igual ou superior a quatro anos, ou de pena mais grave, com o objectivo de obter, directa ou indirectamente, benefícios financeiros ou outro benefício material
- "Associação estruturada", uma associação que não foi constituída de forma fortuita para a prática imediata de uma infracção e que não tem necessariamente atribuições formalmente definidas para os seus membros, continuidade na sua composição ou uma estrutura sofisticada

ELEMENTOS OBJECTIVOS

Conceito de grupo, organização ou associação

- **Argumentos** (continuação):
 - 3) Posição Comum de 29 de Março de 1999 definida pelo Conselho com base no artigo K.3 do TUE, relativa à proposta de convenção das Nações Unidas contra a criminalidade organizada;
 - 4) Reuniões do Comité Especial intergovernamental criado pela Resolução da Assembleia-Geral das Nações Unidas nº. 53/111, de 9 de Dezembro de 1998, para a elaboração do projecto que veio a dar origem à Convenção de Palermo (veja-se, por exemplo, o teor da nota 2 inserida pela Secretária-Geral das Nações Unidas nos Trabalhos Preparatórios das Negociações daquela Convenção e seus Protocolos -- § 16 da Informação elaborada sobre o 7º. período de sessões, realizado em Viena, de 17 a 28.01.2000 e documento das Nações Unidas A/55/383/Add.1, de 3.11.2000, respeitante ao 45º. período de sessões)

ELEMENTOS OBJECTIVOS

Conceito de grupo, organização ou associação

- **Argumentos** (continuação):
 - 5) Guia Legislativo para a Aplicação da Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional e seus Protocolos”, versão de 2004 da Divisão para Assuntos de Tratados dos Escritórios das Nações Unidas contra a Droga e o Crime
 - 6) Projecto de Resolução Legislativa do Parlamento Europeu sobre a Proposta de Decisão-Quadro do Conselho relativa à luta contra a criminalidade organizada [a Proposta (COM(2005)0006)], posteriormente aprovado pela Resolução de 26 de Outubro de 2005 [Resolução P6_TA(2005)0405]



CRIME DE ASSOCIAÇÃO DE AUXÍLIO
A
IMIGRAÇÃO ILEGAL

ELEMENTOS OBJECTIVOS

Finalidade do grupo, organização ou associação

- **Prática de crimes de auxílio à imigração ilegal.**
 - Não de um só, de uma actividade que se esgote numa conduta de auxílio ilegal determinada, mas de uma pluralidade de "auxílios" a efectuar, pois, de outra forma, estar-se-á perante uma situação de comparticipação
 - Mas já não é necessário que o grupo tenha em vista mais de uma modalidade do crime. Pode ser, por exemplo, só para a entrada ou a permanência.



CRIME DE ASSOCIAÇÃO DE AUXÍLIO
A
IMIGRAÇÃO ILEGAL

ELEMENTO SUBJECTIVO

- Basta o **dolo genérico** em qualquer das suas modalidades (art. 14.º do CP)



CRIME DE ASSOCIAÇÃO DE AUXÍLIO
À
IMIGRAÇÃO ILEGAL

SUJEITOS PASSIVOS

- Sujeitos passivos são o **Estado Português** e a própria **União Europeia** enquanto interessada no desenvolvimento do espaço de liberdade, de segurança e de justiça, a partir da competência partilhada com Portugal e das políticas comuns por ela criadas em termos, nomeadamente, do combate à imigração ilegal: cfr. arts. 3º., nº. 2, da versão consolidada do TUE e 4º., nº. 2, al. j), 67º. e ss. e 77º. e ss. (dentre estes, art. 79º., sobretudo) da versão consolidada do TFUE



MUITO OBRIGADO

(Imagens retiradas da Internet)



Videogravação da comunicação

Criminalidade associada à imigração ilegal

Luísa Maia Gonçalves

**IMIGRAÇÃO ILEGAL E TRÁFICO DE SERES HUMANOS:
INVESTIGAÇÃO, PROVA,
ENQUADRAMENTO JURÍDICO E SANÇÕES**

Dr.^a Luisa Maia Gonçalves
Inspetora Superior e Diretora do DCIPAI do SEF

Criminalidade associada à imigração ilegal:

- Globalização versus migrações – A Realidade internacional e a nacional
- Repercussões na criminalidade associada e mecanismos de combate a esta criminalidade – Casos práticos
- Tendências futuras
- Prevenção



Videogravação da comunicação

Detenção de estrangeiros em situação irregular - O Projeto Europeu DEVAS

Tornando-se vulnerável em detenção

Ana Varela



TORNANDO-SE VULNERÁVEL EM DETENÇÃO

A Detenção de Requerentes de Asilo Vulneráveis & Migrantes Irregulares na União Europeia

O Caso Português



Agenda



- I. Estudo europeu DEVAS 
- II. Detenção administrativa em Portugal: Unidade Habitacional de Santo António (UHSA)
- III. Detenção e vulnerabilidade: casos práticos

Metodologia



Estudo da 'vulnerabilidade' de duas formas:

- I. **Qual o impacto** da detenção em pessoas com necessidades especiais oficialmente reconhecidas
- II. **De que modo** a detenção torna as pessoas vulneráveis

3

Metodologia



Mista: aplicação de três questionários qualitativos/quantitativos:



4

Amostra



Estudo:

23 países da UE

(Alemanha, Áustria, Bélgica, Bulgária, Chipre, República Checa, Grécia, Hungria, Irlanda, Lituânia, Letónia, Malta, Holanda, Polónia, **Portugal**, Roménia, Eslováquia, Eslovénia, Espanha Suécia, Estónia, Itália e Reino Unido).

685 entrevistas

Em Portugal:

31 entrevistas a pessoas detidas (27 em situação irregular e 4 com situações relacionadas com Asilo)

1 entrevista a ONG e

1 entrevista a pessoal do centro

5

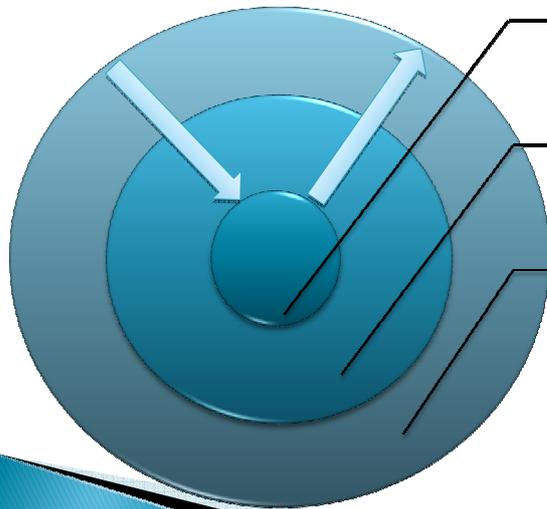
A 'vulnerabilidade' da pessoa em situação de detenção



Definição de 'vulnerabilidade' baseada em múltiplos factores

6

O 'circulo concêntrico' da vulnerabilidade em contexto de detenção



**Factores
Pessoais**

**Factores
Sociais**

**Factores
contextuais**

7

Vulnerabilidade: Factores Pessoais



► Capacidades linguísticas

“Aquele que não entender Checo aqui, não é nada. Não tem direitos.”

“Não entendemos a sua língua (de outros detidos) ... Não sei se o fazem por piada ou porque nós não entendemos o que dizem.”

UHSA: “Não consigo falar com os outros, não entendo a língua...”

8

Vulnerabilidade: Factores pessoais



- Nível de conhecimento do procedimento de asilo/imigração

“Eu quero saber o que se passa e porque motivo ainda estou aqui no centro de detenção.”

“Eu quero saber se vou voltar para a Albânia. Eles continuam a dizer-me “tu irás” mas eu acabo por nunca ir.”

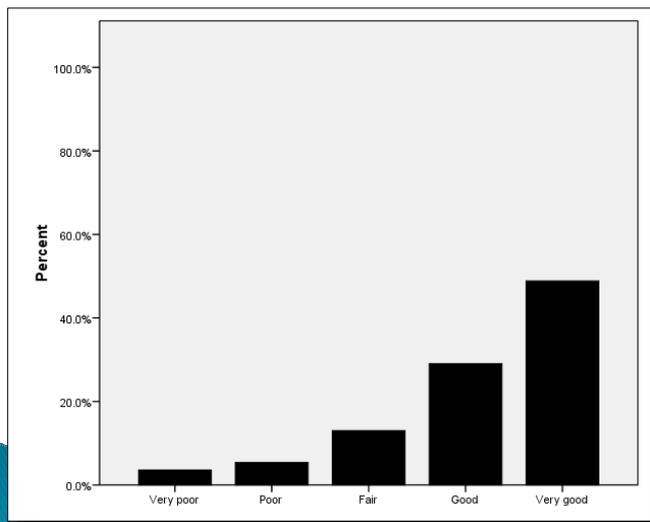
UHSA: “Não sei o que vai acontecer...”

9

Vulnerabilidade: Factores pessoais



- ▶ Estado da **saúde física** antes da detenção

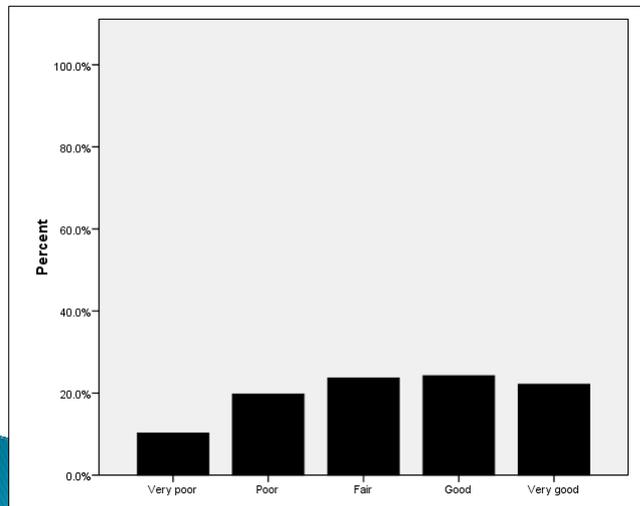


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Vulnerabilidade: Factores pessoais



- ▶ Estado da **saúde física** durante a detenção

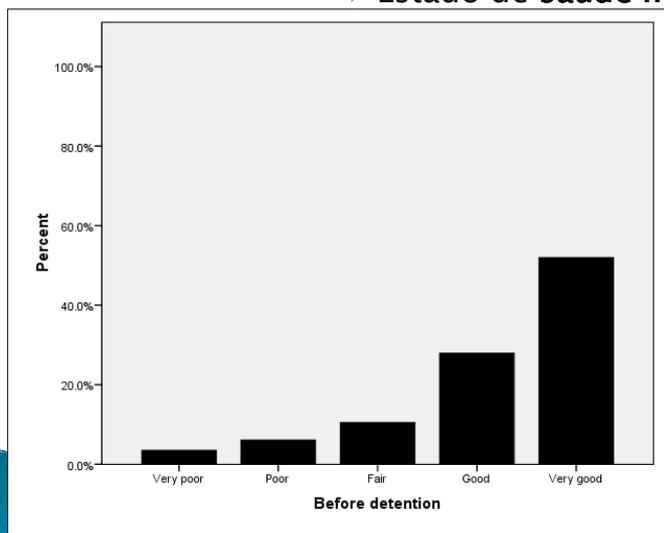


11

Vulnerabilidade: Factores pessoais



- ▶ Estado de **saúde mental** antes da detenção

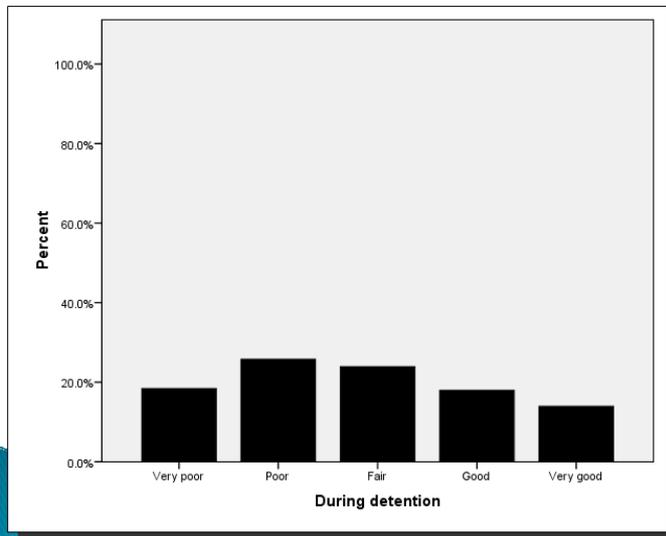


12

Vulnerabilidade: Factores pessoais



- ▶ Estado de saúde mental durante a detenção

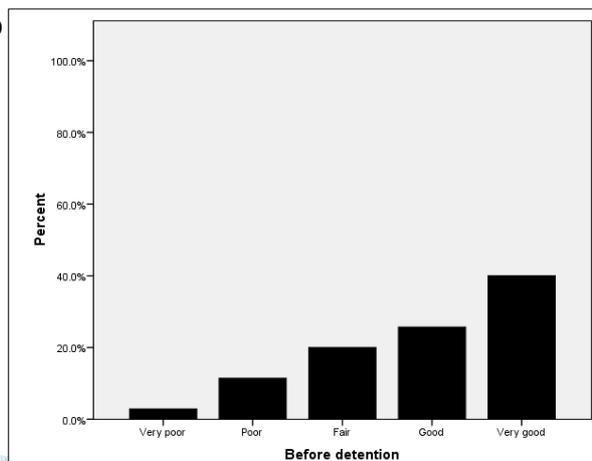


13

Vulnerabilidade: Factores pessoais



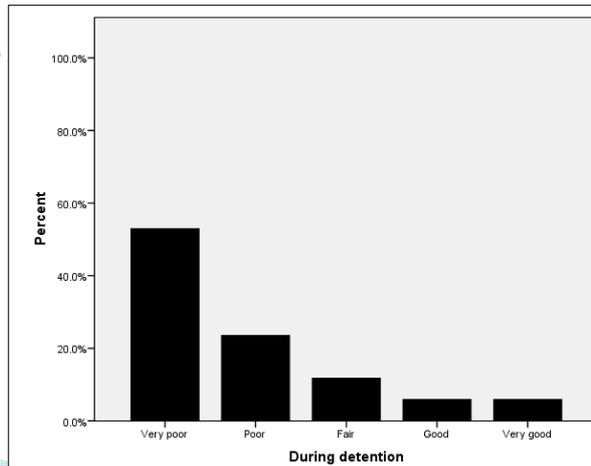
- ▶ O estado de saúde mental dos requerentes de asilo “Dublin II” antes da detenção



Vulnerabilidade: Factores pessoais



- ▶ O estado de saúde mental dos requerentes de asilo “Dublin II” durante a detenção



Vulnerabilidade: Factores Sociais



- ▶ Família, amigos & parentes no mundo “exterior”

A situação de isolamento está relacionada com uma pobre saúde mental

UHSA: “O mais difícil é sentir-me presa, longe dos amigos, do namorado, sentir-me só. Saber que nunca mais vou voltar para a minha casa, para as minhas plantas.”

Vulnerabilidade: Factores Sociais



- ▶ Os detidos mais jovens são os mais isolados

Idade	Familia no país de origem (Percentagem, 78%)	Amigos/família no país de acolhimento (Percentagem, 59%)	Visitas de familiares (Percentagem, 16%)	Visitas de advogados (Percentagem, 47%)
10-17	59%	50%	12%	23%
18-24	79%	46%	13%	51%
25-34	81%	63%	19%	51%
35-44	82%	69%	18%	51%
45-64	64%	62%	19%	65%

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Vulnerabilidade: Factores Sociais



- ▶ Meios de comunicação com o “mundo exterior”

“Os Cartões de telefone são muito caros. Em cinco minutos acabam. Isto é terrível para a família.”

“Se conseguíssemos ter os nossos telemóveis, eu conseguiria ver os números de contacto de que agora sinto falta: O número do meu pai no Iraque e do meu irmão na Grécia.”

UHSA: “Os horários das refeições estão bem, mas não concordo com o horário para usar o meu próprio telemóvel, isto não faz sentido!”

18

Vulnerabilidade: Factores Sociais



- ▶ **Interacção com outros detidos & pessoal do centro de detenção**

“Há querelas por coisa nenhuma, devido à frustração. As tensões surgem quando os detidos pensam que não estão a ser tratados justamente.”

- **Discriminação pelo pessoal do Centro**

19

Vulnerabilidade: Factores Sociais



Explicações dos detidos relativamente ao nível de segurança que sentem

	Inseguro	Moderadamente seguro	Seguro
Atribuições ao nível de segurança			
O 'mundo exterior'	6%	10%	18%
Condições de vida	20%	31%	19%
Guardas e Seguranças	19%	20%	29%
Outros detidos	33%	27%	14%
'Outras' razões	22%	12%	21%

Vulnerabilidade: Factores contextuais



▶ A ‘arquitectura’ do centro de detenção

“Sou um prisioneiro”

“Estava cheio de expectativas. Nunca pensei que iria ser um prisioneiro na Europa.”

UHSA: “Isto vai-me marcar para a vida, vai ficar para sempre. Ter estado em frente a um juiz, ficar preso, fechado.”

21

Vulnerabilidade: Factores contextuais



▶ Os termos e a duração da detenção

- A maioria não sabe quando irá ser libertada

O conhecimento da data da libertação está relacionado com a duração/termo da detenção

22

Vulnerabilidade: Factores contextuais



- ▶ Condições de vida no centro de detenção
 - É o 3.º tipo de dificuldade mais reportada pelos detidos

23

Algumas conclusões



- **Todos** podem ser sujeitos a detenção
- A detenção é entendida pelos detidos como uma **punição** e não como um procedimento administrativo
- A detenção afecta de modo particular **pessoas com necessidades especiais** oficialmente reconhecidas.
- A detenção tem impacto particular no estado de **saúde física e mental**.

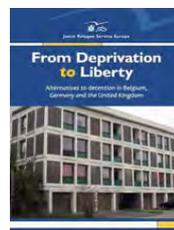
24

Algumas conclusões



- A detenção **conduz a elevados níveis de vulnerabilidade**, e coloca em causa a sua **proporcionalidade e necessidade** comparativamente aos objectivos que visa alcançar
- A detenção pode ser evitada através da aplicação de **medidas alternativas:**

<http://detention-in-europe.org/images/stories/A2D/jrseuropefromdeprivationtoliberty20dec2011.pdf>



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Unidade Habitacional de Santo António – UHSA



(Photo © Don Doll)



(Photo © Don Doll)

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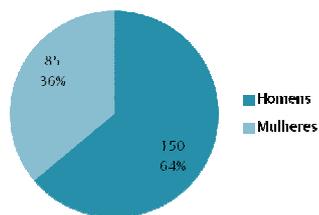
UHSA – dados de 2011



População total = 235 cidadãos estrangeiros

Média de permanência: 19,36 dias

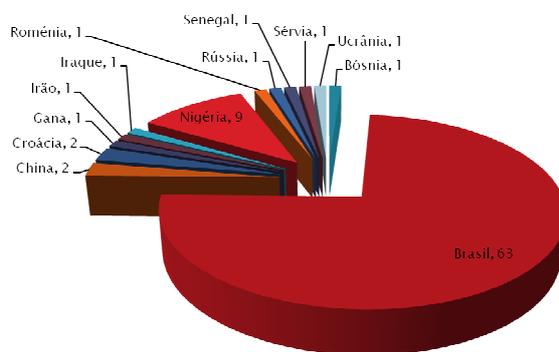
Gênero



UHSA – dados de 2011



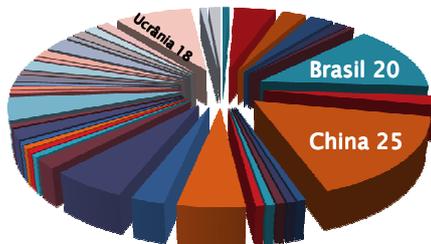
Nacionalidades, População Feminina



UHSA – dados de 2011



Nacionalidades_População Masculina



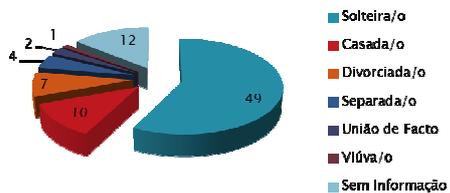
- | | | | | | |
|---------------|--------------|--------------|----------------|-----------------|-----------|
| ■ Afeganistão | ■ Albânia | ■ Angola | ■ Argélia | ■ Bangladesh | ■ Benim |
| ■ Brasil | ■ Cabo Verde | ■ China | ■ Croácia | ■ Cuba | ■ Egito |
| ■ Eslovénia | ■ Gambão | ■ Geórgia | ■ Guiné-Bissau | ■ Guiné-Conacri | ■ Índia |
| ■ Irão | ■ Itália | ■ Kosovo | ■ Libéria | ■ Líbia | ■ Mali |
| ■ Marrocos | ■ México | ■ Moçambique | ■ Moldávia | ■ Nepal | ■ Nigéria |
| ■ Palestina | ■ RDCongo | ■ Rússia | ■ Senegal | ■ Sérvia | ■ Somália |
| ■ Sudão | ■ Túnisia | ■ Ucrânia | ■ Uzbaquistão | ■ Venezuela | |

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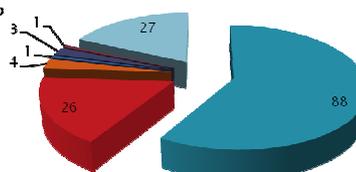
UHSA – dados de 2011



Estado Civil – Mulheres



Estado Civil – Homens

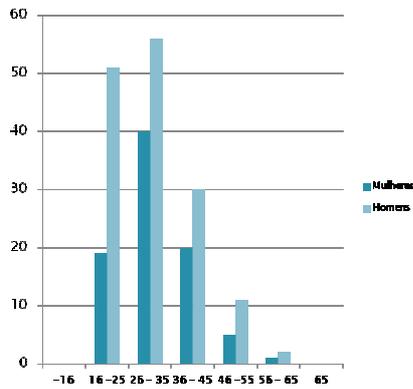


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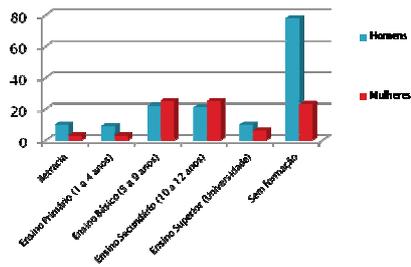
UHSA – dados de 2011



Faixas Etárias



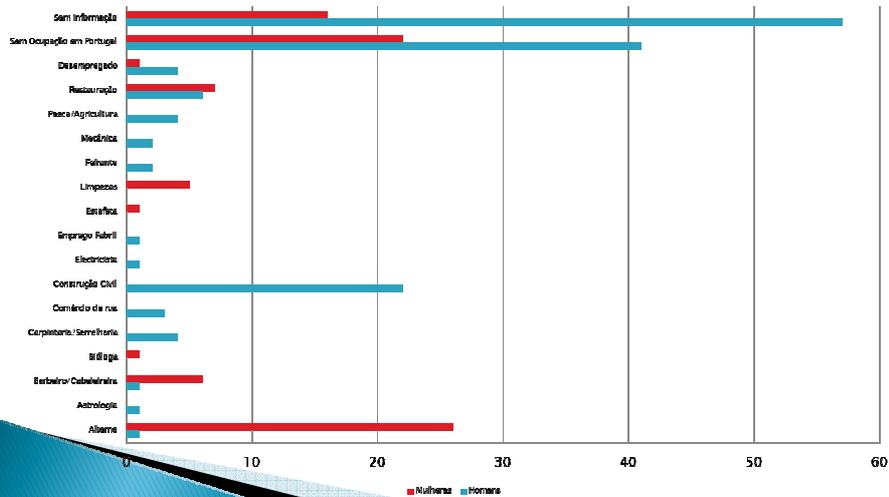
Escolaridade



UHSA – dados de 2011



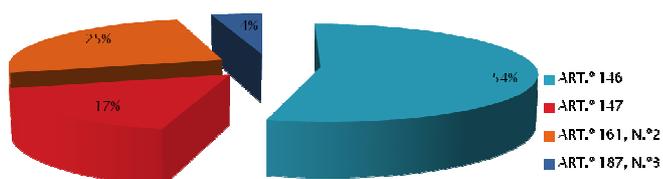
Actividade Profissional



UHSA – dados de 2011



DESPACHO DE INSTALAÇÃO/DISPOSITIVO LEGAL (LEI 23/2007 DE 04/07)

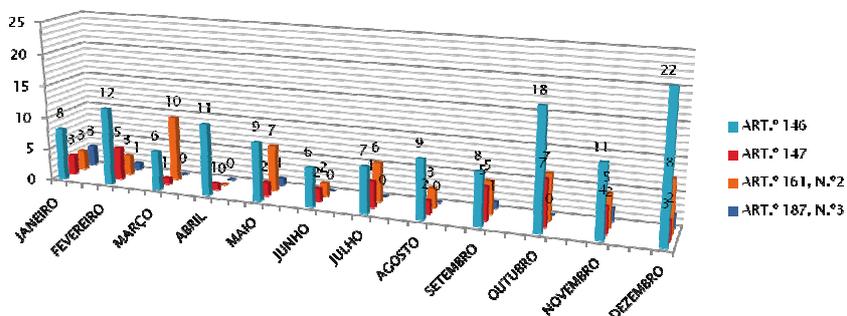


33

UHSA – dados de 2011



Artigo da L.E. ao abrigo do qual a pessoa foi detida e instalada na UHSA



34

UHSA – dados de 2011



Saídas em 2011 (dados do SEF Janeiro a Dezembro)

RPO – Retorno ao país de origem – Total de 157

- ▶ Retomas a cargo (Dublin II): total de 6 (2 para Espanha, 1 para França, 2 para Alemanha e 1 para Suíça)
- ▶ Readmissões activas: total de 13 readmissões para Espanha
- ▶ 1 extradição para Espanha (mandado de detenção internacional)

Alterações de Medida de Coacção: total de 21

- ▶ 14 descritas:
- ▶ Transferências para CPR: 2
- ▶ Transferências para Estabelecimento Prisional para cumprimento de pena: 3
- ▶ Alteração para Apresentações Semanais: 1
- ▶ Alteração para Apresentações Semanais e T.I.R. (termo de Identidade e Residência): 1
- ▶ Alteração para T.I.R. (termo de Identidade e Residência): 1
- ▶ **Libertação: 5** – (1 admissão do pedido de asilo)
- ▶ Prisão preventiva: 1

Fim dos 60 dias – Total de 33 (de Janeiro a Dezembro)

35

UHSA – Vulnerabilidade e Detenção: dados de 2011



- ▶ Crianças – 10
- ▶ Grávidas – 5
- ▶ Asilo – 9 (Requerentes de Asilo – 3 + Dublin II – 6)
- ▶ Sinalização de eventuais vítimas de TSH – 2 (1 brasileira e 1 nigeriana)
- ▶ Saúde:
 - Encaminhamentos hospitalares – 8 (1 ao Centro de Diagnóstico Pulmonar; 3 medicina geral; 4 medicina psiquiátrica – 2 internamentos)
 - Dependências – 8 (6 toxicodependência; 2 casos de alcoolismo – ambos com encaminhamento hospitalar e um internamento em Psiquiatria)
 - Vários acompanhamentos extraordinários da equipa dos Médicos do Mundo na UHSA (particularmente em casos como presença de crianças, doenças crónicas específicas – um diabético e consumos)

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Detenção e Vulnerabilidade

Alguns casos



Caso 1

- Adalberto, cubano, 48 anos;
- Residente em Portugal desde 2000 (durante mais de 10 anos);
- Esteve integrado no mercado de trabalho, com residência legal, a maior parte do tempo da sua permanência em Portugal;
- No último ano, perdeu o emprego e o alojamento o que agravou o seu estado de saúde mental;
- Sem familiares e sem rede de suporte em Portugal, ficou sem-abrigo;
- Foi detido e posteriormente instalado na UHSA, para instrução de um processo de expulsão;
- A situação de detenção agravou o seu estado de saúde mental;
- Da UHSA foi encaminhado para o Serviço de urgências Psiquiátricas do Hospital de São João, no Porto, tendo-lhe sido diagnosticada uma “psicose esquizofrénica”, e internado compulsivamente (2 semanas);
- Após ter sido medicado, apresentou notáveis melhoras;
- O país de origem, Cuba, recusou-se a emitir-lhe salvo-conduto, inviabilizando qualquer efectivação da expulsão;
- Não obstante, esteve instalado na UHSA, **por duas vezes, pelo período máximo de 60 dias; no total de 120 dias.**

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Detenção e Vulnerabilidade

Alguns casos



Caso 2

- Mamadou, nacional da Guiné-Conacri, 17 anos.
- Apresentou pedido de asilo no posto de fronteira do aeroporto internacional de Lisboa, e ficou retido no espaço equiparado a CIT na zona internacional do aeroporto durante a fase de admissibilidade do pedido, de acordo com o estabelecido no regime especial do procedimento de asilo.
- Obteve resposta de inadmissibilidade do pedido e recorreu, tendo o recurso efeito suspensivo (o prazo legal para decisão do tribunal é de 72 horas).
- Permaneceu no CIT do aeroporto, **60 dias.**
- Esgotado este prazo, sem decisão do seu recurso, em lugar de ser libertado, foi determinada – por despacho judicial – a “**prorrogação do prazo da permanência em Centro de Instalação Temporária**”, tendo o mesmo sido transferido para a UHSA.

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Detenção e Vulnerabilidade Alguns casos



Caso 3

- Família monoparental: Loveth, nacional da Nigéria, 31 anos, mãe de duas crianças, de 6 e 4 anos de idade.
- Foi retida no aeroporto quando tentava viajar para o Canadá com documentos falsos e posteriormente instalada na UHSA.
- Proveniente de Espanha, pretendia alegadamente reunir-se ao marido, no Canadá.
- O tempo de permanência na Unidade foi bastante penoso para a mãe, muito preocupada pelo facto de as crianças se encontrarem naquela situação de detenção administrativa.
- Estiveram na UHSA **15 dias** a aguardar a decisão das autoridades espanholas quanto à retoma a cargo.
- Muito ansiosa com a demora da decisão, a cidadã escreveu uma declaração a pedir para ser enviada para o país de origem, Nigéria, o mais rapidamente possível, e assim sair com as crianças da UHSA.

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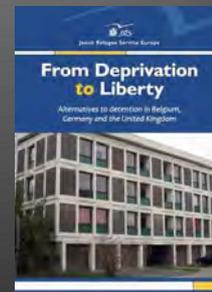
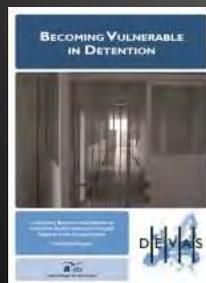
“Tornando-se Vulnerável em detenção”

Para saber mais:

www.jrsportugal.pt

www.jrseurope.org

www.detention-in-europe.org



ana.varela@jrsportugal.pt

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Videogravação da comunicação

Tráfico de Seres Humanos em Portugal; Observatório do Tráfico de Seres Humanos

Tráfico de Seres Humanos em Portugal;
Observatório do Tráfico de Seres Humanos;
Filme *Affected to Life* - Afetadas para a
Vida (UNODC - *United Nations Office on
Drugs and Crime*)

Joana Wrabetz

IMIGRAÇÃO ILEGAL E TRÁFICO DE SERES HUMANOS: INVESTIGAÇÃO, PROVA, ENQUADRAMENTO JURÍDICO E SANÇÕES

Dr^a Joana Daniel-Wrabetz
Chefe de Equipa do OTSH – Observatório do Tráfico de Seres Humanos

Workshop sobre o Manual da UNODC contra o Tráfico de Pessoas para Profissionais do Sistema de Justiça Penal

Módulo 1 – definições de tráfico de pessoas e de auxílio à imigração ilegal:

O primeiro módulo funciona como chave para alguns dos termos usados ao longo do manual. Os termos em causa são definidos de acordo com os instrumentos das Nações Unidas, nomeadamente a Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional e o Protocolo Adicional contra o Tráfico de Pessoas. Este módulo enfatiza a definição de tráfico de seres humanos apresentada no Protocolo contra o Tráfico de Pessoas e a definição de auxílio à imigração ilegal, tal como apresentada no Protocolo contra o Tráfico Ilícito de Migrantes, para além das diferenças centrais entre as duas.

Módulo 2 – indicadores de tráfico de seres humanos:

Este módulo apresenta alguns dos sinais reveladores que podem alertar as primeiras pessoas a chegar à cena do crime para potenciais situações de tráfico. Estes sinais são descritos no módulo como indicadores de que o tráfico pode ter tido lugar (e não provas de que teve lugar), pelo que, por conseguinte, deverão desencadear investigações subsequentes. O módulo cataloga os indicadores segundo as diferentes situações de tráfico, por forma a oferecer orientação à polícia fronteiriça e a outros intervenientes que poderão contactar com vítimas de tráfico de seres humanos.



Videogravação da comunicação



Vídeo - Vidas afetadas (parte 1) e (parte 2)

Workshop sobre o Manual UNODC contra o tráfico de pessoas para profissionais do sistema de justiça penal

Apresentação do Manual da UNODC e Módulos 1 e 2 - caracterização do tráfico de pessoas

Joana Wrabetz

Manual contra o tráfico de pessoas para profissionais do sistema de justiça penal



Tradução e Revisão Técnica do Manual



Grupo Técnico de Acompanhamento:

- PGR
- GNR
- PSP
- SEF
- PJ
- DGAI
- DGPJ
- CEJ
- DIAP (Lisboa, Porto
Coimbra)
- OTSH

Módulos Públicos



1. Definições de Tráfico de Pessoas e de Introdução clandestina de Migrantes
2. Indicadores de Tráfico de Pessoas
3. Reacções psicológicas das vítimas de Tráfico de Pessoas
4. Métodos de Controlo
5. Avaliação do risco nas investigações de Tráfico de Pessoas
6. Cooperação internacional nos casos de Tráfico de Pessoas
7. Análise de provas materiais e da cena do crime nas investigações de Tráfico de Pessoas

Módulos Públicos



8. Entrevistas a vítimas de Tráfico de Pessoas que constituem potenciais testemunhas
9. Entrevistas a Crianças vítimas de Tráfico de Pessoas
10. A utilização de intérpretes nas investigações de Tráfico de Pessoas
11. As necessidades das vítimas durante os procedimentos criminais nos casos de Tráfico de Pessoas
12. Protecção e apoio a vítimas/testemunhas nos casos de Tráfico de Pessoas
13. A indemnização das vítimas de Tráfico de Pessoas
14. Considerações sobre a aplicação das penas em casos de Tráfico de Pessoas

Módulos Reservados



1. Formas de investigação
2. Técnicas de investigação conjunta
3. Informações na investigação
4. Técnicas especializadas nas investigações
5. Vigilância
6. Agentes infiltrados
7. Dados de comunicações
8. Intercepção de comunicações
9. Utilização de informadores
10. Investigações financeiras
11. Reconhecimento de documentos
12. Estratégias usadas pela defesa

Módulo 1 Definições de Tráfico de Pessoas e de Introdução clandestina de Migrantes



Módulo 1
Definições de Tráfico de Pessoas e de
Introdução clandestina de Migrantes



As definições de tráfico de pessoas e de introdução clandestina de migrantes encontram-se:

- **«Protocolo Adicional à Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional relativo à Prevenção, Repressão e Punição do Tráfico de Pessoas, em especial Mulheres e Crianças»** (Protocolo contra o Tráfico de Pessoas);
- **«Protocolo contra o Tráfico Ilícito de Migrantes por Via Terrestre, Marítima e Aérea»** (Protocolo relativo ao Tráfico Ilícito de Migrantes),

Módulo 1
Definições de Tráfico de Pessoas e de
Introdução clandestina de Migrantes



Definição de tráfico de Pessoas

Protocolo contra o Tráfico de Pessoas, Artigo 3.º (a)
define três elementos constitutivos do crime de tráfico de pessoas:

- 1. Um ato/ação (o que é feito)**
- 2. Os meios (como é feito)**
- 3. Objetivo de exploração (porque é feito)**

Módulo 1
Definições de Tráfico de Pessoas e de
Introdução clandestina de Migrantes



Tráfico de Pessoas – Matriz dos Elementos do Crime

O crime deverá incluir **peelo menos um** de cada um dos seguintes elementos

AÇÃO	MEIO	OBJECTIVO	TRÁFICO DE PESSOAS
<ul style="list-style-type: none"> Recrutamento Transporte Transferência Alojamento Acolhimento de pessoas 	<ul style="list-style-type: none"> Ameaça ou uso da força Outras formas de coação Rapto Fraude Engano Abuso de autoridade Abuso de uma situação de vulnerabilidade Entregar ou aceitar pagamentos ou benefícios para obter o consentimento de uma pessoa com autoridade sobre outra. 	<ul style="list-style-type: none"> Exploração da prostituição de outrem Exploração Sexual Exploração Laboral Escravidão ou outras situações semelhantes à escravidão Extração de órgãos Etc. 	

Módulo 1
Definições de Tráfico de Pessoas e de
Introdução clandestina de Migrantes



Definição de tráfico de Pessoas
Código Penal de Portugal

Art. n.º 160º da Lei 59/2007, de 4 de Setembro

1 — Quem oferecer, entregar, aliciar, aceitar, transportar, alojar ou acolher pessoa para fins de exploração sexual, exploração do trabalho ou extração de órgãos:

- a) Por meio de violência, rapto ou ameaça grave;
- b) Através de ardil ou manobra fraudulenta;
- c) Com abuso de autoridade resultante de uma relação de dependência hierárquica, económica, de trabalho ou familiar;
- d) Aproveitando -se de incapacidade psíquica ou de situação de especial vulnerabilidade da vítima; ou
- e) Mediante a obtenção do consentimento da pessoa que tem o controlo sobre a vítima; é punido com pena de prisão de três a dez anos.



Módulo 1
Definições de Tráfico de Pessoas e de
Introdução clandestina de Migrantes



Portugal

O artigo 183º da Lei n.º 23/2007, de 4 de Julho define **auxílio à imigração ilegal** da seguinte forma:

- 1 – Quem favorecer ou facilitar, por qualquer forma, a entrada ou o trânsito ilegais de cidadão estrangeiro em território nacional é punido com pena de prisão até 3 anos.
- 2 – Quem favorecer ou facilitar, por qualquer forma, a entrada, a permanência ou o trânsito ilegais de cidadão estrangeiro em território nacional, com intenção lucrativa, é punido com pena de prisão de 1 a 4 anos.
- 3 – Se os factos forem praticados mediante transporte ou manutenção do cidadão estrangeiro em condições desumanas ou degradantes ou pondo em perigo a sua vida ou causando-lhe ofensa grave à integridade física ou a morte, o agente é punido com pena de prisão de 2 a 8 anos.
- 4 – A tentativa é punível.

...

Módulo 1
Definições de Tráfico de Pessoas e de
Introdução clandestina de Migrantes



Diferenças entre o tráfico de pessoas e
a introdução clandestina de migrantes

Consentimento

A introdução clandestina de migrantes geralmente envolve o consentimento das pessoas que são objeto dessa introdução clandestina.

As vítimas de tráfico, por outro lado, ou nunca deram o seu consentimento ou, se deram o seu consentimento inicial, tal consentimento tornou-se irrelevante devido aos meios usados pelos traficantes.

Transnacionalidade

Introduzir ilegalmente uma pessoa significa facilitar a sua passagem ilegal por uma fronteira e a sua entrada ilegal noutro país.

O tráfico de pessoas, por outro lado, não precisa de envolver a passagem por qualquer fronteira. Nos casos em que tal acontece, a legalidade ou ilegalidade da passagem da fronteira é irrelevante.

Módulo 1
Definições de Tráfico de Pessoas e de
Introdução clandestina de Migrantes



Exploração

A relação entre o facilitador e o migrante termina geralmente após a facilitação da passagem da fronteira. Na introdução clandestina de migrantes, o pagamento pode ser efetuado previamente, ou à chegada. O facilitador e o migrante são parceiros, ainda que muito diferentes, numa operação comercial em que o migrante entra voluntariamente.

O tráfico envolve uma exploração contínua das vítimas, de forma a gerar lucros ilegais para os traficantes.

Fonte do lucro

Um importante indicador da existência de tráfico ou de introdução clandestina de migrantes é a forma como os autores do crime obtêm os seus lucros:

Os facilitadores obtêm o seu rendimento do montante cobrado para deslocar as pessoas.

Os traficantes, por outro lado, continuam a exercer controlo sobre a vítima de tráfico, com o objetivo de conseguir lucros adicionais mediante a exploração contínua da vítima.

Módulo 1
Definições de Tráfico de Pessoas e de
Introdução clandestina de Migrantes



Trafico de Pessoas
Vs

- Crime ou violação contra a pessoa
- Não há consentimento (Contém elemento de coerção)
- Não implica transnacionalidade mas pode incluir Introdução Clandestina de Migrantes e subsequente exploração
- Pessoas traficadas vistas como vítimas pela lei

Intro. Clandestina de Migrantes

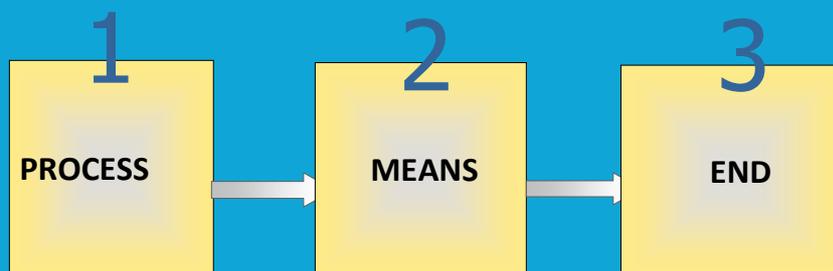
- Passagem ilegal de fronteira : crime ou violação contra um país ou estado
- Há consentimento (Não há coerção)
- Os facilitadores obtêm o seu rendimento do montante cobrado para deslocar as pessoas
- Pessoas que entraram ilegalmente não são vítimas de crime



Módulo 1
Definições de Tráfico de Pessoas e de
Introdução clandestina de Migrantes



Three Elements of Trafficking



- How did the person get to where they are?
- How did the person find out about the job?

- What happened when they arrived in the destination country?
- What was it like when they started to work?

- Was the person paid? How much? How often?
- Did the person try to leave his/her job? What happened?
- Is the person afraid of his/her employer? Why?

Módulo 2
Indicadores de Tráfico de Pessoas



Módulo 2
Indicadores de Tráfico de Pessoas





Videogravação da comunicação

Apresentação do Manual da UNODC - Módulos 15 e 18 - investigação do tráfico de pessoas e técnicas especiais de investigação

Plácido Conde Fernandes

Manual contra o tráfico de pessoas para profissionais do sistema de justiça penal



Módulo 15



- **Formas de investigação nos casos de tráfico de pessoas**

- Reservado -



- **Objetivos:**

- Resumir as principais características das abordagens reativas e pró-ativas à investigação, bem como as ferramentas relacionadas de produção de Informações e de táticas disruptivas;
- Explicar a «abordagem relacionada» à investigação de crimes de tráfico de pessoas;
- Identificar as principais vantagens, obstáculos e contramedidas respeitantes às ameaças existentes nas abordagens de investigação e nas ferramentas relacionadas, no contexto dos casos de tráfico de pessoas;
- Explicar os cinco processos comerciais e como podem ser utilizados para estruturar uma investigação;
- Identificar onde pode ser encontrada mais informação para aprofundar o conhecimento das abordagens de investigação e das ferramentas utilizadas nos casos de tráfico de pessoas.



- **Investigações reativas**
- **Investigações pró-ativas**
- **Táticas disruptivas**

- **Produção de Informações**

(descrito em pormenor no módulo 17, «Informações nas investigações de tráfico de pessoas»)



Em Portugal:

- A distinção entre as investigações reativas e investigações pró-ativas não tem consagração legal;
- Toda a investigação criminal é realizada no âmbito do inquérito, pelo Ministério Público e por intermédio dos órgãos de polícia criminal, mediante delegação ou por competência própria nos casos previstos;
- No processo penal português vigora o princípio da legalidade, que impõe, como regra, a abertura de inquérito e consequente investigação criminal, sempre que se verifique notícia de crime,
- **Isto não impede a combinação de elementos reativos e pró-ativos na investigação, nos termos descritos neste módulo.**



- **Investigações reativas:**

Regra geral, as abordagens que recorrem a métodos reativos são abertas e incluem:

- A obtenção de depoimentos e declarações de testemunhas;
- A detenção e/ou a prisão preventiva e interrogatório de suspeitos;
- Visitas, rusgas ou buscas a instalações ou locais suspeitos para recolha de provas;
- A análise/ exame de materiais recuperados dos suspeitos e das instalações.



- Nenhum módulo específico do Manual trata das abordagens reativas, visto serem muito idênticas a qualquer investigação criminal normal.



- **Investigações reativas:**

VANTAGENS

OBSTÁCULOS

SUPERAÇÃO



- **Jurisprudência do TEDH:**
- A “obrigação positiva” de prever a punição e exercer a acção penal, à luz do artigo 4º da CEDH, em casos de tráfico de pessoas

**TEDH Silliadin c. França –
26/07/2005**

**TEDH Rantsev c. Chipre e
Rússia – 7 /01/2010**



- **Jurisprudência do TEDH:**
- Os limites, à luz do artigo 6 §1 e §3 (d) da CEDH, em casos de tráfico de pessoas – processo equitativo, contraditório e direito a inquirir as testemunhas “de acusação”

**TEDH Breukhoven c.
República Checa –
21/07/2011**



- **Investigações pró-ativas:**

Descritas nos seguintes módulos:

- Técnicas especializadas nas investigações de tráfico de pessoas;
- Utilização de informadores nas investigações de tráfico de pessoas;
- Agentes encobertos/infiltrados nas investigações de tráfico de pessoas;
- Vigilância nas investigações de tráfico de pessoas;
- Uso de dados de comunicações nas investigações de tráfico de pessoas;
- Interceção de comunicações nas investigações de tráfico de pessoas;
- Investigações financeiras em casos de tráfico de pessoas.



- **Investigações pró-ativas:**

VANTAGENS

OBSTÁCULOS

SUPERAÇÃO



- **Táticas disruptivas:**

São muitas as táticas disruptivas que podem ser utilizadas de forma eficaz nos casos de tráfico de pessoas:

- Podem ser usadas como «cobertura» nas investigações para aumentar o impacto das investigações ou de outras atividades policiais
- Podem funcionar como táticas autónomas e eficazes de interrupção das atividades criminosas.
- A variedade das abordagens disruptivas está limitada apenas pela imaginação e pela legislação nacional.
- **Os exemplos...**



- **Táticas disruptivas:**

VANTAGENS

OBSTÁCULOS

SUPERAÇÃO



- **A abordagem “relacionada” – combinação de táticas:**
 - Independentemente da forma como tenham sido desencadeadas, as investigações são mais eficazes quando incluem ambas as formas de investigação — reativa e pró-ativa — combinadas com Informações e táticas disruptivas e de prevenção.
- **Os exemplos...**



- **A abordagem “relacionada” – combinação de táticas:**
 - Nos casos de tráfico de pessoas, existe uma forte probabilidade de a intervenção reativa consistir no resgate de uma vítima potencial.
 - Os indícios de que uma vítima necessita de ser resgatada podem surgir em qualquer fase de uma investigação pró-ativa ou mesmo durante o ciclo de produção de Informações.
 - Dada a natureza das técnicas pró-ativas, os investigadores poderão receber «em tempo real» informação precisa sobre os riscos que uma vítima possa estar a correr e que exijam uma intervenção imediata.



- **A abordagem “relacionada” – combinação de táticas:**
 - Numa investigação pró-ativa, uma intervenção reativa corre o risco óbvio de revelar o recurso a uma tática, para além de poder pôr em perigo informadores, agentes encobertos ou outras vítimas.
 - Para minimizar estes riscos, pode-se recorrer a diversas táticas disruptivas que disfarcem a existência de uma investigação pró-ativa.
- **A gestão de um caso de tráfico de pessoas requer uma combinação complexa de abordagens e táticas de investigação, sucessivamente actualizadas.**



- **A abordagem “relacionada” – combinação de táticas:**

O investigador deve ter competência para identificar a combinação de táticas necessária em cada momento de um inquérito, **pondo sempre a segurança da vítima em primeiro lugar e avaliando as oportunidades de investigação futuras** que possam emergir das Informações reunidas.



- **Os cinco processos comerciais:**
 - Para além de ser uma atividade criminosa, o tráfico de pessoas é uma “atividade comercial”
 - Os traficantes são negociantes, razão pela qual precisam de publicitar os seus «produtos», possuem instalações, usam transportes para movimentar as «mercadorias», têm capital para investir e financiar as suas operações quotidianas e usam uma rede de comunicações
 - No rasto do lucro...



- **Os cinco processos comerciais:**

Os traficantes utilizam cinco elementos comerciais básicos nas suas atividades:

 - **Anúncios;**
 - **Instalações;**
 - **Transporte;**
 - **Aspetos financeiros;**
 - **Comunicações.**

Descrição e interesse para a investigação...



- **Que abordagens/táticas de investigação devem ser utilizadas?**

A vítima está em risco iminente de sofrer agressões físicas...



- **Que abordagens/táticas de investigação devem ser utilizadas?**

Há informação não confirmada sobre tráfico de pessoas na região...



- **Que abordagens/táticas de investigação devem ser utilizadas?**

A vítima afirma às autoridades ter sido traficada...



- **Que abordagens/táticas de investigação devem ser utilizadas?**

Há suspeita de um caso de tráfico de pessoas no bairro...



OTSH OBSERVATÓRIO DO TRÁFICO DE SERVIDORES
HUMANOS OBSERVATORY ON TRAFFICKING IN
HUMAN SERVICES

Mais informação disponível em:

<http://www.otsh.mai.gov.pt/>



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Manual contra o tráfico de pessoas para profissionais do sistema de justiça penal



Módulo 18



- **Técnicas especializadas nas investigações de tráfico de pessoas**

- Reservado -



- **Objetivos:**

- Explicar o que é uma técnica especializada e identificar as técnicas especializadas descritas neste módulo;
- Identificar alguns objetivos e potenciais aplicações das técnicas especializadas nas investigações de tráfico de pessoas;
- Descrever o conceito de técnicas relacionadas;
- Explicar as questões de implementação, formação e gestão a serem consideradas quando se utilizam técnicas especializadas;
- Explicar a razão pela qual é fundamental efetuar uma avaliação contínua dos riscos ao utilizar técnicas especializadas;
- Explicar como as investigações de tráfico de pessoas podem conduzir a intervenções táticas para resgatar vítimas, etc.;
- Enunciar algumas das abordagens que podem ser adotadas para ocultar o uso de técnicas especializadas;
- Descrever como as técnicas especializadas podem ser implementadas para combater uma possível contravigilância;



- É difícil investigar os grupos de crime organizado através dos métodos convencionais.
- A **Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional** reconhece essa situação e incentiva os Estados Partes a fazerem uso de «técnicas especializadas» para investigar os crimes de tráfico de pessoas.



- **Artigo 20.º da Convenção Contra a Criminalidade Organizada:** «cada Estado Parte, tendo em conta as suas possibilidades e em conformidade com as condições previstas no seu direito interno, adotará as medidas necessárias para permitir o recurso apropriado a entregas controladas e, quando o considere adequado, o recurso a outras técnicas especiais de investigação, como a vigilância eletrónica ou outras formas de vigilância e as ações encobertas, por parte das autoridades competentes no seu território, a fim de combater eficazmente a criminalidade organizada».
-



- **O que são técnicas especializadas?**
- Uma técnica especializada é um recurso que pode não ser utilizado nas atividades quotidianas de policiamento.
- Estas técnicas são geralmente encobertas, não devendo os respetivos alvos dar-se conta de que estão a ser utilizada. Consistem em infiltrar-se em áreas normalmente privadas. Por este motivo, o recurso às mesmas é fortemente regulado em muitas jurisdições.
- O tráfico de pessoas envolve redes de crime cuja atividade assenta inteiramente no uso da coação, do engano e da intimidação de pessoas. As técnicas especializadas podem ajudar a reduzir a dependência dos depoimentos das vítimas e permitir às autoridades infiltrar-se profundamente nessas redes.



- **No contexto do presente módulo de formação, as técnicas especializadas são:**

- Uso de informadores;
- Agentes encobertos/infiltrados;
- Vigilância;
- Monitorização e interceção de comunicações;
- Análise e uso de dados de comunicações.



- **Objetivos da utilização das técnicas**

- **Aplicações**

- **Técnicas relacionadas:** As técnicas especializadas são mais eficazes quando utilizadas conjuntamente ou combinadas com outras técnicas. Cada um dos módulos de técnicas especializadas incluídos neste manual apresenta sugestões acerca do modo como pode ser conjugada com outras.
- P.ex. Investigações financeiras nos casos de tráfico de pessoas (módulo 24).

- Formas de investigação nos casos de tráfico de pessoas (módulo 15) (especificamente, o capítulo sobre os cinco processos comerciais);
- Indicadores de tráfico de pessoas (módulo 2);
- Métodos de controlo nas investigações de tráfico de pessoas (módulo 4);
- Avaliação do risco nas investigações de tráfico de pessoas (módulo 5);
- Contraposição das estratégias comuns de defesa nos casos de tráfico de pessoas (módulo 26).
- **Cooperação internacional (módulo 6) e Técnicas de investigação conjunta (módulo 16)**

Módulo 15
Formas de investigação nos casos de tráfico de pessoas



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CENTRO
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Videogravação da comunicação

Apresentação do Manual da UNODC - Módulos 5, 8 e 9 - avaliação do risco nas investigações de tráfico de pessoas e inquirição de vítimas, incluindo crianças

Fernando Marques

**IMIGRAÇÃO ILEGAL E TRÁFICO DE SERES HUMANOS:
INVESTIGAÇÃO, PROVA,
ENQUADRAMENTO JURÍDICO E SANÇÕES**

Inspetor-Adjunto-Principal Fernando Marques
Serviço de Estrangeiros e Fronteiras

**Workshop sobre o Manual da UNODC contra o Tráfico de Pessoas para
Profissionais do Sistema de Justiça Penal**

Módulo 5 – avaliação do risco nas investigações de tráfico de seres humanos:

- Este módulo sublinha a necessidade de uma avaliação contínua do risco, explorando ainda as questões essenciais a ter em consideração ao efetuar avaliações do risco em investigações de tráfico de seres humanos. Com esse intuito, explica o conceito de risco e indica condições que aumentem a probabilidade de determinadas pessoas estarem em risco no contexto dos casos de tráfico de seres humanos. O módulo descreve igualmente quais são os riscos, como determinar o grau e a gravidade do risco, bem como as ações a ponderar como resposta contra um risco identificado.

Módulo 8 – entrevistas a vítimas de tráfico de seres humanos que constituem potenciais testemunhas:

- Este módulo identifica o objetivo geral das entrevistas de investigação criminal às vítimas de tráfico que constituem potenciais testemunhas. Identifica cinco etapas do modelo «PEACE» para a entrevista a vítimas de crime:

- Planeamento e preparação da entrevista;
- Estabelecimento de relação com a vítima/testemunha, explicação do processo e do conteúdo da entrevista;
- Obtenção do depoimento da vítima/testemunha,
- Conclusão adequada da entrevista;
- Avaliação do conteúdo da entrevista.

O módulo enumera os passos concretos do planeamento deste tipo de entrevista e os elementos necessários para iniciar uma inquirição a uma vítima/testemunha de tráfico

numa entrevista probatória. O módulo apresenta também técnicas especializadas de entrevista e explica as diferenças entre perguntas abertas, específicas, fechadas e orientadas.

Módulo 9 – entrevistas a crianças vítimas de tráfico de seres humanos:

- Este módulo define «criança» como uma pessoa com idade inferior a 18 anos, tal como determinado no Protocolo contra o Tráfico de Pessoas. Por conseguinte, determina que o princípio subjacente que deve orientar as entrevistas a crianças é o da sua condução tendo em atenção o interesse superior da criança. O módulo reconhece que as crianças consideradas possíveis vítimas de tráfico de seres humanos poderão ser mais vulneráveis do que uma possível vítima adulta, adaptando em conformidade cada uma das cinco etapas do modelo PEACE de entrevista às vítimas.

SEF OISH

Modulo 5 - Avaliação do risco nas investigações de tráfico de pessoas

RISCO

Quem/o quê?

- Vítimas (cooperantes ou não)
- Amigos e/ou familiares das vítimas
- Testemunhas
- Investigadores e demais profissionais que participam/colaboram na investigação e no apuramento dos factos (intérpretes, psicólogos, pessoas ligadas a ONG)
- Própria investigação

Qual?

- Físico (agressões, exposição a más condições climáticas, más condições de trabalho, de atividade – que poderá conduzir à morte) e/ou
- Psicológico (ameaças à vítima e/ou familiares, amigos, que pode levar, entre outras, a tentativas de suicídio - por parte das vítimas e/ou familiares das mesmas)

SEF OISH

Modulo 5 - Avaliação do risco nas investigações de tráfico de pessoas

Grau do risco?

- Imediato? – vítimas, amigos ou familiares foram gravemente agredidos, violados?
- Os traficantes têm antecedentes de ameaça ou violência?
- Durante a fase de investigação existe ou não capacidade imediata de intervenção das autoridades para a remoção da vítima para uma casa segura?
- A própria família/amigos da vítima podem ser uma ameaça para a mesma?
- Os traficantes conhecem (ou alegam conhecer) a localização das casas seguras?
- Os traficantes têm capacidade de desencadear ações “de força”, contra as vítimas mesmo sabendo que estas estão protegidas pelas autoridades e em locais seguros?

SEF OISH

Modulo 5 - Avaliação do risco nas investigações de tráfico de pessoas

Grau do risco?

- A investigação já está suficientemente “madura” para se desencadear uma ação que liberte as vítimas, existindo prova suficiente para acusar os traficantes?
- Podem/devem ser efetuadas ações “disruptivas” para obstar à violência por parte dos traficantes, garantido ao mesmo tempo a continuação da recolha da prova e segurança às vítimas?
- Existem vítimas cooperantes? (muitas vezes vítimas e/ou informadores que cooperam com as autoridades ficam à mercê da observação atenta dos traficantes ou de outros que colaborem com estes)
- As vítimas devem ser removidas, mesmo correndo-se o risco de não se conseguir prova suficiente para condenar os traficantes pela prática do crime de tráfico de pessoas
- Os investigadores têm um claro dever humanitário de proteger as vítimas

SEF OISH

Modulo 5 - Avaliação do risco nas investigações de tráfico de pessoas

AVALIAÇÃO CONTÍNUA DO RISCO

Para uma correta avaliação continua do risco, devem os investigadores possuir o maior conjunto de informação possível, proveniente de:

- Informadores (e/ou vítimas cooperantes)
- Vigilâncias (por vezes 24H/dia)
- Interceções telefónicas
- Outras

SEF OISH

Modulo 5 - Avaliação do risco nas investigações de tráfico de pessoas

Informadores

- Pessoas que partilham locais com as vítimas e/ou traficantes e/ou conhecem as suas rotinas – trabalhadores de fábricas, trabalhadores agrícolas, lojistas, prostitutas, moradores de habitações contíguas às utilizadas pelas vítimas, etc.
- Podem revelar informação precisa sobre nomes, alcunhas, números de telefone, alojamento, viaturas utilizadas, horas de chegada, horas de partida dos locais - de vítimas, criminosos, clientes ou outros -, que permitem aos investigadores conjugar, adequar, planejar:
 - Ações de fiscalização
 - Remoção de vítimas ou outras pessoas
 - Ações de vigilância direccionadas
 - Ações disruptivas
 - Audição (em tempo real) de conversações telefónicas importantes para a prova

SEF OISH

Modulo 5 - Avaliação do risco nas investigações de tráfico de pessoas

Vigilâncias

- São instrumento muito importante para obtenção da prova
- Devem ser efetuadas por elementos experientes que dominem todas as técnicas de vigilância, nos diversos ambientes
- Podem ser efetuadas a partir de pontos de observação estáticos, a pé, móveis, intrusivas (com recurso identificação/localização eletrónicas)
- Permitem registar contactos (entre vítimas, entre vítimas e traficantes, entre vítimas e clientes, etc.)
- Servem para referenciar indivíduos que posteriormente possam ser identificados por informadores ou em sede de cooperação policial

SEF OISH

Modulo 5 - Avaliação do risco nas investigações de tráfico de pessoas

Vigilâncias

- Permitem a identificação/referenciação de locais frequentados pelas vítimas e traficantes tais como residências, entidades bancárias ou outras similares onde os criminosos depositam e/ou transferem dinheiro, fruto da atividade
- Sempre que possível, as ações de vigilância devem ser acompanhadas por audição, em tempo real, de conversações telefónicas interceptadas
- Permitem o conhecimento dos locais e das pessoas que os frequentam o que se revela fundamental quando seja necessária uma ação para remoção de uma vítima e/ou detenção dos traficantes

SEF OISH

Modulo 5 - Avaliação do risco nas investigações de tráfico de pessoas

Interceções telefónicas

- Sempre que possível conjugadas com vigilâncias e/ou outras ações no terreno;
- Permitem perceber factos passados e antecipar cenários (de eventuais agressões, coação, sequestro de vítimas ou de pessoas ligadas a estas ou à investigação)

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Modulo 5 - Avaliação do risco nas investigações de tráfico de pessoas

Outras

- Cooperação policial (nacional ou internacional)
- Observação direta dos investigadores (quando partilham os mesmos locais, de vítimas e de criminosos) / infiltrados ou não
- Informação proveniente de ONG que têm contacto com as vítimas
- A existência de casas seguras, de uma estrutura de apoio de proteção revela-se fundamental, aquando da remoção de uma vítima durante a fase de investigação e após esta fase – quando se procedem a detenções dos traficantes, outros há que pretendem continuar a explorar estas vítimas

SEF OISH

Modulo 8 - Entrevistas a vítimas de tráfico de pessoas que constituem potenciais testemunhas

As entrevistas têm como principal objectivo a obtenção de um depoimento rigoroso

Da leitura do presente módulo retiramos, entre outros, ensinamentos úteis relativos a

- Planeamento e preparação da entrevista
- Estabelecimento de relação com a vítima/testemunha e explicação do processo e do conteúdo da entrevista
- Obtenção do depoimento da vítima/testemunha
- Conclusão adequada da entrevista
- Avaliação do conteúdo da entrevista

SEF OISH

Modulo 8 - Entrevistas a vítimas de tráfico de pessoas que constituem potenciais testemunhas

Nota prévia

Abordagem à vítima e local onde foi encontrada

- Necessidade de assistência médica e realização de exames/perícias (para aferir da idade, se foi vítima de abusos sexuais, agressões...)
- Necessidade de acautelar prova no local onde foi encontrada/abordada
- Necessidade de serem separadas de outras vítimas e traficantes

SEF OISH

Modulo 8 - Entrevistas a vítimas de tráfico de pessoas que constituem potenciais testemunhas

Preparação da entrevista

Se possível, o entrevistador/o investigador deve ser detentor da maior quantidade de informação possível sobre a vítima e tudo o que a rodeia

- nacionalidade, língua, local onde foi encontrada, idade que diz ter e idade que aparenta ter
- cultura e nível de desenvolvimento (da vítima e do local de onde é proveniente)
- pessoas que foram encontradas com a vítima (devem igualmente ser alvo de pesquisa prévia de informação)
- cooperação policial relativa a eventuais antecedentes da vítima/traficante
- escolha de local apropriado, confortável, seguro, para a realização da entrevista e das pessoas que poderão assistir, intervir na mesma (intérpretes idóneos, técnicos habilitados – psicólogos, etc.)

SEF OISH

Modulo 8 - Entrevistas a vítimas de tráfico de pessoas que constituem potenciais testemunhas

Preparação da entrevista

- Escolha de refeições
- Possibilidade de troca de vestuário (através de ONG / outros)
- Possibilidade, de acordo com a lei, de atribuição de autorização de residência
- Necessidade de discussão entre investigador e autoridade judiciária competente para exercer a acção penal
- Necessidade de avaliação individual levada a cabo por especialista
- Forma como ficará registada a entrevista (registo vídeo, áudio e/ou escrito)
- Ritmo da entrevista, intervalos

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Modulo 8 - Entrevistas a vítimas de tráfico de pessoas que constituem potenciais testemunhas

Recolha de depoimento a vítima

- Em local apropriado, confortável e seguro
- Perguntas abertas (recomendáveis no início da entrevista)
 - convide a um relato livre, aberto
 - descrição de pessoas e locais
 - evitar colocar questões que incluam a palavra «porquê»
- Perguntas específicas/direcionadas
 - para o caso de pessoas que não consigam responder às perguntas abertas para clarificar, desenvolver ou completar informações
- Perguntas fechadas
 - adequadas a pessoas/vítimas especialmente vulneráveis

SEF OISH

Modulo 8 - Entrevistas a vítimas de tráfico de pessoas que constituem potenciais testemunhas

Recolha de depoimento a vítima

- Um "bom depoimento" - de vítima de tráfico de pessoas - deverá conter indicação (o mais precisa possível) sobre:
 - Quem, o quê, como, onde, quando, porquê:
 - ofereceu, entregou, aliciou, aceitou, transportou, alojou, acolheu pessoa para fins de exploração sexual, exploração do trabalho ou extracção de órgãos (*vide artº 160º do CP*)

SEF OISH

Modulo 8 - Entrevistas a vítimas de tráfico de pessoas que constituem potenciais testemunhas

Conclusão da entrevista/depoimento

- Nesta fase poderá ser útil abordar novamente alguns dos tópicos "neutros" referidos na fase inicial de estabelecimento de relação
- Garantir que a pessoa não ficou perturbada
- Não criticar, elogiar ou felicitar a testemunha

Avaliação da entrevista/depoimento

- Perceber se foram alcançados os objectivos da entrevista/recolha de depoimento
- Qual o risco para família, amigos, conhecidos/outros - da vítima
- Diligências que devam ser tomadas e aspetos a explorar (pela investigação)

SEF OISH

Modulo 9 - Entrevistas a crianças vítimas de tráfico de pessoas

Princípio básico que deverá nortear este tipo de entrevistas, inquirições a crianças:

Em cada uma das etapas do processo, é necessário ter em atenção os superiores interesse da criança

Todas as acções têm de se basear nos princípios da proteção e respeito dos direitos humanos consagrados na Convenção das Nações Unidas sobre os Direitos da Criança e noutros instrumentos internacionais

A Convenção das Nações Unidas sobre os Direitos da Criança define como criança qualquer pessoa com idade inferior a dezoito (18) anos

As considerações apresentadas no Módulo 8 (entrevistas a vítimas de tráfico de pessoas que constituem potenciais testemunhas), são igualmente importantes no planeamento e preparação das entrevistas a crianças consideradas potenciais vítimas de tráfico

Complementarmente, deverão ser consideradas a utilização de técnicas específicas de entrevista

SEF OISH

Modulo 9 - Entrevistas a crianças vítimas de tráfico de pessoas

Muitos dos aspectos das entrevistas a crianças que são vítimas e/ou testemunhas de tráfico são semelhantes às entrevistas a adultos vulneráveis que são vítimas e/ou testemunhas do mesmo crime

As crianças poderão ser mais vulneráveis porque:

- Poderão sentir-se compelidas a colaborar
- Poderão considerar normal uma conduta anómala
- Desconhecem as palavras adequadas para descrever o que aconteceu
- Poderão não ter familiares, os familiares não os quererem aceitar ou elas mesmas não quererem voltar para estes

SEF OISH

Modulo 9 - Entrevistas a crianças vítimas de tráfico de pessoas

A lei portuguesa não estabelece o limite a partir do qual uma pessoa pode prestar depoimento, contudo, em sede de julgamento, impõe que a audição de criança menor de dezasseis (16) anos, seja presidida por Mmo Juiz;

É aconselhável que as entrevistas prévias, à crianças, sejam efectuadas por técnico especialmente habilitado (psicólogo/outro), previamente designado para o efeito, que pode/deve, acompanhar a criança na tomada de declarações para memória futura (Artº 271º, nº 2 e nº4 do CPP), a fim de servir de suporte à mesma e garantir uma relação de confiança/apoio

As declarações para memória futura visam obstar à reinquirição de criança na fase subsequente do processo e assim também à sua retraumatização

Também nas fases anteriores do Processo, designadamente na de investigação é aconselhável que a entrevista/prestação de declarações de criança, menor de 16 anos, seja presidida pela competente autoridade judiciária, mediante acompanhamento de técnico especializado [Artigos 349º, 91º, nº 6, al. a) e 131º, nº 2, todos do CPP]

SEF OISH

Obrigado



The collage consists of three images. The top-left image shows a woman in a white protective suit and mask, possibly a forensic or medical professional, examining a child. The top-right image shows a wooden cage or structure, likely used for housing or confinement. The bottom image shows two hands with the words 'HELP' and 'ME' written on the palms, symbolizing a plea for assistance.



Videogravação da comunicação

Apresentação do Manual da UNODC - Módulos 20 e 26 - ações encobertas e estratégias usadas pela defesa em casos de tráfico de pessoas

Rosa Rocha

IMIGRAÇÃO ILEGAL E TRÁFICO DE SERES HUMANOS: INVESTIGAÇÃO, PROVA, ENQUADRAMENTO JURÍDICO E SANÇÕES

Dr.ª Rosa Rocha

Procuradora da República, na Procuradoria-Geral da República

Workshop sobre o Manual da UNODC contra o Tráfico de Pessoas para Profissionais do Sistema de Justiça Penal

Módulo 20 – agentes encobertos/infiltrados nas investigações de tráfico de pessoas:

Este módulo enquadra as acções encobertas nas técnicas especiais de investigação, fornece orientações e princípios gerais a observar na utilização deste meio de investigação e identifica alguns problemas específicos e formas de os evitar, tais como eventuais alegações de actuação provocatória do crime por parte do agente encoberto.

Alerta ainda para o elevado grau de risco que esta forma de investigação comporta para o(s) agente(s) envolvido(s) e para a consequente necessidade de elaboração de um cuidadoso plano de actuação conjugado com a avaliação contínua e dinâmica dos riscos associados à sua utilização.

Módulo 26 – contraposição das estratégias de defesa nos casos de tráficos de seres humanos:

Este módulo visa alertar para a necessidade e vantagem de, nas várias fases do processo, desde a investigação à audiência de julgamento, serem perspectivadas as potenciais estratégias de defesa, por forma a que, atempadamente, sejam recolhidos os elementos probatórios que permitam contrariá-las e, bem assim, ponderar as iniciativas processuais mais adequadas para levar ao conhecimento do tribunal todos os factos relevantes para a decisão.

São ainda identificadas algumas das mais comuns estratégias de defesa utilizadas nos casos de tráfico de seres humanos e apontadas algumas vias para a sua refutação.



Videogravação da comunicação

Tipo jurídico-penal do crime de tráfico de pessoas e sanções - a perspetiva do Julgador no quadro da jurisprudência actual

Tipo jurídico-penal do crime de tráfico de pessoas e sanções - a perspetiva do Julgador no quadro da jurisprudência actual

Margarida Blasco

**IMIGRAÇÃO ILEGAL E TRÁFICO DE SERES HUMANOS:
INVESTIGAÇÃO, PROVA,
ENQUADRAMENTO JURÍDICO E SANÇÕES**

Dr.^a Margarida Blasco

Juíza Desembargadora, Tribunal da Relação de Lisboa

Tipo jurídico-penal do crime de tráfico de pessoas e sanções – a perspectiva do

Julgador no quadro da jurisprudência actual:

- . Dos crimes contra as pessoas e dos crimes contra a liberdade e autodeterminação sexual.
- . Tipificação dos crimes de lenocínio e de tráfico de pessoas.
- . A jurisprudência portuguesa face à sucessão das leis penais no tempo.
- . O concurso de crimes.
- . O crime continuado.
- . A tomada de declarações para memória futura.
- . A determinação da pena.
- . Alguns casos práticos. Análise.



Videogravação da comunicação

Tráfico de seres humanos para fins de exploração sexual

Tráfico de seres humanos para fins de exploração sexual

Madalena Duarte



Videogravação da comunicação

Tráfico de seres humanos para fins de exploração do trabalho

Tráfico de seres humanos para fins de exploração do trabalho

Sofia Amaral de Oliveira



IMIGRAÇÃO ILEGAL E TRÁFICO DE SERES HUMANOS: INVESTIGAÇÃO, PROVA, ENQUADRAMENTO JURÍDICO E SANÇÕES

Centro de Estudos Judiciários, 3 de Fevereiro de 2012

Tráfico de seres humanos para fins de exploração do trabalho

Sofia Amaral de Oliveira
Perita Associada
OIT-Lisboa

I – Sumário

1. Tráfico de seres humanos e trabalho forçado: a perspectiva da OIT.
2. Trabalho digno para trabalhador/as doméstico/as: combater a servidão doméstica.
3. A cooperação técnica no terreno.

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www.ilo.org/lisbon



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III – Sítios de referência (OIT)

1. Em português

OIT-Lisboa: www.ilo.org/lisbon

i) Recursos sobre trabalho doméstico e migração laboral
http://www.ilo.org/public/portugue/region/eurpro/lisbon/html/portugal_18_dez_11_pt.htm

ii) Convenções da OIT sobre trabalho forçado
http://www.ilo.org/public/portugue/region/eurpro/lisbon/pdf/conv_29.pdf
http://www.ilo.org/public/portugue/region/eurpro/lisbon/pdf/conv_105.pdf

2. Em inglês

OIT/ILO – **International Labour Organization**
www.ilo.org

i) Página do programa SAP-FL (Special Action Programme to Combat Forced Labour)
www.ilo.org/forcedlabour

ii) Convenção, Recomendação e outros recursos da OIT sobre trabalhador/as doméstico/as
<http://www.ilo.org/global/topics/domestic-workers/lang--en/index.htm>

OIT-Lisboa

Rua Viriato, 7, 7º andar - 1050-233 Lisboa – Portugal
www.ilo.org/lisbon

IMIGRAÇÃO ILEGAL E TRÁFICO DE SERES HUMANOS: INVESTIGAÇÃO, PROVA, ENQUADRAMENTO JURÍDICO E SANÇÕES

Centro de Estudos Judiciários, 3 de Fevereiro de 2012

Tráfico de seres humanos para fins de exploração do trabalho

Sofia Amaral de Oliveira
Perita Associada
OIT-Lisboa

Em nome do Escritório da OIT para Portugal (OIT Lisboa) e da sua Directora, agradeço o convite que nos foi endereçado pelo Centro de Estudos Judiciários para participar neste seminário, cujo tema está ligado a áreas nas quais a OIT tem actuado desde a sua criação em 1919. É com muito prazer que nos associamos a esta iniciativa, esperando trazer outra perspectiva e poder também contribuir para a vossa reflexão.

O Relatório da OIT *Uma Aliança Global Contra o Trabalho Forçado*, publicado em 2005, forneceu pela 1ª vez estimativas globais sobre o problema: cerca de 12 milhões de pessoas em todo o mundo já passaram por alguma forma de trabalho forçado ou de servidão. Destas, 9.8 milhões foram exploradas por agentes privados, e mais de 2.4 milhões foram alvo de tráfico humano. O maior número de casos encontra-se na Ásia, seguindo-se a América Latina e Caraíbas, e dos países industrializados. Mais de metade das vítimas de trabalho forçado são mulheres e raparigas.

Da análise destes dados, retiramos duas mensagens fulcrais. Primeiro, a abolição do trabalho forçado representa um desafio para praticamente todos os países do mundo, quer sejam industrializados, em transição ou em desenvolvimento. Segundo, a maior parte do trabalho forçado é hoje efectuado na economia privada, e, principalmente, na economia informal dos países em desenvolvimento

Desde então, registou-se progresso a nível político e legislativo, com uma vaga de novas leis, directivas, instrumentos regionais, particularmente contra o tráfico de seres humanos, para exploração laboral ou sexual. Tem havido também um aumento de medidas de protecção para pessoas ou grupos particularmente em risco de trabalho forçado e tráfico, sobretudo para migrantes em situação irregular. E existe uma maior consciencialização para esta temática.

Em Maio de 2009, o mais recente Relatório Global da OIT sobre trabalho forçado¹ revelou o “custo de oportunidade da coerção”: 32 mil milhões de lucros anuais provenientes do tráfico de seres humanos. Na minha intervenção abordarei a problemática do tráfico de seres humanos na perspectiva da OIT, ou seja, tendo em

¹ Disponível em http://www.ilo.org/public/portugue/region/eurpro/lisbon/pdf/relatorioglobal_2009.pdf

conta que a principal preocupação da OIT é a protecção e promoção dos direitos no trabalho. Aprofundarei em seguida a questão das trabalhadoras e dos trabalhadores domésticos, grupo particularmente vulnerável, que recentemente foi objecto de actuação normativa da OIT. Por fim, partilharei convosco um exemplo de cooperação técnica da OIT no terreno.

A OIT prossegue a sua actividade, neste e noutros domínios, através de diversas formas, nomeadamente pela produção de normas internacionais do trabalho. Estas normas têm a particularidade de serem consensualizadas de forma tripartida a nível internacional, entre governos, representantes de empregadores e representantes de trabalhadores, e têm permitido criar mínimos de trabalho digno em todo o mundo.

As mais relevantes para o tema deste seminário são as seguintes:

- A Convenção (N.º 97) sobre a Migração para Trabalho (revista), de 1949², e a Convenção (N.º 143) sobre Trabalhadores Migrantes (Disposições Complementares), de 1975³, que visam combater as migrações em condições abusivas e promover o respeito dos direitos humanos fundamentais de todos os trabalhadores migrantes, e as recomendações que as complementam (a Recomendação (N.º 86), de 1949, e a Recomendação (N.º 151), de 1975);
- A Convenção (N.º 181) sobre Agências de Emprego Privadas, de 1997⁴ e a Recomendação (N.º 188), que regula o funcionamento destas entidades, reconhecendo a função que podem desempenhar no mercado de trabalho e a necessidade de proteger os trabalhadores contra abusos;
- A Convenção (N.º 138) sobre a idade mínima de admissão ao emprego, de 1973⁵, e a Convenção (N.º 182) sobre a interdição das piores formas de trabalho das crianças, de 1999⁶, e as recomendações que as complementam (a Recomendação (N.º 146), de 1973 e a Recomendação (N.º 190), de 1999);
- A Convenção (N.º 29) sobre o trabalho forçado, de 1930⁷ e a Convenção (N.º 105), sobre a abolição do trabalho forçado, de 1957⁸.

As convenções relativas ao trabalho forçado, junto com as relativas ao trabalho infantil, que já foram ratificadas por Portugal, complementam-se e fazem parte de um conjunto de convenções fundamentais da OIT, assim definidas por concorrerem para a noção de trabalho digno.

² Disponível em http://www.ilo.org/public/portugue/region/eurpro/lisbon/pdf/conv_97.pdf

³ Disponível em http://www.ilo.org/public/portugue/region/eurpro/lisbon/pdf/conv_143.pdf

⁴ Disponível em http://www.ilo.org/public/portugue/region/eurpro/lisbon/pdf/conv_181.pdf

⁵ Disponível em http://www.ilo.org/public/portugue/region/eurpro/lisbon/pdf/conv_138.pdf

⁶ Disponível em http://www.ilo.org/public/portugue/region/eurpro/lisbon/pdf/conv_182.pdf

⁷ Disponível em http://www.ilo.org/public/portugue/region/eurpro/lisbon/pdf/conv_29.pdf

⁸ Disponível em http://www.ilo.org/public/portugue/region/eurpro/lisbon/pdf/conv_105.pdf

Para a OIT, o trabalho forçado é todo o trabalho e serviço exigido a qualquer pessoa (homem, mulher ou criança) sob ameaça de uma sanção, que não é realizado de forma voluntária.

Estas ameaças podem traduzir-se em violência física, retenção de documentos, não pagamento de salários, ameaças de denúncia às autoridades quando estamos perante migrantes em situação irregular. Existem zonas cinzentas para as quais a OIT chama particular atenção. Por exemplo, nos casos em que existe um suposto consentimento do trabalhador ou da trabalhadora, este perde qualquer validade se tiver sido obtido com fundamento em engano, mentira ou de forma fraudulenta.

O trabalho forçado pode resultar de uma situação de tráfico, pode envolver a deslocação de uma pessoa de um país para outro para efeitos de exploração, mas também pode existir dentro de um mesmo país.

O trabalho forçado tem sido detectado em diversos sectores, afectando trabalhadores e trabalhadoras, na economia formal e informal. Mas alguns tipos de trabalhadores são mais vulneráveis que outros. Há situações difíceis de detectar, atendendo ao facto dos locais de trabalho serem isolados, ou inacessíveis, como é o caso dos domicílios privados em que se desenvolve o trabalho doméstico.

O tema do trabalho digno para trabalhadoras e trabalhadores é o mais recente sobre o qual a OIT se debruçou. Existem características e factores que justificam que haja uma atenção normativa específica para estes trabalhadores, nomeadamente:

- O local de trabalho é uma residência privada - a casa da família a quem o trabalho é prestado - estando as tarefas directamente ligadas às necessidades das pessoas que vivem na casa, muitas vezes sem definição prévia clara. Por vezes, sobretudo no caso de migrantes, essa casa da família acaba por ser o local de vida do(a) trabalhador(a), o que o(a) coloca numa situação de disponibilidade permanente perante o seu empregador;
- O empregador é uma pessoa singular, a família;
- A noção de trabalho doméstico é vaga, abrangendo uma diversidade de tarefas e funções, que variam consoante o ordenamento jurídico em causa;
- A relação de trabalho é informal, o que coloca o empregador privado numa posição de ainda maior poder na determinação das condições da prestação de trabalho. Em muitos países, este tipo de actividade não é sequer reconhecida como sendo trabalho, não sendo por isso regulada, o que resulta numa maior desprotecção para estes(as) trabalhadores(as);

- Tipicamente não há um contrato formal, sendo as condições que regulam a relação entre as partes indefinidas e facilmente alteráveis unilateralmente;
- A natureza oculta do trabalho doméstico reforça o isolamento destes(as) trabalhadores(as) e limita o seu acesso à informação, à protecção e a medidas de assistência, mesmo que estas existam;
- A falta de reconhecimento do estatuto profissional, que se traduz na ausência de protecção legal ou numa protecção normalmente menor do que conferida pela a legislação geral do trabalho;
- A ausência de fiscalização e controlo, pois mesmo onde as leis existem há obstáculos para que essa fiscalização se realize;
- A falta de acesso a mecanismos jurisdicionais para defesa dos seus direitos, não só porque muitas vezes desconhecem esses seus direitos, como, por outro lado, têm receio, nomeadamente quando se trata de trabalhadores(as) migrantes, de ter problemas relativamente à sua situação de permanência no país onde estão, por vezes, de forma irregular, caso façam valer os seus direitos.

Quanto aos(as) trabalhadores(as) migrantes, além da eventual ausência de regularização, em muitos casos não dominam a língua do país onde se encontram, pelo que, mesmo quando têm liberdade para aceder a determinadas informações, não sabem onde se dirigir, não conhecem sequer, por vezes, o sítio onde estão. São, por isso, trabalhadores(as) que estão ainda mais vulneráveis.

As características e factores anteriormente referidos levam-nos a concluir que se pode agir a nível legislativo para ajudar a prevenir o trabalho doméstico forçado e o tráfico de pessoas para servidão doméstica, adoptando medidas legislativas que proíbam a retenção dos passaportes pelos empregadores; permitindo a extensão da permanência dos(as) trabalhadores(as) domésticos(as) migrantes no território, evitando a sua expulsão imediata no caso de cessação de um contrato; eliminando a exigência dos(as) trabalhadores(as) migrantes residirem na casa do empregador; abolindo o pagamento de taxas a agências privadas de emprego pelos(as) trabalhadores(as), e as deduções equivalentes da respectiva remuneração. A OIT tem exemplos de boas práticas nesta matéria, como sejam a regulação efectiva das agências privadas de emprego ou a celebração de acordos bilaterais entre Estados⁹.

⁹ Cfr. BIT, *Trabalho digno para o trabalho doméstico*, 2010 disponível em http://www.ilo.org/public/portugue/region/eurpro/lisbon/pdf/pub_trabdomestico.pdf, p. 70: “No memorando de entendimento assinado entre a Indonésia e o Kuwait, bem como no assinado entre a Indonésia e a Malásia, são atribuídas várias responsabilidades às agências de recrutamento. No Kuwait, estão obrigadas a assegurar que os contratos de emprego são integralmente compreendidos e cumpridos

Considerando que a regulação do trabalho doméstico era um passo fundamental para contribuir para prevenir as situações de abuso, exploração ou tráfico, a OIT entendeu que era necessário estabelecer normas internacionais específicas para regular a questão do trabalho digno para as trabalhadoras e os trabalhadores domésticos.

Na verdade, os trabalhadores domésticos já beneficiavam de direitos à luz das demais normas internacionais do trabalho existentes. No entanto, a adoção de uma nova norma nesta matéria era importante para responder às características específicas deste tipo de trabalho. Tinha de ser uma norma que permitisse uma ampla cobertura, que fosse de fácil ratificação pelos Estados Membros e que pudesse promover incentivos e orientações que permitissem também a sua aplicação prática com alguma rapidez. Essa norma foi adoptada na Conferência Internacional do Trabalho em Junho de 2011.

A Convenção (N.º 189) relativa ao trabalho digno para trabalhadoras e trabalhadores domésticos, de 2011, depois de reconhecer o importante contributo dos(as) trabalhadores(as) migrantes e dos(as) trabalhadores(as) domésticos(as) para a economia global, de salientar a subvalorização deste tipo de trabalho, de reafirmar que as demais normas internacionais do trabalho também se aplicam a estes(as) trabalhadores(as), vem definir o trabalho doméstico como aquele que é realizado em ou para um ou vários domicílios (incluindo actividades como a lida doméstica, cuidar de crianças ou idosos, a jardinagem, o transporte da família, etc.).

Também define que trabalhador doméstico é qualquer pessoa que execute trabalho doméstico remunerado, no quadro de uma relação de trabalho.

A Convenção adopta medidas que visam efectivamente a protecção efectiva destes(as) trabalhadores(as) domésticos(as), nomeadamente prevê que as condições do contrato sejam comunicadas ao(à) trabalhador(a) de uma forma apropriada e de fácil compreensão; que seja assegurada protecção eficaz contra qualquer forma de abuso ou assédio; que seja protegido o direito à privacidade dos(as) trabalhadores(as); que lhes sejam garantidas condições não menos favoráveis que as dadas a outros trabalhadores em matéria de segurança e saúde no trabalho, segurança social, protecção na maternidade; que os salários sejam pagos a intervalos regulares e seja limitada a parte da remuneração que pode ser paga em espécie.

Desta Convenção, e para o tema aqui em debate, gostaria de destacar o artigo 8.º, que se refere aos(às) trabalhadores(as) migrantes, o artigo 9.º, relativo à residência e

pelos empregadores, que defendem e promovem os direitos e os interesses dos(as) trabalhadores(as) domésticos(as), que monitorizam as condições dos(as) trabalhadores(as) domésticos(as) e prestam mensalmente, durante os três primeiros meses de cada contrato, informações sobre os mesmos à Embaixada Indonésia.”

documentos de identificação, o artigo 10.º que regula o tempo de trabalho e descanso, o artigo 12.º quanto ao pagamento da remuneração, o artigo 15.º sobre as agências privadas de emprego, o artigo 16.º relativo ao acesso à justiça e o artigo 17.º sobre fiscalização e sanções.

Para complementar as regras previstas na Convenção, os mandantes tripartidos adoptaram ainda a Recomendação (N.º 201), que prevê, entre outras medidas, a elaboração de um contrato modelo e a adopção de medidas específicas para que os(as) trabalhadores (as) domésticos(as) tenham um cabal conhecimento dos seus direitos; um dia semanal de descanso fixo, que respeite as exigências do trabalho mas também as necessidades culturais, religiosas e sociais destes(as) trabalhadores(as); o pagamento imediato de horas extraordinárias após a sua realização; requisitos mínimos de condições de alimentação e alojamento para trabalhadores(as) internos(as); medidas concretas para protecção de migrantes, como por exemplo visitas ao domicílio e alojamento de emergência; cooperação a nível bilateral, regional e internacional para melhorar a protecção dos(as) trabalhadores(as) domésticos(as), em especial no que respeita à prevenção do trabalho forçado e tráfico, ao acesso à segurança social, à fiscalização de agências privadas de emprego que recrutem pessoas para trabalho doméstico no estrangeiro.

Quanto à actuação da OIT no terreno, convido-vos a ver um vídeo sobre um projecto de combate ao tráfico de crianças e mulheres na Tailândia, no âmbito do programa internacional de eliminação do trabalho infantil da OIT, que ilustra a importância da prevenção, da coordenação de esforços e da utilização de diferentes abordagens para lidar com a questão do tráfico para trabalho forçado.

Para concluir, saliento que a OIT também realiza investigação, nomeadamente na área do trabalho forçado e do tráfico, produzindo um conjunto significativo de relatórios e manuais de referência que a OIT-Lisboa, dentro das suas possibilidades, com o apoio de diversos parceiros, incluindo entidades governamentais de Portugal, tem vindo a traduzir e a disponibilizar em língua portuguesa. Alguns desses documentos estão indicados na bibliografia disponibilizada para esta sessão.

Muito obrigada pela vossa atenção.



Videogravação da comunicação

Tráfico de seres humanos para fins de exploração do trabalho

Sebastião Sousa

IMIGRAÇÃO ILEGAL E TRÁFICO DE SERES HUMANOS: INVESTIGAÇÃO, PROVA, ENQUADRAMENTO JURÍDICO E SANÇÕES

Inspector-Chefe Sebastião Sousa
Directoria do Norte da Polícia Judiciária

Tráfico de seres humanos para fins de exploração do trabalho:

Apresentação de “case study” a partir de investigação desenvolvida na Directoria do Norte da Polícia Judiciária, tendo por objecto a actuação de uma “organização criminosa” que assentava a sua actividade delituosa na angariação ilegal (levada a cabo mormente por indivíduos de etnia cigana de nacionalidade portuguesa) de mão-de-obra entre cidadãos nacionais (que, invariavelmente, manifestavam uma capacidade de autodeterminação diminuída, sustentada em algum tipo e grau de vulnerabilidade / fragilidade: psicológica, psíquica, física, social, cultural e/ou económica, isolamento familiar e/ou social, situações de alcoolismo, toxicodependência, etc) e posterior/consequente submissão/sujeição/exploração dos mesmos, em “*regime em tudo semelhante à escravidão*” (consubstanciado na circunstância de os trabalhadores/vítimas serem, verdadeiramente, reduzidos à “condição” de objecto) e *revelando um profundo desprezo pela vida e desrespeito pela dignidade humana*, a trabalhos agrícolas em Espanha (províncias de La Rioja, Álava, Navarra e Zaragoza), auferindo com essa prática considerável e ilegítima vantagem de carácter patrimonial.

Esta investigação culminou com duas Operações de buscas e detenções. Em resultado das mesmas efectuaram-se 66 detenções e 64 buscas. Foram apreendidas 12 pistolas e revólveres e 4 caçadeiras, 450 munições e 15 mil euros em dinheiro. Foram constituídos e interrogados 67 arguidos. Foram inquiridas 163 testemunhas/vítimas. Foram realizadas 22 intercepções telefónicas. Nas centenas de deslocações realizadas em diligências neste inquérito por elementos da Brigada, sobretudo paras as regiões do Alto Douro e Trás-dos-Montes, foram percorridos cerca de 130.000 Km. O Inquérito era constituído por 63 volumes e 30 apensos, num total de 19.444 páginas. Foi formulada Acusação pelo M^oP^o (DIAP Porto) tendo sido acusados 59 dos (67) arguidos constituídos nos autos.



Videogravação da comunicação

Sessão de Encerramento

Sessão de Encerramento



Videogravação da intervenção de Maria Helena Fazenda

ANEXOS

ANEXOS

Normativo Internacional e Europeu

- Convenção do Conselho da Europa relativa à Luta contra o Tráfico de Seres Humanos
- Diretiva 2011/36/UE do Parlamento Europeu e do Conselho de 5/4/11 - relativa à Luta contra o Tráfico de Seres Humanos e à Proteção de Vítimas
- Protocolo Adicional à Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional contra o Tráfico Ilícito de Migrantes por via Terrestre, Marítima e Aérea
- Protocolo Adicional à Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional relativo à Prevenção, à Repressão e à Punição do Tráfico de Pessoas, em especial de Mulheres e Crianças

O Projeto Europeu DEVAS

Manual do *United Nations Office on Drugs and Crime (UNODC)*

- Módulo 1
- Módulo 2
- Módulo 5
- Módulo 8
- Módulo 9

Acórdãos relevantes do TEDH

- Case of Breukhoven v. The Czech Republic
- Case of Rantsev v. Cyprus and Russia
- Case of Siliadin v. France

Normativo Internacional e Europeu

Convenção do Conselho da Europa **relativa à Luta contra o Tráfico de Seres Humanos**

Diretiva 2011/36/UE do Parlamento Europeu e do Conselho de 5/4/11 - relativa à Luta contra o Tráfico de Seres Humanos e à Proteção de Vítimas

Protocolo Adicional à Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional contra o Tráfico Ilícito de Migrantes por via Terrestre, Marítima e Aérea

Protocolo Adicional à Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional relativo à Prevenção, à Repressão e à Punição do Tráfico de Pessoas, em especial de Mulheres e Crianças

Convenção do Conselho da Europa relativa à Luta contra o Tráfico de Seres Humanos

CONVENÇÃO DO CONSELHO DA EUROPA RELATIVA À LUTA CONTRA O TRÁFICO DE SERES HUMANOS

Aberta à assinatura em Varsóvia, a 16 de Maio de 2005 (Série de Tratados Europeus, n.º 197).

Entrada em vigor na ordem jurídica internacional: 1 de Fevereiro de 2008.

Portugal:

Assinatura: 16 de Maio de 2005;

Aprovação: Resolução da Assembleia da República n.º 1/2008, de 14 de Janeiro, publicada no Diário da República, I Série, n.º 9;

Ratificação: Decreto do Presidente da República n.º 9/2008, de 14 de Janeiro, publicado no Diário da República, I Série, n.º 9;

Depósito do instrumento de ratificação: 27 de Fevereiro de 2008;

No momento do depósito do seu instrumento de ratificação, Portugal formulou, nos termos do n.º 2 do artigo 31.º, a seguinte reserva:

«Relativamente às competências previstas nas alíneas d) e e) do n.º 1 do artigo 31.º, a República Portuguesa declara que não aplicará as normas de competência aí estabelecidas, em virtude da legislação penal portuguesa estabelecer critérios de competência mais rigorosos e abrangentes do que os previstos nas alíneas supra-referidas.»

Entrada em vigor na ordem jurídica portuguesa: 1 de Junho de 2008.

CONVENÇÃO DO CONSELHO DA EUROPA RELATIVA À LUTA CONTRA O TRÁFICO DE SERES HUMANOS

Os Estados membros do Conselho da Europa e os restantes signatários da presente Convenção:

Considerando que o objectivo do Conselho da Europa é o de realizar uma união mais estreita entre os seus membros;

Considerando que o tráfico de seres humanos constitui uma violação dos direitos humanos e uma ofensa à dignidade e à integridade do ser humano;

Considerando que o tráfico de seres humanos pode conduzir a uma situação de escravidão para as vítimas;

Considerando que o respeito dos direitos das vítimas e a sua protecção, bem como a luta contra o tráfico de seres humanos, devem constituir objectivos primordiais;

Considerando que qualquer acção ou iniciativa no domínio da luta contra o tráfico de seres humanos deve ser não discriminatória e deve ter em consideração tanto a igualdade entre as mulheres e os homens como uma abordagem baseada nos direitos da criança;

Relembrando as declarações dos Ministros dos Negócios Estrangeiros dos Estados membros por ocasião das 112.ª (14 e 15 de Maio de 2003) e 114.ª (12 e 13 de Maio de 2004) Sessões do Comité de Ministros, apelando a uma acção reforçada do Conselho da Europa no domínio do tráfico de seres humanos;

Tendo presente a Convenção para a Protecção dos Direitos do Homem e das Liberdades Fundamentais (1950) e os seus protocolos;

Tendo presentes as seguintes Recomendações do Comité de Ministros aos Estados membros do Conselho da Europa: Recomendação R (91) 11 sobre a exploração sexual, a pornografia, a prostituição, bem como sobre o tráfico de crianças e de jovens; Recomendação R (97) 13 sobre a intimidação das testemunhas e os direitos de defesa; Recomendação R (2000) 11 sobre a luta contra o tráfico de seres humanos com o fim de exploração sexual; Recomendação Rec (2001) 16 sobre a protecção das crianças contra a exploração sexual; Recomendação Rec. (2002) 5 sobre a protecção das mulheres contra a violência;

Tendo presentes as seguintes Recomendações da Assembleia Parlamentar do Conselho da Europa: Recomendação n.º 1325 (1997) relativa ao tráfico das mulheres e à prostituição forçada nos Estados membros do Conselho da Europa; Recomendação n.º 1450 (2000) sobre a violência contra as mulheres na Europa; Recomendação n.º 1545 (2002) relativa a campanhas de luta contra o tráfico de mulheres; Recomendação n.º 1610 (2003) relativa às migrações ligadas ao tráfico de mulheres e à prostituição; Recomendação n.º 1611 (2003) relativa ao tráfico de órgãos na Europa; Recomendação n.º 1663 (2004) sobre a escravatura doméstica: servidão, pessoas colocadas au pair e esposas obtidas por correspondência;

Tendo presentes a Decisão Quadro do Conselho da Europa, de 19 de Julho de 2002, relativa à luta contra o tráfico de seres humanos, bem como a Decisão Quadro do Conselho da União Europeia, de 15 de Março de 2001, relativa ao estatuto da vítima em processo penal, e a Directiva do Conselho da União Europeia, de 29 de Abril de 2004, relativa ao título de residência concedido aos nacionais de países terceiros que sejam vítimas de tráfico de seres humanos ou objecto de uma acção de auxílio à imigração ilegal e que cooperem com as autoridades competentes;

Tendo em devida consideração a Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional e respectivo Protocolo Adicional Que Visa Prevenir, Suprimir e Sancionar o Tráfico de Seres Humanos, particularmente as Mulheres e as Crianças, com vista a reforçar a protecção assegurada por estes instrumentos e a desenvolver as normas neles enunciadas;

Tendo em devida consideração outros instrumentos jurídicos internacionais pertinentes no domínio da luta contra o tráfico de seres humanos;

Tendo em consideração a necessidade de elaborar um instrumento jurídico internacional global centrado nos direitos humanos das vítimas de tráfico e que crie um mecanismo de acompanhamento específico;

acordaram no seguinte:

CAPÍTULO I FINALIDADE, ÂMBITO DE APLICAÇÃO, PRINCÍPIO DA NÃO DISCRIMINAÇÃO E DEFINIÇÕES

Artigo 1.º Finalidade da Convenção

1 - A presente Convenção tem por finalidade:

- a) Prevenir e lutar contra o tráfico de seres humanos, garantindo a igualdade entre mulheres e homens;
- b) Proteger os direitos humanos das vítimas de tráfico, estabelecer um quadro completo de protecção e de assistência às vítimas e às testemunhas garantindo a igualdade entre mulheres e homens, bem como assegurar investigações e procedimentos eficazes;
- c) Promover a cooperação internacional no domínio da luta contra o tráfico de seres humanos.

2 - A fim de garantir uma aplicação eficaz das suas disposições pelas Partes, a presente Convenção cria um mecanismo de acompanhamento específico.

Artigo 2.º Âmbito de aplicação

A presente Convenção será aplicável a todas as formas de tráfico de seres humanos, de âmbito nacional ou internacional, independentemente da sua ligação ou não ligação à criminalidade organizada.

Artigo 3.º Princípio da não discriminação

A aplicação da presente Convenção pelas Partes, em particular das medidas que visam proteger e promover os direitos das vítimas, deverá ser assegurada sem qualquer discriminação com base no sexo, na raça, na cor, na língua, na religião, nas opiniões políticas ou outras, na origem nacional ou social, na pertença a uma minoria nacional, na riqueza, no nascimento ou em qualquer outra situação.

Artigo 4.º **Definições**

Para efeitos da presente Convenção:

- a) «Tráfico de seres humanos» designa o recrutamento, o transporte, a transferência, o alojamento ou o acolhimento de pessoas, recorrendo à ameaça ou ao uso da força ou a outras formas de coacção, ao rapto, à fraude, ao engano, ao abuso de autoridade ou de uma situação de vulnerabilidade ou à entrega ou aceitação de pagamentos ou benefícios para obter o consentimento de uma pessoa com autoridade sobre outra, para fins de exploração. A exploração deverá incluir, pelo menos, a exploração da prostituição de outrem ou outras formas de exploração sexual, o trabalho ou serviços forçados, a escravatura ou práticas similares à escravatura, a servidão ou a extracção de órgãos;
- b) O consentimento dado pela vítima de «tráfico de seres humanos» à exploração referida na alínea a) do presente artigo será considerado irrelevante se tiver sido utilizado qualquer um dos meios indicados na alínea a) do presente artigo;
- c) O recrutamento, o transporte, a transferência, o alojamento ou o acolhimento de uma criança para fins de exploração deverão ser considerados «tráfico de seres humanos» mesmo que não envolvam nenhum dos meios referidos na alínea a) do presente artigo;
- d) «Criança» designa qualquer pessoa com idade inferior a 18 anos;
- e) «Vítima» designa qualquer pessoa física sujeita a tráfico de seres humanos conforme definido no presente artigo.

CAPÍTULO II **PREVENÇÃO, COOPERAÇÃO E OUTRAS MEDIDAS**

Artigo 5.º **Prevenção do tráfico de seres humanos**

- 1 - Cada uma das Partes tomará medidas que visem estabelecer ou reforçar a coordenação, a nível nacional, entre as diferentes entidades responsáveis pela prevenção e pela luta contra o tráfico de seres humanos.
- 2 - Cada uma das Partes criará e ou apoiará políticas e programas eficazes a fim de prevenir o tráfico de seres humanos através de meios como: pesquisas; campanhas de informação, sensibilização e educação; iniciativas sociais e económicas e programas de formação, particularmente dirigidos a pessoas vulneráveis ao tráfico e aos profissionais envolvidos na luta contra o tráfico de seres humanos.
- 3 - Cada uma das Partes promoverá uma abordagem baseada nos direitos humanos e na igualdade entre mulheres e homens, bem como uma abordagem que respeite as crianças, no desenvolvimento, na implementação e na avaliação do conjunto de políticas e programas referidos no n.º 2.
- 4 - Cada uma das Partes tomará as medidas adequadas, que se mostrem necessárias, para garantir que as migrações serão feitas de forma legal, em particular mediante a difusão de informações exactas pelos respectivos serviços sobre as condições de entrada e permanência legais no seu território.
- 5 - Cada uma das Partes tomará medidas específicas por forma a reduzir a vulnerabilidade das crianças relativamente ao tráfico, designadamente criando, para elas, um ambiente protector.
- 6 - As medidas previstas em conformidade com o presente artigo abrangerão, se for caso disso, as organizações não governamentais, outras organizações competentes e outros sectores da sociedade civil envolvidos na prevenção do tráfico de seres humanos, na protecção ou na assistência às vítimas.

Artigo 6.º **Medidas para desencorajar a procura**

A fim de desencorajar a procura que favorece todas as formas de exploração das pessoas, em particular de mulheres e crianças, conducente ao tráfico, cada uma das Partes adoptará ou reforçará medidas legislativas, administrativas, educativas, sociais, culturais ou outras, incluindo:

- a) Pesquisas sobre as melhores práticas, métodos e estratégias;
- b) Medidas visando a consciencialização da responsabilidade e do importante papel dos meios de comunicação e da sociedade civil na identificação da procura como uma das causas profundas do tráfico de seres humanos;
- c) Campanhas de informação direccionadas, envolvendo, se apropriado, as autoridades públicas e os decisores políticos, entre outros;
- d) Medidas preventivas que incluam programas educativos destinados às raparigas e aos rapazes em fase de escolaridade, que sublinhem o carácter inaceitável da discriminação com base no sexo e as suas consequências nefastas, a importância da igualdade entre mulheres e homens, bem como a dignidade e a integridade de cada ser humano.

Artigo 7.º **Medidas nas fronteiras**

1 - Sem prejuízo dos compromissos internacionais relativos à livre circulação de pessoas, as Partes reforçarão, na medida do possível, os controlos fronteiriços necessários para prevenir e detectar o tráfico de seres humanos.

2 - Cada uma das Partes adoptará as medidas legislativas ou outras apropriadas para prevenir, na medida do possível, a utilização de meios de transporte explorados por transportadores comerciais para a prática de infracções penais previstas em conformidade com a presente Convenção.

3 - Se for caso disso, e sem prejuízo das convenções internacionais aplicáveis, tais medidas deverão prever, em particular, a obrigação de os transportadores comerciais, incluindo qualquer empresa de transportes, proprietário ou operador de qualquer meio de transporte, verificarem se todos os passageiros são portadores dos documentos de viagem exigidos para a entrada no Estado de acolhimento.

4 - Cada uma das Partes tomará as medidas necessárias, em conformidade com o seu direito interno, para prever sanções em caso de incumprimento da obrigação referida no n.º 3 do presente artigo.

5 - Cada uma das Partes adoptará as medidas legislativas ou outras necessárias que lhe permitam, em conformidade com o seu direito interno, recusar a entrada ou revogar os vistos de pessoas envolvidas na prática das infracções previstas em conformidade com a presente Convenção.

6 - As Partes intensificarão a cooperação entre os seus serviços de controlo de fronteiras, em particular criando e mantendo canais de comunicação directos.

Artigo 8.º **Segurança e controlo dos documentos**

Cada uma das Partes tomará as medidas necessárias para:

- a) Assegurar que a qualidade dos documentos de viagem ou de identidade por si emitidos dificulte a sua utilização indevida ou a sua falsificação ou alteração, bem como a sua reprodução ou emissão ilícitas; e
- b) Assegurar a integridade e a segurança dos documentos de viagem ou de identidade emitidos por si ou em seu nome, bem como para impedir que tais documentos sejam produzidos e emitidos de forma ilícita.

Artigo 9.º **Legitimidade e validade dos documentos**

A pedido de qualquer uma das outras Partes, uma Parte verificará, em conformidade com o seu direito interno e num prazo razoável, a legitimidade e a validade dos documentos de viagem ou de identidade emitidos ou supostamente emitidos em seu nome de que se suspeite terem sido utilizados para o tráfico de seres humanos.

CAPÍTULO III **MEDIDAS QUE VISAM PROTEGER E PROMOVER OS DIREITOS DAS VÍTIMAS, GARANTINDO A IGUALDADE ENTRE MULHERES E HOMENS**

Artigo 10.º **Identificação das vítimas**

1 - Cada uma das Partes assegurar-se-á de que as suas autoridades competentes dispõem de pessoas formadas e qualificadas no domínio da prevenção e da luta contra o tráfico de seres humanos, bem como da identificação das vítimas, em particular das crianças, e do apoio a estas últimas, assegurando-se ainda que as diversas autoridades envolvidas colaboram entre si e com as organizações com funções de apoio, de modo a permitir a identificação das vítimas num processo que tenha em consideração a situação específica das mulheres e das crianças vítimas e, nos casos apropriados, a emissão de autorizações de permanência de acordo com as condições previstas no artigo 14.º da presente Convenção.

2 - Cada uma das Partes adoptará as medidas legislativas ou outras que se mostrem necessárias para identificar as vítimas, se for caso disso, em colaboração com outras Partes e com as organizações com funções de apoio. Cada uma das Partes garantirá que, caso as autoridades competentes entendam haver motivos razoáveis para crer que uma pessoa foi vítima de tráfico de seres humanos, tal pessoa não será expulsa do seu território até à conclusão do processo de identificação enquanto vítima da infracção prevista no artigo 18.º da presente Convenção, pelas autoridades competentes, e que beneficiará da assistência prevista nos nºs 1 e 2 do artigo 12.º

3 - Em caso de incerteza quanto à idade da vítima e desde que haja razões para crer que se trata de uma criança, presumir-se-á que se trata de uma criança e ser-lhe-ão concedidas medidas de protecção específicas até que a sua idade seja determinada.

4 - Logo que uma criança não acompanhada seja identificada como vítima, cada uma das Partes:

- a) Providenciará pela sua representação através de um tutor legal, de uma organização ou de uma autoridade encarregada de agir em conformidade com os seus superiores interesses;
- b) Tomará as medidas que considere necessárias para determinar a sua idade e a sua nacionalidade;
- c) Desenvolverá todos os esforços no sentido de localizar a família da criança, desde que tal seja do seu superior interesse.

Artigo 11.º **Protecção da vida privada**

1 - Cada uma das Partes protegerá a vida privada e a identidade das vítimas. Os dados de natureza pessoal que lhes digam respeito serão registados e utilizados nas condições previstas pela Convenção para a Protecção das Pessoas relativamente ao Tratamento Automatizado de Dados de Carácter Pessoal (STE n.º 108).

2 - Cada uma das Partes tomará medidas que, em particular, garantam que a identidade, ou os elementos que permitam a identificação, de uma criança vítima de tráfico não serão tornados públicos pelos meios de comunicação ou outros, excepto se, em circunstâncias excepcionais, tal publicidade facilitar a localização de membros da família da criança ou garantir, de outro modo, o seu bem-estar e a sua protecção.

3 - Cada uma das Partes considerará a adopção, em conformidade com o artigo 10.º da Convenção para a Protecção dos Direitos do Homem e das Liberdades Fundamentais, de medidas que visem encorajar os meios de comunicação a proteger a vida privada e a identidade das vítimas através da auto-regulação ou de medidas de regulação ou co-regulação.

Artigo 12.º **Assistência às vítimas**

1 - Cada uma das Partes tomará as medidas legislativas ou outras necessárias para auxiliar as vítimas na sua recuperação física, psicológica e social. Tal assistência incluirá, pelo menos:

- a) Condições de vida susceptíveis de garantir a sua subsistência através de acomodação adequada e segura, apoio psicológico e material;
- b) Acesso a cuidados médicos de urgência;
- c) Ajuda em matéria de tradução e interpretação, se necessário;

d) Aconselhamento e prestação de informações, nomeadamente sobre os direitos que a lei lhes reconhece e sobre os serviços postos à sua disposição, numa língua que compreendam;

e) Assistência para que os seus direitos e interesses sejam assegurados e tidos em conta em todas as fases do procedimento penal instaurado contra os autores das infracções;

f) Acesso das crianças à educação.

2 - Cada uma das Partes tomará em devida consideração a necessidade de segurança e protecção das vítimas.

3 - Cada uma das Partes fornecerá, ainda, a assistência médica necessária ou qualquer outro tipo de assistência às vítimas que residam legalmente no seu território, que não disponham dos recursos adequados e dela necessitem.

4 - Cada uma das Partes estabelecerá as regras segundo as quais as vítimas legalmente residentes no seu território poderão aceder ao mercado de trabalho, à formação profissional e ao ensino.

5 - Cada uma das Partes tomará medidas, conforme se mostre apropriado e nas condições previstas pelo seu direito interno, para cooperar com as organizações não governamentais, com outras organizações competentes ou outros sectores da sociedade civil envolvidos na assistência às vítimas.

6 - Cada uma das Partes adoptará as medidas legislativas ou outras necessárias para garantir que a assistência a uma vítima não fique condicionada à sua disponibilidade para testemunhar.

7 - Para efeitos de aplicação das disposições previstas no presente artigo, cada uma das Partes garantirá que os serviços serão prestados numa base consensual e esclarecida, sendo dada devida consideração às necessidades específicas das pessoas em situação vulnerável e aos direitos das crianças em matéria de acomodação, educação e cuidados de saúde adequados.

Artigo 13.º **Período de restabelecimento e reflexão**

1 - Cada uma das Partes consagrará, no seu direito interno, um período de, pelo menos, 30 dias para restabelecimento e reflexão se houver motivos razoáveis para crer que determinada pessoa é uma vítima. O referido período deverá ter uma duração que permita à pessoa a que respeita restabelecer-se e escapar à influência de traficantes, bem como tomar uma decisão esclarecida relativamente à sua cooperação com as autoridades competentes. Durante esse período, não deverá ser executada qualquer medida de expulsão que lhe respeite. Esta disposição não prejudicará quaisquer diligências por parte das autoridades competentes nas diferentes fases do processo aplicável a nível interno, em particular na fase de investigação e procedimento das infracções criminais. Durante tal período, as Partes autorizarão a permanência dessa pessoa no seu território.

2 - Durante o mesmo período, as pessoas referidas no n.º 1 do presente artigo terão direito a usufruir das medidas previstas nos nºs 1 e 2 do artigo 12.º

3 - As Partes não serão obrigadas a respeitar o referido período com fundamento em razões de ordem pública ou sempre que se afigure que a qualidade de vítima é invocada indevidamente.

Artigo 14.º **Autorização de residência**

1 - Cada uma das Partes emitirá uma autorização de residência renovável, em nome das vítimas, sempre que se verifique um ou ambos os seguintes casos:

a) A autoridade competente considere que a permanência das vítimas se mostra necessária devido à sua situação pessoal;

b) A autoridade competente considere que a permanência das vítimas se mostra necessária para efeitos de cooperação com as autoridades competentes para a investigação ou para a instauração de procedimento criminal.

2 - A autorização de residência das crianças vítimas, se legalmente necessária, será emitida em conformidade com o seu superior interesse e, se for caso disso, renovada nas mesmas condições.

3 - A não renovação ou a retirada de uma autorização de residência ficará sujeita às condições previstas no direito interno da Parte.

4 - Se uma vítima solicitar um título de residência de outra categoria, a respectiva Parte terá em consideração o facto de a vítima ter beneficiado ou beneficiar de uma autorização de residência emitida nos termos do n.º 1.

5 - Relativamente às obrigações das Partes previstas no artigo 40.º da presente Convenção, cada uma das Partes assegurar-se-á de que a emissão de uma autorização em conformidade com esta disposição não prejudicará o direito de solicitar asilo e dele beneficiar.

Artigo 15.º **Indemnização e apoio**

1 - Cada uma das Partes deverá assegurar às vítimas, desde o seu primeiro contacto com as autoridades competentes, o acesso a informação sobre procedimentos judiciais e administrativos aplicáveis, numa língua que compreendam.

2 - Cada uma das Partes consagrará, no seu direito interno, o direito à assistência e ao apoio jurídico gratuito para as vítimas, nas condições previstas pelo seu direito interno.

3 - Cada uma das Partes consagrará, no seu direito interno, o direito das vítimas a serem indemnizadas pelos autores das infracções.

4 - Cada uma das Partes adoptará as medidas legislativas ou outras necessárias para garantir a indemnização das vítimas, nas condições previstas no seu direito interno, mediante, por exemplo, a criação de um fundo de indemnização às vítimas ou outras medidas ou programas destinados à assistência e à integração social das vítimas, podendo ser financiados pelos valores resultantes da aplicação das medidas previstas no artigo 23.º

Artigo 16.º **Repatriamento e regresso das vítimas**

1 - A Parte de que uma vítima seja nacional ou na qual tinha o direito de residir a título permanente no momento da sua entrada no território da Parte de acolhimento facilitará e aceitará, tendo em devida consideração os direitos, a segurança e a dignidade da pessoa, o seu regresso sem atraso injustificado ou não razoável.

2 - Sempre que uma Parte reenviar uma vítima para outro Estado, tal regresso terá em devida consideração os direitos, a segurança e a dignidade da pessoa, bem como o estado de qualquer processo judicial relacionado com o seu estatuto de vítima, devendo o regresso ser preferencialmente voluntário.

3 - A pedido de uma Parte de acolhimento, a Parte requerida verificará se uma determinada pessoa é sua nacional ou tinha o direito de residir, a título permanente, no seu território aquando da sua entrada no território da Parte de acolhimento.

4 - A fim de facilitar o regresso de uma vítima que não possua os documentos exigidos, a Parte de que tal pessoa seja nacional ou na qual tinha o direito de residir a título permanente aquando da sua entrada no território da Parte de acolhimento aceitará emitir, a pedido da Parte de acolhimento, os documentos de viagem ou qualquer outra autorização necessária para permitir à pessoa deslocar-se e reentrar no seu território.

5 - Cada uma das Partes tomará as medidas legislativas ou outras necessárias para implementar programas de repatriamento com a participação das instituições nacionais ou internacionais e das organizações não governamentais. Tais programas visam evitar a revitimização. Cada uma das Partes deverá efectuar todos os esforços para facilitar a reinserção social das vítimas no Estado de regresso, incluindo a reinserção no sistema educativo e no mercado de trabalho em particular através da aquisição e do aperfeiçoamento dos conhecimentos profissionais. Relativamente às crianças, tais programas deverão incluir o gozo do direito à educação e medidas que visem garantir uma protecção ou um acolhimento adequados pelas famílias ou por estruturas de acolhimento apropriadas.

6 - Cada uma das Partes tomará as medidas legislativas ou outras necessárias para disponibilizar às vítimas, se necessário em colaboração com qualquer uma das Partes envolvidas, informação sobre as entidades que lhes poderão prestar auxílio no país para onde regressem ou para onde sejam repatriadas,

tais como os serviços responsáveis pelo cumprimento da lei, as organizações não governamentais, as entidades jurídicas com capacidade para lhes prestarem aconselhamento e os organismos de acção social.

7 - As crianças vítimas não serão repatriadas para um Estado se, após uma avaliação sobre os riscos e a segurança, se considerar que o seu regresso não corresponde ao seu superior interesse.

Artigo 17.º
Igualdade entre mulheres e homens

Ao aplicar as medidas previstas no presente capítulo, cada uma das Partes procurará promover a igualdade entre mulheres e homens, tomando-a em consideração para fins de desenvolvimento, implementação e avaliação de tais medidas.

CAPÍTULO IV
DIREITO PENAL SUBSTANTIVO

Artigo 18.º
Criminalização do tráfico de seres humanos

Cada uma das Partes procurará adoptar as medidas legislativas e outras necessárias para qualificar como infracções penais os actos referidos no artigo 4.º da presente Convenção, quando praticados intencionalmente.

Artigo 19.º
Criminalização da utilização dos serviços de uma vítima

Cada uma das Partes procurará adoptar as medidas legislativas e outras necessárias para qualificar como infracção penal, nos termos do seu direito interno, a utilização dos serviços que constituem objecto da exploração referida na alínea a) do artigo 4.º da presente Convenção, com conhecimento de que a pessoa em causa é vítima de tráfico de seres humanos.

Artigo 20.º
Criminalização dos actos relativos aos documentos de viagem ou de identificação

Cada uma das Partes adoptará as medidas legislativas e outras necessárias para qualificar como infracções penais os seguintes actos, quando cometidos intencionalmente e para permitir o tráfico de seres humanos:

- a) Fabricar um documento de viagem ou de identidade falso;
- b) Obter ou fornecer tal documento;
- c) Reter, subtrair, alterar, danificar ou destruir um documento de viagem ou de identidade de outra pessoa.

Artigo 21.º
Auxílio, instigação e tentativa

1 - Cada uma das Partes adoptará as medidas legislativas e outras que se revelem necessárias para que sejam abrangidas pela norma incriminadora qualquer forma de auxílio ou instigação, quando intencionais, com vista à prática de qualquer uma das infracções previstas nos artigos 18.º e 20.º da presente Convenção.

2 - Cada uma das Partes adoptará as medidas legislativas e outras que se revelem necessárias para que seja abrangida pela norma incriminadora a tentativa, desde que intencional, para praticar qualquer uma das infracções penais previstas no artigo 18.º e da alínea a) do artigo 20.º da presente Convenção.

Artigo 22.º
Responsabilidade das pessoas colectivas

Cada uma das Partes adoptará as medidas legislativas e outras que se revelem necessárias para garantir que as pessoas colectivas possam ser consideradas responsáveis pelas infracções previstas nos termos da presente Convenção cometidas em seu benefício por qualquer pessoa singular, agindo individualmente ou como membro de um órgão da pessoa colectiva, que nela ocupe uma posição dominante baseada em:

- a) Poderes de representação da pessoa colectiva;
- b) Autoridade para tomar decisões em nome da pessoa colectiva;

c) Autoridade para exercer controlo no seio da pessoa colectiva.

2 - Para além dos casos previstos no n.º 1, cada uma das Partes adoptará as medidas necessárias para garantir que as pessoas colectivas possam ser consideradas responsáveis sempre que a falta de vigilância ou de controlo por parte de uma pessoa referida no n.º 1 tenha tornado possível a prática de uma infracção prevista nos termos da presente Convenção, em benefício dessa pessoa colectiva, por uma pessoa singular sujeita à sua autoridade.

3 - De acordo com os princípios jurídicos da Parte, a responsabilidade de uma pessoa colectiva poderá ser de natureza penal, civil ou administrativa.

4 - Tal responsabilidade será estabelecida sem prejuízo da responsabilidade penal das pessoas singulares que tenham cometido a infracção.

Artigo 23.º **Sanções e medidas**

1 - Cada uma das Partes adoptará as medidas que se revelem necessárias para garantir que as infracções previstas nos artigos 18.º a 21.º sejam punidas com sanções eficazes, proporcionais e dissuasoras. Tais sanções incluirão, relativamente às infracções previstas no artigo 18.º cometidas por pessoas singulares, sanções privativas de liberdade que possam dar lugar a extradição.

2 - Cada uma das Partes assegurará que as pessoas colectivas consideradas responsáveis nos termos do artigo 22.º sejam sujeitas a sanções ou medidas efectivas, proporcionadas e dissuasoras, de natureza penal ou outra, incluindo sanções pecuniárias.

3 - Cada uma das Partes adoptará as medidas que se revelem necessárias para lhe permitir decretar a perda ou de, de outro modo, impedir a utilização dos instrumentos e produtos das infracções penais previstas nos termos do artigo 18.º e na alínea a) do artigo 20.º da presente Convenção, ou dos bens cujo valor corresponda a tais produtos.

4 - Cada uma das Partes adoptará as medidas que se revelem necessárias para permitir o encerramento temporário ou definitivo de qualquer estabelecimento utilizado para a prática do tráfico de seres humanos, sem prejuízo dos direitos de terceiros de boa fé, ou para interditar o autor dessa infracção, a título temporário ou definitivo, do exercício da actividade no âmbito da qual a infracção foi cometida.

Artigo 24.º **Circunstâncias agravantes**

Cada uma das Partes assegurará que as circunstâncias seguintes serão consideradas circunstâncias agravantes na determinação da sanção a impor relativamente às infracções previstas nos termos do artigo 18.º da presente Convenção:

- a) A infracção ter colocado em perigo a vida da vítima, deliberadamente ou por negligência grave;
- b) A infracção ter sido cometida contra uma criança;
- c) A infracção ter sido cometida por um agente público no exercício das suas funções;
- d) A infracção ter sido cometida no quadro de uma organização criminosa.

Artigo 25.º **Condenações anteriores**

Cada uma das Partes adoptará as medidas legislativas e outras para que seja prevista a possibilidade de serem tomadas em consideração, no âmbito da ponderação da pena a aplicar, as decisões finais tomadas numa outra Parte relativamente a infracções penais previstas em conformidade com a presente Convenção.

Artigo 26.º **Não aplicação de sanções**

Cada uma das Partes deverá prever, em conformidade com os princípios fundamentais do seu sistema jurídico, a possibilidade de não aplicar sanções às vítimas por terem participado em actividades ilícitas desde que a tal tenham sido obrigadas.

CAPÍTULO V INVESTIGAÇÃO, PROCEDIMENTO CRIMINAL E DIREITO PROCESSUAL

Artigo 27.º Pedidos *ex parte* e *ex officio*

1 - Cada uma das Partes garantirá que as investigações ou os procedimentos relativos a infracções previstas em conformidade com a presente Convenção não ficarão sujeitos a denúncia ou acusação feita por uma vítima, pelo menos nos casos em que a infracção tiver sido cometida, no todo ou em parte, no seu território.

2 - Cada uma das Parte garantirá que as vítimas de uma infracção cometida no território de uma Parte diferente daquela em que residem possam apresentar queixa junto das autoridades competentes do respectivo Estado de residência. Se a autoridade competente junto da qual a queixa foi apresentada não tiver competência na matéria, deverá transmiti-la sem demora à autoridade competente da Parte em cujo território a infracção foi cometida. Tal queixa será tratada em conformidade com o direito interno da Parte em que a infracção foi cometida.

3 - Cada uma das Partes garantirá, através de medidas legislativas ou outras e nas condições previstas no seu direito interno, aos grupos, às fundações, às associações ou às organizações não governamentais cujo objectivo seja a luta contra o tráfico de seres humanos ou a protecção dos direitos da pessoa humana a possibilidade de prestar assistência e ou apoiar a vítima, com o consentimento desta, nos procedimentos criminais relativos às infracções previstas, de acordo como o artigo 18.º da presente Convenção.

Artigo 28.º Protecção das vítimas, testemunhas e pessoas que colaborem com as autoridades judiciárias

1 - Cada uma das Partes adoptará as medidas legislativas ou outras necessárias para garantir uma protecção efectiva e adequada face às possíveis represálias ou acções de intimidação, em particular durante ou após a conclusão de investigações e procedimentos criminais contra os autores de infracções, a favor:

- a) Das vítimas;
- b) Se apropriado, das pessoas que prestem informação acerca da prática de infracções penais previstas no artigo 18.º da presente Convenção ou que colaborem, por qualquer outra forma, com as autoridades encarregadas de proceder às investigações e de instaurar procedimentos criminais;
- c) Das testemunhas cujos depoimentos digam respeito a infracções criminais previstas no artigo 18.º da presente Convenção;
- d) Se necessário, dos familiares das pessoas referidas nas alíneas a) e c).

2 - Cada uma das Partes adoptará as medidas legislativas ou outras necessárias para garantir e oferecer diversas formas de protecção. Tais medidas poderão incluir a protecção física, a atribuição de um novo local de residência, a alteração de identidade e a ajuda na obtenção de emprego.

3 - As crianças beneficiarão de medidas de protecção especiais tendo em consideração o seu superior interesse.

4 - Cada uma das Partes adoptará as medidas legislativas ou outras necessárias para garantir, se necessário, uma protecção apropriada aos membros dos grupos, das fundações, das associações ou das organizações não governamentais que exerçam uma ou várias das actividades referidas no n.º 3 do artigo 27.º, face às possíveis represálias ou acções de intimidação, em particular durante ou após a conclusão de investigações e procedimentos criminais contra os autores de infracções.

5 - Cada uma das Parte procurará concluir acordos ou convénios com outros Estados com o objectivo de implementar o disposto no presente artigo.

Artigo 29.º Autoridades especializadas e serviços de coordenação

1 - Cada uma das Partes adoptará as medidas necessárias para a especialização de pessoas ou entidades na luta contra o tráfico de seres humanos e na protecção das vítimas. Tais pessoas ou entidades disporão da necessária independência, de acordo com os princípios fundamentais do sistema jurídico dessa Parte,

para que possam exercer as suas funções de forma eficaz e estejam livres de qualquer pressão ilícita. As referidas pessoas ou o pessoal das referidas entidades deverão dispor de formação e de recursos financeiros adequados às funções que exercem.

2 - Cada uma das Partes adoptará as medidas necessárias para garantir a coordenação das políticas e das actividades dos serviços integrados na sua administração e dos outros organismos públicos envolvidos na luta contra o tráfico de seres humanos, se necessário criando serviços de coordenação.

3 - Cada uma das Partes assegurará ou reforçará a formação dos funcionários responsáveis pela prevenção e pela luta contra o tráfico de seres humanos, incluindo a formação sobre os direitos da pessoa humana. A formação poderá ser adaptada aos diferentes serviços e incidirá, se for caso disso, sobre os métodos utilizados para impedir o tráfico, perseguir judicialmente os seus autores e proteger os direitos das vítimas, incluindo a protecção das vítimas contra os traficantes.

4 - Cada uma das Partes procurará nomear relatores nacionais ou criar outros mecanismos responsáveis pelo acompanhamento das actividades de luta contra o tráfico desenvolvidas pelas instituições estatais e pela implementação das obrigações previstas na legislação nacional.

Artigo 30.º **Processos judiciais**

No respeito da Convenção para a Protecção dos Direitos do Homem e das Liberdades Fundamentais, em particular do seu artigo 6.º, cada uma das Partes adoptará as medidas legislativas ou outras necessárias para garantir, no decurso dos procedimentos judiciais:

- a) A protecção da vida privada das vítimas e, se for caso disso, da sua identidade;
- b) A segurança das vítimas e a sua protecção contra acções de intimidação;

segundo as condições previstas no seu direito interno e, tratando-se de crianças-vítimas, tendo em particular consideração as necessidades das crianças e assegurando o seu direito a medidas de protecção específicas.

Artigo 31.º **Competência**

1 - Cada uma das Partes adoptará as medidas legislativas e outras que se revelem necessárias para estabelecer a sua competência relativamente às infracções criminais previstas em conformidade com a presente Convenção, sempre que a infracção for cometida:

- a) No seu território; ou
- b) A bordo de um navio arvorando o pavilhão dessa Parte; ou
- c) A bordo de uma aeronave com matrícula conforme às leis dessa Parte; ou
- d) Por um dos seus nacionais, ou por um apátrida com residência habitual no seu território, se a infracção for criminalmente punível no local onde foi cometida ou se não for da competência territorial de qualquer Estado;
- e) Contra um dos seus nacionais.

2 - Cada uma das Partes poderá, no momento da assinatura ou do depósito do seu instrumento de ratificação, aceitação, aprovação ou adesão, mediante declaração dirigida ao Secretário-Geral do Conselho da Europa, referir que se reserva o direito de não aplicar, ou de só aplicar em condições e casos específicos, as normas de competência estabelecidas nas alíneas d) e e) do n.º 1 do presente artigo, ou numa parte das referidas alíneas.

3 - Cada uma das Partes adoptará as medidas necessárias para estabelecer a sua competência relativamente a qualquer uma das infracções referidas na presente Convenção, nos casos em que o presumível autor se encontre no seu território e não possa ser extraditado para uma outra Parte apenas em razão da sua nacionalidade, após um pedido de extradição.

4 - Se várias Partes invocarem competência relativamente a uma presumível infracção prevista de acordo com a presente Convenção, tais Partes acordarão entre si, se tal se mostrar adequado, sobre qual delas está em melhores condições para exercer a acção penal

5 - Sem prejuízo das regras gerais de direito internacional, a presente Convenção não exclui qualquer competência em matéria criminal exercida por uma Parte em conformidade com o seu direito interno.

CAPÍTULO VI COOPERAÇÃO INTERNACIONAL E COOPERAÇÃO COM A SOCIEDADE CIVIL

Artigo 32.º Princípios gerais e medidas de cooperação internacional

As Partes cooperarão entre si, nos termos da presente Convenção, aplicando os relevantes instrumentos internacionais e regionais aplicáveis, os convénios baseados em legislações uniformes ou recíprocas e os respectivos direitos internos, o mais amplamente possível para:

- a) Prevenir e combater o tráfico de seres humanos;
- b) Proteger e prestar assistência às vítimas;
- c) Proceder a investigações ou instaurar processos relativamente a infracções penais previstas nos termos da presente Convenção.

Artigo 33.º Medidas relativas a pessoas ameaçadas ou desaparecidas

1 - Sempre que uma das Partes, com base em informações de que disponha, tiver motivos razoáveis para crer que a vida, a liberdade ou a integridade física de uma pessoa referida no n.º 1 do artigo 28.º corre perigo imediato no território de uma outra Parte, deverá, em tal situação de urgência, transmitir as referidas informações a esta última Parte, para que tome as medidas de protecção adequadas.

2 - As Partes na presente Convenção poderão procurar reforçar a sua cooperação na procura de pessoas desaparecidas, em particular crianças, sempre que as informações disponíveis permitam crer que tais pessoas são vítimas de tráfico de seres humanos. Para esse efeito, as Partes poderão concluir entre si acordos bilaterais ou multilaterais.

Artigo 34.º Informações

1 - A Parte requerida informará, de imediato, a Parte requerente acerca do resultado final das medidas tomadas nos termos do presente capítulo. A Parte requerida informará, de imediato, a Parte requerente acerca de quaisquer circunstâncias que inviabilizem a execução das medidas solicitadas ou que possam retardá-la significativamente.

2 - Qualquer uma das Partes poderá, nos termos do seu direito interno e perante a inexistência de um pedido prévio, transmitir a qualquer outra Parte as informações que tenha obtido no decurso das suas próprias investigações nos casos em que considere que tal poderá auxiliar a Parte destinatária a proceder ou a concluir investigações ou processos com base em infracções penais previstas nos termos da presente Convenção ou que tais informações poderão dar lugar a um pedido de cooperação formulado por essa Parte nos termos do presente capítulo.

3 - Antes de transmitir tais informações, a Parte que as disponibilizar poderá solicitar que permaneçam confidenciais ou que apenas sejam utilizadas em determinadas condições. Se a Parte destinatária não puder satisfazer tal pretensão, deverá informar a outra Parte de tal impossibilidade, a qual deverá, nesse caso, decidir se as informações em causa deverão ser transmitidas. Caso aceite as informações nas condições estabelecidas, a Parte destinatária ficará vinculada às mesmas.

4 - Todas as informações solicitadas com referência aos artigos 13.º, 14.º e 16.º que se mostrem necessárias para a atribuição dos direitos conferidos por tais artigos, serão transmitidas imediatamente após a formulação do pedido da Parte interessada, em conformidade com o artigo 11.º da presente Convenção.

Artigo 35.º Cooperação com a sociedade civil

Cada uma das Partes encorajará as autoridades estaduais, bem como os agentes públicos, a cooperar com as organizações não governamentais, outras organizações relevantes e membros da sociedade civil, por forma a estabelecer parcerias estratégicas que permitam atingir os objectivos da presente Convenção.

CAPÍTULO VII MECANISMO DE ACOMPANHAMENTO

Artigo 36.º Grupo de Peritos sobre a Luta contra o Tráfico de Seres Humanos

1 - O Grupo de Peritos sobre o Tráfico de Seres Humanos (adiante denominado «GRETA») supervisionará a implementação da presente Convenção pelas Partes.

2 - O GRETA será composto por um mínimo de 10 e um máximo de 15 membros e contará com uma participação de homens e mulheres e uma participação geográfica equilibradas, dele fazendo igualmente parte peritos com competência multidisciplinar. Os seus membros serão eleitos pelo Comité das Partes de entre os nacionais dos Estados Partes na presente Convenção e terão um mandato de quatro anos renovável por uma vez.

3 - A eleição dos membros do GRETA assentará nos seguintes princípios:

- a) Serão escolhidos de entre personalidades de elevada ética e reconhecida competência em matéria de direitos da pessoa humana, assistência e protecção às vítimas e luta contra o tráfico de seres humanos, ou com experiência profissional nos domínios abrangidos pela presente Convenção;
- b) Terão assento a título individual, serão independentes e imparciais no exercício do seu mandato e estarão disponíveis para exercer as suas funções de forma eficiente;
- c) O GRETA não poderá contar com mais de um nacional do mesmo Estado;
- d) Deverão representar os principais sistemas jurídicos.

4 - O processo de eleição dos membros do GRETA será fixado pelo Comité de Ministros, após consulta e mediante o acordo unânime das Partes na presente Convenção, no prazo de um ano a contar da data de entrada em vigor da presente Convenção. O GRETA adoptará o seu próprio regulamento interno.

Artigo 37.º Comité das Partes

1 - O Comité das Partes será composto pelos representantes no Comité dos Ministros do Conselho da Europa e dos Estados membros Partes na Convenção e pelos representantes das Partes na Convenção que não sejam membros do Conselho da Europa.

2 - O Comité das Partes será convocado pelo Secretário-Geral do Conselho da Europa. A sua primeira reunião terá lugar num prazo de um ano após a entrada em vigor da presente Convenção, com o objectivo de eleger os membros do GRETA. Posteriormente, reunir-se-á a pedido de um terço das Partes, do Presidente do GRETA ou do Secretário-Geral.

3 - O Comité das Partes adoptará o seu próprio regulamento interno.

Artigo 38.º Processo

1 - O processo de avaliação será da responsabilidade das Partes na Convenção, repartido por ciclos cuja duração será estabelecida pelo GRETA. No início de cada ciclo, o GRETA seleccionará as disposições específicas nas quais se baseará o processo de avaliação.

2 - O GRETA estabelecerá os meios mais apropriados para proceder a tal avaliação. O GRETA poderá, em particular, adoptar um questionário para cada um dos ciclos, o qual poderá servir de base à avaliação da implementação da presente Convenção pelas Partes. O questionário será dirigido a todas as Partes. As Partes responderão ao questionário, bem como a qualquer outro pedido de informação formulado pelo GRETA.

3 - O GRETA poderá solicitar informações junto da sociedade civil.

4 - Subsidiariamente, o GRETA poderá organizar, em cooperação com as autoridades nacionais e o «elemento de contacto» designado por estas e, se necessário, com a assistência de peritos nacionais independentes, visitas aos respectivos países. No decurso de tais visitas, o GRETA poderá ser assistido por especialistas em áreas específicas.

5 - O GRETA preparará um projecto de relatório contendo a sua análise acerca da implementação das disposições em que a avaliação se baseia, bem como as suas sugestões e propostas relativamente à forma como a Parte a que respeita poderá tratar os problemas identificados. Aquele projecto será transmitido à Parte sob avaliação para apresentar os seus comentários. Estes serão tidos em consideração pelo GRETA ao elaborar o seu relatório.

6 - Nesta base, o GRETA adoptará o seu relatório e as suas conclusões sobre as medidas tomadas pela Parte a que respeita para implementar as disposições da presente Convenção. O relatório e as conclusões serão remetidos à referida Parte e ao Comité das Partes. O relatório e as conclusões do GRETA serão tornados públicos após a sua adopção juntamente com os eventuais comentários da mesma Parte.

7 - Sem prejuízo do processo previsto nos n.os 1 a 6 do presente artigo, o Comité das Partes poderá formular, com base no relatório e nas conclusões do GRETA, recomendações dirigidas à referida Parte: a) relativamente às medidas a tomar para implementar as conclusões do GRETA, se necessário fixando uma data para apresentação de informações sobre tal implementação; e b) tendo por objectivo promover a cooperação com tal Parte com vista à implementação da presente Convenção.

CAPÍTULO VIII RELAÇÃO COM OUTROS INSTRUMENTOS INTERNACIONAIS

ARTIGO 39.º

Relação com o Protocolo Adicional à Convenção das Nações Unidas contra a Criminalidade Transnacional Organizada Relativo à Prevenção, à Repressão e à Punição do Tráfico de Pessoas, em especial de Mulheres e Crianças.

A presente Convenção não afectará os direitos e as obrigações decorrentes das disposições do Protocolo Adicional à Convenção das Nações Unidas contra a Criminalidade Transnacional Organizada Relativo à Prevenção, à Repressão e à Punição do Tráfico de Pessoas, em especial de Mulheres e Crianças. A presente Convenção tem por finalidade o reforço da protecção concedida pelo Protocolo e o desenvolvimento dos princípios nele enunciados.

Artigo 40.º

Relação com outros instrumentos internacionais

1 - A presente Convenção não afectará os direitos e obrigações decorrentes de outros instrumentos internacionais de que as Partes sejam ou venham a ser Partes e que contenham disposições relativas às matérias por ela regidas e que garantam maior protecção e assistência às vítimas de tráfico de seres humanos.

2 - As Partes na presente Convenção poderão concluir entre si acordos bilaterais ou multilaterais relativos às questões reguladas pela presente Convenção, visando completar ou reforçar as disposições desta ou facilitar a aplicação dos princípios nela consagrados.

3 - As Partes que sejam membros da União Europeia aplicarão, nas suas relações mútuas, as normas da Comunidade e da União Europeia na medida em que existam normas da Comunidade ou da União Europeia que regulem determinado tema em particular e que sejam aplicáveis ao caso concreto, sem prejuízo do objecto e da finalidade da presente Convenção e da sua integral aplicação relativamente às outras Partes.

4 - Nenhuma disposição da presente Convenção afectará os direitos, obrigações e responsabilidades dos Estados e dos cidadãos nos termos do direito internacional, incluindo o direito internacional humanitário e o direito internacional relativo aos direitos do homem e, em particular, se aplicáveis, a Convenção de 1951 e o Protocolo de 1967 relativos ao estatuto dos refugiados bem como o princípio de non refoulement aí enunciado.

CAPÍTULO IX ALTERAÇÕES À CONVENÇÃO

Artigo 41.º

Alterações

1 - Qualquer alteração à presente Convenção proposta por uma Parte deverá ser comunicada ao Secretário-Geral do Conselho da Europa e transmitida por este aos Estados membros do Conselho da Europa, a qualquer outro Estado signatário, a qualquer Estado Parte, à Comunidade Europeia e a qualquer

Estado convidado a assinar a presente Convenção nos termos do artigo 42.º, assim como a qualquer Estado que tenha sido convidado a aderir à presente Convenção nos termos do artigo 43.º

2 - Qualquer alteração proposta por uma Parte será comunicada ao GRETA, que transmitirá ao Comité de Ministros o seu parecer sobre a alteração proposta.

3 - O Comité de Ministros analisará a alteração proposta e o parecer apresentado pelo GRETA; após consulta às Partes na Convenção e tendo obtido o acordo unânime, o Comité poderá adoptar tal alteração.

4 - O texto de qualquer alteração adoptada pelo Comité de Ministros nos termos do n.º 3 do presente artigo será comunicado às Partes, com vista à sua aceitação.

5 - Qualquer alteração adoptada nos termos do n.º 3 do presente artigo entrará em vigor no 1.º dia do mês seguinte ao termo de um período de três meses após a data em que todas as Partes tenham informado o Secretário-Geral da sua aceitação.

CAPÍTULO X CLÁUSULAS FINAIS

Artigo 42.º Assinatura e entrada em vigor

1 - A presente Convenção será aberta à assinatura dos Estados membros do Conselho da Europa, dos Estados não membros que tenham participado na sua elaboração e da Comunidade Europeia.

2 - A presente Convenção será sujeita a ratificação, aceitação ou aprovação. Os instrumentos de ratificação, aceitação ou aprovação serão depositados junto do Secretário-Geral do Conselho da Europa.

3 - A presente Convenção entrará em vigor no 1.º dia do mês seguinte ao termo de um período de três meses após a data em que 10 signatários, dos quais pelo menos 8 sejam membros do Conselho da Europa, tenham exprimido o seu consentimento em ficarem vinculados à presente Convenção, em conformidade com o disposto no n.º 2.

4 - Relativamente a qualquer Estado referido no n.º 1 ou à Comunidade Europeia que exprima posteriormente o seu consentimento em ficar vinculado à presente Convenção, esta entrará em vigor no 1.º dia do mês seguinte ao termo de um período de três meses após a data do depósito do instrumento de ratificação, aceitação ou aprovação.

Artigo 43.º Adesão à Convenção

1 - Após a entrada em vigor da presente Convenção, o Comité de Ministros do Conselho da Europa poderá, após ter consultado as Partes na presente Convenção e ter obtido o acordo unânime destas, convidar qualquer Estado não membro do Conselho que não tenha participado na sua elaboração a aderir à presente Convenção. A decisão será tomada pela maioria prevista no artigo 20.º, alínea d), do Estatuto do Conselho da Europa e por unanimidade dos representantes dos Estados Contratantes com assento no Comité de Ministros.

2 - Relativamente a qualquer Estado que a ela adira, a presente Convenção entrará em vigor no 1.º dia do mês seguinte ao termo de um período de três meses após a data do depósito do instrumento de adesão junto do Secretário-Geral do Conselho da Europa.

Artigo 44.º Aplicação territorial

1 - Qualquer Estado ou a Comunidade Europeia poderá, no momento da assinatura ou do depósito do seu instrumento de ratificação, aceitação, aprovação ou adesão, indicar o território ou os territórios aos quais se aplicará a presente Convenção.

2 - Qualquer Parte poderá, em qualquer momento posterior, mediante declaração dirigida ao Secretário-Geral do Conselho da Europa, estender a aplicação da presente Convenção a qualquer outro território indicado na declaração, relativamente ao qual assegure as relações internacionais e em nome do qual esteja autorizado a assumir compromissos. A Convenção entrará em vigor, relativamente a esse território, no primeiro dia do mês seguinte ao termo de um período de três meses após a data de recepção da declaração pelo Secretário-Geral.

3 - Qualquer declaração feita nos termos dos dois números anteriores poderá ser retirada, no que respeita a qualquer território nela indicado, mediante notificação dirigida ao Secretário-Geral do Conselho da Europa. A retirada produzirá efeitos no 1.º dia do mês seguinte ao termo de um período de três meses após a data de recepção da notificação pelo Secretário-Geral.

Artigo 45.º **Reservas**

Nenhuma reserva à presente Convenção será aceite, com excepção da prevista no n.º 2 do artigo 31.º

Artigo 46.º **Denúncia**

1 - Qualquer Parte poderá, em qualquer momento, denunciar a presente Convenção mediante notificação dirigida ao Secretário-Geral do Conselho da Europa.

2 - A denúncia produzirá efeitos no 1.º dia do mês seguinte ao termo de um período de três meses após a data de recepção da notificação pelo Secretário-Geral.

Artigo 47.º **Notificação**

1 - O Secretário-Geral do Conselho da Europa notificará os Estados membros do Conselho da Europa, qualquer Estado signatário, qualquer Estado Parte, a Comunidade Europeia, qualquer Estado que tenha sido convidado a aderir à presente Convenção nos termos do artigo 42.º, bem como qualquer Estado convidado a aderir à Convenção nos termos do artigo 43.º:

- a) De qualquer assinatura;
- b) Do depósito de qualquer instrumento de ratificação, aceitação, aprovação ou adesão;
- c) De qualquer data de entrada em vigor da presente Convenção, em conformidade com os artigos 42.º e 43.º;
- d) De qualquer alteração adoptada nos termos do artigo 41.º, bem como da data da entrada em vigor da referida alteração;
- e) De qualquer denúncia feita nos termos do artigo 46.º;
- f) De qualquer outro acto, notificação ou comunicação referentes à presente Convenção;
- g) De qualquer reserva nos termos do artigo 45.º

Em fé do que, os abaixo assinados, devidamente autorizados para o efeito, assinaram a presente Convenção.

Feito em Varsóvia, a 16 de Maio de 2005, em francês e inglês, fazendo ambos os textos igualmente fé, num único exemplar, que será depositado nos arquivos do Conselho da Europa. O Secretário-Geral do Conselho da Europa enviará uma cópia autenticada a cada um dos Estados membros do Conselho da Europa, aos Estados não membros que tenham participado na elaboração da presente Convenção, à Comunidade Europeia e a qualquer outro Estado convidado a aderir à presente Convenção.



Diretiva 2011/36/UE do Parlamento Europeu e do Conselho de 5/4/11 - relativa à Luta contra o Tráfico de Seres Humanos e à Proteção de Vítimas

I

(Actos legislativos)

DIRECTIVAS

DIRECTIVA 2011/36/UE DO PARLAMENTO EUROPEU E DO CONSELHO

de 5 de Abril de 2011

relativa à prevenção e luta contra o tráfico de seres humanos e à protecção das vítimas, e que substitui a Decisão-Quadro 2002/629/JAI do Conselho

O PARLAMENTO EUROPEU E O CONSELHO DA UNIÃO EUROPEIA,

Tendo em conta o Tratado sobre o Funcionamento da União Europeia, nomeadamente o n.º 2 do artigo 82.º e o n.º 1 do artigo 83.º,

Tendo em conta a proposta da Comissão Europeia,

Tendo em conta o parecer do Comité Económico e Social Europeu ⁽¹⁾,

Após consulta ao Comité das Regiões,

Após transmissão do projecto da proposta aos parlamentos nacionais,

Deliberando de acordo com o processo legislativo ordinário ⁽²⁾,

Considerando o seguinte:

- (1) O tráfico de seres humanos constitui um crime grave, cometido frequentemente no quadro da criminalidade organizada, e uma violação grosseira dos direitos humanos fundamentais expressamente proibida pela Carta dos Direitos Fundamentais da União Europeia. A prevenção e o combate ao tráfico de seres humanos constituem prioridades da UE e dos Estados-Membros.
- (2) A presente directiva faz parte de uma acção global contra o tráfico de seres humanos que inclui a participação de países terceiros, tal como indica o «Documento orientado para a acção com vista a reforçar a dimensão externa da

União em matéria de luta contra o tráfico de seres humanos: para uma acção da União à escala mundial contra o tráfico de seres humanos», aprovado pelo Conselho a 30 de Novembro de 2009. Neste contexto, deverão ser desenvolvidas acções em países terceiros que são pontos de origem e transferência das vítimas, visando em especial sensibilizar, reduzir a vulnerabilidade, apoiar e dar assistência às vítimas, combater as causas profundas do tráfico e ajudar esses países terceiros a desenvolver legislação adequada de luta contra o tráfico.

- (3) A presente directiva reconhece que o tráfico é um fenómeno com aspectos específicos conforme o sexo e que os homens e as mulheres são objecto de tráfico para diferentes fins. Por este motivo, as medidas de assistência e apoio deverão ser diferenciadas por sexo, sempre que oportuno. Os factores de «dissuasão» e «incentivo» podem ser diferentes conforme os sectores em questão, como seja o tráfico de seres humanos na indústria do sexo ou para exploração laboral, por exemplo, na construção civil, na agricultura ou no trabalho doméstico.
- (4) A União está empenhada na prevenção e luta contra o tráfico de seres humanos e na protecção dos direitos das pessoas vítimas desse tráfico. Para o efeito, foi adoptada a Decisão-Quadro 2002/629/JAI do Conselho, de 19 Julho 2002, relativa à luta contra o tráfico de seres humanos ⁽³⁾, bem como um Plano da UE sobre as melhores práticas, normas e procedimentos para prevenir e combater o tráfico de seres humanos ⁽⁴⁾. Além disso, o Programa de Estocolmo — Uma Europa aberta e segura que sirva e proteja os cidadãos ⁽⁵⁾, aprovado pelo Conselho Europeu, atribui uma clara prioridade à luta contra o tráfico de seres humanos. Deverão ainda ser encaradas outras medidas, como o apoio ao desenvolvimento de indicadores gerais comuns na União para a identificação de vítimas do tráfico, mediante o intercâmbio das boas práticas entre todos os interessados, sobretudo os serviços sociais públicos e privados.

⁽¹⁾ Parecer de 21 de Outubro de 2010 (ainda não publicado no Jornal Oficial).

⁽²⁾ Posição do Parlamento Europeu de 14 de Dezembro de 2010 (ainda não publicada no Jornal Oficial) e decisão do Conselho de 21 de Março de 2011.

⁽³⁾ JO L 203 de 1.8.2002, p. 1.

⁽⁴⁾ JO C 311 de 9.12.2005, p. 1.

⁽⁵⁾ JO C 115 de 4.5.2010, p. 1.

- (5) As autoridades responsáveis pela aplicação da lei dos Estados-Membros deverão continuar a cooperar no reforço da luta contra o tráfico de seres humanos. A este respeito, é essencial a cooperação transfronteiriça, incluindo a partilha de informações e de boas práticas, bem como a continuação do diálogo aberto entre as autoridades policiais, judiciárias e financeiras dos Estados-Membros. A coordenação das investigações e acções penais relativas aos casos de tráfico de seres humanos deverá ser facilitada por uma maior cooperação entre a Europol e a Eurojust, a criação de equipas de investigação conjuntas e pela aplicação da Decisão-Quadro 2009/948/JAI do Conselho, de 30 de Novembro de 2009, relativa à prevenção e resolução de conflitos de exercício de competência em processo penal ⁽¹⁾.
- (6) Os Estados-Membros deverão incentivar e agir em estreita colaboração com organismos da sociedade civil, incluindo organizações não governamentais reconhecidas e activas no domínio do apoio às pessoas traficadas, em especial em matéria de iniciativas políticas, campanhas de informação e sensibilização, programas de investigação, ensino e formação, bem como no acompanhamento e avaliação do impacto das medidas antitráfico.
- (7) A presente directiva adopta uma abordagem integrada, respeitadora dos direitos humanos e global da luta contra o tráfico de seres humanos e, na sua aplicação, deverão ser tidas em consideração a Directiva 2004/81/CE do Conselho, de 29 de Abril de 2004, relativa ao título de residência concedido aos nacionais de países terceiros que sejam vítimas do tráfico de seres humanos ou objecto de uma acção de auxílio à imigração ilegal, e que cooperem com as autoridades competentes ⁽²⁾, e a Directiva 2009/52/CE do Parlamento Europeu e do Conselho, de 18 de Junho de 2009, que estabelece normas mínimas sobre sanções e medidas contra os empregadores de nacionais de países terceiros em situação irregular ⁽³⁾. Entre os principais objectivos da presente directiva, contam-se uma prevenção e repressão mais rigorosas e a protecção dos direitos das vítimas. A presente directiva adopta igualmente concepções contextuais das diferentes formas de tráfico e visa assegurar que cada uma das formas seja combatida através das medidas mais eficazes.
- (8) As crianças são mais vulneráveis do que os adultos e, por esta razão, existe um maior risco de se tornarem vítimas do tráfico de seres humanos. Na aplicação da presente directiva, o superior interesse do criança deve constituir a principal consideração, nos termos da Carta dos Direitos Fundamentais da União Europeia e da Convenção das Nações Unidas sobre os Direitos da Criança de 1989.
- (9) O Protocolo das Nações Unidas de 2000 relativo à Prevenção, à Repressão e à Punição do Tráfico de Pessoas, em especial de Mulheres e Crianças, adicional à Convenção contra a Criminalidade Organizada Transnacional, e a Convenção do Conselho da Europa de 2005 relativa à Luta contra o Tráfico de Seres Humanos, foram passos cruciais no processo de reforçar a cooperação internacional contra o tráfico de seres humanos. Note-se que a Convenção do Conselho da Europa contém um mecanismo de avaliação, constituído por um Grupo de peritos sobre o Tráfico de Seres Humanos (GRETA) e pelo Comité das Partes. Deverá ser incentivada a coordenação entre as organizações internacionais com competência no domínio do combate ao tráfico de seres humanos, a fim de evitar a duplicação de esforços.
- (10) A presente directiva não prejudica o princípio da não repulsão nos termos da Convenção de 1951 relativa ao Estatuto dos Refugiados (Convenção de Genebra) e respeita o disposto no artigo 4.º e no n.º 2 do artigo 19.º da Carta dos Direitos Fundamentais da União Europeia.
- (11) A fim de responder à evolução recente do fenómeno do tráfico de seres humanos, a presente directiva adopta um conceito mais amplo de tráfico de seres humanos do que a Decisão-Quadro 2002/629/JAI, passando a incluir novas formas de exploração. No contexto da presente directiva, a mendicidade forçada deverá ser entendida como uma forma de trabalho ou serviços forçados, tal como definidos na Convenção n.º 29 da OIT de 1930 sobre o Trabalho Forçado ou Obrigatório. Por conseguinte, a exploração da mendicidade, incluindo a utilização de uma pessoa traficada e dependente na mendicidade, só é abrangida pelo âmbito da definição do tráfico de seres humanos quando estejam reunidos todos os elementos do trabalho ou serviços forçados. À luz da jurisprudência relevante, a validade do eventual consentimento dado à prestação desse trabalho ou desses serviços deverá ser avaliada caso a caso. Contudo, quando esteja em causa uma criança, o eventual consentimento nunca deverá ser considerado válido. A expressão «exploração de actividades criminosas» deverá ser entendida como a exploração de uma pessoa com vista, nomeadamente, à prática de pequenos furtos ou roubos, tráfico de droga e outras actividades semelhantes que sejam puníveis e lucrativas. A definição também abrange o tráfico de seres humanos para efeitos de remoção de órgãos, que constitui uma grave violação da dignidade humana e da integridade física, bem como outras condutas como, por exemplo, a adopção ilegal ou o casamento forçado, na medida em que sejam elementos constitutivos do tráfico de seres humanos.
- (12) O nível das sanções previstas na presente directiva reflecte a preocupação crescente que existe entre os Estados-Membros relativamente ao desenvolvimento do fenómeno do tráfico de seres humanos. É por esta razão que a presente directiva se fundamenta nos níveis 3 e 4 das Conclusões do Conselho de 24 e 25 de Abril de 2002 sobre a abordagem a seguir no que diz respeito à harmonização das sanções. Caso a infracção seja cometida

⁽¹⁾ JO L 328 de 15.12.2009, p. 42.

⁽²⁾ JO L 261 de 6.8.2004, p. 19.

⁽³⁾ JO L 168 de 30.6.2009, p. 24.

- em determinadas circunstâncias, por exemplo, contra uma vítima particularmente vulnerável, a sanção deverá ser agravada. No contexto da presente directiva, entre as pessoas particularmente vulneráveis devem incluir-se, pelo menos, todas as crianças. Outros factores que poderão ser tidos em conta na apreciação da vulnerabilidade da vítima incluem, por exemplo, o sexo, a gravidez, o estado de saúde e a deficiência. Caso a infracção seja especialmente grave, por exemplo, se puser em perigo a vida da vítima, envolver violência grave, como tortura, uso forçado de drogas/medicamentos, violação ou outras formas graves de violência psicológica, física ou sexual, ou de outro modo tiver causado à vítima danos particularmente graves, tal facto deverá traduzir-se numa sanção agravada. Se, no âmbito da presente directiva, for feita referência à entrega, esta referência deverá ser interpretada nos termos da Decisão-Quadro 2002/584/JAI do Conselho, de 13 de Junho de 2002, relativa ao mandado de detenção europeu e aos processos de entrega entre os Estados-Membros ⁽¹⁾. A gravidade da infracção cometida poderá ser tida em conta no âmbito da execução da sentença.
- (13) Na luta contra o tráfico de seres humanos, deverá ser feito pleno uso dos instrumentos em vigor em matéria de apreensão e perda a favor do Estado dos produtos do crime, como a Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional e respectivos protocolos, a Convenção do Conselho da Europa de 1990 relativa ao Branqueamento, Detecção, Apreensão e Perda dos Produtos do Crime, a Decisão-Quadro 2001/500/JAI do Conselho, de 26 de Junho de 2001, relativa ao branqueamento de capitais, à identificação, detecção, congelamento, apreensão e perda dos instrumentos e produtos do crime ⁽²⁾, e a Decisão-Quadro 2005/212/JAI do Conselho, de 24 de Fevereiro de 2005, relativa à perda de produtos, instrumentos e bens relacionados com o crime ⁽³⁾. Deverá ser incentivada a utilização dos produtos e instrumentos apreendidos e declarados perdidos a favor do Estado, proveniente das infracções referidas na presente directiva, para fins de assistência e protecção das vítimas, incluindo para a indemnização das vítimas e as acções policiais transfronteiriças de combate ao tráfico na União.
- (14) As vítimas de tráfico de seres humanos deverão, ao abrigo dos princípios fundamentais das ordens jurídicas dos Estados-Membros em causa, ser protegidas da instauração de uma acção penal ou da aplicação de sanções em consequência de actividades criminosas, tais como a utilização de documentos falsos ou a violação da legislação relativa à prostituição ou à imigração, em que tenham sido obrigadas a participar como consequência directa de serem objecto de tráfico. O objectivo desta protecção é salvaguardar os direitos humanos das vítimas, evitar uma vitimização adicional e encorajá-las a testemunhar nos processos penais contra os autores dos crimes. Esta salvaguarda não exclui a acção penal ou a punição das infracções quando alguém voluntariamente tiver cometido essas infracções ou nelas participado.
- (15) Para assegurar o sucesso da investigação e da acção penal nas infracções de tráfico de seres humanos, a instauração do processo não deverá depender, em princípio, de queixa ou de acusação por parte da vítima. Se a natureza do acto o justificar, deverá ser possível instaurar a acção penal durante um período de tempo suficiente após a vítima ter atingido a maioridade. A duração do período de tempo suficiente para instaurar a acção penal deverá ser determinada pelo direito nacional respectivo. Os agentes das forças da ordem e os magistrados do ministério público deverão beneficiar de formação adequada, nomeadamente com vista a melhorar a aplicação do direito internacional e a cooperação judiciária. Os responsáveis pela investigação e pelo exercício da acção penal relativamente a estas infracções deverão igualmente poder recorrer aos instrumentos de investigação utilizados nos casos de criminalidade organizada ou outros crimes graves. Estes instrumentos poderão incluir a intercepção das comunicações, a vigilância discreta, incluindo a vigilância electrónica, a monitorização das contas bancárias e outras investigações financeiras.
- (16) A fim de assegurar a eficácia da acção penal contra os grupos criminosos internacionais cujo centro de actividade se encontre num Estado-Membro e que se dediquem ao tráfico de seres humanos em países terceiros, deverá ser atribuída competência a um Estado-Membro relativamente à infracção de tráfico de seres humanos quando o autor da infracção for nacional desse Estado-Membro e a infracção for cometida fora do território desse Estado-Membro. De igual modo, também deverá ser possível atribuir competência a um Estado-Membro quando o autor da infracção for residente habitual de um Estado-Membro, a vítima for nacional ou residente habitual de um Estado-Membro ou a infracção for cometida em benefício de uma pessoa colectiva estabelecida no território de um Estado-Membro, e a infracção for cometida fora do território desse Estado-Membro.
- (17) Embora a Directiva 2004/81/CE preveja a emissão de uma autorização de residência para as vítimas do tráfico de seres humanos que sejam nacionais de países terceiros e a Directiva 2004/38/CE do Parlamento Europeu e do Conselho, de 29 de Abril de 2004, relativa ao direito de livre circulação e residência dos cidadãos da União e dos membros das suas famílias no território dos Estados-Membros ⁽⁴⁾, regule o exercício do direito de livre circulação e residência dos cidadãos da União e dos membros das suas famílias no território dos Estados-Membros, incluindo a protecção contra o afastamento, a presente directiva estabelece medidas de protecção específicas para qualquer vítima do tráfico de seres humanos. Assim, a presente directiva não aborda as condições relativas à residência das vítimas do tráfico de seres humanos no território dos Estados-Membros.
- (18) É necessário que as vítimas de tráfico de seres humanos possam exercer eficazmente os seus direitos. Por conseguinte, as vítimas deverão dispor de assistência e apoio antes, durante e, por um período adequado, após a conclusão do processo penal. Os Estados-Membros deverão disponibilizar recursos destinados à assistência, apoio e protecção das vítimas. A prestação de assistência e apoio

⁽¹⁾ JO L 190 de 18.7.2002, p. 1.

⁽²⁾ JO L 182 de 5.7.2001, p. 1.

⁽³⁾ JO L 68 de 15.3.2005, p. 49.

⁽⁴⁾ JO L 158 de 30.4.2004, p. 77.

deverá incluir, pelo menos, um conjunto mínimo de medidas necessárias para que a vítima possa recuperar e escapar aos traficantes. A aplicação prática destas medidas deverá ter em conta, com base numa avaliação individual efectuada segundo os procedimentos nacionais, as circunstâncias, o contexto cultural e as necessidades da pessoa em causa. Deverá ser prestada assistência e apoio às vítimas em relação às quais haja indicação de existirem motivos razoáveis para crer que possam ter sido vítimas de tráfico, e independentemente da sua vontade de deporem como testemunhas. No caso de a vítima não residir legalmente no Estado-Membro em causa, a assistência e o apoio deverão ser prestados incondicionalmente, pelo menos durante o prazo de reflexão. Concluído o processo de identificação ou decorrido o prazo de reflexão, caso se considere que a vítima não tem direito a autorização de residência ou a estabelecer legalmente residência no país, ou se a vítima tiver deixado o território do Estado-Membro, o Estado-Membro em causa não é obrigado a continuar a prestar-lhe assistência e apoio por força da presente directiva. Se necessário, deverá continuar a ser prestada assistência e apoio por um período de tempo adequado após a conclusão do processo penal, por exemplo, se estiverem em curso tratamentos médicos motivados pelas consequências físicas ou psicológicas graves do crime ou se houver um risco para a segurança da vítima por esta ter testemunhado no processo penal.

- (19) A Decisão-Quadro 2001/220/JAI do Conselho, de 15 de Março de 2001, relativa ao estatuto da vítima em processo penal⁽¹⁾, estabelece um conjunto de direitos das vítimas em processo penal, incluindo o direito a protecção e a indemnização. Além disso, as vítimas de tráfico de seres humanos deverão ter acesso sem demora a aconselhamento jurídico e, de acordo com o papel da vítima no sistema judicial respectivo, acesso a patrocínio judiciário, nomeadamente para efeitos de pedidos indemnizatórios. Esse aconselhamento jurídico e patrocínio judiciário pode também ser prestado pelas autoridades competentes para efeitos de pedido de indemnização ao Estado. O objectivo do aconselhamento jurídico é permitir que as vítimas sejam informadas e aconselhadas acerca das várias possibilidades que lhes são proporcionadas. O aconselhamento jurídico deverá ser prestado por uma pessoa que tenha recebido formação jurídica apropriada, não tendo necessariamente de ser um jurista. O aconselhamento jurídico e, de acordo com o papel da vítima no sistema judicial respectivo, o acesso ao patrocínio judiciário deverão ser gratuitos, pelo menos no caso de a vítima não dispor de recursos financeiros suficientes, em moldes compatíveis com os procedimentos dos Estados-Membros. Dada a especial improbabilidade de as crianças vítimas de tráfico possuírem esses recursos, na prática o aconselhamento jurídico e o patrocínio judiciário ser-lhes-ão prestados a título gratuito. Além disso, com base numa avaliação individual dos riscos a efectuar segundo os procedimentos nacionais, as vítimas deverão ser protegidas dos actos de retaliação ou intimidação e do risco de voltarem a ser objecto de tráfico.
- (20) As vítimas de tráfico que já sofreram os abusos e tratamentos degradantes habitualmente associados ao tráfico,

como a exploração sexual, os abusos sexuais, a violação, práticas esclavagistas ou remoção de órgãos, deverão ser protegidas da vitimização secundária e de novos traumas durante o processo penal. A repetição desnecessária de inquirições durante a investigação, o inquérito e a instrução, e o julgamento deverá ser evitada, por exemplo, se for caso disso, mediante a gravação em vídeo dessas inquirições numa fase inicial do processo. Para o efeito, durante a investigação criminal e o processo penal, deverá ser dispensado às vítimas de tráfico um tratamento adequado às suas necessidades individuais. A avaliação das suas necessidades individuais deverá ter em conta determinadas circunstâncias como a idade, a eventual gravidez, o seu estado de saúde, deficiências de que sejam portadores ou outras circunstâncias pessoais, bem como as consequências físicas e psicológicas da actividade criminosa a que a vítima foi sujeita. A decisão sobre a necessidade e a forma como será dispensado esse tratamento deverá ser tomada caso a caso, segundo as condições definidas no direito nacional, nas regras relativas ao exercício do poder discricionário por parte das autoridades judiciais, nas práticas e orientações judiciais.

- (21) As medidas de assistência e apoio deverão ser prestadas às vítimas numa base consensual e informada. As vítimas deverão, portanto, ser informadas dos aspectos importantes de tais medidas, não devendo estas ser-lhes impostas. A recusa das medidas de assistência ou apoio por parte da vítima não deverá implicar a obrigação por parte das autoridades competentes dos Estados-Membros em causa de proporcionarem medidas alternativas.
- (22) Além das medidas que estão disponíveis a todas as vítimas de tráfico de seres humanos, os Estados-Membros deverão assegurar a existência de medidas específicas de assistência, apoio e protecção para as vítimas crianças. Essas medidas deverão ser tomadas no superior interesse da criança, nos termos da Convenção das Nações Unidas de 1989 sobre os Direitos da Criança. Se a idade da vítima de tráfico for incerta e se houver motivos para crer que tem menos de 18 anos, deverá presumir-se que se trata de uma criança e facultar-lhe de imediato assistência, apoio e protecção. As medidas de assistência e apoio a vítimas crianças deverão visar a sua recuperação física e psicossocial, bem como uma solução duradoura para essas pessoas. O acesso à educação contribuirá para a reintegração da criança na sociedade. Dado que as crianças vítimas de tráfico são particularmente vulneráveis, deverá prever-se medidas de protecção adicionais para as proteger durante as inquirições realizadas no âmbito da investigação criminal e do processo penal.
- (23) Deverá ser prestada uma atenção particular às crianças não acompanhadas vítimas de tráfico de seres humanos, dado que necessitam de assistência e apoio específicos em virtude da sua situação de particular vulnerabilidade. A partir do momento em que uma criança não acompanhada é identificada como vítima de tráfico de seres humanos e até ser encontrada uma solução duradoura, os Estados-Membros deverão aplicar medidas de recepção adequadas às necessidades da criança e assegurar que se aplicam as garantias processuais relevantes. Deverão ser tomadas as medidas necessárias para assegurar, se for caso disso, a nomeação de um tutor e/ou de um representante a fim de assegurar o superior interesse da

⁽¹⁾ JO L 82 de 22.3.2001, p. 1.

- criança. A decisão sobre o futuro de cada criança não acompanhada, vítima de tráfico de seres humanos, deverá ser tomada no mais curto prazo possível, tendo em vista encontrar soluções duradouras baseadas na avaliação individual do superior interesse da criança, o que deverá constituir uma consideração primordial. A referida solução duradoura poderá consistir no retorno e na reintegração da criança no país de origem ou no país de retorno, na integração na sociedade de acolhimento, na concessão do estatuto de protecção internacional ou outro, nos termos do direito nacional dos Estados-Membros.
- (24) Se, nos termos da presente directiva, for nomeado um tutor e/ou um representante da criança, estas funções podem ser desempenhadas pela mesma pessoa ou por uma pessoa colectiva, uma instituição ou uma autoridade.
- (25) Os Estados-Membros deverão estabelecer e/ou reforçar as políticas de prevenção do tráfico de seres humanos, incluindo através de medidas de dissuasão e redução da procura que favoreça todas as formas de exploração, e de medidas para reduzir o risco de as pessoas se tornarem vítimas do tráfico, através da investigação, nomeadamente da investigação relativa a novas formas de tráfico de seres humanos, informação, sensibilização e educação. No âmbito dessas iniciativas, os Estados-Membros deverão adoptar uma perspectiva que tenha em conta as questões de género e os direitos da criança. Os funcionários e agentes susceptíveis de entrar em contacto com vítimas, efectivas ou potenciais, do tráfico de seres humanos, deverão receber formação adequada para identificar e lidar com tais vítimas. Esta obrigação de formação deverá ser promovida para o seguinte pessoal susceptível de vir a estar em contacto com vítimas: agentes da polícia, guardas de fronteira, funcionários dos serviços de imigração, magistrados do ministério público, juristas, magistrados e funcionários judiciais, inspectores do trabalho, pessoal dos serviços sociais, de acolhimento de crianças, de saúde e pessoal consular, podendo também, em função das circunstâncias locais, envolver igualmente outros grupos de funcionários e agentes públicos que sejam susceptíveis de entrar em contacto com vítimas de tráfico no exercício das suas funções.
- (26) A Directiva 2009/52/CE prevê sanções contra os empregadores de nacionais de países terceiros em situação irregular que, apesar de não terem sido acusados nem condenados por tráfico de seres humanos, utilizam o trabalho ou serviços de uma pessoa com conhecimento de que esta é vítima desse tipo de tráfico. Além disso, os Estados-Membros deverão considerar a possibilidade de aplicar sanções aos utilizadores de qualquer serviço imposto a uma vítima, quando tenham conhecimento de que esta foi objecto de tráfico. Esta criminalização adicional poderá incluir a conduta de empregadores de nacionais de países terceiros que residam legalmente e de nacionais da União, bem como os utilizadores de serviços sexuais de qualquer pessoa vítima de tráfico, qualquer que seja a sua nacionalidade.
- (27) Os Estados-Membros deverão criar sistemas nacionais de acompanhamento, tais como relatores nacionais ou mecanismos equivalentes, nas modalidades que considerem adequadas de acordo com a sua organização interna, e atendendo à necessidade de uma estrutura mínima com tarefas identificadas, a fim de avaliar as tendências do tráfico de seres humanos, recolher estatísticas, avaliar os resultados das medidas de luta contra esse tráfico e apresentar relatórios periódicos sobre esta matéria. Estes relatores nacionais ou mecanismos equivalentes já constituem uma rede informal da União, criada por via das Conclusões do Conselho relativas à criação de uma rede informal da UE constituída por relatores nacionais ou mecanismos equivalentes sobre o tráfico de seres humanos, de 4 de Junho de 2009. Um Coordenador da Luta Antitráfico poderá participar nas actividades desta rede, que fornece à União e aos seus Estados-Membros uma informação estratégica objectiva, fiável, comparável e actualizada no domínio do tráfico de seres humanos e faz o intercâmbio de experiências e melhores práticas a nível da União no domínio da prevenção e luta contra o tráfico de seres humanos. O Parlamento Europeu deverá ter o direito de participar nas actividades conjuntas dos relatores nacionais ou mecanismos equivalentes.
- (28) A fim de avaliar os resultados das acções antitráfico, a União deverá continuar a desenvolver o seu trabalho sobre metodologias e métodos de recolha de dados para produzir estatísticas comparáveis.
- (29) À luz do programa de Estocolmo, e tendo em vista desenvolver uma estratégia consolidada da União contra o tráfico e reforçar o empenho e os esforços da União e dos Estados-Membros na prevenção e luta contra o tráfico, os Estados-Membros deverão facilitar o exercício das atribuições cometidas a um Coordenador da Luta Antitráfico, que poderão incluir, por exemplo, a melhoria da coordenação e coerência, evitando a duplicação de esforços, entre as instituições e agências da União, bem como entre os Estados-Membros e os intervenientes internacionais, o contributo para o desenvolvimento das actuais ou futuras políticas e estratégias da União que sejam adequadas para a luta contra o tráfico de seres humanos, ou a apresentação de relatórios às instituições da União.
- (30) A presente directiva visa alterar e alargar as disposições da Decisão-Quadro 2002/629/JAI. Dado que as alterações a introduzir são substanciais em número e natureza, por razões de clareza a Decisão-Quadro deverá ser substituída na sua totalidade relativamente aos Estados-Membros que participaram na sua adopção.
- (31) Nos termos do ponto 34 do Acordo Interinstitucional «Legislar Melhor»⁽¹⁾, os Estados-Membros são encorajados a elaborar, para si próprios e no interesse da Comunidade, os seus próprios quadros, que ilustrem, na medida do possível, a concordância entre a presente directiva e as medidas de transposição, e a publicá-los.

(1) JO C 321 de 31.12.2003, p. 1.

- (32) Atendendo a que o objectivo da presente directiva, a saber, a luta contra o tráfico de seres humanos, não pode ser suficientemente realizado pelos Estados-Membros, e pode, devido à sua dimensão e aos seus efeitos, ser mais bem atingido a nível da União, esta pode adoptar medidas em conformidade com o princípio da subsidiariedade consagrado no artigo 5.º do Tratado da União Europeia. Em conformidade com o princípio da proporcionalidade consagrado no mesmo artigo, a presente directiva não excede o necessário para atingir aquele objectivo.
- (33) A presente directiva respeita os direitos fundamentais e observa os princípios reconhecidos, em especial, na Carta dos Direitos Fundamentais da União Europeia e, nomeadamente, a dignidade humana, a proibição da escravatura, do trabalho forçado e do tráfico de seres humanos, a proibição da tortura e das penas ou tratamentos desumanos ou degradantes, os direitos da criança, o direito à liberdade e à segurança, a liberdade de expressão e de informação, a protecção dos dados pessoais, o direito à acção e a um tribunal imparcial e os princípios da legalidade e da proporcionalidade entre os delitos e as penas. Em especial, a presente directiva procura garantir o pleno respeito por esses direitos e princípios e deve ser aplicada em conformidade.
- (34) Nos termos do artigo 3.º do Protocolo relativo à posição do Reino Unido e da Irlanda em relação ao espaço de liberdade, segurança e justiça, anexo ao Tratado da União Europeia e ao Tratado sobre o Funcionamento da União Europeia, a Irlanda notificou a sua intenção de participar na adopção e na aplicação da presente directiva.
- (35) Nos termos dos artigos 1.º e 2.º do Protocolo relativo à posição do Reino Unido e da Irlanda em relação ao espaço de liberdade, segurança e justiça, anexo ao Tratado da União Europeia e ao Tratado sobre o Funcionamento da União Europeia, e sem prejuízo do artigo 4.º do referido Protocolo, o Reino Unido não participa na adopção da presente directiva e não está a ela vinculado nem sujeito à sua aplicação.
- (36) Nos termos dos artigos 1.º e 2.º do Protocolo relativo à posição da Dinamarca, anexo ao Tratado da União Europeia e ao Tratado sobre o Funcionamento da União Europeia, a Dinamarca não participa na adopção da presente decisão e não está a ela vinculada nem sujeita à sua aplicação.

ADOPTARAM A PRESENTE DIRECTIVA:

Artigo 1.º

Objecto

A presente directiva estabelece as regras mínimas relativas à definição das infracções penais e das sanções no domínio do tráfico de seres humanos. Introdz igualmente disposições comuns, tendo em conta uma perspectiva de género, para reforçar a prevenção destes crimes e a protecção das suas vítimas.

Artigo 2.º

Infracções relativas ao tráfico de seres humanos

1. Os Estados-Membros devem tomar as medidas necessárias para garantir que os seguintes actos intencionais são puníveis:

Recrutamento, transporte, transferência, guarida ou acolhimento de pessoas, incluindo a troca ou a transferência do controlo sobre elas exercido, através do recurso a ameaças ou à força ou a outras formas de coacção, rapto, fraude, ardil, abuso de autoridade ou de uma posição de vulnerabilidade, ou da oferta ou obtenção de pagamentos ou benefícios a fim de conseguir o consentimento de uma pessoa que tenha controlo sobre outra para efeitos de exploração.

2. Por posição de vulnerabilidade entende-se uma situação em que a pessoa não tem outra alternativa, real ou aceitável, que não seja submeter-se ao abuso em causa.

3. A exploração inclui, no mínimo, a exploração da prostituição de outrem ou outras formas de exploração sexual, o trabalho ou serviços forçados, incluindo a mendicidade, a escravatura ou práticas equiparáveis à escravatura, a servidão, a exploração de actividades criminosas, bem como a remoção de órgãos.

4. O consentimento de uma vítima do tráfico de seres humanos na sua exploração, quer na forma tentada quer consumada, é irrelevante se tiverem sido utilizados quaisquer dos meios indicados no n.º 1.

5. Sempre que o comportamento referido no n.º 1 incidir sobre uma criança, deve ser considerado uma infracção punível de tráfico de seres humanos, ainda que não tenha sido utilizado nenhum dos meios indicados no n.º 1.

6. Para efeitos da presente directiva, entende-se por «criança» qualquer pessoa com menos de 18 anos.

Artigo 3.º

Instigação, auxílio e cumplicidade, e tentativa

Os Estados-Membros devem tomar as medidas necessárias para garantir que são puníveis a instigação, o auxílio e a cumplicidade, ou a tentativa de cometer qualquer das infracções referidas no artigo 2.º.

Artigo 4.º

Sanções

1. Os Estados-Membros devem tomar as medidas necessárias para garantir que as infracções referidas no artigo 2.º sejam puníveis com penas máximas com duração de, pelo menos, cinco anos de prisão.

2. Os Estados-Membros devem tomar as medidas necessárias para garantir que as infracções referidas no artigo 2.º sejam puníveis com penas máximas com duração de, pelo menos, dez anos de prisão, caso a infracção:

- a) Tenha sido cometida contra uma vítima particularmente vulnerável, o que, no contexto da presente directiva, inclui no mínimo as vítimas que forem crianças;

- b) Tenha sido cometida no quadro de uma organização criminosa na acepção da Decisão-Quadro 2008/841/JAI do Conselho, de 24 de Outubro de 2008, relativa à luta contra a criminalidade organizada ⁽¹⁾;
- c) Tenha posto em perigo a vida da vítima e tenha sido cometida com dolo ou negligência grosseira; ou
- d) Tenha sido cometida com especial violência ou tenha causado à vítima danos particularmente graves.

3. Os Estados-Membros devem tomar as medidas necessárias para garantir que seja considerado circunstância agravante o facto de uma infracção referida no artigo 2.º ter sido cometida por um funcionário ou agente público no exercício das suas funções.

4. Os Estados-Membros devem tomar as medidas necessárias para garantir que as infracções referidas no artigo 3.º sejam puníveis com sanções efectivas, proporcionadas e dissuasivas, que possam dar origem a entrega.

Artigo 5.º

Responsabilidade das pessoas colectivas

1. Os Estados-Membros devem tomar as medidas necessárias para garantir que as pessoas colectivas possam ser consideradas responsáveis pelas infracções referidas nos artigos 2.º e 3.º, cometidas em seu benefício por qualquer pessoa, agindo a título individual ou como membro de um órgão da pessoa colectiva, que nesta ocupe uma posição de liderança, com base:

- a) Em poderes de representação da pessoa colectiva;
- b) Na autoridade para tomar decisões em nome da pessoa colectiva; ou
- c) Na autoridade para exercer controlo dentro da pessoa colectiva.

2. Os Estados-Membros devem igualmente garantir que uma pessoa colectiva possa ser responsabilizada sempre que a falta de supervisão ou de controlo por parte de uma pessoa referida no n.º 1 tenha possibilitado a prática de infracções referidas nos artigos 2.º e 3.º, em benefício dessa pessoa colectiva, por uma pessoa sob a sua autoridade.

3. A responsabilidade das pessoas colectivas prevista nos n.ºs 1 e 2 não exclui a instauração de processos penais contra as pessoas singulares que sejam autoras, instigadoras ou cúmplices nas infracções referidas nos artigos 2.º e 3.º.

4. Para efeitos da presente directiva, entende-se por «pessoa colectiva» qualquer entidade dotada de personalidade jurídica por força do direito aplicável, com excepção do Estado ou de organismos públicos no exercício de prerrogativas de autoridade pública e das organizações internacionais públicas.

Artigo 6.º

Sanções aplicáveis às pessoas colectivas

Os Estados-Membros devem tomar as medidas necessárias para garantir que as pessoas colectivas consideradas responsáveis nos termos dos n.ºs 1 ou 2 do artigo 5.º sejam passíveis de sanções efectivas, proporcionadas e dissuasivas, incluindo multas ou coimas e, eventualmente, outras sanções, tais como:

- a) Exclusão do direito a benefícios ou auxílios públicos;
- b) Proibição temporária ou permanente de exercer actividade comercial;
- c) Colocação sob vigilância judicial;
- d) Liquidação judicial;
- e) Encerramento temporário ou definitivo dos estabelecimentos utilizados para a prática da infracção.

Artigo 7.º

Apreensão e perda a favor do Estado

Os Estados-Membros devem tomar as medidas necessárias para garantir que as respectivas autoridades competentes têm o direito de apreender os instrumentos e produtos das infracções referidas nos artigos 2.º e 3.º e de declarar a respectiva perda a favor do Estado.

Artigo 8.º

Não instauração de acção penal ou não aplicação de sanções à vítima

Os Estados-Membros devem, de acordo com os princípios de base do respectivo sistema jurídico, tomar as medidas necessárias para garantir que as autoridades nacionais competentes tenham o direito de não instaurar acções penais ou de não aplicar sanções às vítimas de tráfico de seres humanos pela sua participação em actividades criminosas que tenham sido forçadas a cometer como consequência directa de estarem submetidas a qualquer dos actos referidos no artigo 2.º.

Artigo 9.º

Investigação e acção penal

1. Os Estados-Membros devem garantir que a investigação ou o exercício da acção penal relativamente a infracções referidas nos artigos 2.º e 3.º não dependam de queixa ou acusação por parte da vítima e que a acção penal pode prosseguir mesmo que a vítima retire a sua declaração.

2. Os Estados-Membros devem tomar as medidas necessárias para permitir, caso a natureza do acto o exija, o exercício da acção penal relativamente a infracções referidas nos artigos 2.º e 3.º durante um período de tempo suficiente após a vítima ter atingido a maioridade.

3. Os Estados-Membros devem tomar as medidas necessárias para garantir que as pessoas, unidades ou serviços responsáveis pela investigação ou pelo exercício da acção penal relativamente a infracções referidas nos artigos 2.º e 3.º recebam a formação adequada.

4. Os Estados-Membros devem tomar as medidas necessárias para garantir que as pessoas, unidades ou serviços responsáveis pela investigação ou pelo exercício da acção penal relativamente a infracções referidas nos artigos 2.º e 3.º tenham acesso a instrumentos de investigação eficazes, como os que são utilizados nos casos de criminalidade organizada e outros crimes graves.

⁽¹⁾ JO L 300 de 11.11.2008, p. 42.

Artigo 10.º**Competência**

1. Os Estados-Membros devem tomar as medidas necessárias para determinar a sua competência relativamente às infracções referidas nos artigos 2.º e 3.º, caso:

- a) A infracção tenha sido cometida, no todo ou em parte, no seu território; ou
- b) O autor da infracção seja um seu nacional.

2. Um Estado-Membro deve informar a Comissão sempre que decidir estender a sua competência relativamente a infracções referidas nos artigos 2.º e 3.º cometidas fora do seu território, designadamente, caso:

- a) A infracção tenha sido cometida contra um seu nacional ou contra uma pessoa que resida habitualmente no seu território;
- b) A infracção tenha sido cometida em benefício de uma pessoa colectiva estabelecida no seu território; ou
- c) O autor da infracção resida habitualmente no seu território.

3. Para efeitos de acção penal relativamente a infracções referidas nos artigos 2.º e 3.º e cometidas fora do território do Estado-Membro em causa, cada Estado-Membro deve tomar, em relação aos casos previstos na alínea b) do n.º 1, e pode tomar, em relação aos casos previstos no n.º 2, as medidas necessárias para garantir que a sua competência não depende de nenhuma das seguintes condições:

- a) Os actos constituírem uma infracção penal no local em que foram cometidos; ou
- b) A acção penal só se poder iniciar após a apresentação de queixa pela vítima no local em que a infracção foi cometida, ou de uma denúncia do Estado em cujo território a infracção foi cometida.

Artigo 11.º**Assistência e apoio às vítimas de tráfico de seres humanos**

1. Os Estados-Membros devem tomar as medidas necessárias para garantir que seja prestada assistência e apoio às vítimas antes, durante e, por um período de tempo adequado, após a conclusão do processo penal, a fim de lhes permitir exercer os direitos estabelecidos na Decisão-Quadro 2001/220/JAI e na presente directiva.

2. Os Estados-Membros devem tomar as medidas necessárias para garantir que uma pessoa receba assistência e apoio logo que as autoridades competentes disponham de indicação de que existem motivos razoáveis para crer que a pessoa em causa pode ter sido vítima das infracções referidas nos artigos 2.º e 3.º.

3. Os Estados-Membros devem tomar as medidas necessárias para garantir que a prestação de assistência e apoio a uma

vítima não dependa da sua vontade de cooperar na investigação criminal, na acção penal ou no julgamento, sem prejuízo da Directiva 2004/81/CE ou de regras nacionais semelhantes.

4. Os Estados-Membros devem tomar as medidas necessárias para estabelecer os mecanismos adequados que permitam proceder a uma identificação rápida e prestar assistência e apoio às vítimas, em colaboração com as organizações de apoio relevantes.

5. As medidas de assistência e apoio referidas nos n.ºs 1 e 2 devem ser prestadas numa base consensual e informada, devendo proporcionar, pelo menos, níveis de vida que possam assegurar a subsistência das vítimas, nomeadamente o seu alojamento condigno e seguro e assistência material, bem como o tratamento médico necessário, incluindo assistência psicológica, o aconselhamento e informação, e a tradução e interpretação quando necessárias.

6. A informação referida no n.º 5 inclui, se for caso disso, a informação sobre um período de reflexão e recuperação nos termos da Directiva 2004/81/CE, bem como a informação sobre a possibilidade de conceder protecção internacional nos termos da Directiva 2004/83/CE do Conselho, de 29 de Abril de 2004, que estabelece normas mínimas relativas às condições a preencher por nacionais de países terceiros ou apátridas para poderem beneficiar do estatuto de refugiado ou de pessoa que, por outros motivos, necessite de protecção internacional, bem como relativas ao respectivo estatuto, e relativas ao conteúdo da protecção concedida ⁽¹⁾, e da Directiva 2005/85/CE do Conselho, de 1 de Dezembro de 2005, relativa a normas mínimas aplicáveis ao procedimento de concessão e retirada do estatuto de refugiado nos Estados-Membros ⁽²⁾, ou nos termos de outros instrumentos internacionais ou outras regras nacionais semelhantes.

7. Os Estados-Membros devem atender às vítimas com necessidades especiais, caso essas necessidades resultem, em especial, de uma eventual gravidez, do seu estado de saúde, de deficiência, de distúrbios mentais ou psicológicos de que sofram, ou de terem sido alvo de formas graves de violência psicológica, física ou sexual.

Artigo 12.º**Protecção das vítimas de tráfico de seres humanos na investigação criminal e no processo penal**

1. As medidas de protecção referidas no presente artigo aplicam-se em complemento dos direitos estabelecidos na Decisão-Quadro 2001/220/JAI.

2. Os Estados-Membros devem garantir que as vítimas do tráfico de seres humanos têm acesso sem demora a aconselhamento jurídico e, de acordo com o papel da vítima no sistema judicial respectivo, ao patrocínio judiciário, incluindo para efeitos de pedido de indemnização. O aconselhamento jurídico e o patrocínio judiciário devem ser gratuitos, caso a vítima não disponha de recursos financeiros suficientes.

⁽¹⁾ JO L 304 de 30.9.2004, p. 12.

⁽²⁾ JO L 326 de 13.12.2005, p. 13.

3. Os Estados-Membros devem garantir que as vítimas de tráfico de seres humanos recebem protecção adequada, com base numa avaliação individual dos riscos, tendo nomeadamente acesso a programas de protecção de testemunhas ou a outras medidas semelhantes, se tal se afigurar adequado e de acordo com as condições definidas no direito ou nos procedimentos nacionais.

4. Sem prejuízo dos direitos da defesa, e de acordo com a avaliação individual das circunstâncias pessoais da vítima pelas autoridades competentes, os Estados-Membros devem garantir que as vítimas de tráfico de seres humanos recebem tratamento específico para prevenir a vitimização secundária, evitando-se tanto quanto possível e segundo as condições definidas no direito nacional, bem como nas regras relativas ao exercício do poder discricionário por parte das autoridades judiciais, nas práticas ou orientações judiciais:

- a) A repetição desnecessária de inquirições durante a investigação, o inquérito e a instrução, ou o julgamento;
- b) O contacto visual entre as vítimas e os arguidos, nomeadamente durante o depoimento, como o interrogatório e o contra-interrogatório, por meios adequados, incluindo o recurso às tecnologias de comunicação adequadas;
- c) O depoimento em audiência pública; e
- d) Perguntas desnecessárias sobre a vida privada da vítima.

Artigo 13.º

Disposições gerais sobre as medidas de assistência, apoio e protecção às crianças que sejam vítimas de tráfico de seres humanos

1. As crianças que sejam vítimas de tráfico de seres humanos devem receber assistência, apoio e protecção. Na aplicação da presente directiva, o superior interesse da criança deve constituir uma consideração primordial.
2. Os Estados-Membros devem garantir que, caso a idade da vítima de tráfico de seres humanos seja incerta e havendo motivos para crer que se trata de uma criança, se presume que essa pessoa é uma criança a fim de ter acesso imediato a assistência, apoio e protecção nos termos dos artigos 14.º e 15.º.

Artigo 14.º

Assistência e apoio a vítimas que sejam crianças

1. Os Estados-Membros devem tomar as medidas necessárias para garantir que as medidas específicas de assistência e apoio às crianças que sejam vítimas de tráfico de seres humanos, a curto e a longo prazo, para a sua recuperação física e psicossocial, sejam tomadas após uma avaliação individual das circunstâncias específicas de cada uma dessas crianças, atendendo às suas opi-

niões, necessidades e preocupações, com vista a encontrar uma solução duradoura para a criança. Num período de tempo razoável, os Estados-Membros devem providenciar o acesso à educação para as vítimas que sejam crianças e para os filhos de vítimas que recebam assistência e apoio nos termos do artigo 11.º, ao abrigo do respectivo direito nacional.

2. Os Estados-Membros devem nomear um tutor ou representante para a criança vítima de tráfico de seres humanos a partir do momento em que a mesma seja identificada pelas autoridades caso, por força do direito nacional, os titulares da responsabilidade parental estejam impedidos de garantir o superior interesse da criança e/ou de a representar, devido a um conflito de interesses entre eles e a criança.

3. Os Estados-Membros devem tomar medidas para prestar assistência e apoio às famílias das crianças vítimas de tráfico de seres humanos, sempre que possível e justificado, quando a família se encontrar no respectivo território. Em especial, sempre que adequado e possível, os Estados-Membros devem aplicar à família o artigo 4.º da Decisão-Quadro 2001/220/JAI.

4. O presente artigo é aplicável sem prejuízo do artigo 11.º.

Artigo 15.º

Protecção das crianças vítimas de tráfico de seres humanos na investigação criminal e no processo penal

1. Os Estados-Membros devem tomar as medidas necessárias para garantir que, na investigação criminal e no processo penal, de acordo com o papel da vítima no sistema judicial respectivo, as autoridades competentes nomeiem um representante para as crianças vítimas de tráfico de seres humanos quando, por força do direito nacional, os titulares da responsabilidade parental estejam impedidos de representar a criança devido a um conflito de interesses entre eles e a criança.

2. Os Estados-Membros devem garantir, de acordo com o papel da vítima no respectivo sistema judicial, que as crianças vítimas têm acesso sem demora a aconselhamento jurídico e patrocínio judiciário gratuitos, nomeadamente para efeitos de pedidos de indemnização, salvo se dispuserem de recursos financeiros suficientes.

3. Sem prejuízo dos direitos da defesa, os Estados-Membros devem tomar as medidas necessárias para garantir que na investigação criminal e no processo penal relativos a qualquer das infracções referidas nos artigos 2.º e 3.º:

- a) A inquirição da criança vítima ocorra sem demora injustificada após a denúncia dos factos às autoridades competentes;
- b) A inquirição da criança vítima ocorra, caso seja necessário, em instalações concebidas e adaptadas para o efeito;

- c) A inquirição da criança vítima seja feita, caso seja necessário, por profissionais qualificados para o efeito;
- d) Sejam as mesmas pessoas, se possível e caso seja adequado, a realizar todas as inquirições da criança vítima;
- e) O número de inquirições seja o mais limitado possível e que sejam realizadas apenas em caso de estrita necessidade para efeitos da investigação criminal e do processo penal;
- f) A criança vítima seja acompanhada pelo seu representante legal ou, caso seja necessário, por um adulto à sua escolha, salvo decisão fundamentada em contrário relativamente a essa pessoa.

4. Os Estados-Membros devem tomar as medidas necessárias para garantir que, na investigação criminal relativa às infracções referidas nos artigos 2.º e 3.º, todas as inquirições da criança vítima ou, se for caso disso, testemunha, possam ser gravadas em vídeo e que estas gravações possam ser utilizadas como prova no processo penal, de acordo com as disposições aplicáveis do direito nacional.

5. Os Estados-Membros devem tomar as medidas necessárias para garantir que no âmbito dos processos penais relativos a qualquer das infracções referidas nos artigos 2.º a 3.º se possa determinar que:

- a) A inquirição decorra sem a presença do público; e
- b) A criança vítima possa ser ouvida pelo tribunal sem estar presente, nomeadamente com recurso a tecnologias de comunicação adequadas.

6. O presente artigo é aplicável sem prejuízo do artigo 12.º.

Artigo 16.º

Assistência, apoio e protecção de crianças não acompanhadas vítimas de tráfico de seres humanos

1. Os Estados-Membros devem tomar as medidas necessárias para garantir que as medidas específicas de assistência e apoio às crianças vítimas de tráfico de seres humanos, como referido no n.º 1 do artigo 14.º, tenham em devida conta as circunstâncias pessoais e especiais da vítima menor não acompanhada.

2. Os Estados-Membros devem tomar as medidas necessárias para encontrar uma solução duradoura com base na avaliação individual do superior interesse da criança.

3. Os Estados-Membros devem tomar as medidas necessárias para garantir que, se for caso disso, seja nomeado um tutor da criança não acompanhada vítima de tráfico de seres humanos.

4. Os Estados-Membros devem tomar as medidas necessárias para garantir que, na investigação criminal e no processo penal, e de acordo com o papel da vítima no respectivo sistema judicial, as autoridades competentes nomeiem um representante

caso a criança não esteja acompanhada ou esteja separada da família.

5. O presente artigo é aplicável sem prejuízo dos artigos 14.º e 15.º.

Artigo 17.º

Indemnização das vítimas

Os Estados-Membros devem garantir que as vítimas de tráfico de seres humanos tenham acesso aos regimes vigentes de indemnização de vítimas de crimes intencionais violentos.

Artigo 18.º

Prevenção

1. Os Estados-Membros devem tomar as medidas adequadas, como a educação e a formação, para desencorajar e reduzir a procura que incentiva todas as formas de exploração ligada ao tráfico de seres humanos.

2. Os Estados-Membros devem tomar medidas adequadas, nomeadamente através da Internet, tais como campanhas de informação e sensibilização, programas de investigação e educação, se necessário em cooperação com organizações relevantes da sociedade civil e outras partes interessadas, a fim de aumentar a consciencialização em relação a este problema e de reduzir o risco de pessoas, sobretudo as crianças, virem a ser vítimas de tráfico de seres humanos.

3. Os Estados-Membros devem promover uma formação regular dos funcionários e agentes susceptíveis de virem a estar em contacto com vítimas ou potenciais vítimas de tráfico de seres humanos, incluindo os agentes da polícia no terreno, a fim de que estes possam identificar e lidar com as vítimas e potenciais vítimas de tráfico de seres humanos.

4. A fim de tornar a prevenção e a luta contra o tráfico de seres humanos mais eficazes mediante o desencorajamento da procura, os Estados-Membros devem considerar a possibilidade de criminalizar a utilização dos serviços que são objecto de exploração, tal como referida no artigo 2.º, quando o utilizador tenha conhecimento de que a pessoa é vítima de uma infracção referida no artigo 2.º.

Artigo 19.º

Relatores nacionais ou mecanismos equivalentes

Os Estados-Membros devem tomar as medidas necessárias para criar relatores nacionais ou mecanismos equivalentes. A estes mecanismos cabe, nomeadamente, avaliar as tendências do tráfico de seres humanos, avaliar os resultados das medidas de luta contra esse tráfico, incluindo a recolha de estatísticas em estreita cooperação com as organizações relevantes da sociedade civil activas neste domínio, e apresentar relatórios sobre esta matéria.

*Artigo 20.º***Coordenação da estratégia da União contra o tráfico de seres humanos**

A fim de contribuir para uma estratégia coordenada e consolidada da União contra o tráfico de seres humanos, os Estados-Membros devem facilitar o exercício das atribuições de um Coordenador da Luta Antitráfico (CLAT). Em especial, os Estados-Membros devem transmitir ao CLAT as informações referidas no artigo 19.º, com base nas quais o CLAT contribui para a apresentação de um relatório pela Comissão, de dois em dois anos, sobre os progressos alcançados na luta contra o tráfico de seres humanos.

*Artigo 21.º***Substituição da Decisão-Quadro 2002/629/JAI**

A Decisão-Quadro 2002/629/JAI, relativa à luta contra o tráfico de seres humanos, é substituída no que diz respeito aos Estados-Membros que participam na adopção da presente directiva, sem prejuízo das obrigações dos Estados-Membros quanto ao prazo de transposição dessa decisão-quadro para o direito nacional.

No que diz respeito aos Estados-Membros que participam na adopção da presente directiva, as remissões para a Decisão-Quadro 2002/629/JAI devem entender-se como sendo feitas para a presente directiva.

*Artigo 22.º***Transposição**

1. Os Estados-Membros põem em vigor as disposições legislativas, regulamentares e administrativas necessárias para dar cumprimento à presente directiva até 6 de Abril de 2013.

2. Os Estados-Membros comunicam à Comissão o texto das disposições que transpõem as obrigações resultantes da presente directiva para o respectivo direito interno.

3. Quando os Estados-Membros adoptarem essas disposições, estas incluem uma referência à presente directiva ou são acom-

panhadas dessa referência aquando da sua publicação oficial. As modalidades dessa referência são estabelecidas pelos Estados-Membros.

*Artigo 23.º***Relatórios**

1. A Comissão apresenta, até 6 de Abril de 2015, um relatório ao Parlamento Europeu e ao Conselho no qual avalie em que medida os Estados-Membros tomaram as disposições necessárias para dar cumprimento à presente directiva, incluindo uma descrição das disposições aplicadas por força do n.º 4 do artigo 18.º, devendo esse relatório ser acompanhado, se necessário, de propostas legislativas.

2. A Comissão apresenta, até 6 de Abril de 2016, um relatório ao Parlamento Europeu e ao Conselho no qual avalie o impacto na prevenção do tráfico de seres humanos do direito nacional em vigor que criminalize a utilização de serviços que são objecto da exploração do tráfico de seres humanos, devendo esse relatório ser acompanhado, se necessário, das propostas adequadas.

*Artigo 24.º***Entrada em vigor**

A presente directiva entra em vigor no dia da sua publicação no *Jornal Oficial da União Europeia*.

*Artigo 25.º***Destinatários**

Os destinatários da presente directiva são os Estados-Membros nos termos dos Tratados.

Feito em Estrasburgo, em 5 de Abril de 2011.

Pelo Parlamento Europeu

O Presidente

J. BUZEK

Pelo Conselho

A Presidente

GYŐRI E.



Protocolo Adicional à Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional contra o Tráfico Ilícito de Migrantes por via Terrestre, Marítima e Aérea

PROTOCOLO ADICIONAL À CONVENÇÃO DAS NAÇÕES UNIDAS CONTRA A CRIMINALIDADE ORGANIZADA TRANSNACIONAL CONTRA O TRÁFICO ILÍCITO DE MIGRANTES POR VIA TERRESTRE, MARÍTIMA E AÉREA

Adoptado pela resolução A/RES/55/25 da Assembleia Geral das Nações Unidas, de 15 de Novembro de 2000 (55.ª Sessão).

Entrada em vigor na ordem jurídica internacional: 28 de Janeiro de 2004, em conformidade com o artigo 22.º.

Portugal:

Assinatura: 12 de Dezembro de 2000;

Aprovação para ratificação: Resolução da Assembleia da República n.º 32/2004, de 2 de Abril, publicada no Diário da República, I Série-A, n.º 79;

Ratificação: Decreto do Presidente da República n.º 19/2004, de 2 de Abril, publicado no Diário da República, I Série-A, n.º 79;

Depósito do instrumento de ratificação junto do Secretário-Geral das Nações Unidas: 10 de Maio de 2004;

Aviso de depósito do instrumento de ratificação: Aviso n.º 121/2004 do Ministério dos Negócios Estrangeiros, publicado no Diário da República, I Série-A, n.º 141, de 17 de Junho de 2004;

Para efeitos do disposto no n.º 6 do artigo 8.º deste Protocolo Adicional, Portugal declarou que a autoridade para receber e responder aos pedidos de auxílio e de confirmação de registo de matrícula ou do direito de uma embarcação arvorar o seu pavilhão e aos pedidos de autorização para tomar as medidas necessárias é a Procuradoria-Geral da República;

Entrada em vigor na ordem jurídica portuguesa: 9 de Junho de 2004.

PROTOCOLO ADICIONAL À CONVENÇÃO DAS NAÇÕES UNIDAS CONTRA A CRIMINALIDADE ORGANIZADA TRANSNACIONAL CONTRA O TRÁFICO ILÍCITO DE MIGRANTES POR VIA TERRESTRE, MARÍTIMA E AÉREA

Preâmbulo

Os Estados Partes no presente Protocolo:

Declarando que uma acção eficaz para prevenir e combater a introdução clandestina de migrantes por via terrestre, marítima e aérea exige uma abordagem global e internacional, incluindo a cooperação, a troca de informações e outras medidas apropriadas, de natureza social e económica, designadamente a nível nacional, regional e internacional;

Relembrando a Resolução n.º 54/212, da Assembleia Geral, de 22 de Dezembro de 1999, na qual a Assembleia instou os Estados membros e os organismos das Nações Unidas a reforçarem a cooperação internacional no domínio das migrações internacionais e do desenvolvimento, de forma a combater as causas profundas das migrações, designadamente as que estão ligadas à pobreza, e a otimizar os benefícios que as migrações internacionais proporcionam aos interessados e a incentivar, se necessário, os

mecanismos inter-regionais, regionais e sub-regionais a continuarem a tratar da questão das migrações e do desenvolvimento;

Convencidos da necessidade de tratar os migrantes com humanidade e de proteger plenamente os seus direitos;

Tendo em conta que, apesar do trabalho efectuado noutras instâncias internacionais, não existe um instrumento universal que trate de todos os aspectos da introdução clandestina de migrantes e de outras questões conexas;

Preocupados com o aumento significativo das actividades dos grupos criminosos organizados relacionadas com a introdução clandestina de migrantes e outras actividades criminosas conexas, enunciadas no presente Protocolo, que causam grandes prejuízos aos Estados afectados;

Preocupados também pelo facto de a introdução clandestina de migrantes poder pôr em risco as vidas ou a segurança dos migrantes envolvidos;

Recordando a Resolução n.º 53/111, da Assembleia Geral, de 9 de Dezembro de 1998, na qual a Assembleia decidiu criar um comité intergovernamental especial, de composição aberta, para elaborar uma convenção internacional global contra a criminalidade organizada transnacional e examinar a possibilidade de elaborar, designadamente, um instrumento internacional de luta contra a introdução clandestina e o transporte ilícito de migrantes, incluindo por via marítima;

Convencidos de que o facto de completar a Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional com um instrumento internacional contra a introdução clandestina de migrantes por via terrestre, marítima e aérea ajudará a prevenir e a combater esse tipo de criminalidade;

acordaram no seguinte:

I - DISPOSIÇÕES GERAIS

Artigo 1.º

Relação com a Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional

1 - O presente Protocolo completa a Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional e será interpretado em conjunto com a Convenção.

2 - As disposições da Convenção aplicar-se-ão mutatis mutandis ao presente Protocolo, salvo se no mesmo se dispuser o contrário.

3 - As infracções estabelecidas em conformidade com o artigo 6.º do presente Protocolo serão consideradas como infracções estabelecidas em conformidade com a Convenção.

Artigo 2.º

Objecto

O presente Protocolo tem como objecto prevenir e combater a introdução clandestina de migrantes, bem como promover a cooperação entre os Estados Partes com esse fim, protegendo ao mesmo tempo os direitos dos migrantes introduzidos clandestinamente.

Artigo 3.º

Definições

Para efeitos do presente Protocolo:

- a) Por «introdução clandestina de migrantes» entende-se o facilitar da entrada ilegal de uma pessoa num Estado Parte do qual essa pessoa não é nacional ou residente permanente com o objectivo de obter, directa ou indirectamente, um benefício financeiro ou outro benefício material;
- b) Por «entrada ilegal» entende-se a passagem de fronteiras sem preencher as condições necessárias para a entrada legal no Estado de acolhimento;
- c) Por «documento de viagem ou de identidade fraudulento» entende-se qualquer documento de viagem ou de identificação:

- i) Que tenha sido falsificado ou alterado de forma substancial por uma pessoa ou uma entidade que não esteja legalmente autorizada a fazer ou emitir documentos de viagem ou de identidade em nome de um Estado; ou
- ii) Que tenha sido emitido ou obtido de forma irregular, através de falsas declarações, corrupção, coacção ou de qualquer outro meio ilícito; ou
- iii) Que seja utilizado por outra pessoa que não o seu titular legítimo;
- d) Por «navio» entende-se todo o tipo de embarcação, incluindo embarcações sem calado e hidroaviões, utilizados ou que possam ser utilizados como meio de transporte sobre a água, com excepção dos navios de guerra, navios auxiliares da armada ou outras embarcações pertencentes a um governo ou por ele exploradas, desde que sejam utilizadas exclusivamente por um serviço público não comercial.

Artigo 4.º **Âmbito de aplicação**

O presente Protocolo aplica-se, salvo disposição em contrário, à prevenção, à investigação e à repressão das infracções estabelecidas em conformidade com o artigo 6.º deste Protocolo, quando essas infracções sejam de natureza transnacional e envolvam um grupo criminoso organizado, bem como à protecção dos direitos das pessoas que foram objecto dessas infracções.

Artigo 5.º **Responsabilidade penal dos migrantes**

Os migrantes não estarão sujeitos a procedimentos criminais nos termos do presente Protocolo pelo facto de terem sido objecto dos actos enunciados no artigo 6.º deste Protocolo.

Artigo 6.º **Criminalização**

1 - Cada Estado Parte adoptará as medidas legislativas e outras que considere necessárias para estabelecer como infracções penais, quando praticadas intencionalmente e de forma a obter, directa ou indirectamente, um benefício financeiro ou outro benefício material:

- a) A introdução clandestina de migrantes;
- b) Os seguintes actos quando praticados com o objectivo de possibilitar a introdução clandestina de migrantes:
 - i) Elaborar um documento de viagem ou de identidade fraudulento;
 - ii) Obter, fornecer ou possuir tal documento;
- c) Permitir que uma pessoa que não é nacional ou residente permanente permaneça no Estado em causa sem preencher as condições necessárias para permanecer legalmente no Estado através dos meios referidos na alínea b) do presente número ou de qualquer outro meio ilegal.

2 - Cada Estado Parte adoptará também as medidas legislativas e outras que considere necessárias para estabelecer como infracções penais:

- a) Sem prejuízo dos conceitos fundamentais do seu sistema jurídico, a tentativa de cometer uma infracção estabelecida em conformidade com o n.º 1 do presente artigo;
- b) A participação como cúmplice numa infracção estabelecida em conformidade com as alíneas a), b), subalínea i), ou c) do n.º 1 do presente artigo e, sem prejuízo dos conceitos fundamentais do seu sistema jurídico, a participação como cúmplice numa infracção estabelecida em conformidade com a alínea b), subalínea ii), do n.º 1 do presente artigo;
- c) A organização ou a determinação de outras pessoas para a prática de uma infracção em conformidade com o n.º 1 do presente artigo.

3 - Cada Estado Parte adoptará as medidas legislativas e outras necessárias para considerar como circunstâncias agravantes das infracções estabelecidas em conformidade com as alíneas a), b), subalínea

i), e c) do n.º 1 do presente artigo e, sem prejuízo dos conceitos fundamentais do seu sistema jurídico, das infracções estabelecidas em conformidade com as alíneas b) e c) do n.º 2 do presente artigo:

a) Pôr em perigo ou ameaçar pôr em perigo as vidas e a segurança dos migrantes em causa; ou

b) O tratamento desumano ou degradante desses migrantes, incluindo a sua exploração.

4 - Nenhuma disposição do presente Protocolo impedirá um Estado Parte de tomar medidas contra uma pessoa cuja conduta constitua uma infracção nos termos do seu direito interno.

II - INTRODUÇÃO CLANDESTINA DE MIGRANTES POR VIA MARÍTIMA

Artigo 7.º Cooperação

Os Estados Partes cooperarão na medida do possível para prevenir e reprimir a introdução clandestina de migrantes por via marítima, em conformidade com o direito internacional do mar.

Artigo 8.º Medidas contra a introdução clandestina de migrantes por via marítima

1 - Um Estado Parte que tenha motivos razoáveis para suspeitar que um navio que arvora o seu pavilhão ou que invoca o registo da matrícula neste Estado, sem nacionalidade, ou que apesar de arvorar um pavilhão estrangeiro ou recusar mostrar o seu pavilhão tem na verdade a nacionalidade do Estado Parte em questão, está a ser utilizado para introduzir clandestinamente migrantes por via marítima pode pedir o auxílio a outros Estados Partes para pôr termo à utilização do referido navio para esse fim. Os Estados Partes a quem foi solicitado o auxílio deverão prestá-lo na medida do possível tendo em conta os meios de que dispõem.

2 - Um Estado Parte que tenha motivos razoáveis para suspeitar que um navio que exerce a liberdade de navegação em conformidade com o direito internacional e arvora o pavilhão ou exhibe sinais de matrícula de outro Estado Parte está a ser utilizado para introduzir clandestinamente migrantes por via marítima pode notificar o Estado do pavilhão, solicitar a confirmação do registo da matrícula e, se este se confirmar, solicitar autorização a esse Estado para tomar as medidas apropriadas relativamente ao navio. O Estado do pavilhão pode, designadamente, autorizar o Estado requerente a:

a) Entrar a bordo do navio;

b) Revistar o navio; e

c) Se forem encontradas provas de que o navio está a ser utilizado para introduzir clandestinamente migrantes por via marítima, tomar as medidas que considere apropriadas relativamente ao navio, às pessoas e à carga que se encontrem a bordo, nos termos em que foi autorizado pelo Estado do pavilhão.

3 - Um Estado Parte que tenha tomado qualquer medida em conformidade com o n.º 2 do presente artigo deverá informar imediatamente o Estado do pavilhão em causa sobre os resultados das referidas medidas.

4 - Um Estado Parte deverá responder imediatamente a qualquer pedido de outro Estado Parte com vista a determinar se um navio que invoca o registo da matrícula neste Estado ou arvora o seu pavilhão está autorizado a fazê-lo, bem como a um pedido de autorização efectuado em conformidade com o n.º 2 do presente artigo.

5 - O Estado do pavilhão pode, em conformidade com o artigo 7.º do presente Protocolo, fazer depender a sua autorização de condições a acordar com o Estado requerente, nomeadamente condições relativas à responsabilidade e ao alcance das medidas efectivas a tomar. Um Estado Parte não deverá tomar medidas adicionais sem autorização expressa do Estado do pavilhão, excepto aquelas que sejam necessárias para afastar um perigo iminente para a vida das pessoas ou as que resultam de acordos bilaterais ou multilaterais aplicáveis.

6 - Cada Estado Parte designa uma ou, se necessário, várias autoridades para receber e responder a pedidos de auxílio, de confirmação do registo de matrícula ou do direito de uma embarcação arvorar o seu pavilhão e a pedidos de autorização para tomar as medidas apropriadas. Essa designação será notificada pelo Secretário-Geral a todos os outros Estados Partes no prazo de um mês após esta designação.

7 - Um Estado Parte que tenha motivos razoáveis para suspeitar que um navio está a ser utilizado para introduzir clandestinamente migrantes por via marítima e não tem nacionalidade ou é equiparado a um navio sem nacionalidade pode entrar a bordo e proceder à busca. Se forem encontradas provas que confirmem a suspeita, esse Estado Parte deverá tomar as medidas apropriadas em conformidade com o direito interno e internacional aplicável.

Artigo 9.º **Cláusulas de protecção**

1 - Quando um Estado Parte tomar medidas contra um navio em conformidade com o artigo 8.º do presente Protocolo:

- a) Deverá garantir a segurança e o tratamento humano das pessoas a bordo;
- b) Deverá ter devidamente em conta a necessidade de não pôr em perigo a segurança do navio ou da sua carga;
- c) Deverá ter devidamente em conta a necessidade de não prejudicar os interesses comerciais ou os direitos do Estado do pavilhão ou de qualquer outro Estado interessado;
- d) Deverá assegurar que, consoante os meios disponíveis, quaisquer medidas tomadas em relação ao navio sejam ecologicamente razoáveis.

2 - Se os motivos das medidas tomadas em conformidade com o artigo 8.º do presente Protocolo se revelarem infundados, o navio deverá ser indemnizado por qualquer eventual prejuízo ou dano, desde que não tenha praticado nenhum acto que tenha justificado a medida tomada.

3 - Qualquer medida que seja tomada, adoptada ou aplicada em conformidade com o presente capítulo deverá ter devidamente em conta a necessidade de não prejudicar ou afectar:

- a) Os direitos e obrigações dos Estados costeiros e o exercício da sua jurisdição em conformidade com o direito internacional do mar; ou
- b) O poder do Estado do pavilhão de exercer jurisdição e controlo relativamente às questões administrativas, técnicas e sociais relacionadas com o navio.

4 - Qualquer medida tomada no mar, em conformidade com o disposto no presente capítulo, será executada apenas por navios de guerra ou aeronaves militares ou por outros navios ou aeronaves devidamente autorizados para esse efeito que ostentem sinais claros e identificáveis como estando ao serviço do Estado.

III - PREVENÇÃO, COOPERAÇÃO E OUTRAS MEDIDAS

Artigo 10.º **Informação**

1 - Sem prejuízo do disposto nos artigos 27.º e 28.º da Convenção, os Estados Partes, em especial aqueles que têm fronteiras comuns ou se encontram situados em itinerários utilizados para a introdução clandestina de migrantes, para atingirem os objectivos do presente Protocolo, trocarão entre si e em conformidade com os respectivos sistemas jurídicos e administrativos internos informações relevantes, designadamente sobre:

- a) Os pontos de embarque e de destino, bem como os itinerários, os transportadores e os meios de transporte, dos quais se tem conhecimento ou se suspeita que são utilizados por um grupo criminoso organizado que pratica os actos enunciados no artigo 6.º do presente Protocolo;
- b) A identidade e os métodos das organizações ou grupos criminosos organizados dos quais se tem conhecimento ou se suspeita de envolvimento na prática dos actos enunciados no artigo 6.º do presente Protocolo;
- c) A autenticidade e as características dos documentos de viagem emitidos por um Estado Parte e o furto ou a utilização indevida de documentos de viagem ou de identidade em branco;
- d) Os meios e métodos de dissimulação e de transporte de pessoas, a modificação, a reprodução ou a aquisição ilícitas ou qualquer outra utilização indevida de documentos de

viagem ou de identidade utilizados nos actos enunciados no artigo 6.º do presente Protocolo e os meios para os detectar;

e) Informação relativa à experiência legislativa, bem como práticas e medidas destinadas a prevenir e a combater os actos enunciados no artigo 6.º do presente Protocolo; e

f) Questões científicas e tecnológicas úteis para a investigação e a repressão, a fim de reforçar mutuamente a respectiva capacidade de prevenir e detectar os actos enunciados no artigo 6.º do presente Protocolo, conduzir investigações sobre esses actos e perseguir judicialmente os seus autores.

2 - Um Estado Parte que receba informações deverá respeitar qualquer pedido do Estado Parte que as tenha transmitido, que sujeite a sua utilização a restrições.

Artigo 11.º **Medidas nas fronteiras**

1 - Sem prejuízo dos compromissos internacionais relativos à liberdade de circulação de pessoas, os Estados Partes deverão reforçar, na medida do possível, os controlos fronteiriços que considerem necessários para prevenir e detectar a introdução clandestina de migrantes.

2 - Cada Estado Parte deverá adoptar as medidas legislativas ou outras medidas apropriadas para prevenir, na medida do possível, a utilização de meios de transporte explorados por transportadores comerciais para a prática da infracção estabelecida em conformidade com a alínea a) do n.º 1 do artigo 6.º do presente Protocolo.

3 - Quando se considere apropriado e sem prejuízo das convenções internacionais aplicáveis, tais medidas deverão consistir, designadamente, em estabelecer a obrigação para os transportadores comerciais, incluindo qualquer empresa de transportes, proprietário ou operador de qualquer meio de transporte, de verificar se todos os passageiros são portadores dos documentos de viagem exigidos para a entrada no Estado de acolhimento.

4 - Cada Estado Parte deverá tomar as medidas necessárias, em conformidade com o seu direito interno, para prever sanções em caso de incumprimento da obrigação constante do n.º 3 do presente artigo.

5 - Cada Estado Parte deverá considerar a possibilidade de tomar medidas que permitam, em conformidade com o seu direito interno, recusar a entrada ou anular os vistos de pessoas envolvidas na prática de infracções estabelecidas em conformidade com o presente Protocolo.

6 - Sem prejuízo do disposto no artigo 27.º da Convenção, os Estados Partes deverão procurar intensificar a cooperação entre os serviços de controlo de fronteiras, designadamente através da criação e manutenção de canais de comunicação directos.

Artigo 12.º **Segurança e controlo de documentos**

Cada Estado Parte deverá adoptar, de acordo com os meios disponíveis, as medidas necessárias para:

a) Assegurar a qualidade dos documentos de viagem ou de identidade que emitir, de forma que não possam ser, com facilidade, indevidamente utilizados, falsificados, modificados, reproduzidos ou emitidos de forma ilícita; e

b) Assegurar a integridade e a segurança dos documentos de viagem ou de identidade emitidos por si ou em seu nome e impedir a sua criação, emissão e utilização ilícitas.

Artigo 13.º **Legitimidade e validade dos documentos**

A pedido de outro Estado Parte, um Estado Parte deverá verificar, em conformidade com o seu direito interno e dentro de um prazo razoável, a legitimidade e validade dos documentos de viagem ou de identidade emitidos ou supostamente emitidos em seu nome e de que se suspeita terem sido utilizados para a prática dos actos estabelecidos no artigo 6.º do presente Protocolo.

Artigo 14.º **Formação e cooperação técnica**

1 - Os Estados Partes deverão assegurar ou reforçar a formação especializada dos funcionários dos serviços de imigração e de outros funcionários competentes para a prevenção dos actos estabelecidos no artigo 6.º do presente Protocolo e o tratamento humano dos migrantes que foram objecto desses actos, respeitando os direitos que lhes são reconhecidos no presente Protocolo.

2 - Os Estados Partes deverão cooperar entre si e com organizações internacionais, organizações não governamentais, outras organizações competentes e outros sectores da sociedade civil, na medida do possível, para assegurar uma formação adequada do pessoal nos respectivos territórios com vista a prevenir, combater e erradicar os actos estabelecidos no artigo 6.º do presente Protocolo e a proteger os direitos dos migrantes que foram objecto desses actos. Essa formação deverá incidir, nomeadamente, sobre:

- a) A melhoria da segurança e da qualidade dos documentos de viagem;
- b) A identificação e a detecção de documentos de viagem ou de identidade fraudulentos;
- c) A recolha de informações de carácter criminal e, em especial, sobre a identificação de grupos criminosos organizados dos quais se tem conhecimento ou se suspeita estarem envolvidos na prática dos actos estabelecidos no artigo 6.º do presente Protocolo, os métodos utilizados para o transporte de migrantes que são clandestinamente introduzidos num país, a utilização indevida de documentos de viagem ou de identidade para a prática dos actos estabelecidos no artigo 6.º e os meios de dissimulação utilizados na introdução clandestina de migrantes;
- d) A melhoria de procedimentos para a detecção, nos pontos de entrada e de saída tradicionais e não tradicionais, de pessoas introduzidas clandestinamente; e
- e) O tratamento humano de migrantes e a protecção dos direitos que lhes são reconhecidos no presente Protocolo.

3 - Os Estados Partes que tenham conhecimentos especializados relevantes deverão considerar a possibilidade de prestar assistência técnica aos Estados que são frequentemente países de origem ou de trânsito de pessoas que foram objecto dos actos estabelecidos no artigo 6.º do presente Protocolo. Os Estados Partes deverão envidar esforços para fornecerem os recursos necessários, tais como veículos, sistemas informáticos e leitores de documentos, para combater os actos estabelecidos no artigo 6.º.

Artigo 15.º **Outras medidas de prevenção**

1 - Cada Estado Parte deverá adoptar as medidas destinadas a instituir ou a reforçar programas de informação para sensibilizar o público para o facto de os actos enunciados no artigo 6.º do presente Protocolo constituírem uma actividade criminosa frequentemente praticada por grupos criminosos organizados com fins lucrativos e que representam um grande risco para os migrantes em questão.

2 - Em conformidade com o disposto no artigo 31.º da Convenção, os Estados Partes deverão cooperar no domínio da informação a fim de impedir que potenciais migrantes se tornem vítimas de grupos criminosos organizados.

3 - Cada Estado Parte deverá promover ou reforçar, de forma apropriada, programas de desenvolvimento e de cooperação a nível nacional, regional e internacional, tendo em conta as realidades sociais e económicas da migração e prestando especial atenção a zonas económica e socialmente desfavorecidas, de forma a combater as causas profundas da introdução clandestina de migrantes, tais como a pobreza e o subdesenvolvimento.

Artigo 16.º **Medidas de protecção e de assistência**

1 - Ao aplicar o presente Protocolo, cada Estado Parte deverá adoptar, em conformidade com as obrigações que lhe incumbem nos termos do direito internacional, todas as medidas apropriadas, incluindo as medidas legislativas que considere necessárias, a fim de preservar e proteger os direitos das pessoas que foram objecto dos actos estabelecidos no artigo 6.º do presente Protocolo, que lhes são reconhecidos pelo direito internacional aplicável, especialmente o direito à vida e o direito a não ser submetido a tortura ou a outras penas ou tratamentos cruéis, desumanos ou degradantes.

2 - Cada Estado Parte deverá adoptar as medidas apropriadas para conceder aos migrantes uma protecção adequada contra a violência que lhes possa ser infligida tanto por pessoas como por grupos pelo facto de terem sido objecto dos actos enunciados no artigo 6.º do presente Protocolo.

3 - Cada Estado Parte deverá conceder uma assistência adequada aos migrantes cuja vida ou segurança tenham sido postas em perigo pelo facto de terem sido objecto dos actos estabelecidos no artigo 6.º do presente Protocolo.

4 - Ao aplicar as disposições do presente artigo, os Estados Partes deverão ter em conta as necessidades específicas das mulheres e das crianças.

5 - No caso de detenção de uma pessoa que foi objecto dos actos estabelecidos no artigo 6.º do presente Protocolo, cada Estado Parte deverá dar cumprimento às obrigações que lhe incumbem nos termos da Convenção de Viena sobre as Relações Consulares, quando aplicável, incluindo a obrigação de informar sem demora a pessoa em causa sobre as disposições relativas à notificação e comunicação aos funcionários consulares.

Artigo 17.º **Acordos**

Os Estados Partes deverão considerar a possibilidade de celebrar acordos bilaterais ou regionais, acordos operacionais ou outras formas de entendimento com o objectivo de:

- a) Estabelecer as medidas mais apropriadas e eficazes para prevenir e combater os actos enunciados no artigo 6.º do presente Protocolo; ou
- b) Desenvolver entre si as disposições constantes do presente Protocolo.

Artigo 18.º **Regresso de migrantes introduzidos clandestinamente**

1 - Cada Estado Parte acorda em facilitar e aceitar, sem demora indevida ou injustificada, o regresso de uma pessoa que foi objecto de um acto estabelecido no artigo 6.º do presente Protocolo e que é seu nacional ou que tem o direito de residência permanente no seu território no momento do regresso.

2 - Cada Estado Parte deverá considerar a possibilidade de facilitar e aceitar, em conformidade com o seu direito interno, o regresso de uma pessoa que tenha sido objecto de um acto estabelecido no artigo 6.º do presente Protocolo e que tinha o direito de residência permanente no território do Estado Parte no momento da sua entrada no Estado de acolhimento.

3 - A pedido do Estado Parte de acolhimento, um Estado Parte requerido deverá verificar, sem demora indevida ou injustificada, se uma pessoa que foi objecto de um acto estabelecido no artigo 6.º do presente Protocolo é nacional desse Estado Parte ou se tem o direito de residência permanente no seu território.

4 - A fim de facilitar o regresso de uma pessoa que tenha sido objecto de um acto estabelecido no artigo 6.º do presente Protocolo e que não possui os documentos devidos, o Estado Parte do qual essa pessoa é nacional ou no qual tem direito de residência permanente deverá aceitar emitir, a pedido do Estado Parte de acolhimento, os documentos de viagem ou qualquer outra autorização que considere necessária para permitir à pessoa viajar e voltar a entrar no seu território.

5 - Cada Estado Parte envolvido no regresso de uma pessoa que tenha sido objecto de um acto enunciado no artigo 6.º do presente Protocolo deverá adoptar todas as medidas adequadas para organizar esse regresso de forma ordenada e tendo devidamente em conta a segurança e a dignidade da pessoa.

6 - Os Estados Partes podem cooperar com organizações internacionais competentes para a aplicação do presente artigo.

7 - O disposto no presente artigo deve ser aplicado sem prejuízo de qualquer direito reconhecido às pessoas que tenham sido objecto dos actos estabelecidos no artigo 6.º do presente Protocolo, nos termos da legislação do Estado Parte de acolhimento.

8 - O presente artigo não prejudica as obrigações decorrentes de qualquer outro tratado bilateral ou multilateral ou de qualquer outro acordo operacional aplicável que regule, no todo ou em parte, o regresso das pessoas que tenham sido objecto de um acto estabelecido no artigo 6.º do presente Protocolo.

IV - DISPOSIÇÕES FINAIS

Artigo 19.º
Cláusula de salvaguarda

1 - Nenhuma disposição do presente Protocolo prejudicará outros direitos, obrigações e responsabilidades dos Estados e das pessoas por força do direito internacional, incluindo o direito internacional humanitário e o direito internacional relativo aos direitos humanos e, em particular, na medida em que sejam aplicáveis, a Convenção Relativa ao Estatuto dos Refugiados de 1951 e o seu Protocolo de 1967 e o princípio do non-refoulement neles consagrado.

2 - As medidas constantes do presente Protocolo serão interpretadas e aplicadas de forma que as pessoas que tenham sido objecto dos actos estabelecidos no artigo 6.º do presente Protocolo não sejam discriminadas. A interpretação e aplicação das referidas medidas estarão em conformidade com os princípios de não discriminação internacionalmente reconhecidos.

Artigo 20.º
Resolução de diferendos

1 - Os Estados Partes deverão procurar resolver os diferendos relativos à interpretação ou à aplicação do presente Protocolo por via da negociação.

2 - Os diferendos entre dois ou mais Estados Partes relativos à aplicação ou à interpretação do presente Protocolo que não possam ser resolvidos por via da negociação num prazo razoável deverão, a pedido de um desses Estados Partes, ser submetidos a arbitragem. Se, no prazo de seis meses a contar da data do pedido de arbitragem, esses Estados Partes não chegarem a acordo sobre a organização da arbitragem, qualquer deles poderá submeter o diferendo ao Tribunal Internacional de Justiça, mediante petição de acordo com o estatuto do Tribunal.

3 - Cada Estado Parte pode, no momento em que assina, ratifica, aceita, aprova ou adere ao presente Protocolo, declarar que não se considera ligado pelo n.º 2 do presente artigo. Os outros Estados Partes não estão ligados pelo n.º 2 do presente artigo relativamente a qualquer Estado Parte que tenha formulado essa reserva.

4 - Todo o Estado Parte que tenha formulado uma reserva nos termos do n.º 3 do presente artigo pode, a qualquer momento, retirá-la mediante notificação dirigida ao Secretário-Geral da Organização das Nações Unidas.

Artigo 21.º
Assinatura, ratificação, aceitação, aprovação e adesão

1 - O presente Protocolo estará aberto à assinatura de todos os Estados entre 12 e 15 de Dezembro de 2000 em Palermo (Itália) e, seguidamente, na sede da Organização das Nações Unidas, em Nova Iorque, a partir do 30.º dia seguinte à sua adopção pela Assembleia Geral até 12 de Dezembro de 2002.

2 - O presente Protocolo está igualmente aberto à assinatura das organizações regionais de integração económica desde que pelo menos um Estado membro dessa organização tenha assinado o presente Protocolo de acordo com o n.º 1 do presente artigo.

3 - O presente Protocolo está sujeito à ratificação, aceitação ou aprovação. Os instrumentos de ratificação, aceitação ou aprovação serão depositados junto do Secretário-Geral da Organização das Nações Unidas. Uma organização regional de integração económica pode depositar o seu instrumento de ratificação, aceitação ou aprovação se pelo menos um dos seus Estados membros o tiver feito. Nesse instrumento de ratificação, aceitação ou aprovação, essa organização deverá declarar o âmbito da sua competência relativamente às matérias reguladas pelo presente Protocolo. Deverá igualmente informar o depositário de qualquer alteração substancial do âmbito da sua competência.

4 - O presente Protocolo está aberto à adesão de qualquer Estado ou organização regional de integração económica da qual, pelo menos, um Estado membro seja parte no presente Protocolo. Os instrumentos de adesão serão depositados junto do Secretário-Geral da Organização das Nações Unidas. No momento da sua adesão, uma organização regional de integração económica deverá declarar o âmbito da sua competência relativamente às matérias reguladas pelo presente Protocolo. Deverá igualmente informar o depositário de qualquer alteração substancial do âmbito da sua competência.

Artigo 22.º
Entrada em vigor

1 - O presente Protocolo entrará em vigor no 90.º dia seguinte à data do depósito do 40.º instrumento de ratificação, aceitação, aprovação ou adesão, mas não antes da entrada em vigor da Convenção. Para efeitos do presente número, nenhum dos instrumentos depositados por uma organização regional de integração económica será considerado um instrumento adicional aos que já tenham sido depositados pelos Estados membros dessa organização.

2 - Para cada Estado ou organização regional de integração económica que ratifique, aceite ou aprove o presente Protocolo ou a ele adira depois de ter sido depositado o 40.º instrumento de ratificação, aceitação, aprovação ou adesão, o presente Protocolo entrará em vigor no 30.º dia seguinte à data de depósito por tal Estado ou organização do referido instrumento, ou na data em que ele entra em vigor de acordo com o n.º 1 do presente artigo, se esta for posterior.

Artigo 23.º **Emendas**

1 - Decorridos cinco anos sobre a data de entrada em vigor do presente Protocolo, um Estado Parte no Protocolo poderá propor uma emenda e depositar o respectivo texto junto do Secretário-Geral das Nações Unidas. Este último transmitirá, em seguida, a proposta de emenda aos Estados Partes e à Conferência das Partes na Convenção para apreciação da proposta e tomada de uma decisão. Os Estados Partes no presente Protocolo, reunidos na Conferência das Partes, farão todos os esforços para conseguirem chegar, por consenso, a um acordo sobre toda e qualquer emenda. Uma vez esgotados todos os esforços nesse sentido sem que um acordo tenha sido alcançado, a emenda será, como último recurso, adoptada por uma maioria de dois terços dos votos dos Estados Partes no presente Protocolo presentes e votantes na Conferência das Partes.

2 - As organizações de integração económica regional, nas áreas da sua competência, dispõem, para exercerem o seu direito de voto, de um número de votos igual ao número dos seus Estados membros que sejam Partes no presente Protocolo. Estas organizações não deverão exercer o seu direito de voto caso os seus Estados membros exerçam o deles e vice-versa.

3 - Uma emenda adoptada nos termos do n.º 1 do presente artigo está sujeita a ratificação, aceitação ou aprovação dos Estados Partes.

4 - Uma emenda adoptada nos termos do n.º 1 do presente artigo entrará em vigor para cada Estado Parte 90 dias após a data do depósito, por esse mesmo Estado Parte, de um instrumento de ratificação, aceitação ou aprovação da referida emenda junto do Secretário-Geral das Nações Unidas.

5 - Logo que uma emenda entra em vigor, ela vincula os Estados Partes que manifestaram o seu consentimento de vinculação a essa emenda. Os outros Estados Partes permanecerão ligados pelas disposições do presente Protocolo e por todas as alterações anteriores que tenham ratificado, aceite ou aprovado.

Artigo 24.º **Denúncia**

1 - Um Estado Parte pode denunciar o presente Protocolo mediante notificação escrita dirigida ao Secretário-Geral das Nações Unidas. A denúncia produzirá efeitos um ano após a data de recepção da notificação pelo Secretário-Geral.

2 - Uma organização regional de integração económica regional deixará de ser Parte no presente Protocolo quando todos os seus Estados membros o tiverem denunciado.

Artigo 25.º **Depositário e línguas**

1 - O Secretário-Geral das Nações Unidas é o depositário do presente Protocolo.

2 - O original do presente Protocolo, cujos textos em árabe, chinês, espanhol, francês, inglês e russo fazem igualmente fé, será depositado junto do Secretário-Geral das Nações Unidas.

Em fé do que os plenipotenciários abaixo assinados, para o efeito devidamente autorizados pelos seus respectivos Governos, assinaram este Protocolo.



Protocolo Adicional à Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional relativo à Prevenção, à Repressão e à Punição do Tráfico de Pessoas, em especial de Mulheres e Crianças

PROTOCOLO ADICIONAL À CONVENÇÃO DAS NAÇÕES UNIDAS CONTRA A CRIMINALIDADE ORGANIZADA TRANSNACIONAL RELATIVO À PREVENÇÃO, À REPRESSÃO E À PUNIÇÃO DO TRÁFICO DE PESSOAS, EM ESPECIAL DE MULHERES E CRIANÇAS

Adoptado pela resolução A/RES/55/25 da Assembleia Geral das Nações Unidas, de 15 de Novembro de 2000 (55.ª Sessão).

Entrada em vigor na ordem jurídica internacional: 25 de Dezembro de 2003, em conformidade com o artigo 17.º.

Portugal:

Assinatura: 12 de Dezembro de 2000;

Aprovação para ratificação: Resolução da Assembleia da República n.º 32/2004, de 2 de Abril, publicada no Diário da República, I Série-A, n.º 79;

Ratificação: Decreto do Presidente da República n.º 19/2004, de 2 de Abril, publicado no Diário da República, I Série-A, n.º 79;

Depósito do instrumento de ratificação junto do Secretário-Geral das Nações Unidas: 10 de Maio de 2004;

Aviso de depósito do instrumento de ratificação: Aviso n.º 121/2004 do Ministério dos Negócios Estrangeiros, publicado no Diário da República, I Série-A, n.º 141, de 17 de Junho de 2004;

Entrada em vigor na ordem jurídica portuguesa: 9 de Junho de 2004.

PROTOCOLO ADICIONAL À CONVENÇÃO DAS NAÇÕES UNIDAS CONTRA A CRIMINALIDADE ORGANIZADA TRANSNACIONAL RELATIVO À PREVENÇÃO, À REPRESSÃO E À PUNIÇÃO DO TRÁFICO DE PESSOAS, EM ESPECIAL DE MULHERES E CRIANÇAS

Preâmbulo

Os Estados Partes no presente Protocolo:

Declarando que uma acção eficaz para prevenir e combater o tráfico de pessoas, em especial de mulheres e crianças, exige por parte dos países de origem, de trânsito e de destino uma abordagem global e internacional que inclua medidas destinadas a prevenir esse tráfico, a punir os traficantes e a proteger as vítimas desse tráfico, designadamente protegendo os seus direitos fundamentais internacionalmente reconhecidos;

Tendo em conta que, apesar da existência de uma variedade de instrumentos internacionais que contêm normas e medidas práticas destinadas a combater a exploração de pessoas, em especial de mulheres e crianças, não existe nenhum instrumento universal que trate de todos os aspectos relativos ao tráfico de pessoas;

Preocupados com o facto de, na ausência desse instrumento, as pessoas vulneráveis ao tráfico não estarem suficientemente protegidas;

Relembrando a Resolução n.º 53/111, da Assembleia Geral, de 9 de Dezembro de 1998, na qual a Assembleia decidiu criar um comité intergovernamental especial, de composição aberta, para elaborar uma convenção internacional global contra a criminalidade organizada transnacional e examinar a possibilidade de elaborar, designadamente, um instrumento internacional de luta contra o tráfico de mulheres e de crianças;

Convencidos de que para prevenir e combater este tipo de criminalidade será útil completar a Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional com um instrumento internacional destinado a prevenir, reprimir e punir o tráfico de pessoas, em especial de mulheres e crianças;

acordaram no seguinte:

I - DISPOSIÇÕES GERAIS

Artigo 1.º

Relação com a Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional

1 - O presente Protocolo completa a Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional e deverá ser interpretado em conjunto com a Convenção.

2 - As disposições da Convenção deverão aplicar-se *mutatis mutandis* ao presente Protocolo, salvo se no mesmo se dispuser o contrário.

3 - As infracções estabelecidas em conformidade com o artigo 5.º do presente Protocolo deverão ser consideradas infracções estabelecidas em conformidade com a Convenção.

Artigo 2.º

Objecto

O presente Protocolo tem como objecto:

- a) Prevenir e combater o tráfico de pessoas, prestando uma especial atenção às mulheres e às crianças;
- b) Proteger e ajudar as vítimas desse tráfico, respeitando plenamente os seus direitos humanos; e
- c) Promover a cooperação entre os Estados Partes de forma a atingir estes objectivos.

Artigo 3.º

Definições

Para efeitos do presente Protocolo:

- a) Por «tráfico de pessoas» entende-se o recrutamento, o transporte, a transferência, o alojamento ou o acolhimento de pessoas, recorrendo à ameaça ou ao uso da força ou a outras formas de coacção, ao rapto, à fraude, ao engano, ao abuso de autoridade ou de situação de vulnerabilidade ou à entrega ou aceitação de pagamentos ou benefícios para obter o consentimento de uma pessoa que tem autoridade sobre outra, para fins de exploração. A exploração deverá incluir, pelo menos, a exploração da prostituição de outrem ou outras formas de exploração sexual, o trabalho ou serviços forçados, a escravatura ou práticas similares à escravatura, a servidão ou a extracção de órgãos;
- b) O consentimento dado pela vítima de tráfico de pessoas tendo em vista qualquer tipo de exploração descrito na alínea a) do presente artigo deverá ser considerado irrelevante se tiver sido utilizado qualquer dos meios referidos na alínea a);
- c) O recrutamento, o transporte, a transferência, o alojamento ou o acolhimento de uma criança para fins de exploração deverão ser considerados «tráfico de pessoas» mesmo que não envolvam nenhum dos meios referidos na alínea a) do presente artigo;
- d) Por «criança» entende-se qualquer pessoa com idade inferior a 18 anos.

Artigo 4.º

Âmbito de aplicação

O presente Protocolo aplica-se, salvo disposição em contrário, à prevenção, à investigação e à repressão das infracções estabelecidas em conformidade com o seu artigo 5.º do presente Protocolo, quando essas infracções sejam de natureza transnacional e envolvam um grupo criminoso organizado, bem como à protecção das vítimas dessas infracções.

Artigo 5.º **Criminalização**

1 - Cada Estado Parte deverá adoptar as medidas legislativas e outras que considere necessárias para estabelecer como infracções penais os actos descritos no artigo 3.º do presente Protocolo quando tenham sido praticados intencionalmente.

2 - Cada Estado Parte deverá adoptar igualmente as medidas legislativas e outras que considere necessárias para estabelecer como infracções penais:

- a) Sem prejuízo dos conceitos fundamentais do seu sistema jurídico, a tentativa de cometer uma infracção estabelecida em conformidade com o n.º 1 do presente artigo;
- b) Participar como cúmplice numa infracção estabelecida em conformidade com o n.º 1 do presente artigo; e
- c) Organizar a prática de ou mandar outras pessoas cometer uma infracção estabelecida em conformidade com o n.º 1 do presente artigo.

II - PROTECÇÃO DAS VÍTIMAS DE TRÁFICO DE PESSOAS

Artigo 6.º **Assistência e protecção às vítimas de tráfico de pessoas**

1 - Nos casos em que se considere apropriado e na medida em que o permita o seu direito interno, cada Estado Parte deverá proteger a privacidade e a identidade das vítimas de tráfico de pessoas, nomeadamente estabelecendo a confidencialidade dos processos judiciais relativos a esse tráfico.

2 - Cada Estado Parte deverá assegurar que o seu sistema jurídico ou administrativo contenha medidas que forneçam às vítimas de tráfico de pessoas, quando necessário:

- a) Informação sobre os processos judiciais e administrativos aplicáveis;
- b) Assistência para permitir que as suas opiniões e preocupações sejam apresentadas e tomadas em conta nas fases adequadas do processo penal instaurado contra os autores das infracções, sem prejuízo dos direitos de defesa.

3 - Cada Estado Parte deverá considerar a possibilidade de aplicar medidas que permitam a recuperação física, psicológica e social das vítimas de tráfico de pessoas, nomeadamente, se for caso disso, em cooperação com organizações não governamentais, outras organizações competentes e outros sectores da sociedade civil e, em especial, facultar:

- a) Alojamento adequado;
- b) Aconselhamento e informação, em particular quanto aos direitos que a lei lhes reconhece numa língua que compreendam;
- c) Assistência médica, psicológica e material; e
- d) Oportunidades de emprego, de educação e de formação.

4 - Cada Estado Parte deverá ter em conta, ao aplicar as disposições do presente artigo, a idade, o sexo e as necessidades especiais das vítimas de tráfico de pessoas, em particular as necessidades especiais das crianças, nomeadamente o alojamento, a educação e os cuidados adequados.

5 - Cada Estado Parte deverá esforçar-se por garantir a segurança física das vítimas de tráfico de pessoas enquanto estas se encontrarem no seu território.

6 - Cada Estado Parte deverá assegurar que o seu sistema jurídico preveja medidas que ofereçam às vítimas de tráfico de pessoas a possibilidade de obterem indemnização pelos danos sofridos.

Artigo 7.º **Estatuto das vítimas de tráfico de pessoas nos Estados de acolhimento**

1 - Além de adoptar as medidas previstas no artigo 6.º do presente Protocolo, cada Estado Parte deverá considerar a possibilidade de adoptar medidas legislativas ou outras medidas adequadas que permitam às vítimas de tráfico de pessoas permanecerem no seu território, se for caso disso, temporária ou permanentemente.

2 - Ao aplicar o disposto no n.º 1 do presente artigo, cada Estado Parte deverá ter devidamente em conta factores humanitários e compassivos.

Artigo 8.º **Repatriamento das vítimas de tráfico de pessoas**

1 - O Estado Parte do qual a vítima de tráfico de pessoas é nacional ou no qual esta tinha direito de residência permanente no momento da sua entrada no território do Estado Parte de acolhimento, deverá facilitar e aceitar, tendo devidamente em conta a segurança dessa pessoa, o seu regresso sem demora indevida ou injustificada.

2 - Quando um Estado Parte repatria uma vítima de tráfico de pessoas para um Estado Parte do qual essa pessoa é nacional ou no qual esta tinha direito de residência permanente, no momento da sua entrada no território do Estado Parte de acolhimento, deverá assegurar que esse repatriamento tenha devidamente em conta a segurança da pessoa, bem como o estado de qualquer processo judicial relacionado com o facto de ela ser uma vítima de tráfico, e que seja, de preferência, voluntário.

3 - A pedido do Estado Parte de acolhimento, qualquer Estado Parte requerido deverá verificar, sem demora indevida ou injustificada, se uma vítima de tráfico de pessoas é sua nacional ou tinha direito de residência permanente no seu território no momento da sua entrada no território do Estado Parte de acolhimento.

4 - De forma a facilitar o repatriamento de uma vítima de tráfico de pessoas que não possua os documentos devidos, o Estado Parte do qual essa pessoa é nacional ou no qual esta tinha direito de residência permanente no momento da sua entrada no território do Estado Parte de acolhimento, deverá aceitar emitir, a pedido do Estado Parte de acolhimento, os documentos de viagem ou qualquer outro tipo de autorização necessária que permitam à pessoa viajar e voltar a entrar no seu território.

5 - O presente artigo não prejudica os direitos reconhecidos às vítimas de tráfico de pessoas por força de qualquer disposição do direito interno do Estado Parte de acolhimento.

6 - O presente artigo não prejudica qualquer acordo bilateral ou multilateral aplicável que regule, no todo ou em parte, o repatriamento das vítimas de tráfico de pessoas.

III - PREVENÇÃO, COOPERAÇÃO E OUTRAS MEDIDAS

Artigo 9.º **Prevenção do tráfico de pessoas**

1 - Os Estados Partes deverão estabelecer políticas, programas e outras medidas abrangentes para:

- a) Prevenir e combater o tráfico de pessoas; e
- b) Proteger as vítimas de tráfico de pessoas, especialmente as mulheres e as crianças, de nova vitimização.

2 - Os Estados Partes deverão esforçar-se por adoptar medidas tais como pesquisas, campanhas de informação e de difusão, através dos órgãos de comunicação social, bem como iniciativas sociais e económicas, tendo em vista prevenir e combater o tráfico de pessoas.

3 - As políticas, os programas e outras medidas adoptados em conformidade com o presente artigo deverão incluir, se necessário, a cooperação com organizações não governamentais, outras organizações relevantes e outros sectores da sociedade civil.

4 - Os Estados Partes deverão adoptar ou reforçar medidas, designadamente através da cooperação bilateral ou multilateral, para reduzir os factores como a pobreza, o subdesenvolvimento e a desigualdade de oportunidades, que tornam as pessoas, em especial as mulheres e as crianças, vulneráveis ao tráfico.

5 - Os Estados Partes deverão adoptar ou reforçar as medidas legislativas ou outras, tais como medidas educativas, sociais ou culturais, designadamente através da cooperação bilateral ou multilateral, a fim de

desencorajar a procura que propicie qualquer forma de exploração de pessoas, em especial de mulheres e crianças, que leve ao tráfico.

Artigo 10.º **Intercâmbio de informações e formação**

1 - Os serviços responsáveis pela aplicação da lei, os serviços de imigração ou outros serviços competentes dos Estados Partes deverão cooperar entre si, na medida do possível, através da troca de informações, em conformidade com o seu direito interno, a fim de poderem determinar:

- a) Se as pessoas que atravessam ou tentam atravessar uma fronteira internacional com documentos de viagem pertencentes a terceiros ou sem documentos de viagem são autores ou vítimas de tráfico de pessoas;
- b) Os tipos de documentos de viagem que as pessoas têm utilizado ou tentado utilizar para atravessar uma fronteira internacional para fins de tráfico de pessoas; e
- c) Os meios e métodos utilizados por grupos criminosos organizados para fins de tráfico de pessoas, incluindo o recrutamento e o transporte de vítimas, as rotas e as ligações entre as pessoas e os grupos envolvidos no referido tráfico, bem como as medidas adequadas à sua deteção.

2 - Os Estados Partes deverão assegurar ou reforçar a formação dos funcionários dos serviços responsáveis pela aplicação da lei, dos serviços de imigração ou de outros serviços competentes, na prevenção do tráfico de pessoas. A formação deve incidir sobre os métodos utilizados para prevenir o referido tráfico, para perseguir judicialmente os traficantes e para fazer respeitar os direitos das vítimas, nomeadamente protegendo-as dos traficantes. A formação deverá igualmente ter em conta a necessidade de abarcar os direitos humanos e as questões específicas dos homens, das mulheres e das crianças bem como encorajar a cooperação com organizações não governamentais, outras organizações relevantes e outros sectores da sociedade civil.

3 - Um Estado Parte que receba informações, deverá respeitar qualquer pedido do Estado Parte que as tenha transmitido, que sujeite a sua utilização a restrições.

Artigo 11.º **Medidas nas fronteiras**

1 - Sem prejuízo dos compromissos internacionais relativos à liberdade de circulação de pessoas, os Estados Partes deverão reforçar, na medida do possível, os controlos fronteiriços necessários para prevenir e detectar o tráfico de pessoas.

2 - Cada Estado Parte deverá adoptar as medidas legislativas ou outras medidas apropriadas para prevenir, na medida do possível, a utilização de meios de transporte explorados por transportadores comerciais para a prática de infracções estabelecidas em conformidade com o artigo 5.º do presente Protocolo.

3 - Quando se considere apropriado e sem prejuízo das convenções internacionais aplicáveis, tais medidas deverão consistir, nomeadamente, em estabelecer a obrigação para os transportadores comerciais, incluindo qualquer empresa de transportes, proprietário ou operador de qualquer meio de transporte, de verificar se todos os passageiros são portadores dos documentos de viagem exigidos para a entrada no Estado de acolhimento.

4 - Cada Estado Parte deverá tomar as medidas necessárias em conformidade com o seu direito interno para prever sanções em caso de incumprimento da obrigação constante do n.º 3 do presente artigo.

5 - Cada Estado Parte deverá considerar a possibilidade de tomar medidas que permitam, de acordo com o seu direito interno, recusar a entrada ou anular os vistos de pessoas envolvidas na prática de infracções estabelecidas em conformidade com o presente Protocolo.

6 - Sem prejuízo do disposto no artigo 27.º da Convenção, os Estados Partes deverão procurar intensificar a cooperação entre os serviços de controlo de fronteiras, designadamente através da criação e manutenção de canais de comunicação directos.

Artigo 12.º **Segurança e controlo dos documentos**

Cada Estado Parte deverá adoptar, de acordo com os meios disponíveis, as medidas necessárias para:

- a) Assegurar a qualidade dos documentos de viagem ou de identidade que emitir, de forma que não possam com facilidade ser indevidamente utilizados, falsificados, modificados, reproduzidos ou emitidos de forma ilícita; e
- b) Assegurar a integridade e segurança dos documentos de viagem ou de identidade por si ou em seu nome emitidos e impedir a sua criação, emissão e utilização ilícitas.

Artigo 13.º
Legitimidade e validade dos documentos

A pedido de outro Estado Parte, um Estado Parte deverá verificar, em conformidade com o seu direito interno e dentro de um prazo razoável, a legitimidade e validade dos documentos de viagem ou de identidade emitidos ou supostamente emitidos em seu nome e de que se suspeita terem sido utilizados para o tráfico de pessoas.

IV - DISPOSIÇÕES FINAIS

Artigo 14.º
Cláusula de salvaguarda

1 - Nenhuma disposição do presente Protocolo deverá prejudicar os direitos, obrigações e responsabilidades dos Estados e das pessoas por força do direito internacional, incluindo o direito internacional humanitário e o direito internacional relativo aos direitos humanos e, em particular, na medida em que sejam aplicáveis, a Convenção Relativa ao Estatuto dos Refugiados de 1951 e o seu Protocolo de 1967 e o princípio de *non refoulement* neles consagrado.

2 - As medidas constantes do presente Protocolo deverão ser interpretadas e aplicadas de forma que as pessoas que foram vítimas de tráfico de pessoas não sejam discriminadas. A interpretação e aplicação das referidas medidas deverão estar em conformidade com os princípios de não discriminação internacionalmente reconhecidos.

Artigo 15.º
Resolução de diferendos

1 - Os Estados Partes deverão procurar resolver os diferendos relativos à interpretação ou à aplicação do presente Protocolo por via da negociação.

2 - Os diferendos entre dois ou mais Estados Partes relativos à aplicação ou à interpretação do presente Protocolo que não possam ser resolvidos por via da negociação num prazo razoável deverão, a pedido de um desses Estados Partes, ser submetidos a arbitragem. Se, no prazo de seis meses a contar da data do pedido de arbitragem, esses Estados Partes não chegarem a acordo sobre a organização da arbitragem, qualquer deles poderá submeter o diferendo ao Tribunal Internacional de Justiça, mediante petição de acordo com o estatuto do Tribunal.

3 - Cada Estado Parte pode, no momento em que assina, ratifica, aceita, aprova ou adere ao presente Protocolo, declarar que não se considera ligado pelo n.º 2 do presente artigo. Os outros Estados Partes não estão ligados pelo n.º 2 do presente artigo, relativamente a qualquer Estado Parte que tenha formulado essa reserva.

4 - Todo o Estado Parte que tenha formulado uma reserva nos termos do n.º 3 do presente artigo pode, a qualquer momento, retirá-la mediante notificação dirigida ao Secretário-Geral da Organização das Nações Unidas.

Artigo 16.º
Assinatura, ratificação, aceitação, aprovação e adesão

1 - O presente Protocolo será aberto à assinatura de todos os Estados entre 12 e 15 de Dezembro de 2000, em Palermo (Itália) e, seguidamente, na sede da Organização das Nações Unidas, em Nova Iorque, a partir do 30.º dia seguinte à sua adopção pela Assembleia Geral até 12 de Dezembro de 2002.

2 - O presente Protocolo está igualmente aberto à assinatura das organizações regionais de integração económica desde que pelo menos um Estado membro dessa organização tenha assinado o presente Protocolo de acordo com o n.º 1 do presente artigo.

3 - O presente Protocolo está sujeito a ratificação, aceitação ou aprovação. Os instrumentos de ratificação, aceitação ou aprovação serão depositados junto do Secretário-Geral da Organização das Nações Unidas. Uma organização regional de integração económica pode depositar o seu instrumento de ratificação, aceitação ou aprovação se pelo menos um dos seus Estados membros o tiver feito. Nesse instrumento de ratificação, aceitação ou aprovação, essa organização deverá declarar o âmbito da sua competência relativamente às matérias reguladas pelo presente Protocolo. Deverá igualmente informar o depositário de qualquer alteração substancial do âmbito da sua competência.

4 - O presente Protocolo está aberto à adesão de qualquer Estado ou organização regional de integração económica da qual, pelo menos, um Estado membro seja parte no presente Protocolo. Os instrumentos de adesão serão depositados junto do Secretário-Geral da Organização das Nações Unidas. No momento da sua adesão, uma organização regional de integração económica deverá declarar o âmbito da sua competência relativamente às matérias reguladas pelo presente Protocolo. Deverá igualmente informar o depositário de qualquer alteração substancial do âmbito da sua competência.

Artigo 17.º **Entrada em vigor**

1 - O presente Protocolo entrará em vigor no 90.º dia seguinte à data do depósito do 40.º instrumento de ratificação, aceitação, aprovação ou adesão, mas não antes da entrada em vigor da Convenção. Para efeitos do presente número, nenhum dos instrumentos depositados por uma organização regional de integração económica será considerado um instrumento adicional aos que já tenham sido depositados pelos Estados membros dessa organização.

2 - Para cada Estado ou organização regional de integração económica que ratifique, aceite ou aprove o presente Protocolo ou a ele adira depois de ter sido depositado o 40.º instrumento de ratificação, aceitação, aprovação ou adesão, o presente Protocolo entrará em vigor no 30.º dia seguinte à data de depósito por tal Estado ou organização do referido instrumento, ou na data em que ele entra em vigor de acordo com o n.º 1 do presente artigo, se esta for posterior.

Artigo 18.º **Emendas**

1 - Decorridos cinco anos sobre a data de entrada em vigor do presente Protocolo, um Estado Parte no Protocolo poderá propor uma emenda e depositar o respectivo texto junto do Secretário-Geral das Nações Unidas. Este último transmitirá, em seguida, a proposta de emenda aos Estados Partes e à Conferência das Partes na Convenção para apreciação da proposta e tomada de uma decisão. Os Estados Partes no presente Protocolo, reunidos na Conferência das Partes, farão todos os esforços para conseguirem chegar, por consenso, a um acordo sobre toda e qualquer emenda. Uma vez esgotados todos os esforços nesse sentido sem que um acordo tenha sido alcançado, a emenda será, como último recurso, adoptada por uma maioria de dois terços dos votos dos Estados Partes no presente Protocolo presentes e votantes na Conferência das Partes.

2 - As organizações de integração económica regional, nas áreas da sua competência, dispõem, para exercerem o seu direito de voto, de um número de votos igual ao número dos seus Estados membros que sejam Partes no presente Protocolo. Estas organizações não deverão exercer o seu direito de voto caso os seus Estados membros exerçam o deles e vice-versa.

3 - Uma emenda adoptada nos termos do n.º 1 do presente artigo está sujeita a ratificação, aceitação ou aprovação dos Estados Partes.

4 - Uma emenda adoptada nos termos do n.º 1 do presente artigo entrará em vigor para cada Estado Parte 90 dias após a data do depósito, por esse mesmo Estado Parte, de um instrumento de ratificação, aceitação ou aprovação da referida emenda junto do Secretário-Geral das Nações Unidas.

5 - Logo que uma emenda entra em vigor, ela vincula os Estados Partes que manifestaram o seu consentimento de vinculação a essa emenda. Os outros Estados Partes permanecerão ligados pelas disposições do presente Protocolo e por todas as alterações anteriores que tenham ratificado, aceite ou aprovado.

Artigo 19.º **Denúncia**

1 - Um Estado Parte pode denunciar o presente Protocolo mediante notificação escrita dirigida ao Secretário-Geral das Nações Unidas. A denúncia produzirá efeitos um ano após a data de recepção da notificação pelo Secretário-Geral.

2 - Uma organização regional de integração económica regional deixará de ser Parte no presente Protocolo quando todos os seus Estados membros o tiverem denunciado.

Artigo 20.º
Depositário e línguas

1 - O Secretário-Geral das Nações Unidas é o depositário do presente Protocolo.

2 - O original do presente Protocolo, cujos textos em árabe, chinês, espanhol, francês, inglês e russo fazem igualmente fé, será depositado junto do Secretário-Geral das Nações Unidas.

Em fé do que os plenipotenciários abaixo assinados, para o efeito devidamente autorizados pelos seus respectivos Governos, assinaram este Protocolo.



O Projeto Europeu DEVAS

BECOMING VULNERABLE IN DETENTION



Civil Society Report on the Detention of
Vulnerable Asylum Seekers and Irregular
Migrants in the European Union

(The DEVAS Project)



Jesuit Refugee Service-Europe

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EXECUTIVE SUMMARY

The objective of the DEVAS project was to investigate and analyse vulnerability in detained asylum seekers and irregular migrants: both the way in which pre-existing vulnerable groups cope with detention, and the way in which detention can enable vulnerability in persons who do not otherwise possess officially recognised vulnerabilities and special needs.

In partnership with NGOs in 23 EU Member States, JRS-Europe oversaw the collection of 685 one-on-one interviews with detainees. The size and scope of the sample reveals that, despite the diversity of personal circumstances of the detainees, detention does have a common negative effect upon the persons who experience it. In addition to detainees, project partners interviewed detention centre staff and other NGOs operating within the centres, and conducted a survey of asylum and immigration laws in their respective countries. This data is included within each of the 22 national reports that are published in the full DEVAS report.

This study builds on previous reports and projects that investigated vulnerability in detention. It analyses the situation of individuals and groups that possess officially recognised special needs, such as minors, young women with children, the elderly and persons with medical illness. But this study also analyses the situation of detainees who often go unnoticed: young single men, persons without stated physical and mental health needs, and persons in prolonged detention. Most importantly, this study pushes the discussion on vulnerability and detention one step further because its results are based exclusively on the voices of detainees. Thus the understanding of vulnerability that emerges from this study characterises the experiences of detainees as they told it themselves.

PART 1: DATA FINDINGS

BASIC INFORMATION

The average detainee in the sample is male, single, 30 years old and likely to be from West Africa, South Asia or the Middle East. But women do consist of almost one quarter of the sample, of which many come from not only West Africa but also Eastern Europe and Eastern Africa.

The data shows that, at an average of 3.56 months at the time of their interview, asylum seekers experience the most prolonged periods of detention in the sample. They were detained for one month longer than irregular migrants. Of those detained for five to six months, 78 percent are asylum seekers.

Taking the entire sample into account, the average duration of detention at the time of interview is 3.01 months. Detainees were kept for as little as one day, or for as long as 31 months.

POSSESSION OF INFORMATION

Asylum seekers are less informed about the reasons for their detention than irregular migrants are. One-third of female asylum seekers do not know why they are detained; and almost 40 percent of asylum seekers detained for more than three months contend to know little about why they are detained. Forty percent of asylum seekers are uninformed about the asylum procedure.

Awareness of detention increases with age: one-third of minors do not know why they are detained, and 76 percent of asylum-seeking minors are uninformed of the asylum procedure. Women, especially those aged 18 to 24, possess less information about detention, and their immigration/asylum status, than men do.

Persons kept for more than three months in detention know less about the circumstances of their detention, and the details of their respective cases, than persons detained for less than three months; 85 percent of persons detained for four to five months describe a need for more information on their situation.

SPACE WITHIN THE DETENTION CENTRE

Detainees overwhelmingly feel negative about the conditions of the detention centre. Many complain of unsanitary toilet and shower facilities, and unhygienic kitchens. A large number of detainees equate their detention centre to that of a prison.

Asylum seekers and long-term detainees more frequently complain of overcrowded conditions than others do. Moreover, detainees kept for more than three months say they have little access to private space within the detention centre.

RULES WITHIN THE DETENTION CENTRE

The strict regimes found in many detention centres have a profound negative impact on detainees' lives. The fixed eating times, recreation hours and mandatory nightly curfews lead detainees to feel as if they are in prison.

A great number of detainees describe rules that keep them isolated in their cells more than anything else. Consequently, many detainees report to sleep excessively during the daytime, leading to insomnia at night. Isolation and inactivity leaves other detainees feel degraded and undignified.

The "informal" rules are just as important as the "formal" rules. Detainees describe an atmosphere where certain persons receive more favour from the staff, and thus benefit from more relaxed rules. This creates an atmosphere of arbitrariness, uncertainty and mistrust. It also makes certain detainees more vulnerable to other, more socially dominant, detainees.

DETAINEES' INTERACTION WITH STAFF IN THE DETENTION CENTRE

Detainees are more frequently in contact with security staff than any other staff. The manner in which detainees interact with staff is good. But detainees are critical about the way the staff supports their daily needs in detention.

Language is an important factor in detainee-staff relations. Minors and women in the study especially report having experienced discrimination for not being able to speak the language of the staff.

SAFETY WITHIN THE DETENTION CENTRE

Detainees attribute their safety to the security guards, but their lack of safety to co-detainees. Nevertheless, incidents of physical and verbal abuse occur at the hands of staff as well as other detainees. Incidents of physical abuse were recorded in three quarters of the EU Member States; and incidents involving verbal abuse were recorded in 19 Member States. Minors, women aged 18 to 24 and asylum seekers frequently report being victims of both forms of abuse.

The living conditions have an impact on detainees' sense of safety. Excessive noise, unhygienic conditions and the prison-like atmosphere are widely reported factors that make detainees feel unsafe.

ACTIVITIES WITHIN THE DETENTION CENTRE

Prolonged inactivity is inherent within the situation of detention. Detainees have little to do unless the staff organises something for them to do. The resulting boredom increases levels of psychological stress. Most notably, detainees aged 18 to 24 – in particular women – report high levels of inactivity in the detention centre.

Detainees have greater access to sedentary and physical activities, rather than those that would engage their intellectual capacities. Television watching, rudimentary sports activities and general time spent outdoors is more widely available than educational and religious/spiritual activities. Even books are not available to a significant minority of detainees.

More than anything, detainees either want activities that enable them to connect to the 'outside world', or they want nothing at all. Asylum seekers and minors especially wish for greater access to the Internet and telephone. When asked which activities they would like to have, a startlingly large minority of detainees said that they want "freedom" or "nothing".

MEDICAL CARE IN THE DETENTION CENTRE

Detention centres are generally only able to provide very basic medical care to detainees, irrespective of their needs. Medical specialists such as psychologists, gynaecologists and dentists are largely unavailable. In fact, 87 percent say psychological services are unavailable to them.

Language is a major factor here too. Detainees report an inability to speak with the medical staff because of language differences. Co-detainees are often turned to for help because other options do not exist. Minors frequently report experiencing difficulties in this regard.

Most detainees want improved medical care services. Over 90 percent of women aged 18 to 24 express a need for better medical care. Many detainees report receiving only pain-reducing medication for whatever medical need they express.

Persons kept for more than three months in detention are more frequently negative about the medical care than those who are kept for fewer months. In fact, detainees who are negative about the quality of medical care are detained on average for one and a half months longer than detainees who feel positive about the medical care.

PHYSICAL HEALTH IN DETENTION

The data shows that detention harms otherwise healthy people. While a number express having pre-existing conditions such as asthma, chronic pain or medical illnesses, most say they entered into detention in relatively good physical health.

The living conditions of the centre, such as the lack of fresh air or the mere confinement to one location, and the psychological stress associated with detention all bring harmful physical health consequences.

Physical health deteriorates as detention endures. Whereas one quarter of people detained for one month describe their physical health as being poor, 72 percent of people detained for four to five months say they have very poor physical health.

Younger detainees more frequently report poor physical health than older detainees do. Minors and women aged 18 to 24 frequently describe negative physical health impacts than when compared to others.

MENTAL HEALTH WITHIN THE DETENTION CENTRE

Detention brings very negative consequences for detainees' mental health. Almost half of the entire sample describes their mental health as being poor in detention.

The mere situation of detention itself is a primary determinant in the negative mental health consequences described by detainees. Many were unable to provide specific reasons for these impacts. Instead, they more frequently described being "shocked", "fearful" and "depressed" at their situation of confinement. Detainees' psychological stress is also a consequence of the poor living conditions, the self-uncertainty of their situations and their isolation from the 'outside world'. Their inability to establish a perspective of their future, due to a lack of information and disconnection from the outside world, places a great deal of psychological stress upon their shoulders. This stress often leads to deeper anxiety and depression.

Prolonged detention compounds the adverse mental health effects of detention: 71 percent of persons detained for four to five months blame their psychological problems on detention itself.

Age and legal status are two important factors for how detainees mentally cope with detention at a personal level. Minors and detainees aged 18 to 24 frequently report negative mental health impacts. Asylum seekers express shock at their detainment; it being far from what they would have expected by coming to Europe. Irregular migrants express anxiety and uncertainty about what may happen to them post-expulsion. Seventy-seven percent of "Dublin II" asylum seekers and 55 percent of 'rejected asylum seekers' report poor mental health in detention.

SOCIAL INTERACTION WITHIN THE DETENTION CENTRE

The environment of detention has a negative impact on the level and quality of social interaction among detainees and between detainees and staff. The mix of cultures, nationalities and languages within the detention centre makes conflict inevitable. Prolonged detainees more frequently report negative social interactions than others.

An absence of language skills makes certain detainees vulnerable to other, more dominant, social groups. Minors and detainees aged 18 to 24 are frequently witness to arguments and physical violence.

COMMUNICATION WITH THE 'OUTSIDE WORLD'

Almost half of the entire sample admits that they do not have networks of family or friends in the host Member State. Detainees are more likely to receive support from strangers than from familiar persons.

The telephone is the most widely used means of communication, and detainees' preferred method of communication. However many detainees say they are unable to use their personal mobile telephones – an important loss for detainees as their personal mobile telephones often contain important contact information.

Asylum seekers are particularly isolated from the outside world: approximately 80 percent do not receive any personal from family and friends, and over half do not have any family or friends in the host Member State.

The data shows that the young detainees in the sample are particularly isolated from the 'outside world'. Up to 80 percent of minors, and almost half of women aged 18 to 24, do not receive any personal visits. In other cases, people kept for more than three months in detention are shown to be particularly isolated.

THE IMPACT OF DETENTION ON THE INDIVIDUAL

A large majority of detainees express deep dissatisfaction over the quality of the food provided in the detention centre, and over half experience insomnia at night. Both conditions significantly contribute to the amount of psychological stress detainees feel. In particular, the quality of the food contributes to an overall sense of indignity among detainees. Appetite and weight loss are very common. Prolonged detention exacerbates these negative effects.

The situation of detention itself is the biggest difficulty detainees described coping with. The mere imposition of detention and all of its consequent effects are an insurmountable difficulty for many detainees. Everyone, regardless of age, sex, legal status and duration of detention, is affected.

The difficulties of detention are daily present in detainees' lives; any changes of these difficulties are usually for the worse. The inability to establish a future perspective is crippling; in fact, 79 percent of detainees do not know when they will be released from detention.

Remarkably, detainees hold positive perceptions of themselves despite the adversities they experience. But almost 70 percent say that detention steadily worsens their self-perception.

When asked directly, most detainees do not admit to having special needs – but they readily point out the needs and vulnerabilities that others possess. Those who do admit having special needs are more likely to describe needs that are not officially recognised: language capacity, connection to family, possession of information and the ability to communicate with the outside world. According to detainees, language capacity and familial connections are two of the more important factors of vulnerability they perceive in others.

PART 2: ANALYSIS

WHAT DOES THIS STUDY SAY ABOUT 'VULNERABILITY'?

The data offers a story of detainees who not only have special needs such as medical problems, pre-existing traumatic histories and families to take care of, but also of detainees who *become vulnerable* to the negative effects of detention. Some detainees find that they can cope with the adversity posed by detention; others find that they are easily crippled. Some detainees find that detention does not negatively affect them until after one or two months; yet others find that detention harms them from the very first day.

The picture that emerges from the data is one of a detainee who is trapped and cannot escape, and is thus vulnerable to harm from the factors associated with detention. The detainee must therefore rely on their personal attributes, the people in their social network and the factors in their environment in order to free him or herself from that trap. Conversely, the same personal, social and environmental factors – or an absence of such factors – may actually hinder an individual's ability to reduce their level of vulnerability to detention.

A NEW OUTLOOK TOWARDS VULNERABILITY IN DETENTION

Within the context of detention and the data that was collected for DEVAS, 'vulnerability' can be conceptualised as a concentric circle of personal (internal), social and environment (external) factors that may strengthen or weaken an individual's personal condition. Put differently, the presence or absence of these factors may either empower a detainee to cope with the negative effects of detention, or they may expose the detainee to further harm.

Factors interact with each other in a variety of ways, both positively and negatively. For example, the data findings show that detention centre staff members are an important part of detainees' social network. Discriminatory attitudes and inappropriate behaviour on the part of staff can have a detrimental affect on detainees' well being. Thus it would be important that staff members are sufficiently trained so that they can meet the needs of detainees in a dignified and humane manner.

In another example, the study shows that the possession of information is important for detainees to understand their situation, to exercise their rights and also to organise plans for their future. The inability to receive understandable and clear information about their case, and to communicate with supportive networks in the 'outside world', may foster a deep sense of personal uncertainty, stress and despair within the detainee. All of these effects can lead to a deterioration of their mental and physical health.

Personal factors can be defined as the *sum of the individual's personal sense of agency*. It is a set of determinants that an individual personally carries with him or herself, all of which may hinder or improve the individual's ability to cope with the adversities of detention. Language capacity, level of awareness of the asylum/immigration procedure and state of physical and mental health are shown to have the most influence over an individual detainee's ability to cope in the environment of detention.

Social factors can be defined as the *sum of the individual's existing social network, and available means of communicating with that network*. It is made up of the persons, organisations or bodies in the detainee's life who may lessen or increase his or her level of vulnerability to the adversities of detention. These social factors may also be labelled as 'external factors', in the sense that they are situated outside of the personal self. Yet they do not necessitate existence in the 'outside world', *per se* – such factors may also exist in the detainees' social network within the detention centre. The factors that seem to most influence detainees' personal situations are family, relatives and/or friend in the 'outside world', the 'outside world' (means of contact to), co-detainees and detention centre staff.

Finally, environmental factors can be defined as *the sum of the determinants that exist in the individual's larger environment but that the individual cannot control nor influence, and which may still increase or lessen his or her level of vulnerability to detention*. Among those that seem to most influence detainees' level of vulnerability is the architecture of the detention centre, the terms and length of their detention and the living conditions in the detention centre.

ASSESSING VULNERABILITY IN PRACTICE

The data shows that detention has the potential to harm many types of people: those with pre-existing special needs and otherwise healthy persons. It is important to stress that a person becomes vulnerable from the first day of their detention, as the individual's personal condition is instantly affected due to their disadvantaged and weakened position. Detainees' level of vulnerability fluctuates in relation to the characteristics that they personally possess, the factors in their social network and the determinants in their wider environment.

This method of understanding attempts to acknowledge the variety of factors that foster vulnerability in detained asylum seekers and irregular migrants. In practice, it shows that every person must be individually assessed for vulnerabilities and special needs that may make it difficult for them to cope in the environment of detention. This is the only way to ensure that detention does not cause unnecessary harm to individuals and is not disproportionate to their actual situation.

PART 3: CONCLUSIONS & RECOMMENDATIONS

DEVAS RESEARCH IMPLICATIONS FOR THE ONGOING USE OF DETENTION

The data reveals that detention is implemented in a broad variety of cases and situations. Everyone, from asylum seekers to irregular migrants, minors to older persons, and from medically ill persons to the healthy, can be subject to detention irrespective of their special needs and vulnerabilities.

Detention, as observed from the research, is used in a mostly indiscriminate manner with little deference to personal choice and preferences. The cases that were recorded demonstrate a situation where detainees can do little to alter their circumstances within the detention centre. They must accept the state of living conditions within the detention centre, and cohabitation with persons of differing nationalities, cultures and even personalities and temperaments; and they must accept the restriction on their freedom to move about as they please, even within the confines of the detention centre. Although exceptions may exist in some Member States for persons with special needs, the 'average detainee' will find that he or she is unable to exercise a degree of personal choice and must therefore accept detention as one accepts a punishment, rather than an administrative procedure.

The results show that persons with officially recognised needs, such as minors, young women and the medically ill, are indeed negatively impacted by detention. The adult environment of detention immediately puts minors at a disadvantage, especially if they are unaccompanied, because they are vulnerable to the behaviour of the staff and to the prison-like atmosphere of detention, for example. The data findings show that women, especially between the age of 18 and 24, especially suffer from adverse mental health impacts. The medically ill may not be able to receive the treatment they need because the detention centre only provides for basic medical care.

In almost every case, the study shows that detention has a distinctively deteriorative effect upon the individual person. Only in very few cases do detainees describe their personal situation as having improved after detention; and just as few say that detention has not impacted them whatsoever. The vast majority of detainees describe a scenario in which the environment of detention weakens their personal condition. The prison-like environments existing in many detention centres, the isolation from the 'outside world', the unreliable flow of information and the disruption of a life plan lead to mental health impacts such as depression, self-uncertainty and psychological stress, as well as physical health impacts such as decreased appetite and varying degrees of insomnia. The manner in how detainees see themselves is significantly impacted by detention. In this context, self-perception becomes an important indicator of the effects of detention because as an administrative measure, it should not bring such detrimental personal consequences.

The biggest implication from the DEVAS research is the way in which detention – frequently implemented as a tool of asylum and immigration policymaking for the EU and its Member States – leads to high rates of vulnerability in people. It calls into question the proportionality and necessity of detention in relation to the ends it seeks to achieve: that is, to systematically manage migration flows so that States may enforce their asylum and immigration policies.

The research reveals that the human cost of detention is too high, regardless of the achievability of these ends because

- The negative consequences of detention and its harmful effects on individual persons are disproportionate to their actual situations, in that they have committed no crime and are only subject to administrative procedures, and;

- It is unnecessary to detain persons and thus make them vulnerable to the harmful effects of detention because non-custodial alternatives to detention do exist.

RECOMMENDATIONS FOR EU POLICYMAKING ON THE DETENTION OF ASYLUM SEEKERS

The institutions of the European Union and its Member States have an important role to play in the way asylum seekers are received and treated within the territory of the EU. But the legal minimum standards that have been established at the end of the first phase of the *Common European Asylum System*, such as in the Reception Conditions Directive and Dublin Regulation, provide very little guidance for the implementation of detention, and for the treatment of asylum seekers with special needs.

The DEVAS research findings allow us to put forth a series of recommendations that aim to further improve future *EU policymaking* on vulnerability within the context of detention for asylum seekers:

1. *Asylum seekers should not be detained during the asylum procedure.*

It is not appropriate for asylum seekers to be detained because there should neither be a presumption that they have committed a wrongdoing, nor a presumption of rejection or removal while they are in the asylum procedure. Furthermore, the legal complexity inherent within the asylum procedure means that asylum seekers should access all means of support at their own volition; the closed environment of detention cannot provide this. The negative impacts of detention, and the vulnerabilities it creates, make the asylum seeker less able to present his or her case in an appropriate way, calling into question the fairness of the asylum procedure.

2. *Non-custodial alternatives to detention for asylum seekers that respect their human dignity and fundamental rights should always take precedence before detention.*

Asylum seekers, due to the legal complexity of their situation and the asylum procedure, require a level of care and support that cannot be provided in a detention centre. In particular, detention cannot be implemented if there is no assessment of their special needs and vulnerabilities at the beginning, because it would then not be known how they might cope within the environment of detention. This is why non-custodial alternatives to detention should always take precedence.

3. *A system of qualified identification of asylum seekers' special needs and vulnerabilities should be designed and implemented at ports of entry, be they land, sea or air, for the purpose of avoiding the use of detention.*

This identification should be done as soon as possible after entry. It can help to ensure smoother procedures at later stages, a more efficient use of State resources and a higher degree of safety and care for asylum seekers' potential vulnerabilities. Most importantly, an appropriate assessment of special needs and vulnerabilities can ensure that detention is not used for persons who may be particularly harmed by it.

4. *A qualified identification system should be individually based and holistic, taking into account the personal, social and environmental factors that are present within the asylum seeker's situation.*

Factors such as legal status, country of origin, marital status, the possession of information, the presence of supportive social networks and the state of physical and mental health highly impact detainees' level of vulnerability to detention. These and other factors should be assessed in order to determine an individual asylum seeker's vulnerabilities, and the types of concrete special needs he or she may possess.

5. ***If the detention of asylum seekers cannot be avoided, and if all non-custodial alternatives have been exhausted, then detention should be subject to regular tests of necessity and proportionality; the duration of detention should be for as short a time period as possible.***

Criteria for the necessity of asylum seeker detention should adhere to the 1999 UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers. Regular tests of necessity and proportionality should be conducted on a monthly basis by the relevant judicial authority.

6. ***If detention cannot be avoided, then asylum seekers should be given appropriate and effective legal aid and/or assistance from the very first day of their detention.***

The legal complexity of asylum procedures in the EU, mixed together with the precarious situation of asylum seekers, means that they may not be able to adequately fulfil all of the asylum procedures in a manner that serves their best interests – especially if they are in detention. Legal aid and/or representation are thus vitally necessary.

7. ***Detained asylum seekers should be given regular and transparent access to all information concerning their asylum case and the terms of their detention, in verbal and written form, and in a language they can understand.***

The isolative environment of detention means that extra efforts should be made to inform asylum seekers as well as possible on all details that concern their situation. The regular provision of information is a key step in lowering asylum seekers' vulnerability to the adversities of detention.

8. ***Detained asylum seekers should be afforded all means of contact to the 'outside world'.***

Detained asylum seekers should be able to contact family, relatives, friends and other supportive persons who are in the 'outside world'. The DEVAS research shows that it can reduce psychological stress, and it can help prepare detained asylum seekers for their eventual release from detention.

9. ***Detained asylum seekers should be given regular access to activities that engage their physical and intellectual capacities.***

The monotony of detention that comes as a consequence of its isolative environment can have a negative impact upon the physical and mental health of detained asylum seekers. Time spent in detention should not be 'wasted time'; instead, detainees should be afforded activities that help them to pursue their goals.

10. ***Detained asylum seekers should be given regular access to appropriate and relevant medical care, including mental health care.***

Medical care, as well as mental health care, should be made available everyone in the detention centre. In the case that such care only exists outside of the detention centre, the staff should ensure that access remains unhindered and facilitated.

RECOMMENDATIONS FOR MEMBER STATE POLICYMAKING ON THE DETENTION OF ASYLUM SEEKERS

Member States can take steps toward improving the immediate situation of asylum seekers in their territory. They can do this by implementing current EU asylum law in a manner that best serves the interests of asylum seekers, and in a manner that narrowly restricts the use of detention.

11. ***Article 18.1 of the Asylum Procedures Directive, "Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum", should be adhered to in all circumstances.***

Member States should make this principle applicable for reception conditions and for asylum seekers in the “Dublin system”. It should be the one principle that applies to all circumstances. In this context, “detention” should be defined as confinement to a particular place and therefore also covering the situations at the port of entry.

- 12. *If detention cannot be avoided, then Article 18.2 of the Asylum Procedures Directive stipulating, “Where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review” should be strictly adhered to.***

Access to regular judicial reviews is important in order to continually determine the necessity and proportionality of detention. This is especially necessary for detainees to know when they will be released from detention. The data findings show that not knowing the release date places a great deal of psychological stress upon detainees. Therefore, such judicial reviews should be effective, transparent and should occur at least once per month.

- 13. *Detained asylum seekers should have regular access to visitors from the ‘outside world’, including the UNHCR, lawyers, civil society organisations and also family, relatives and friends.***

Alongside this, detained asylum seekers should have access to persons in their social network that help them cope with the negative effects of detention, e.g. spiritual/faith counsellors, psychosocial care providers – all of which may greatly limit the level of vulnerability asylum seekers may experience in detention.

- 14. *All guarantees and protections contained within the Reception Conditions Directive should be extended to asylum seekers in detention.***

This should include rights to information, medical care, education and vocational training. In the case of Article 14.8 allowing Member States to “exceptionally set modalities for material reception conditions different from those provided ... when the asylum seeker is in detention”, such modalities should include strong safeguards that monitor the level of vulnerability of detained asylum seekers.

- 15. *Health care provision – foreseen in Article 13 of the Reception Conditions Directive – should include sufficient resources to care for the mental health needs of detained asylum seekers.***

Access to mental health professionals such as social workers, psychologists and psychiatrists, should be afforded to asylum seekers who need such services; these services should be available from the first day of their detention.

- 16. *Detention centre staff persons should receive sufficient training in order to respond to the vulnerabilities and needs of detained asylum seekers.***

Article 24 of the Reception Conditions Directive – ensuring the necessary training of staff – should be implemented so they can be able to respond appropriately to asylum seekers’ concerns and needs. In particular, staff persons should be trained to identify signs of vulnerability within detainees.

- 17. *Access to translators and interpreters should be ensured for asylum seekers who need it.***

The inability to speak the same language as detention centre staff, the asylum authorities and even with co-detainees has a profound effect on one’s ability to cope with being in detention. Translators and interpreters can help detained asylum seekers with understanding the information that is given to them, and they can also help to maintain good relations between staff and detainees.

RECOMMENDATIONS FOR MEMBER STATE POLICYMAKING ON THE DETENTION OF IRREGULAR MIGRANTS FOR THE PURPOSE OF REMOVAL

Taking into account the elements within the Return Directive that relate to the detention of irregular migrants, the DEVAS research allows us to propose a set of recommendations that aim to improve government policymaking in this area. As the deadline for national transposition has not yet passed, it may be too early to indicate in which specific way EU policy should be improved since the common standards contained within the Directive have not yet been sufficiently tested in the Member States. Thus the main target of the following recommendations will be Member States' efforts to transpose the Directive into their respective national legislation.

18. *Detention for irregular migrants should only be used as a last resort.*

The negative effects of detention are so great as to warrant its spare use. Detention should only be applied in cases of strict necessity, and in a manner that is directly proportionate to an individual person's situation.

19. *Article 15.1 of the Return Directive stipulating “sufficient but less coercive measures” should lead to the establishment of non-custodial alternatives to detention that respect the fundamental rights and human dignity of individual persons and families.*

The optimal way to reduce people's vulnerability to detention is to limit its use by instituting viable alternatives to detention. Only by removing persons from the closed and isolative environment of detention can they best prepare themselves for the possibility of return, but also for the possibility of legal residence within the Member State should the opportunity present itself.

20. *The criteria foreseen in Article 15.1(a, b) for the purpose of determining whether an irregular migrant should be detained should go beyond the “risk of absconding” and the hampering of the “return or ... removal process” to include a holistic assessment of the person's level of vulnerability to detention.*

The DEVAS research shows that all types of persons are vulnerable to the negative effects of detention, irrespective of whether or not they possess officially recognised special needs. Holistic individual assessment criteria should include a review of the personal, social and environmental factors that are present in an individual's situation, such as their legal status, the presence of supportive social networks and their level of physical and mental health.

21. *If detention cannot be avoided, then it should be strictly set for “as short a time period as possible and only maintained as long as removal arrangements are in progress”, as laid down in Article 15.1 of the Return Directive.*

The DEVAS research shows that while detention carries negative consequences from the first days of its implementation, the personal circumstances of detainees deteriorates as the time period of their detainment endures. Alternatives should be immediately sought when detention is no longer necessary or proportional.

22. *The situation of individual detainees and detained families should be reviewed at least once per month, using holistic assessment criteria to determine the personal impacts of detention.*

Ongoing assessments are the only way to ensure that harmful effects of detention are minimised as much as possible. Detention centre staff, especially social workers or staff who have received sufficient inter-cultural or psychosocial training within the context of detention, may be among those who conduct these assessments.

23. *The provision of information on “rules ... rights and obligations” in detention – as foreseen in Article 16.5 of the Directive – should be provided in a language the detainees can understand.*

Many of the persons interviewed for the DEVAS project have never before been in a situation of detention. The stress of detention and its isolative effects means that detention centre staff should make an effort to immediately inform detainees of all rules, rights and obligations. Language is a key factor of vulnerability because it facilitates communication and understanding. This is why it is important that such information be given in an understandable language.

24. *The provision of “legal assistance and/or representation” – as foreseen in Article 13.4 of the Directive – should be provided to all detainees at no additional cost, and in a language that detainees can understand. Such legal assistance and/or representation should extend to detainees who challenge the lawfulness of their detention.*

The DEVAS research shows that the legal complexities of detention can have an adverse affect on detainees because they are unsure of how to proceed and how to alleviate their situation. Legal assistance and/or representation is a key factor of vulnerability in detention; without it detainees are left disempowered and with further deteriorations in their mental health.

25. *Detained irregular migrants should have the opportunity to establish immediate contact with supportive persons or bodies in the ‘outside world’, as foreseen in Article 16.2 of the Directive.*

Detainees should be able to communicate by fixed-line and mobile telephone, especially since the latter often contains vital contact information that detainees need. Internet stations should be made available, as this would allow detainees to search for support if they lack a social network in the Member State.

INTRODUCTION

The Jesuit Refugee Service and its partners have observed that detention is being utilised ever more frequently for asylum seekers and irregular migrants arriving to the European Union. Despite the efforts made by EU policymakers to harmonise the manner in which Member States manage asylum and migration flows, the reality we observe is that these migrants are subject to conditions that are different from one Member State to the next.

In regards to detention, the differences are remarkable: some Member States indiscriminately detain anyone who arrives to their shores for an indeterminate length of time, while others provide for narrow legal conditions that exempt particular groups of persons from detention, such as those who are identified as 'vulnerable' or having 'special needs'. Safeguards and living conditions differ as well: some Member States offer psychosocial care, access to interpreters and adequate living space, for example; yet other Member States operate detention centres as if they are prisons, with barred windows and high-wire perimeter fencing. The best case scenario for an asylum seeker or irregular migrant who is detained in the EU is that they are given a private room with psychosocial support, and a fixed duration of detention with a foreseeable perspective of what will happen post-detention; the worse case scenario is overcrowded rooms, unhygienic conditions, an abusive environment and persistent isolation due to limited access to information and a prison-like environment. These are the parameters from which detention in Europe is configured upon.

The human impact of detention has been observed and documented by a number of organisations and bodies on all sides of the spectrum. Sadly, the documentation shows detention to have a mostly negative impact on persons. Members of European Parliament have undertaken inspections of detention centres throughout the EU between 2005 and 2009; and in 2008 the Parliament published a report detailing the sub-standard conditions found in many of the Member States, especially for persons with special needs.¹ In the United Kingdom, Her Majesty's Inspectorate of Prisons, Dame Anne Owers, has conducted several inspections of "immigration removal centres" and has repeatedly criticised the detention of children, describing it as neither "exceptional" nor "necessary".² The Council of Europe's Parliamentary Assembly in January 2010 published a resolution and report on the use of migrant administrative detention in Europe, which addresses the "long list of serious problems", including the use of detention as the "option of first resort and not last resort".³ The Council of Europe's Commission for Human Rights, Mr. Thomas Hammarberg, has published several reports on the use of detention in Europe, notably on the conditions he found during his inspection of the detention of asylum seekers in Greece in December 2008.⁴ Adding to this are the reports of the European Committee for the Prevention of Torture that have consistently documented the absence of procedural safeguards and inhumane conditions in European detention centres.⁵

The Jesuit Refugee Service, along with many other non-governmental organisations in Europe,⁶ has documented the human impact of detention through research and day-to-day accompaniment of detainees. In 2005, JRS launched its first major report on detention, *Detention in Europe*; in 2007 this was followed up by the publication of report on

¹ 2008 STEPS Consulting Social Study for the European Parliament, *The conditions in centres for third country nationals (detention camps, open centres as well as transit centres and transit zones) with a particular focus on provisions and facilities for persons with special needs in the 25 EU Member States*.

² Her Majesty's Inspector of Prisons report on an inspection of Yarl's Wood Immigration Removal Centre, 9-13 November 2009, p.5. For more information on the visits conducted by the HM Inspectorate of Prisons, go to <http://www.justice.gov.uk/inspectors/hmi-prisons/immigration-removal-centre-inspections.htm>

³ Council of Europe, Parliamentary Assembly, 11 January 2010, *The detention of asylum seekers and irregular migrants in Europe*, Committee on Migration, Refugees and Population, doc. 12105, Rapporteur: Mrs. Anna Catarina Mendonça

⁴ Report by Thomas Hammarberg, Commission for Human Rights of the Council of Europe, following his visit to Greece on 8-10 December 2008, published in Strasbourg on 4 February 2009. Similar reports can be found on the Commissioner's website: http://www.coe.int/t/commissioner/Default_en.asp

⁵ See the CPT website for copies of their reports, <http://www.cpt.coe.int/en/>

⁶ The available documentation on the use of detention in Europe is too numerous to publish in this report. The websites cited in this report are merely a small representation of publicly available information, and are not intended to prioritise one source of information over another. The UNHCR, in partnership with Refworld, maintains a large database on many types of detention-related documentation: <http://www.unhcr.org/refworld/detention.html>.

Detention Conditions in the Ten New Member States that Acceded to the European Union in 2005. Since 2007 JRS-Europe has maintained a website with specific country-by-country information, EU law and project-related materials focused on the use of detention in Europe.⁷ The country offices of JRS in Europe presently accompany detainees by providing services such as social support, pastoral care and legal support.⁸ All of the NGO partners involved in this study engage in work related to detention in their respective countries, from monitoring detention conditions, to training detention centre staff and to advocating for alternatives to detention. The international aspects of detention have been documented by the Australia-based International Detention Coalition⁹ – of which JRS-Europe and many of its project partners are members – and the recently initiated Global Detention Project, based in Geneva.¹⁰ The work of these organisations reveals that the adverse human impacts of detention are not confined to one country or one region, but to wherever detention is practised.

The literature also shows that certain types of people may be especially susceptible to harm in detention. These persons are thus regarded as being ‘vulnerable’, or possessing ‘special needs’. Women, children, unaccompanied minors and person with medical or psychological needs are widely acknowledged by government and civil society stakeholders to be vulnerable; additional groups include victims of torture, rape and other kinds of mental, physical and sexual violence, the elderly and disabled persons.¹¹ The 2008 European Parliament study on detention defines ‘vulnerability’ according to risk, personal and environmental factors, arguing that asylum seekers and irregular migrants possess certain determinants that increase their level of vulnerability to detention, such as experiences obtained prior to and during their migratory journey.¹² Thus the former understanding conceives of vulnerability as a pre-determined set of factors which remain fixed irrespective of a person’s situation, while the latter conceives vulnerability as consisting of a multitude of factors which may ebb and flow according to individual experience.

The scientific literature on vulnerability and migrant detention lends support to both of these conceptualisations, with a strong emphasis on medical health as a factor of vulnerability in detention. Studies of detained asylum seekers show that detention leads to the build-up of clinically significant symptoms such as severe depression, anxiety, post-traumatic stress disorder and even suicidal ideation – all of which are significantly correlated to the length of detention.¹³ A 2009 study by Robjant, Robbins and Senior shows that asylum seekers in detention are more susceptible to severe psychological distress than asylum seekers living in the community.¹⁴ A 2009 article in the *British Journal of Psychiatry* reviewing ten studies on the mental health impact of detained children, adolescents and adults concludes that the time spent in detention is positively associated with the severity of distress.¹⁵ The literature reveals a troubling indication of developmental delay and emotional disturbance in detained children, including insomnia, poor appetite, emotional symptoms and behavioural difficulties.¹⁶ Many studies show asylum seekers to be

⁷ This website is accessible on www.detention-in-europe.org. All JRS-Europe reports and projects related to detention can be found on this website.

⁸ The website of JRS-Europe, www.jrseurope.org, provides information and links to the work of the JRS country offices in Europe.

⁹ The International Detention Coalition is currently undertaking research on good practices concerning alternatives to detention. For more information see <http://idcoalition.org>.

¹⁰ More information on the Global Detention Project can be found on their website, <http://www.globaldetentionproject.org>

¹¹ This definition of ‘vulnerable groups’ is taken from the 1999 UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, and also the EU Reception Conditions Directive and Return Directive. The definitions of ‘vulnerability’ and ‘special needs’, especially within the context of detention, continue to be debated by government and civil society actors. Nevertheless, the definition that emerges from these sources form the basis of most of the thinking, advocacy and decision-making on this topic.

¹² Ibid, 2008 STEPS Consulting Social Study for the European Parliament, p. 30

¹³ Coffrey, G.J. et al. (2010). The meaning and mental health consequences of long-term immigration detention for people seeking asylum. *Social Science and Medicine* [E-publication ahead of print]; Keller A.S., et al. (2003). The mental health of detained asylum seekers. *Lancet*, 22(362), 1721-3; Keller, A.S. et al. (2003). The impact of detention on the health of asylum seekers. *The Journal of Ambulatory Care Management*, 26(4), 383-5; Steel, Z. et al. (2006). Impact of immigration detention and temporary protection on the mental health of refugees. *The British Journal of Psychiatry*, (188), 58-64.

¹⁴ Robjant, K., Robbins, I. & Senior, V. (2009). Psychological distress amongst immigration detainees: A cross-sectional questionnaire study. *The British Journal of Clinical Psychology*, 48(3), 275-86.

¹⁵ Robjant, K., Hassan, R. & Katona, C. (2009). Mental health implications of detaining asylum seekers: A systematic review. *The British Journal of Psychiatry*, 194(4), 306-12.

¹⁶ Mares, S. & Jureidini, J. (2004). Psychiatric assessment of children and families in immigration detention: Clinical, administrative and ethical issues. *Australian and New Zealand Journal of Public Health*, 28(6), 520-6; Lorek, A. et al. (2009). The mental and

a group that is particularly vulnerable to detention, given the traumatic nature of their flight and the persecution they may have had to endure in their home country.

THE DEVAS PROJECT

The Jesuit Refugee Service-Europe and its project partners implemented the DEVAS project on the basis of the examples cited above. Its objective was to investigate and analyse vulnerability in detained asylum seekers and irregular migrants: both the way in which pre-existing vulnerable groups cope with detention, and the way in which detention can enable vulnerability in persons who are otherwise healthy. The DEVAS project builds on previous reports and projects by focusing on the experiences of detainees themselves – in other words, by allowing detainees to articulate their own conceptualisations of vulnerability and special need. Each project partner undertook this task by recording detainees' voices in as detailed a manner as possible. In turn, detainees' responses were put together and amplified so that others may understand vulnerability in detention on as broad a level as possible. In doing so, JRS-Europe and its project partners have sought to determine the manner in which all people, not only those in specially recognised categories, could be made vulnerable in detention.

What follows is a presentation of the experiences of 685 asylum seekers and irregular migrants detained in 21 EU Member States. Using a mixed quantitative and qualitative questionnaire, each migrant was individually interviewed by a DEVAS project partner within the premises of a detention centre in their respective Member State.¹⁷ The result is a sample consisting of persons from all continents of the world, except Australia and Antarctica, and representing a multitude of nationalities and cultures. This diversity is as striking as it is unintentional: it is merely a 'snapshot' of the broad array of persons who are detained in Europe at any given time. This diversity also means that the DEVAS project could not construct the profile of a 'average' detainee, especially since the way in which detention is implemented differs between the Member States; also because, as we shall see, people possess a number of factors that affect their level of vulnerability in detention in a variety of ways. Nevertheless, the DEVAS research does show us that detention does have a common negative effect upon people that echoes the conclusions found in the studies and reports mentioned above.

The following report is organised into three main sections: *data findings*, *analysis*, and *conclusions*. The first section is separated into 13 chapters, with each representing a section of the research questionnaire that was used to interview detainees. Each chapter (excepting the first), presents the "average" and "disaggregate" results from the research: the former looks at the DEVAS sample as a whole (all 685 detainees), while the latter examines the sample in more detail, selecting out particular groups of detainees such as minors, asylum seekers, prolonged detainees, etc. The purpose for doing so is to portray a dual perspective of detainees' levels of vulnerability, showing the way in which detainees are affected by common, but also disparate, factors. The content within this first section is an exclusive presentation of the research results, i.e. on the responses detainees made to the questionnaire. A summary is included at the end of each chapter.

The second section, *analysis*, uses the data findings to construct a framework for the assessment of vulnerability in detention. The concepts that make up the analytic tool is explained in detail, and is applied to three groups of detainees from the sample: minors, prolonged detainees and asylum seekers. The purpose of doing so is to demonstrate how such a tool may be used to individually assess vulnerability in practice. The third section, *conclusions*, examines the implications that the DEVAS project holds for the ongoing implementation of detention in Europe. This section ends with a list of research-based recommendations for EU and Member State policymaking on the detention of asylum seekers and irregular migrants.

physical difficulties of children held within a British immigration detention centre: A pilot study. *Child Abuse and Neglect*, 33(9), 573-85.

¹⁷ See the "Preliminary Methodological Remarks" for the exceptions to this.

Section IV is a presentation of 22 national reports written by the DEVAS project partners. Each national report mirrors the structure found within the larger European-wide report, reflecting the research done within each respective country. The analyses, conclusions and recommendations in each national report are country-specific and were designed by the project partners who wrote the report.

PRELIMINARY METHODOLOGICAL REMARKS

The DEVAS project was coordinated by JRS-Europe in partnership with NGOs in 23 EU Member States:

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| • <i>Caritas Austria</i> | • <i>Caritas Vilnius (Lithuania)</i> |
| • <i>JRS-Belgium</i> | • <i>JRS-Malta</i> |
| • <i>Bulgarian Helsinki Committee</i> | • <i>Dutch Refugee Council</i> |
| • <i>Symfiliosi (Cyprus)</i> | • <i>Caritas Poland</i> |
| • <i>Association for Integration and Migration (Czech Republic)</i> | • <i>JRS-Portugal</i> |
| • <i>Estonian Refugee Council</i> | • <i>JRS-Romania</i> |
| • <i>JRS-Germany</i> | • <i>JRS-Slovenia</i> |
| • <i>Greek Refugee Council</i> | • <i>Caritas Slovakia</i> |
| • <i>Hungarian Helsinki Committee</i> | • <i>Spanish Commission for Refugees (CEAR)</i> |
| • <i>JRS-Italy (Centro Astalli)</i> | • <i>JRS-Sweden</i> |
| • <i>JRS-Ireland</i> | • <i>JRS-United Kingdom</i> |
| • <i>Caritas Latvia</i> | |
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The project, which commenced in November 2008, was co-financed by the European Commission under the 2007 European Refugee Fund Community Actions (JLS/2007/ERF/011). The first Steering Committee meeting was held in January 2009, and used to decide upon the project's methodological framework and research instruments. The data collection and analysis phase continued forth until the second Steering Committee meeting in December 2009; there JRS-Europe and its partners reviewed the research results and analyses, and agreed on a series of conclusions and recommendations to be used for the report. From this point, JRS-Europe and the project partners commenced the writing of the European-wide and national reports, respectively. The DEVAS project results were disseminated to the public at a conference on 8th June in Brussels.

RESEARCH INSTRUMENTS

Three mixed qualitative and quantitative questionnaires were created in consultation with Dr. Richard Haavisto, a professor of forced migration studies at the Refugee Studies Centre, University of Oxford. Each questionnaire was dedicated to a specific group: Detainees (asylum seekers and irregular migrants), NGOs that operate in the detention centres where interviews took place, and the Staff of the detention centres where interviews took place. All three instruments asked the same questions under the same headings. This triangulation was done in order to elicit the perspectives of three distinct groups on the same variables and headings. Due to the research and analytic constraints of JRS-Europe, and the sheer size of the detainee sample, the NGO and Staff questionnaires are not incorporated into the European-wide report. But the responses from all three instruments are included within each of the national reports. An additional questionnaire was developed by JRS-Europe in order to examine the legal environments concerning detention and vulnerability within each of the participating Member States. In most cases the project partners completed the legal questionnaire themselves, or they solicited the assistance of a lawyer known to them.

After each detainee interview partners were asked to complete a one-page Post-Interview Evaluation. This was intended to capture any elements or conditions which may have impacted the quality of the interview: the detainee's state of physical and mental health, the ambient temperature and available light in the room, the presence of guards and the conditions of the space used for the interview, for example.

Project partners were not permitted to alter the questionnaires in any way; but detainees were allowed to refuse a response to any question for any reason. In some cases national authorities and detention centre staff, and also NGOs, were permitted to review the questionnaires in advance; but they were not allowed to alter them in any way.

ACCESSING THE SAMPLE POPULATION

Project partners were asked to visit at least three detention centres and to interview a minimum of 30 detainees within each centre. Partners were permitted to interview any detained asylum seeker or irregular migrant who was available to them,¹⁸ excepting third-country nationals detained at a transit zone for not possessing correct immigration documents or while undergoing a routine asylum pre-determination interview by the immigration authorities, and third-country nationals incarcerated by the national criminal justice authorities for committing a criminally recognised offence. All detainees who chose to take part in an interview provided their voluntary and informed consent, either verbally or in written form.

In some cases partners already had access to certain detention centres due to ongoing work, and as a result could speak freely with any detainee who agreed to participate. In other cases they had to specifically petition the national authorities for permission to implement DEVAS, which on particular occasions meant that partners could only enter the detention facility at certain times and had permission to interview a predetermined number and group of detainees.

Most partners were able to interview at least 30 detainees for each detention centre they visited. Exceptions are for partners who encountered logistical obstacles in implementing the study, such as the lack of linguistic interpretation and translation capacities, geographic distances between partners' offices and the detention centre(s) or slow approval times from national authorities. Out of the 23 partners only two were unable to interview any detainees:

- JRS-United Kingdom was officially refused permission by the Home Office, who deemed the DEVAS project to be unnecessary because other detention monitoring projects and programmes are already being implemented.
- JRS-Italy (Centro Astalli) was unable to visit the *Ponte Galeria* detention centre in Rome due to the expiration of their contract, which had previously permitted them to access the detention centre.

The Estonian Refugee Council was able to interview only one detainee during the data collection phase from January to August 2009. This is for the simple reason that only one migrant was actually detained in Estonia during this time period.

In addition to detainees, partners were asked to interview at least one NGO and one staff person in each detention centre they visited. NGOs were chosen on the criterion that they provide social services to detainees in the centre, either in an official or non-official capacity. In some cases the partners were the *only* NGO to operate within the centre: in these instances they were asked to interview a colleague in their organisation who was not involved with the DEVAS project. Detention centre staff persons were chosen on the basis that he or she had to maintain regular

¹⁸ Random and snowball sampling were the most widely used methods of selecting detainees for interview. In practice, random sampling was implemented by the DEVAS partner entering the detention centre and approaching people without any preordained selection process, or, by being placed in a designated interview room within the detention centre and waiting for interested detainees to show.

contact with detainees as a part of their work, and that he or she should have been an employee of the detention centre for at least one year. Partners were encouraged to interview administrative and security staff, for example.

All interviews were conducted in full compliance with the national authorities and detention centre staff. In no case whatsoever did DEVAS project partners undertake research without their consent.

ANALYSING THE DATA

Partners submitted their completed interviews to JRS-Europe in either digital PDF or hardcopy format. In July 2009 a research team was assembled by JRS-Europe to establish an analytical coding structure to enable interpretation of the data. Ms. Julia Inthorn, who lectures on mathematics and philosophy at the Institute of Ethnics and Law at the University of Vienna, guided the team's work.

Categories of codes were created by evaluating all of the responses on each of the detainee questionnaires. This enabled the research team to establish a system of variables that could then permit a centralised analysis of the entire data set.¹⁹

Following this, a data map was constructed by using the SPSS statistical software package; the JRS-Europe research team entered each detainee interview was the central database. Members of the team communicated regularly by telephone and email, meeting again in October 2009 to ensure a uniform data entry process.

Using SPSS, the team conducted frequency analyses, cross-tabulation and correlation analyses of the detainee dataset. Each member of the research team assumed responsibility for a particular group of DEVAS partner countries; in turn they entered the data for their countries into SPSS, and communicated the analyses back to the respective DEVAS project partners. It was in this manner that JRS-Europe analysed the full 'European' dataset, which was as well disaggregated by age, sex, duration of detention and legal status.

The full European and national results were reviewed by the DEVAS Steering Committee in December 2009. From this point the Committee was able to begin to identify central themes in the data, to draw preliminary conclusions and advocacy recommendations for use in the final report. At this juncture most partners had contributed a first draft of their national report, which enabled comparison to the work of the other partners, and an evaluation by JRS-Europe to ensure a uniform structure in every national report.

NATIONAL REPORTS

Project partners wrote their national reports based on the data analyses provided by the JRS-Europe research team. In every case, partners frequently communicated with members of the research team in order to ensure that the data analyses reflected the actual situation partners encountered when they conducted the interviews.

Partners were encouraged to situate their national data analyses within the set of experiences their organisations have had as concerns detention monitoring; as well as to limit the use of numbers and percentages in order to retain a narrative format. Drafts have been revised, edited and finalised by a separate team within JRS-Europe.

The national reports for Estonia, Italy and the UK are included in an annex, due to difference in the methodology used (as reported on the preceding page). There is no national report for Poland because it was not submitted in time for this report's publication.

¹⁹ Only responses on the detainee questionnaires were coded and entered into the central database. Limitations of capacity would not permit a similar coding process for the NGO and Staff questionnaires.

EUROPEAN REPORT

The content of the European-wide report consists of an examination of the full dataset (685 detainees). Conclusions and recommendations are strictly based on an analysis of the dataset, and on input provided by the Steering Committee.

Percentages and frequencies are used to describe data findings that are particularly strong; and tables and charts are used to illustrate many of these findings. However, JRS-Europe has endeavoured to retain a narrative format to facilitate easy reading and comprehension. This means that phrases such as “a great number”, or “the numbers indicate”, or “the research shows” are sometimes used instead of percentages in order to portray majorities, or significant minorities, within the sample.

RESEARCH LIMITATIONS

Despite the size and scope of the sample, JRS-Europe does not regard it as being statistically significant or scientifically representative of the migrant detainee population in Europe, nor of the total number of detention centres in existence in Europe. The variance in sampling techniques utilised by the DEVAS project partners, as well as the differing situations of the detainees that were interviewed, prevented the obtainment of a scientifically sound sample. Assuredly, this result is not the fault of the project partners. Detention centres are not easily accessible by external third-party individuals or groups. If a partner did not already have regular access to a detention centre, then they would have needed to petition the national authorities for access; and in some cases even partners who already had such access needed to specifically petition the national authorities in order to conduct the research. Notwithstanding these limitations, the transitory nature of detainee populations in Europe would make any effort to obtain a scientifically representative sample difficult to achieve.

Detainees' responses to the questionnaire represent what they were feeling, as well as the conditions they were subject to, on the particular day of the interview. JRS-Europe and its partners were not able to re-interview any of the detainees. The transitory nature of detainees' situations would make this limitation difficult to overcome. In addition, detainees' responses could not be systematically confirmed with other sources due to the technical limitations in the capacities of DEVAS partners to do so, and also to the sheer inability to find an impartial and independent source of confirmation. Unless the conditions of the interview led a DEVAS partner to conclude otherwise, it was assumed that all detainees responded honestly and without undue interference from any external source of pressure.²⁰

The DEVAS project was not able to provide for translators and interpreters. This was left to the discretion of the DEVAS partners: in many cases they used their own resources to translate questionnaires into several languages, or to use the services of an interpreter; in other instances, partners were only able to interview detainees for whom they shared a common language. On a few occasions DEVAS partners had to rely on co-detainees for interpretation due to the lack of other resources. But in every one of these cases co-detainees voluntarily agreed to provide interpretation, and were thus not forced in any way to provide such services.

ACKNOWLEDGMENTS

First and foremost, JRS-Europe would like to acknowledge and thank each member of the Steering Committee for their committed and professional efforts towards the successful implementation and completion the DEVAS project:

²⁰ JRS-Europe is aware of only one situation, in Cyprus, where the detention centre staff handpicked detainees, and where interviews took place in the presence of such staff.

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| • Andrea Zauner, <i>Caritas Austria</i> | • Ericka Rueschhoff, <i>Caritas Vilnius (Lithuania)</i> |
| • Benoit Willemaers, <i>JRS-Belgium</i> | • Katrine Camilleri, <i>JRS-Malta</i> |
| • Iliana Savova, <i>Bulgarian Helsinki Committee</i> | • Bernadette Hoekstra, <i>Dutch Refugee Council</i> |
| • Maria Ioannou, <i>Symfiliosi (Cyprus)</i> | • Katarzyna Sekula, <i>Caritas Poland</i> |
| • Hana Kamenicka, <i>Association for Migration and Integration (Czech Republic)</i> | • Alexandra Silva, <i>JRS-Portugal</i> |
| • Kristi Toodo, <i>Estonian Refugee Council</i> | • Catalin Albu, <i>JRS-Romania</i> |
| • Heiko Habbe, <i>JRS-Germany</i> | • Robin Schweiger, <i>JRS-Slovenia</i> |
| • Leda Lakka, <i>Greek Refugee Council</i> | • Alžbeta Kovalová, <i>Caritas Slovakia</i> |
| • Marta Pardavi, <i>Hungarian Helsinki Committee</i> | • Paz Bermejo, <i>Spanish Commission for Refugees (CEAR)</i> |
| • Annamaria Cacchione, <i>JRS-Italy (Centro Astalli)</i> | • Marie Christine Eidem, <i>JRS-Sweden</i> |
| • Anna Maria Gallagher, <i>JRS-Ireland</i> | • Margaret Baxter, <i>JRS-United Kingdom</i> |
| • Edgar Cakuls, <i>Caritas Latvia</i> | |
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JRS-Europe acknowledges and thanks each member of the research team for their unwavering commitment to undertake rigorous analyses of the findings, to collaborate with the DEVAS partners and to ensure that each detainee's voice was heard and understood as clearly as possible amidst all of the data:

- Richard Haavisto, *professor of Forced Migration Studies at the Refugee Studies Centre of Oxford University*
- Julia Inthorn, *professor of Statistics and Philosophy at the University of Vienna*
- Alice Kennedy, *independent consultant*
- Benoit Willemaers, *JRS-Belgium*
- Julian Halbeisen, *JRS-Europe*

JRS-Europe would also like to thank the Institute for Ethics and Law at the University of Vienna for facilitating the license for the use of the SPSS statistical software package.

Finally, JRS-Europe sincerely acknowledges and thanks the hundreds of detained asylum seekers and irregular migrants who took part in this study, despite it not having any immediate benefit for their situation.

Overview of relevant legal provisions

The purpose of this section is to give an overview of legal provisions in the national laws of several EU Member States that are relevant for the situation of vulnerable detainees. Details can be taken from the national reports. Here we will focus on five main aspects:

1. Are there any legal provisions with regard to the special situation of certain groups, such as (unaccompanied) minors, pregnant women, etc.?
2. Does the law regulate access to services such as interpreters, medical assistance, etc.?
3. Has a detainee the right of appeal against the detention order and/or the detention conditions?
4. What is the maximum duration of detention?
5. Are alternatives to detention envisaged in national law?

Regulations on certain groups

In Belgium, minors (younger than 18) must in principle not be detained. They are hosted in observation and orientation centres. Six days of detention is possible if the age is doubtful. Also in Czech Republic, Hungary, Ireland, Italy and Portugal, detention of minors under the age of 18 years is not allowed. In Germany the minimum age is 16, while in Latvia it is 14 years. In other countries there is no minimum age for detention but in some (like Austria or Sweden) a detention order against a minor must meet stricter conditions. In The Netherlands, for instance, 12 –16 years old children must be placed in youth custodial institutions.

Bulgaria does not apply detention in cases of asylum seekers from other vulnerable groups such as, pregnant women, or individuals with physical or mental disabilities who should be transferred to the premises of the State Agency for Refugees. In cases of health problems also the German *Laender* in their respective regulations provide for aliens not to be detained. The law in Latvia says that a detained third-country national who has a health disorder shall be accommodated in accordance with the instructions of medical personnel in premises specially equipped for such purposes.

Access to certain services

In all countries law provides for at least basic medical care being given to all detainees.

Seven Member States (Belgium, Czech Republic, Germany, The Netherlands, Portugal, Romania, and Spain) have laws where the provision of social services to detainees is regulated. Another three countries (Austria, Italy and Slovenia) have regulations by which associations providing social services can be granted access to detention facilities. From all other countries no similar provision is reported.

In most countries detainees have the right to use the services of an interpreter during detention. In three countries (Ireland, The Netherlands and Romania) access to interpretation is provided even if the law does not foresee it.

Right of appeal against detention order and/or detention conditions

In accordance to national laws, in all countries a detainee can lodge an appeal against a detention order. Also, in most countries (except Bulgaria, Italy and Romania) detention conditions can be contested, in form of either an appeal or of a request to the relevant authorities.

The maximum duration of detention

The maximum duration of detention as provided in the national laws very much differs across the EU. In some countries there are also different provisions regarding certain groups of detainees, be it Dublin cases, asylum seekers, failed asylum seekers, irregular migrants, etc. The range of the maximum period ranges from three weeks (in Ireland in the case of irregular migrants) to two years (in Romania). Some countries (Bulgaria, Estonia, Ireland in the case of asylum seekers, and Sweden) do not have legal limits of detention.

Alternatives to detention

In some EU Member States the law at least gives the responsible authority the possibility to consider whether in a certain case the purpose of ensuring the availability of the person for his/her forced return can be met by a less severe measure than detention. In Austria for instance the authority may refrain from ordering detention if in their opinion a more moderate measure can be sufficiently applied. Examples for those alternative measures are given in the law as well: Imposing of the obligation to reside at certain places or to report regularly to a certain police station. A regular report to the local police station or to the Aliens' authorities is also envisaged in Bulgaria (for cases in which the deportation cannot be immediately enforced) and Portugal. Designation of certain places of stay as an alternative to detention is mentioned for example in the Belgian and Hungarian laws. In Portugal, a person can be ordered to remain at home while awaiting deportation. The Portuguese law knows other alternatives as well, such as electronic surveillance or granting bail. In Sweden, an alien may be placed under supervision instead of being detained.



DATA FINDINGS

- Basic information
- Possession of information
- Space within the detention centre
- Rules within the detention centre
- Detainees' interaction with staff
- Safety within the detention centre
- Activities within the detention centre
- Medical care
- Physical health
- Mental health
- Social interaction
- Communication with the 'outside world'
- The impact of detention on the individual

1. BASIC INFORMATION

1.1. Age, sex, region of origin and marital status

The average detainee in the DEVAS sample is 30 years old, with the youngest being 10 and the oldest 64 years. Most detainees are between the ages of 25 and 34 years. Persons aged 18 to 24 years are also frequently found in the sample (see table 1).

Table 1: The DEVAS sample population, disaggregated by age

	Number of detainees interviewed	Cumulative percentage of the total sample
Age (in years)		
10-17	28	4.2
18-24	180	27.2
25-34	283	42.8
34-49	142	21.5
50-64	28	4.2
Total	661	100.0
Missing data	24	
Total	685	

A disaggregation of the sample reveals minimal differences in age between the various categories and groups of detainees. The average age of asylum seekers is 29 years, while the average age of irregular migrants is 31 years. Men and women are of the same average age as found in the total sample average. People detained for 31 to 60 and 91 to 120 days are, on average, 31 years old, while those detained for 61 to 90 days are 29 years. The age of those detained for 0 to 30 days match the average age of the total sample average.

Looking at the total sample we find that West Africa, South Asia and Russia are the top three regions where detainees come from. Following this we also find that many in the sample come from the Middle East, East Africa, South-eastern Europe and East Asia. The majority of detainees within the sample are men who are from West African countries, notably Nigeria, but also from countries in South Asia such as Afghanistan, India and Pakistan. A sizable minority identify their country of origin as Iraq and Somalia. Women make up 22 percent of the entire sample, with most also coming from the West Africa region; and out of that group most are from Nigeria. A noteworthy difference between the men and women in the sample is that the latter more frequently come from Southeast and Eastern Europe, Central African and South American.

Most within the sample are single. One quarter say they are married, with seven percent being divorced and two percent widowed. In comparison with men, the women in the sample report slightly lower percentages of being single and married, but more women than men are divorced and widowed (see table 2).

Table 2: Marital status, disaggregated by sex and age

	Single	Married	Divorced	Widowed
Males	70%	24%	6%	1%
Females	62%	22%	11%	5%
Male asylum seekers	68%	26%	5%	0%
Female asylum seekers	67%	18%	9%	6%
Male irregular migrants	71%	22%	5%	1%
Female irregular migrants	58%	25%	13%	4%
Males aged 18-24	91%	9%	0%	0%
Females aged 18-24	72%	20%	2%	7%
Males aged 25-34	71%	26%	2%	0.4%
Females aged 25-34	66%	21%	13%	0%

1.2. Duration of detention

The average duration of detention in the entire sample is 3.01 months, or, 92.35 days. At the time of their interview, individuals may have been detained for as little as one day or as long as 31 months. When we disaggregate the sample we see that the data reveals three important findings:

- *Asylum seekers are detained longer than irregularly staying migrants.* On average they are detained for 3.56 months – 35.54 more days than irregular migrants, and 17.40 more days than the total sample average.
- *Men are detained longer than women.* This is especially true for male asylum seekers, who are on average detained for 3.77 months, or, 23.46 more days than the total sample average.
- *The duration of detention increases with age.* Minors are on average detained for 1.79 months, while persons over 45 years old are detained for 3.17 months. Between these two groups there is a steady upward progression in the duration of detention (see table 3).

Male asylum seekers are the one group in our sample that experiences the most prolonged duration of detention. Women aged 18 to 24 are the one exception to this finding. On average they are detained for 3.69 months – 17.76 more days than the total sample average, 62.76 more days than females aged 25 to 34 years and 27.57 more days than males aged 18 to 24. Asylum seekers with “rejected” applications are detained for an average of 3.60 months.

Table 3: Duration of detention, disaggregated by age

Months in detention	
AGE	
10-17	1.79
18-24	2.94
25-34	2.95
35-44	3.07
45-64	3.17

Although this data represents the average, it is important to note the individual EU Member States where asylum seekers and irregular migrants were detained the longest (see table 4). In general, Malta has the highest percentages of long-term detainees. There we find: 24 percent of all asylum seekers in our sample, 25 percent of male asylum seekers, 13 percent of the men in the sample and 26 percent of women aged 18 to 24. The exception to this is for older detainees: 13 percent of detainees over the age of 45 were interviewed in Slovakia. Other exceptions can be found when we disaggregate the sample by legal status: Spain has the highest percentage of irregular migrants detained for less than 90 days, while Bulgaria has the highest percentage of the same group detained for more than 90 days; Belgium has the highest percentage of asylum seekers detained for less than 90 days, while Malta has the highest percentage detained for more than 90 days.

Table 4: Duration of detention, disaggregated by DEVAS partner countries

Top three countries where detainees were interviewed	
Duration of detention (in days)	
0-30	<ul style="list-style-type: none"> • Spain, 16% • Belgium, Slovakia and Sweden, 10% • Germany and Poland, 8%
31-60	<ul style="list-style-type: none"> • Belgium, 16% • Czech Republic, 11% • Portugal and Sweden, 10%
61-90	<ul style="list-style-type: none"> • Czech Republic, 22% • Belgium and Greece, 13% • Sweden, 10%
91-120	<ul style="list-style-type: none"> • Czech Republic, 17% • Hungary, 15% • Netherlands and Slovenia, 10%
121-150	<ul style="list-style-type: none"> • Bulgaria and Slovenia, 19% • Slovakia and Czech Republic, 14% • Hungary and Sweden, 10%
151-180	<ul style="list-style-type: none"> • Malta, 53% • Slovakia, 16% • Czech Republic, 13%

1.3. Legal status

Irregular migrants barely outnumber asylum seekers in our sample, by 51.3 to 48.7 percent. Within the total sample we find that almost ten percent are persons whose asylum applications have been “rejected” and are now awaiting expulsion, and approximately five percent are asylum seekers awaiting a transfer to a Member State that is

responsible for examining their application.²¹ One quarter of the asylum seekers in the sample were interviewed in Malta, while 15 percent of irregular migrants were interviewed in Spain. A notable exception is found in Portugal, where 15 percent of female irregular migrants were interviewed.

The percentages of asylum seekers and irregular migrants change as we disaggregate the data by age, sex and duration of detention (see table 5). The highest concentration of asylum seekers, 79 percent, is found in the category of persons detained for 121 to 150 days. Second to that, 78 percent of asylum seekers are in the category of persons detained for 151 to 180 days. These two findings are striking because it means that a disproportionate number of the asylum seekers in the sample have been detained for more than five months at the time of their interview. Elsewhere we find that a high percentage of asylum seekers are found in groups of males and females below the age of 24.

Table 5: Percentages of asylum seekers, disaggregated by duration of detention, age and sex

	Percentage of asylum seekers	Comparison to the total sample average (48.7%)
Detainee category		
121-150 days in detention	79%	+30%
151-180 days in detention	78%	+29%
Gender		
Males aged 18-24	58%	+9%
Females aged 18-24	56%	+7%
Age		
Detainees aged 18-24	58%	+8%
Detainees aged 10-17	56%	+7%

In comparison to asylum seekers, the highest percentage of irregular migrants, 65 percent, are found in the category of persons detained for 0-30 days. Elsewhere we find that the irregular migrants in our sample are more frequently found in older age categories (see table 6).

Table 6: Percentages of irregular migrants, disaggregated by duration of detention, age and sex

	Percentage of illegally staying migrants	Comparison to the total sample average (51.3%)
Detainee category		
0-30 days in detention	65%	+14%
Gender		
Males aged 25-34	56%	+5%
Females aged 25-34	54%	+3%
Age		
Detainees aged 25-34	55%	+4%
Detainees aged 35-44 and 45-64	54%	+3%

The data shows that the percentage of asylum seekers decreases as detainees become older, while the percentage of irregular migrants increases with age. Fifty four percent of minors are asylum seekers, for example, compared to 45 percent of detainees aged over 45 years. Alternatively, 46 percent of minors are irregular migrants in comparison to 55 percent aged over 45. In the same way, where the percentage of 'rejected' asylum seekers increases with age, the percentage of 'Dublin' asylum seekers decreases with age (see table 7).

²¹ Otherwise known as a "Dublin transfer", based on the provisions contained within the so-called Dublin Regulation (COUNCIL REGULATION (EC) No 343/2003 of 18 February 2003 establishing criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

Table 7: Age profile of legal status

	Asylum seeker	Illegal migrant	Rejected asylum seeker	Asylum seeker in “Dublin II” detention
Age (years)				
10-17	54%	46%	0%	11%
18-24	57%	43%	7%	3%
25-34	45%	55%	13%	7%
35-44	46%	54%	10%	5%
45-64	45%	55%	13%	7%

1.4. Chapter summary

The purpose of presenting this demographic data is to set the foundation for the following sections, all of which will present what detainees have said in response to the questions posed to them during their interviews. An examination of this basic examination reveals the context within which detainees have made their statements, and within which we base our forthcoming analyses. The data specifically informs us that:

- *The average detainee in our total sample is male, single, 30 years old and likely to be from West Africa, with a minority from South Asia or the Middle East. But a significant minority of women are present within the sample, of which many are divorced and/or widowed, and come from not only West Africa but also Eastern Europe and Eastern Africa.*
- *Asylum seekers, men and persons older than 45 years are detained longer than others within the sample; and Malta detains people for the longest period of time. But we also see that females aged 18 to 24 years are detained for 3.69 months, and “rejected” asylum seekers for 3.60 months. Concerning Member States, alongside Malta we find that Bulgaria, Czech Republic, Hungary and Slovakia are among the countries that also detain people for a prolonged period of time.²²*
- *There are almost as many asylum seekers as there are irregular migrants in our sample, but the latter slightly outnumbers the former. But we also find that asylum seekers are more frequently present in the sample as the duration of detention increases. Moreover, the asylum seekers in the sample are younger than the irregular migrants. In this the data demonstrates a clear pattern showing irregular migrants and ‘rejected’ asylum seekers to be older, while asylum seekers and those in “Dublin” detention are younger.*

2. POSSESSION OF INFORMATION

Detainees were asked a series of questions relating to their possession of information. The purpose of this questioning was to assess the level of awareness and knowledge they have about a variety of factors that would concern their situation: duration of detention, awareness of the reasons for detention and knowledge of the asylum procedure. Detainees were subsequently asked if they would need more information, and if so, to elaborate upon the reasons for wanting more of it. The possession of information is an important factor of vulnerability within the context of detention. The closed environment of detention and the resulting restriction on detainees’ freedom of movement means that the potential ways in which they can obtain information becomes limited. They must have either a

²² The DEVAS methodology is not equipped to establish a definition of “prolonged detention”; hence this concept shall not be defined within this report. However, as we shall observe in later chapters, the data does reflect a difference in the responses between persons detained for +/- 90 days. Therefore for the purposes of this report, any period of detention that is longer than 90 days will be considered as “prolonged”.

connection to external support, depend on whatever is told to them by detention centre staff or seek information from co-detainees. Without adequate information, then detainees may literally be kept ‘in the dark’ on the circumstances of their situations.

2.1. Awareness of the reasons for detention

2.1.1. Average data findings

On average the detainees in the sample maintain that they are aware of the reasons for their detention. But almost one quarter say that they are unaware. Those who do know are most likely to have been informed by the police, or to a lesser extent, by national administrative authorities. A minority of detainees say that they did not learn about the reasons for their detention until they spoke with the detention centre staff. Up to ten percent of the detainees that were interviewed say that “persons not in charge” informed them, i.e. persons who are not legally obligated by the State to provide such information, such as private lawyers, non-governmental organisations and social and familial networks. Only five percent of detainees profess to have been aware of the reasons for detention before anyone informed them. Most detainees report to have been informed of the reasons for their detention either during their arrest or interception for detention, or during official asylum or immigration administrative procedures. Fifteen percent admit that they knew they were at risk of detention while living under an irregular status in the host EU Member State.

2.1.2. Disaggregated data findings

The data portrays a different scenario after it is disaggregated by age, sex, legal status and duration of detention. At 86 percent, irregular migrants are 15 percent more aware of the reasons for their detention than asylum seekers purport to be. Only 66 percent of female asylum seekers report to be aware of detention – six percent less than male asylum seekers, and twelve percent less than the total sample average. In fact, the data findings show that asylum seekers across categories frequently report to know less about the reasons for their detention than irregular migrants do, and less than the total sample average (see table 8).

Table 8: Awareness of the reasons for detention, disaggregated by age, sex, legal status and duration of detention

Are detainees aware of the reasons for their detention?		
Detainee category	Yes	No
Asylum seekers	71%	29%
Illegally staying migrants	86%	14%
Male asylum seekers	72%	28%
Female asylum seekers	66%	34%
Male irregular migrants	86%	14%
Female irregular migrants	86%	14%
Asylum seekers detained for <90 days	77%	23%
Asylum seekers detained for >90 days	61%	39%
Irregular migrants detained for <90 days	87%	13%
Irregular migrants detained for >90 days	78%	22%

Other groups contain significant minorities of detainees who report that they are unaware of the reasons for their detention. From those who are younger than 18 years, 32 percent report to be unaware, or ten percent more than found in the total sample average. In comparison to other age categories, this makes minors the least aware of the reasons for their detention. Thirty seven percent of women aged 18 to 24 say they are unaware, more than men of

the same age, than women aged 25 to 34 and 15 percent more than the total sample average. Notably, the data shows that awareness of the reasons for detention increases with age (see table 9).

Table 9: Awareness of the reasons for detention, disaggregated by age group

Percentage of detainees who are aware of the reasons for their detention	
AGE	
10-17	68%
18-24	71%
25-34	80%
35-44	80%
45-64	90%

As detention endures asylum seekers and irregular migrants more frequently speculate about the rationale for their detention. In particular, persons detained for 121 to 150 days at the time of their interview report are less frequently aware of the reasons for their detention than when compared to other detainees on the basis of duration of detention. One third of detainees from this group say they do not know why they are still in detention, which is among the highest even when compared to all other detainee groups in the total sample.

2.2. Level of knowledge about the asylum procedure

2.2.1. Average data findings

Asylum seekers were asked to rate their knowledge of the host Member State's asylum procedure on a Likert scale of 1 to 10, from 'poorly informed' to 'well informed'. After the interviews were collected and the data entered into the central DEVAS database, the scale was adjusted to reflect a score of 1 to 5. On average, asylum seekers scored 2.95 out of 5.00. More specifically, 40 percent say they are 'uninformed', while 37 percent say they are 'informed'. Twenty four percent claim to be 'moderately informed' of the asylum procedure. Asylum seekers' level of knowledge about the asylum procedure does not follow a clear trend as the duration of detention endures.

2.2.2. Disaggregated data findings

The data indicates that knowledge of the asylum procedure increases with age. Asylum seekers between 10 and 17 years score 2.12 out of 5.00, or just slightly less than one point from the total sample average. Added to this, 76 percent profess to be 'uninformed' of the asylum procedure – 36 percent more than the total sample average. Within this group only 18 percent say they are 'informed'. As shown in table 10, the percentage of detainees who are informed of the asylum procedure increases to 50 percent for detainees older than 45 years.

Table 10: Level of knowledge of the asylum procedure, disaggregated by age

AGE (in years)	Level of knowledge based on a 5.0 scale	Percentage who are informed of the asylum procedure	Percentage who are uninformed of the asylum procedure
10-17	2.12	18%	76%
18-24	2.84	32%	43%
25-34	2.97	39%	39%
35-44	3.10	45%	37%
45-64	3.28	50%	33%

Female asylum seekers aged 18 to 24 also report a lack of information about the asylum procedure: 60 percent report to be 'uninformed' while only one quarter report to be 'informed'. Based on these findings, this group of detainees is 22 percent more uninformed than men of the same age, and 20 percent more uninformed than the total sample average. As a whole, the female asylum seekers within the sample are more uninformed about the asylum procedure than male asylum seekers are.

2.3. Detainees' expressed need for more information

2.3.1. Average data findings

A majority of detainees express a strong desire to obtain more information about their situation. Above all they want to know more about the host Member State's asylum and immigration procedures. Following that, detainees want to learn more about the duration of their detention and the reasons for their detention. In many of their statements detainees express a profound concern about the course of their asylum applications, or the impending removal to their country of origin. Others express a need to simply know "everything".

"I filed an application to the State agency for refugees, and I want to know what is going on and why I am still here in the detention centre."

Male, 30-years-old, asylum seeker detained in Bulgaria for 136 days

"I want to know whether I will go back to Albania. They keep telling me that 'you will go tomorrow' but I never end up leaving. I want to know what is going to happen."

Male, 16-years-old, illegally staying migrant detained in Greece

"Actually, I don't know what this centre here is meant for."

Female, 24-years-old, asylum seeker detained in Belgium

"I don't know why they keep me here. My embassy doesn't cooperate so why do they keep me here? It is the second time they detain me in this country. Every time I am here they advise me to ask for asylum, and then they put me in a detention centre. I go to court, they give me a lawyer ... they just want to make money."

Male, 24-years-old, illegally staying migrant detained in The Netherlands

A slight majority of detainees say that they need more information so they can better prepare for what lies ahead of them. The need to retrieve a sense of a 'life perspective' is persistently present in their responses. Placement in a closed detention centre cultivates within detainees a sense of isolation from the outside world. Many express frustration at having their life plans interrupted with little to no indication of how they would resume their lives after release.

Second to that sentiment, detainees express a need to better adapt to their current situation in detention. The negative atmosphere of detention and the uncertainty of their asylum or immigration status have placed detainees in a situation in which they are unfamiliar of how to proceed. "To me this information is important," states a 46-year-old man detained in Bulgaria, "because here my life is ruined. There are no legal terms for detention here. I do not know when I will be released. I want to start my life again because here I am in prison." A 17-year-old female asylum

seeker detained in Malta says she needs more information “because I was expecting after all [of the] suffering to get protection and to live a normal life.” Others express no other reason than simply their general right to know. “I’m a human being, and human beings need information”, declares a 22-year-old Somali asylum seeker detained in Malta. “I come from Africa, so I need information about the country where I live now.” And yet others have only very personal and practical reasons for wanting more information: “How will I get in touch with my family?” asks a 48-year-old man detained in the Czech Republic.

2.3.2. Disaggregated data findings

The demands detainees have for more information decrease as they become older (see table 11). Seventy nine percent of minors, for example, articulate a need for more information compared to 52 percent of detainees older than 45 years. Detainees under the age of 24 frequently say they want to know more about the duration of their detention. “When will I be released?” is the most common question posed by detainees of this age. Looking at minors, over half express a need to know more information so that they can adequately prepare for their future. “I want to make a plan for my life”, asserts a 17-year-old Afghani boy detained in Greece. Interestingly, just as the need for more information decreases with age, so does needing it to prepare for the future.

Table 11: The need for more information, disaggregated by age

AGE	Percentage of detainees who need more information about their situation
10-17	79%
18-24	70%
25-34	71%
35-44	72%
45-64	52%

Persons detained for 121 to 150 days at the time of their interview stand out in their need for more information. Within this group, 85 percent express a wish for more information, with almost one third saying they want to know the expected duration of their detention – six percent more than the total sample average and more than any other age category. A number of these detainees also want to know more details about the asylum and immigration procedures in the host Member State.

Three quarters of women aged 18 to 24 express a need for more information about their situation, in particular about the existing asylum and immigration procedures. But many convey individual concerns and questions about their specific circumstances, such as their families, for example. When asked for what reasons they would like more information, many within this age bracket assert that the information should simply be made available to them. A 21-year-old Congolese woman detained in Belgium, for example, wants to “at least understand what they tell me.” Over one third of women aged 18 to 24 in the sample express similar sentiments.

2.4. Chapter summary

Immigration detention in the EU is fraught with legal complexity. Foreigners that arrive on Europe’s shores, land borders and airports are unlikely to be familiar with such complexity, and unprepared to absorb the multitude of information that may or may not be officially presented to them. Thus the ‘possession of information’, *per se*, regarding asylum and immigration procedures, duration and reasons for detention and expected release dates serves as a critical indicator of detainees’ ability to cope with their time in detention. On average, the asylum seekers and irregular migrants in the sample report to be well aware of the reasons for their detention. But there nevertheless exists almost one quarter of detainees who say they are not aware of such reasons. The findings inform us of several points after taking together the average data findings with what was found after disaggregating the sample for age, sex, legal status and duration of detention:

- *Asylum seekers report to know less about the reasons for detention than irregular migrants do.* Male and female asylum seekers, and also those detained for more than 90 days, report higher percentages of being unaware of the reasons for their detention than when compared to irregular migrants and also to the total sample average.
- *Younger detainees report to possess less information than when compared to older detainees.* Minors are less aware of the reasons for their detention than every other age category. As detainees become older, the more frequently they admit being aware of the reasons for their detention. On the other hand, younger detainees express a more frequent need for more information. Minors are particularly uninformed, not only about the terms of their detention but also about the asylum procedure. Women aged 18 to 24 are more unaware of the reasons for detention than men of the same age, and more than men and women who are above the age of 25.
- *Women report to possess less information than men do.* Almost one quarter of female asylum seekers are more 'uninformed' than male asylum seekers about the asylum procedure in the host Member State.
- *Long-term detainees report to possess less information than recently detained persons.* Asylum seekers and irregular migrants who were detained for more than 90 days at the time of their interview are more frequently unaware of the reasons for their detention than those detained for less than 90 days. In particular, one third of the persons detained for 121 to 150 days say they are unaware of the reasons for their detention – ten percent more than the total sample average. A starting 85 percent of persons detained for 121-150 days express a need for more information.

3. SPACE WITHIN THE DETENTION CENTRE

Detainees were assessed for their personal perceptions of the space within the detention centre. The architectural plan of the detention centre, the conditions of the cells and of the facilities within the detention centre has important links to vulnerability. Detainees who are kept in clean, well maintained and spacious facilities may feel less negative about their situation, at least in the short term. The number of windows, the presence of sun light and the availability of exterior grounds may hold a great impact on detainees' physical and mental well being. Conversely, cramped spaces, unclean facilities, barred windows and restricted movement within the centre can foster within detainees a sense of imprisonment. Worse still, is that detainees who are kept for a prolonged period of time may physically and mentally suffer if the conditions of the space within the centre are inhospitable.

3.1. The conditions of the cells and the rest of the centre's space

3.1.1. Average data findings

Only 18 percent of the detainees in the sample feel positively about their cell²³. Instead more feel negative, or to slightly lesser extent, simply neutral about the condition of their cell. Detainees who feel negative make strong statements that compare the conditions of their cell to that of a prison. A 34-year-old Tunisian man detained in Belgium said his cell is like a "prison room", saying, "It is not OK for more than a few days. People stay here for

²³ For the purpose of this report, a "cell" shall be defined, without carrying a negative or positive connotation, as the room within the detention centre where the detainee is principally kept. Some of the detention centres in Europe contain "cells" that bear a strong resemblance to those found in prisons in that the windows are barred and the rooms sparsely furnished, with thick doors adorned only with a small window. In some Member States detainees are kept in their cells for most of the day, while in others detainees are free to use the rest of the space within the detention centre. Some detention centres provide for one-person cells, while other centres keep two, three or more in one cell. Yet in a few other Member States, such as in Malta and in Greece, detention centres bear more resemblance to large dormitories where many detainees are kept.

months.” A 27-year-old Nigerian man detained in Spain describes his cell in equally stark terms: “[It is] very bad. It is bad for everybody. Hygiene and sanitation are really bad. Water leaks from the toilets and goes into the bedrooms. It smells awful.” Although many detainees identify specific issues such as the level of cleanliness, or the condition of the facilities within the cell, most others who felt negative simply cited the general atmosphere, or climate, of the cell: The lack of comfort, the poor air quality, the lack of windows and the varying temperatures within the room all contribute to this sense of negativity. Detainees who positively describe their cell do not elaborate their answers in the same way that detainees who respond negatively do. In these cases, detainees simply describe their dormitories as “good”, “clean” or “big”.

As to their opinions regarding the rest of the centre’s space, an even percentage of detainees – 43 percent – feel both negative and neutral, but only 15 percent report feeling positively. Most detainees base their opinions on the condition of the centre’s facilities, such as the lack of kitchen equipment or the lack of outdoor space. Many also point to the small size of their detention centre, and how there is simply too little space to move within. Others protest the lack of hot water. Detainees base more of their statements on the state of cleanliness of the centre space than they did when reporting on the condition of their cells. A detainee in Greece echoes many others when he describes the centre as “dirty and disgusting”, with “cockroaches in the toilets and sometimes where the food is stored.”

3.1.2. Disaggregated data findings

Asylum seekers are more negative about the condition of their cells and of the entire detention centre space than irregular migrants are; and they are more frequently negative than the total sample average. Approximately one quarter of asylum seekers base their opinion of the detention centre’s space on ‘cleanliness’ – seven percent more than the total sample average, and thirteen percent more than irregular migrants. In regards to the duration of detention, while there is no clear linear trend, people detained for 121 to 150 days and 61 to 90 days during the time of their interview feel more negatively than others about the conditions of the cells, and the rest of the detention centre’s space.

The data does indicate that younger detainees feel more positively about the detention centre space. Minors, however, feel more negatively than other age groups as concerns the specific condition of their cells. They also find the level of cohabitation to be problematic, especially in situations where they are isolated from the rest. A 17-year-old Vietnamese boy detained in the Czech Republic says, “I’m separated from all the other people. I can meet other people only at breakfast, lunch and dinner time.” Looking to other younger detainees, over half of women aged 18 to 24 report feel negatively about their cell, while most feel better about the rest of the centre’s space.

3.2. Personal space within the centre

3.2.1. Average data findings

Detainees were asked if they found their centre to be “overcrowded”, i.e. if they think that there are too many people in each cell, or if in general they think that the centre is beyond its capacity to hold people. A majority of detainees say that their centre is not overcrowded. Nevertheless, just over one third state the contrary. Up to 61 percent of those who describe feeling overcrowded base their statement on the size of their cell and the limits of its capacity. “There is no space; there are around 42 detainees in my room!” exclaimed a detainee in Malta. For some, the large numbers of migrants confined to one small space made the climate feel ‘prison-like’: “There are a lot of people in here. This makes me feel bad because I think I am in prison without being guilty”, says one man detained in Bulgaria. A smaller, but still significant, percentage of detainees attribute their response not to the size of the cells, but to problems related to cohabitation. A 27-year-old female detained in Belgium says

Everyone comes to live in Belgium. Some listen to CDs, some put the TV loud or want another programme. Some argue over the telephone because there are not enough [for all detainees to use]. Where could we go to be in peace?

Detainees who feel overcrowded continue to compare their situation to that of prisoners. Some also point to flows of migrants that arrive and depart from the centre, leading to a transitory effect that builds upon the stress caused by overcrowding. “Everyday people come in and out,” says a person detained in Spain, “even mad people come in here. It is like a prison.” A very small percentage of detainees base their perception of “over-crowdedness” on the conditions of sanitation.

Detainees were additionally asked if they had access to any space where “they could be alone”. Just over one third answered negatively, while 65 percent said they do have access to such space. In Portugal, for example, each detainee has their own cell where they can go and come from when they wish. In countries where detention centres may house two detainees per cell, detainees’ sense of privacy is not altogether affected. But it is in those detention centres where more than two people are kept to each cell where detainees report having difficulty finding personal space for themselves.

3.2.2. Disaggregated data findings

Perceptions of overcrowded conditions differ between the EU Member States where the DEVAS project was implemented. The Czech Republic, Romania and Hungary, for instance, have high percentages of detainees who feel that the conditions are not overcrowded. In contrast, 75 percent of the detainees interviewed in Malta and in Bulgaria feel that the conditions are overcrowded, saying that there is simply not enough space for all detainees to live in. Differences are also found when the data is disaggregated by legal status, sex, age and duration of detention (see table 12).

Table 12 shows that, asylum seekers feel more overcrowded than irregular migrants do. The biggest departure from the total sample average lies with asylum seekers detained for more than 90 days, and for women aged 18 to 24. As with the findings in the total sample average, these findings are also dependent on where detainees were interviewed.

The ability to find space to “be alone” differs among the various groups in the sample. On the whole, asylum seekers less frequently claim to have private space than irregular migrants do. Female asylum seekers more frequently report having private space than male asylum seekers do. The opposite is true for irregular migrants, where more males than females report having access to such space. But if we remove ‘legal status’ from this comparison, then we find that women have more access to private space than men do. Looking at duration of detention, almost three quarters of asylum seekers detained for more than 90 days report not having space to be alone – seven percent more than irregular migrants detained for the same time, and eight percent more than the total sample average. Detainees aged 18 to 24 report having the least access to private space when compared to the other age groups.

Table 12: Detainee perceptions of over-crowded conditions, disaggregated by legal status, sex, age and duration of detention

	“Do you feel that the detention centre you are in is overcrowded?”	
	Yes (Master average: 39%)	No (Master average: 61%)
Asylum seekers	42%	58%
Irregular migrants	36%	64%
Female asylum seekers	38%	62%
Male asylum seekers	43%	57%
Female irregular migrants	27%	73%
Male irregular migrants	39%	61%
Irregular migrants detained for <90 days	32%	68%
Irregular migrants detained for >90 days	49%	51%
Asylum seekers detained for <90 days	36%	64%
Asylum seekers detained for >90 days	51%	49%
Ages 10-17	24%	76%
Ages 18-24	48%	52%
Ages 25-34	41%	60%
Ages 35-44	32%	69%
Ages 45-64	26%	75%
Women aged 18-24	50%	50%
Men aged 18-24	47%	53%

3.3. Chapter summary

The varying legal environments on asylum and immigration between the EU Member States are matched by the variance found in the standard of conditions found within detention centres across the EU. In this chapter we presented detainees’ responses to questions about the space within their detention centre, such as the conditions of the cells, and other interior and exterior spaces. We also presented detainees’ perceptions of “over-crowdedness” in their centres, and their access to private space, i.e. a “space to be alone”. The indicates that

- *Detainees feel negatively about the living space within their detention centre.* In general most detainees point to the “general climate” within both their cells and the rest of the centre’s space as a factor of their negative responses. Detainees do feel strongly about the level of cleanliness and the condition of the facilities. Many, for example, complain of unsanitary toilet facilities and insect infestations in the kitchen facilities. Others equate the living space within their centre to the atmosphere found in prisons. In particular, detainees under 24 years of age in feel very negative about the conditions in their cells.
- *Perceptions of “over-crowdedness” depend on the country of detention, but differences do exist based on legal status, duration of detention, sex and age.* Detainees that were interviewed in Malta and Bulgaria more frequently report feeling overcrowded than do detainees in Belgium, Sweden, the Czech Republic and Romania, for example. But if we remove the ‘country of detention’ from comparison, we observe that asylum seekers feel more overcrowded than irregular migrants, and that detainees aged 18 to 24 feel more overcrowded than all other age groups. Asylum seekers and irregular migrants detained for more than 90 days at the time of their interview more frequently report feeling overcrowded than those detained for less than 90 days.

- *Males and asylum seekers detained for more than 90 days least report having access to private space.* Irregular migrants more frequently report having access to private space than asylum seekers do. Compared to other age groups, detainees aged 18 to 24 report having little access to such space.

4. RULES WITHIN THE DETENTION CENTRE

Detainees were asked about their knowledge of the *rules* within their detention centre. The purpose of this questioning was to assess the extent to which detainees are aware of the boundaries within the detention centre, i.e. what they can or cannot do. Rules on behaviour, daily routine, access to recreational material and communication devices may all have an impact on the way detainees perceive their situation to be. Restrictive rules may lend to a prison-like atmosphere, while more lax rules might allow detainees a level of flexibility to manage their lives in whichever way suits them. Awareness of the rules can also say something about the relations between detainees and staff, since it is the latter that is responsible for informing detainees about all aspects of life in the centre. Nevertheless, sets of 'informal' rules may exist that might have an even greater impact on detainees' lives. Vulnerability is closely linked to personal awareness of how one should conduct oneself, especially since the situation of detention is new to so many of the detainees that were interviewed. If one does not know how to interact within the boundaries of detention, set by the formal and 'informal' rules, then they may become vulnerable to harm from both the environment of detention, and the other people in the centre.

4.1. Detainees' awareness of the rules, and its impact on daily life in detention

4.1.1. Average data findings

More than half of the detainees say that the most familiar rules to them are those that regulate daily routine. Detainees within this group frequently describe the times that they must wake up and have breakfast, when they must stay within their cells, when they can watch television, use the telephone, have dinner and so forth. Some detainees portray daily routines that are isolative and very low in physical activity. A 19-year-old man detained in Greece says, "They open the cells for 30 minutes to one hour, three times per day. During this time we can make a telephone call, go to the toilet and take a shower, etc. We go to the yard two to three times per week for one hour." Another detainee in Greece, a 24-year-old Afghani man, expresses a similar scenario: "We are always indoors. We go to the yard only once or twice per week for 30 minutes."

Alongside the description of the daily routine, a number of detainees tell of particular behavioural rules, such as the inability to smoke cigarettes in certain places, or the inability to use their mobile telephones. A small percentage of detainees say that there are *no rules* in their detention centre. "There are no rules to follow here", says a Somali man detained in Malta, "We're locked in here and do what the soldiers tell us to do." Another says, "There are no rules. You respect me and I respect you."

Another small group of detainees say that they do not have any information about the rules. "Nobody explained to me the rules", says a 31-year-old woman detained in Spain, "there is an absolute lack of information. I know about the rules from other detainees." Metaphors to prison are again used: "I don't know the rules. We are in prison. We cannot do anything." Other detainees describe a set of informal rules that are determined by certain groups of detainees who possess a more powerful social status than the others. According to a detainee in Cyprus, "Rules are set by the 'high-order' prisoners, the ones that are here for a longer period of time and who have better relations with the guards." The issue of staff bias towards detainees appears in some of the detainees' responses. "Guards segregate detainees by race", says one detainee, "Certain detainees are treated more favourably than others." The arbitrariness of the rules within some detention centres has an effect upon detainees' self-perception. A Ghanaian woman detained in Germany says, "If you want to go outside, you cannot. When it's raining, they tell you to go out. They are treating us like animals. When they are cleaning, they lock us in one room."

Most detainees feel that the rules within the detention centre cannot be changed. Even for those who feel that opportunities for change may exist, in the end they conclude that in practice the rules are hardly ever changed. According to detainees, the most relevant rules for are those that dictate daily routine – in particular, the rules that dictate sleeping times. They express frustration both at being forced to sleep at fixed times, i.e. mandatory nightly curfews, and at not being allowed to sleep whenever they wish. One detainee says that the “hour to go to sleep is way too early”, and another says, “We sleep all day long; it’s too difficult to go to sleep early.” A person detained in Belgium laments, “If only they could let us sleep. We do not work. We wake up tired. We do not have the right to rest during the day. 7:00am [wake up time] is not OK.”

A smaller number of detainees express that “all rules” within the detention centre are important to them. An even smaller group believe that none of the rules are relevant for them. Many report not being interested in whatever rules exist; and yet others simply do not know how to respond to the question, “Which rules are most important for you?” But others tell of a situation in which they find the detention centre rules to be the least of their problems. “There are no important rules here,” says an Algerian detainee in Belgium, “I left my country for the better, [but] I found worse.”

4.1.2. Disaggregated data findings

There is little variation in the types of responses when comparing legal status. The climate of closed detention and the existence – or non-existence – of rules is more or less the same irrespective if one is an asylum seeker or an irregular migrant. The exception to this is that irregular migrants more readily say that no rules exist in their detention centre, than when compared to asylum seekers. More variations emerge when examining the data by sex, age and duration of detention. Nine percent more females than males say that they do not have information about the rules. Minors report to know less about the rules than those in other age categories, and they more frequently report not caring about the rules. Twelve percent of people detained for one month report that they do not know about the rules of their detention centre, while over one third of those detained for 151 to 180 days describe their detention centres as being without rules.

4.2. Chapter summary

The rules within a detention centre are important because they impact the daily lives of detainees. Precise and clearly communicated rules allow detainees to navigate the environment within a detention centre, and to establish boundaries for themselves and for others. Any discrepancy in the existing rules, or the lack of rules at all, might very well lead to situations where certain detainees or groups of detainees become more powerful than others, thereby leading to a disordered environment that may worsen the personal impacts of detention. Disaggregating the data set does not show any stark differences between groups of detainees. The rules, or lack thereof, apply to almost everyone in the data set irrespective of legal status, sex, age and time spent in detention. In this regard, the most compelling data findings emerge as we examine the averages from the total sample.

- *Detainees are most impacted by the rules that affect their daily routine.* The data informs us that detainees are most familiar with the rules that dictate daily regimen. The fixed eating times, recreation hours and mandatory nightly curfews are described in negative terms by most. This fixed daily regimen leads detainees to compare their situation to that of prisoners.
- *For many detainees, the rules lead to isolation and inactivity.* A large number of detainees depict detention centre rules that keep them inside their cells for long periods of time, with only periodic breaks to move around within the rest of the centre. As a result, many detainees say they sleep too much during the daytime, which leads to insomnia at night. The inactivity and isolation leaves other detainees feeling degraded and undignified.

- *The ‘informal’ rules are just as important as the ‘formal rules’.* Some detainees describe an atmosphere where detainees of certain nationalities receive more favour from the staff, and are thus freer to do as they please. The consequence is that ‘less favourable’ detainees become subject to whatever system of rules that are established by the more dominant group. This creates an atmosphere of arbitrariness, uncertainty and mistrust. It also makes certain detainees more vulnerable to other, more socially dominant, detainees.

5. DETAINEES’ INTERACTION WITH STAFF IN THE DETENTION CENTRE

Detainees were asked to describe the type of security staff they are in regular contact with, and the quality of their interaction with them. An obvious limitation to this question is that detainees may be unfamiliar with the division in roles among staff. They might perceive everyone in the staff as belonging to security, especially if the existing staff-detainee relations are poor. In any case, the level and quality of interaction with staff is important when considering the vulnerability of detainees. Staff persons have a high level of leverage over detainees, who, as a result of their position, are much less empowered than staff members are. As a result, detainees may either benefit from staff persons who interact well and respect their dignity and rights, or detainees may suffer from staff attitudes and behaviours that are abusive. Staff persons form an important part of a detainee’s social network within the detention centre. Detainees may become very dependent on the staff, since the closed environment of detention restricts detainees’ abilities to independently manage their lives. This dependence has the power to both improve and worsen the circumstances of detention.

5.1. Level of contact with staff and quality of interaction

5.1.1. Average data findings

An overwhelming number of detainees say they are most frequently in contact with the security staff of the detention centre. Within this group we find that one-third report to have contact with social service staff. But detainees from only eleven out of the 23 countries in the DEVAS study report having contact with social service staff, and of that group 28% were interviewed in Belgium and 26% in the Czech Republic. The frequency of contact with healthcare, domestic and administrative staff is low.

Detainees feel mostly positive about the quality of their interaction with staff. These detainees express their interactions with staff as being “nice”, “fine”, “friendly” and “kind”. A 37-year-old Brazilian woman detained in Portugal describes the staff as “good, humble people” who are available “every time we need [them]”. Sixteen percent of detainees describe their interactions with staff as being negative. Detainees who feel this way describe being treated “inhumanely” by staff, or in a “violent” manner. Others criticise staff for being unwilling to grant requests, or being “indifferent” to their needs. But more detainees simply feel neutral about their interaction with staff, and just as many feel that it varies depending on the situation. A 29-year-old Nigerian man detained in Bulgaria says that “some of them are really nice, but some of them are not. They [those who are not ‘nice’] treat us like animals.”

Many more detainees feel negative about the manner in which staff supports their needs. While the majority feel positive, almost one-third say that staff does not adequately support their needs. In these cases detainees express frustration at not having access to translators, having too little access to self-hygiene products or not being able to receive special requests. Most detainees say that their opinions reflect staff’s inability to fulfil the full range of their needs; others say that staff persons do not address special circumstances. A 21-year-old Moroccan man detained in Greece, for example complains of not receiving staff support for his skin disease. A 38-year-old Syrian man detained

in Hungary says, “I got no answer about my many requests to meet my lawyer.” An Ethiopian man of the same age detained in The Netherlands states that the staff refused his many requests to meet with a doctor.

5.1.2. Disaggregated data findings

None of the minors who were interviewed report being in contact with health care staff. Together with 18 to 24 year old detainees, these two groups are below the total sample average in the frequency of contact with health care staff in the detention centre. The data shows that contact with health care staff increases as detainees become older – up to 21 percent for detainees older than 45 years. Similarly, the older detainees are the more likely they hold positive opinions about staff fulfilment of their needs, starting at 39 percent for minors and ending at 61 percent for detainees older than 45 years. Concerning the duration of detention, those detained for three to four months feel the more negative about the quality of staff support than other groups within the category. There is little difference when comparing legal status and sex. The exception to the latter is that women aged 18 to 24 are more negative about the quality of staff interaction and support than men of the same age.

5.2. Staff discrimination towards detainees

5.2.1. Average data findings

A majority of detainees say that they have not experienced any discrimination from detention centre staff; but 20 percent do say that they have. Most detainees within the latter group attribute the discrimination to particular factors and circumstances, and not as a part of a pattern of discrimination from detention centre staff. For example, some detainees identify positive discrimination from staff as a result of their good behaviour. A 32-year-old Croatian man says, “If you respect them [staff], they will respect you too.” Others remark that detainees who are detained longer are treated differently than newcomers. A 46-year-old Iraqi detained in Bulgaria says “the guards treat the people who are more than one year in detention differently from the others ... they are treated better.”

Nonetheless, approximately one-third attributes the discrimination they experience to ethnicity and nationality. For example, two Indian and Pakistani men detained in Germany state that the staff treats European and Asian detainees differently. A 29-year-old Kosovar woman detained in Hungary says that the staff treats Albanians very poorly. A detainee in Spain goes so far as to say he is “treated better than the Moroccans and Africans” because he is Hispanic.

A smaller percentage attributes being discriminated against due to their inability to speak the same language as the staff. “[One] who doesn’t understand Czech is nothing here. [He] has no rights,” says a 27-year-old Mongolian man detained in the Czech Republic. Few detainees in our sample pointed to age and sex as reasons for staff discrimination. A woman detained in Austria explains that the staff treats her nicely “because I’m the only woman here.”

5.2.2. Disaggregated data findings

An examination of the data by age category does not reveal great differences from the total sample average. The one exception is for minors: detainees within this group more frequently identify language as a factor for experiencing discrimination from staff. A 16-year-old girl from Sierra Leone, for example, says that when she goes to the detention centre guards, “they ask me to speak German”. Bigger variations exist when we disaggregate the data by sex. Women report experiencing staff discrimination slightly more than males do, and they overwhelmingly point to ethnicity and nationality as reasons. The same finding applies to women aged 18 to 24, where 82 percent blame ethnicity and nationality as a reason for discrimination. We also find that female asylum seekers more frequently report experiencing discrimination than male asylum seekers do. But this does not apply to male and female irregular migrants: in this respect, male irregular migrants more frequently report discrimination than their female counterparts.

Looking at legal status, irregular migrants more frequently report experiencing staff discrimination than asylum seekers do. They also more frequently blame ethnicity and nationality, language and sex as reasons for the discrimination – but not their legal status. Concerning duration of detention, irregular migrants detained for less than 90 days at the time of their interview most frequently report experiencing staff discrimination. Taking asylum seekers and irregular migrants together, we find that those detained for 121 to 150 days experience staff discrimination more frequently than others.

5.3. Chapter summary

The level and quality of detainees' interaction with staff in the detention centre can serve as an important indicator for detainees' overall experience in detention, simply because detainees are so often in contact with staff due to the circumstances of their situation. The restriction upon their liberties means that detainees are fully reliant on the staff to meet their needs. As such, detainees are also subject to the behaviours and attitudes of staff, whether they are positive or negative. In this sense the data indicates that

- *Detainees are more frequently in contact with security staff than with other types of staff in the detention centre.* It may be the case that some of the detainees we interviewed do not know the differences in staff roles, resulting in their perception that all of the staff belongs to 'security'. Whether or not this misperception exists, it may indicate that detainees perceive the general role of the staff to be more security-minded than sympathetic.
- *Generally, detainees find their interaction with staff to be good but the fulfilment of their needs by staff to be poor.* Detainees may feel positive or neutral about the behaviours and attitudes of staff, but many feel that the staff is inadequately addressing their needs, e.g. fulfilling access to interpreters, to medical treatment, self-hygiene products and access to legal counsel, for example.
- *Detainee opinions of the quality of staff support improve with age.* Older detainees feel better about the quality of staff support than those who are under 24 years old. The latter report having less frequent access to health care staff than older detainees do.
- *Detainees report being discriminated against by staff not only for reasons of ethnicity and nationality, but also for reasons of language.* Detainees report experiencing many types of staff discrimination. Among these, and especially for minors, linguistically based discrimination in a small but not altogether insignificant basis. In these cases detainees report being treated poorly because they do not speak the language of the staff. Women more frequently report to experience staff discrimination than men do.

6. SAFETY WITHIN THE DETENTION CENTRE

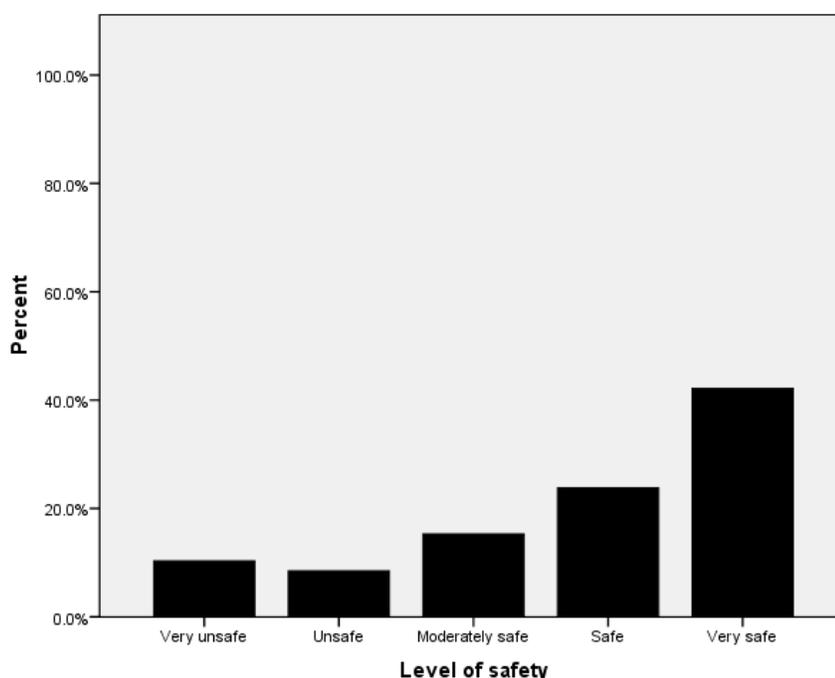
The concept of safety is intrinsically linked to the concept of vulnerability. If the most fundamental meaning of 'vulnerability' is the level of one's exposure to harm, then safety becomes the most obvious antidote against vulnerability. Detainees were asked to rate and describe their personal sense of safety within the detention centre, and to describe instances (if any) of when they experience verbal insult or physical abuse from other persons within the detention centre. The purpose of this questioning was to assess the extent to which feel vulnerable in the most basic sense of the term. The mix of nationalities, the attitudes of staff persons and the restrictive environment of detention among the factors that might highly impact detainees' personal level of safety, both in a physical and in a mental sense. Detainees who feel safe in the detention centre may be better able to cope with other adversities; those who feel unsafe might likely experience a continued deterioration of their situation.

6.1. Detainees' reported level of safety

6.1.1. Average data findings

Detainees were asked to rate their level of safety on a scale of 0.0 to 5.0, from “very unsafe” to “very safe”. At an average score of 3.79, detainees report to feel quite safe in the detention centre. As shown in Chart 1, only ten percent of detainees feel very unsafe, while 42 percent feel very safe. Among those who answered, 26 percent attributed their level of safety, for good or ill, to the security guards. A 30-year-old Pakistani man detained in Romania, for example, attributed his sense of safety to the frequent presence of security guards. Conversely, a 26-year-old man detained in Malta told us that “the detention staff are soldiers and I don't feel safe about that.” Some detainees reported to be fearful of experiencing physical abuse by the guards, while others express anxiety at being closely watched by security.

Chart 1: Detainees' perception of their level of safety in the detention centre



Second to security guards, detainees attribute their safety – for better or worse – to the living conditions and to their co-detainees. Detainees in these categories report a fear of being attacked by other detainees, or their uneasiness at the mix of nationalities and cultures and the tensions it could produce. Concerning living conditions, people held in a detention centre next to Brussels National Airport, for example, complain of the frequent and severely disturbing noise made by airplanes. A 21-year-old Nigerian man detained in Malta feels in danger because there is no safe exit in case of a fire. Even the poor level of cleanliness in some centres makes some of detainees feel unsafe. They also blame the prison-like atmosphere of the detention centre as a reason for not feeling safe.

In other cases, detainees feel that the living conditions contribute to a positive sense of safety. “I have no reason to feel unsafe here. I have a place to sleep and food to eat,” remarks one person detained in the Czech Republic. Another detainee in Portugal says, “In here it is all very controlled so there cannot be any problems.” Yet others observe that the safety of the living conditions does not contribute to a psychological sense of safety. “Nobody comes from the outside, but we are not safe mentally”, says a Pakistani man detained in Romania. Detainees who attribute their positive sense of safety to other detainees either report feeling safe because of the presence of co-

nationals, or because they feel that they can defend themselves against others. “I am not afraid of anyone” is an oft-repeated refrain from the detainees that were interviewed.

A smaller percentage of detainees attribute their safety to the ‘outside world’, i.e. either being protected from it or being isolated from it. A 35-year-old Russian woman detained in Poland describes the detention centre as a “safer place than the one I used to live in”. Some are afraid of being returned to their country of origin, and yet others feel unsafe by the danger posed to their lives. “I have fear,” explains a 24-year-old female asylum seeker from Cote d’Ivoire, detained in Hungary, “because of the things that happened in my home country.”

6.1.2. Disaggregated data findings

Detainees’ attributions of safety differ depending on how safe they actually feel. Those who feel safe point to the security guards as an explanation for their safety; those who feel unsafe point to their co-detainees. As Table 13 shows, in terms of safety, detainees perceive their co-detainees more negatively than they do the security guards. Furthermore, detainees are more likely to feel ‘safe’ from the outside world rather than ‘unsafe’ by it.

Table 13: Detainees’ explanations of their reported safety, disaggregated by category of safety

	Unsafe	Moderately safe	Safe
Attributions to the level of safety			
The ‘outside world’	6%	10%	18%
Living conditions	20%	31%	19%
Security guards	19%	20%	29%
Co-detainees	33%	27%	14%
‘Other’ reasons	22%	12%	21%

An examination of the data by age reveals that minors feel the least safe in detention. They score the lowest on the safety scale of measurement (3.64), and almost one quarter specifically says that they feel unsafe. Approximately one quarter within this group attribute their level of safety to co-detainees – most say that they feel unsafe by the presence of co-detainees. Detained minors who feel safe tend to point to the living conditions as an explanation of their safety.

Detainees aged 25 to 34 stand out among the sample as a group that reports to feel particularly unsafe in detention. They score almost as low as minors do on the safety scale of measurement (3.67), and 21 percent report feeling unsafe. Just as with minors and the total sample average, this group of detainees more frequently attributes their lack of safety to co-detainees, and their positive sense of safety to the security guards.

One quarter of persons detained for 151 to 180 feel unsafe in the detention centre – six percent more than the total sample average and more than any group disaggregated by duration of detention. Unlike the others, detainees in this group more frequently attribute their *lack* of safety to the security guards.

“The soldiers can come in when they want and beat us. In case of fire, electrical accident, etc., we cannot escape. With the rubbish, inside the room where we sleep, we risk getting sick.”

Male, 46-years-old, asylum seeker, detained in Malta for 161 days

6.2. Occurrences of verbal insults and mocking in detention

6.2.1. Average data findings

One quarter of the detainees that were interviewed report to have experienced one or more incidents in which they were verbally insulted or mocked by someone else in the detention centre. Among these, 48 percent blame the security staff and 44 percent blame co-detainees. Forty percent say that these experiences are frequent²⁴, while 26 percent say that such incidents occur on an occasional basis.²⁵ According to 46 percent of detainees, the reason for the mocking or insulting behaviour stems from a general attitude of unfriendliness from the detention centre staff. Many of the detainees within this group report incidents of simple verbal abuse, to those where more severe mocking is involved. A 34-year-old Algerian man detained in the Czech Republic says that the staff calls him and other detainees “bad names when we ask for something; to give us a ball for example”. A 19-year-old Kurdish man from Turkey who was detained in Greece at the time of his interview says, “Policemen swear very often. They often call us *malaka* or say similar things for no particular reason”. In many cases detainees report being shouted at for making simple requests, such as to use the toilet, to have more food or to have medical treatment.

“I was sick one day and asked for help. They refused to take me to the hospital. I started to knock the door very hard. This time the commander came and insulted me [by] saying ‘black monkey’.”

Male, 35-years-old, Sudanese asylum seeker detained in Malta

Incidents of insults and mocking from co-detainees often have a strong racist sentiment. Detainees interviewed in Ireland report having racist insults hurled at them from the Irish criminal offenders that are detained within the same space. Muslim detainees say they have been subject to insults for outward expressions of spirituality. A 30-year-old irregularly staying Chinese migrant detained in Spain explains, “It is because [we] do not understand their [co-detainees’] language. During the night our bed sheets get stolen. I do not know if they do that as a joke or because we don’t understand what they say”.

6.2.2. Disaggregated data findings

Examining the data set by age, we find that minors most frequently report experiencing insults and mocking. Among those who have experienced verbal abuse, 79 percent blame the security guards, attributing the verbal abuse to unsympathetic staff attitudes. This latter figure is almost one-third more than what is found in the total sample average, meaning that the minors within the sample are particularly subject to verbal insults and mocking. Similarly to minors, women aged 18 to 24 years report experiencing more insults and mocking than when compared to other groups by age and sex.

Asylum seekers seem to more frequently experience a high percentage of insults and mocking than when compared to irregular migrants. One-quarter say they have experienced such incidents, and half within that group blame the security guards for the verbal abuse. According to asylum seekers, incidents of verbal insults and mocking are quite frequent and can be attributed to unsympathetic staff attitudes. People who were detained for three to four months at the time of their interview – of which 53 percent are asylum seekers – more frequently report being insulted and mocked than when compared with other groups based on duration of detention.

²⁴ “Frequent” verbal insult and physical abuse indicates detainees who have experienced such cases on three or more separate occasions.

²⁵ “Occasional” verbal insult and physical abuse indicates detainees who have experienced such cases on less than three separate occasions.

6.3. Occurrences of physical abuse and assault in detention

6.3.1. Average data findings

The vast majority of detainees say that they have never experienced physical abuse or assault in the detention centre. Nevertheless, a small group within the sample – nine percent – did report cases of physical abuse. For most within this group such incidents do not occur frequently, and in a majority of cases detainees blame co-detainees; but almost one-third blame the security guards. Many of the reported incidents, involving both security staff and co-detainees, involve aggressive pushing or slapping. A small minority of those who report physical abuse say that they have endured beatings.

“He beat me with a stick. Somebody was shouting, but the policeman said it was I who was shouting. He came to me and asked me if I was the person shouting. I replied in English that I didn’t understand. Then he told me ‘speak in Greek’. I said again in English that I didn’t understand. Then he walked towards me and started beating me.”

Male, 17-years-old, Somali illegal migrant detained in Greece

“I told him [a security guard], ‘You are not strong just because you are a policeman and I am detained here.’ He took the chair and hit me with it. I put my hands in front of my face and he hit my hands.”

Male, 21-years-old, Iraqi illegal migrant detained in Greece

Most detainees attribute the reasons for the physical abuse and assault to inter-personal quarrels and to unsympathetic staff attitudes. Some say they have been physically assaulted by co-detainees for something they had, such as cigarettes, or because of their nationality. Others describe a general atmosphere of tension and stress that frustrates detainees and leads to physical conflicts. “It’s a daily reality among detainees”, admits a 27-year-old Vietnamese person detained in the Czech Republic. A 17-year-old man detained in Greece describes being beaten by four Albanian co-detainees simply because of his Afghani nationality.

6.3.2. Disaggregated data findings

Among those who admit having experienced physical abuse or assault in detention, 40 percent were detained in Malta at the time of their interview. More than half within this group identify co-detainees as perpetrators of the abuse. But one-third of these detainees do blame staff, with some describing being beaten for making simple requests, such as for a mobile telephone SIM card, or being “pushed” and “cuffed” for apparently no reason while having their valuables “tore up”. Second to those detained in Malta, the most frequent reports of physical abuse and assault come from Greece. Although the number of reported incidents are much fewer than those reported from Malta, the cases in Greece – of which almost half are minors – are more frequently attributed to unsympathetic staff attitudes.

Once again, minors more frequently report having experienced physical abuse or assault in detention than when compared to other age groups. Almost one-third says that these incidents occur frequently, and just over half identify the detention centre security staff as perpetrators of the abuse. Detainees in this age group frequently attribute physical abuse to ethnicity or nationality. Looking further within the category of age, the data findings show that women aged 18 to 24 report physical abuse or assault more frequently than when compared to other groups by age and sex.

Asylum seekers and persons detained for 61 to 90 days – of which 53 percent are asylum seekers – report experiencing a higher percentage of physical abuse or assault than when compared to irregular migrants and other duration of detention categories. Well over half of the persons within these two groups who have experienced physical abuse and assault identify co-detainees as perpetrators. But there does exist small, but significant, minorities in each group that blames the security staff. Neither legal status nor time spent in detention is attributed as reasons for the abuse. Instead, detainees in these two groups point to unsympathetic staff attitudes, and ethnic or national differences, as reasons.

6.4. Chapter summary

The DEVAS project has sought to measure detainees' level of safety in three primary ways: firstly, by asking detainees to rate their level of safety on a Likert scale of 0.0 to 5.0; secondly, by recording incidents of verbal insults and mocking; thirdly, by recording incidents of physical abuse and assault. Every detainee who say they feel unsafe in detention also say that they have experienced physical abuse or assault; 65 percent of those who feel unsafe say they have experienced verbal insults or mocking. Conversely, only four percent of the detainees who feel safe report incidents of physical abuse, and 21 percent report incidents of verbal insults and mocking. Despite these incidents, in general detainees report to feel safe in the detention centre. Most have not experienced verbal or physical abuse.

- *Detainees most frequently attribute their level of safety, whether for good or ill, to the security staff.* Interestingly, detainees more frequently attribute a positive sense of safety to the security staff, and a negative sense of safety to co-detainees. In other cases, detainees more frequently report feeling safe from the outside world, rather than being in danger from it.
- *The living conditions within the detention centre impact detainees' sense of safety.* Detainees perceive 'safety' as not only prevention from physical harm, but also prevention from mental harm. Excessive noise, unhygienic conditions and the prison-like atmosphere of the detention centre all contribute to detainees' feelings of being unsafe.
- *Minors particularly feel unsafe in detention.* Detainees within this age category not only more frequently rank themselves as unsafe, but they also more frequently report incidents of verbal and physical abuse while in detention than when compared to other age categories, and also the total sample average. Similarly, women aged 18 to 24 years report more incidents of verbal and physical abuse than other groups by age and sex.
- *Incidents of physical abuse or assault in detention centres are widespread in the EU.* Although 40 percent of those who reported physical abuse or assault were interviewed in Malta, it remains notable that such incidents were recorded in three quarters of the EU Member States where the DEVAS project was implemented. Incidents involving verbal insults and mocking were recorded in 19 EU Member States. Detention centre security staff and co-detainees are most frequently implicated in both forms of abuse.
- *Asylum seekers more frequently experience verbal and physical abuse than irregular migrants do.* This also includes people detained for 61 to 90 days, of which 53 percent are asylum seekers. Asylum seekers do not attribute these incidents to their legal status, but instead to cross-cultural tension between detainees and to the unfriendly behaviours and attitudes of staff.

7. PROVISION AND PARTICIPATION OF ACTIVITIES WITHIN THE DETENTION CENTRE

7.1. Availability of activities and level of detainees' participation

Detainees were asked about the provision of activities within the detention centre, and to elaborate on whatever activities are provided. They were also asked about their level of participation and to elaborate upon the reasons for doing so. Within the context of the DEVAS project, 'activities' was broadly defined to consist of what is formally organised by the detention centre staff, what is informally provided by the staff to detainees, and what is informally organised by the detainees themselves. The availability of activities within the detention centre is important, since the nature of closed detention leaves detainees with little else to do. Prolonged periods of physical inactivity can lead to fluctuations in appetite and weight, for example; prolonged periods of mental inactivity may lead to increased psychological stress.

Vulnerability is closely linked because the inability to engage one's physical and mental faculties has the tendency to weaken one's personal condition. People who are held for prolonged periods of time in detention centres that do not offer sufficient activities may suffer not only in detention, but also when they are released to find that it has become difficult to find work or to re-enter school, for example.

7.1.1. Average data findings

On average, well over half of detainees say that the detention centre does provide for activities, and most say that they participate in them. Sports and watching television are activities that detainees most frequently participate in. Much smaller percentages of detainees report doing other activities related to arts and education, or even religion and spirituality. Detainees admit that they participate in these activities mostly to relieve themselves of the stress and boredom of detention: to "kill time" or to "forget problems", to "liberate" their "state of mind" and "to release tension". But detainees just as often participate in activities simply for their personal satisfaction. Those interviewed in Slovenia, for example, frequently say that they do activities because they have "plenty of time", or even "too much time" at their disposal. In general the notion of having ample 'time' arises frequently in detainees' statements. For many, the provision of activities is an important distraction from the protracted inactivity inherent within the situation of detention, and the mental stress that it imposes on detainees.

Alternatively, 29 percent of detainees say they do not participate in activities. For the most part they are uninterested. Some are "bored" by the activities, and others say that the activities provided are not what they want. A smaller number of detainees attribute their non-participation to their general state of unhappiness in detention, or because they do not expect to be in detention for much longer. "I hope I will leave soon so I won't have to participate in activities", says a 28-year-old Brazilian woman detained in Ireland. Second to a lack of interest, 22 percent of detainees say that they do not participate in activities because of mental health reasons. For these detainees, the provision of activities is not enough of a distraction from the stress of detention. Statements like "too stressed" and "no peace of mind", or "I'm just tired" and feeling "too depressed" is a frequently expressed sentiment. A Serbian male detained in Hungary says that he does not participate in activities because he sleeps all day – a consequence of his inability to sleep well at night due to the stress he feels.

Alongside mental health, a small number of detainees say they are physically unable to participate in activities. In these cases detainees often admit to experiencing physical pain, but they do not attribute it to detention. Yet other detainees say they do not participate in activities because they are unaware of what the centre provides, or they say that the centre does not provide for anything to do. Very small percentages of detainees say they do not participate either because of other personal obligations, e.g. single females with children, or because of language barriers.

7.1.2. Disaggregated data findings

An examination of the data by age group reveals that detainees aged 18 to 24 most frequently report that the detention centre does not provide for activities. Consequently, they have the highest percentage of non-participation when compared to other age groups. More so than others, 18 to 24 year olds say they do not participate in activities because of the mental health stress they experience as a outcome of detention. Looking at other age groups, we find that minors participate most frequently in activities and do so for their own personal satisfaction, while detainees older than 45 years frequently report a physical inability to participate in activities.

People who were detained for 61 to 90 days at the time of their interview most frequently report participating in activities in order to relieve psychological stress. As for legal status, asylum seekers are more likely than irregular migrants to say that their detention centre does not provide for activities. Nonetheless, more asylum seekers participate in educational and sports activities than irregular migrants do. Furthermore, asylum seekers say they do these activities for personal satisfaction, whereas irregular migrants do it more for stress relief. Asylum seekers who choose not to participate do so for lack of interest; irregular migrants most frequently say that they do not participate because they are unaware of any activities. Elsewhere in the sample, female detainees more frequently report non-participation in activities than males do. Women say they do not participate in activities because they are unaware of them, while men choose not to participate because of the stress they feel in detention. Females, however, do report having more access to educational activities than male detainees do.

Responses from women aged 18 to 24 present telling results. When asked if the detention centre provides activities, 45 percent said no – 19 percent more than the total sample average. Up to 45 percent of women in this age group admit that they do not participate in activities – 16 percent more than the total sample average. They also more frequently report being unaware of activities than when compared to their male counterparts. Additionally, a significant minority within this group say they are uninterested in participating in activities and that they are physically unable to participate.

7.2. Access to specific activities and detainees' preferences for activities

7.2.1. Average data findings

Most detainees express having frequent access to the telephone and to the television. At the same time, most detainees say that they do not have access to computers nor the Internet. Almost half of detainees say that they do not have access to books.²⁶ Many also say that the detention centre does not provide access to sporting equipment; but slightly over half say that outdoor space is generally available to them. Going further, only one-quarter of detainees admit having access to educational activities, and just over one-third report having access to some type of religious/spiritual space.

Apart from stating what they have or do not have access to, detainees were asked to list an activity they would prefer to have, insofar as the detention centre could “reasonably provide” it to them. Responses to this question were varied, with most responses matching closely to the activities listed in the preceding paragraph (see table 14). Approximately 17 percent say they want greater access to computers and the Internet. A number of detainees express that it would be easier for them to communicate with family and friends, and to stay abreast of events happening outside of the centre if they had access to the Internet and also to email. A 21-year-old Russian man detained in Lithuania says he would like “PCs, Internet and Skype to keep in touch with family and friends.” A 25-year-old Kazak man detained in the Czech Republic says he needs computers and Internet “to have access to information.”

²⁶ The highest percentages of detainees who say they do not have access to books have been interviewed in Malta and Spain.

Table 14: Activities that detainees prefer to have in the detention centre, insofar as the detention centre can “reasonably provide” for it

	Percentage
Activities	
Computers/Internet	17%
“Freedom”	14%
“Nothing”	13%
Entertainment, e.g. television/radio	12%
‘Other’ activities	12%
Sports	8%
Better living conditions	7%
Religious/spiritual	4%
Work	2%
Artistic/creative	1%

Second to that, 14 percent of detainees say that they want “freedom” as an activity, and 13 percent say that they want “nothing”. These two responses are interesting in that they do not pertain to the question asked, and telling because they reveal a level of irrelevance – or absurdity – to the question asked of them. For these persons, no type of activity can alter their present situation of detention. “Freedom is the main priority”, according to a 19-year-old Somali man detained in Malta. While it is obvious that the detention centre will not provide “freedom” as an activity, these detainees feel that there is nothing more that the centre could reasonably provide. “Even if they gave you 100,000 euros”, says a 27-year-old Congolese woman detained in Belgium, “nothing could improve your life in here”.

7.2.2. Disaggregated data findings

Variations in access to the activities described above do exist when the data is disaggregated for legal status, age and sex. Asylum seekers have more access to books and educational activities, while irregular migrants have more access to computers, Internet, the telephone and television. Minors say they have good access to books, but very low access to computers and Internet, educational activities and religious/spiritual space. But those aged 18 to 24 describe having little access to books, sports equipment and outdoor space. While those aged 25 to 34 years report good access to the telephone and television, detainees older than 45 years report having little access to it. In regards to sex, women say they have more access to books than men do; but men more frequently report having access to computers, Internet, telephone and television. Women have greater access to educational activities than men do. As shown here, it is evident that a disaggregation of the data shows no clear pattern as regards to who has access, or no access, to certain activities.

Concerning the activities that detainees would prefer to have, both asylum seekers and minors express a desire to have greater access to computers and the Internet. The latter also reports wanting more access to educational activities. Detainees older than 45 years more frequently report wanting “freedom” than all other age categories. Women aged 18 to 24 want more access to computers and Internet, while men and women aged 25 to 34 more frequently report wanting “freedom” and “nothing” than when compared to other groups by age and sex. Men aged 18 to 24 wish for more sports and educational activities. In general, the entire male sample expresses a desire to have more educational and religious/spiritual activities. Looking at duration of detention, whereas people detained for 121 to 150 days most frequently express wanting “freedom”, those detained two to three months would like more access to computers and Internet.

7.3. Chapter summary

The primary rationale for inquiring to detainees about the provision of activities in the detention centre, and their level of participation, is to determine the extent to which detainees are permitted to engage in mental and physical pursuits within an environment where their freedom of movement is severely curtailed. Since detainees cannot leave the

detention centre – some for months – their ability and motivation to engage in any kind of activity might serve as a measure of what their level of vulnerability to the deteriorative effects of detention may be. Prolonged periods of inactivity may lead to a progressive deterioration of mental and physical capacities. Physical idleness may lead to fluctuations in weight, appetite and sleep patterns, and mental idleness may lead to increased stress, anxiety and depression.

On average detainees express that activities available and that they participate in them. The top two activities that detainees most frequently engage in are related to sports and entertainment, e.g. football and television watching. According to detainees' statements, detention centres seem reluctant to provide activities that would require the dedication of extra personnel, organisation or space. Among the findings presented in this chapter, the most notable show that

- *Activities can serve as an antidote to boredom and stress.* Prolonged inactivity is inherent within the situation of closed detention. Detainees have little to do unless the detention centre staff organises activities. According to detainees, the boredom they experience in detention increases the stress that they feel. In other cases, those who do not participate in any activities say that there is nothing the detention centre could provide that would distract them enough from the reality of detention.
- *Detainees aged 18 to 24 years, most notably women within that category, report high levels of inactivity.* As a whole, 18 to 24 year olds frequently say that the detention centre does not provide for activities; consequently they have the lowest rates of participation when compared to other age categories. Furthermore, many say that, in any case, the psychological stress they experience would prevent them from engaging in any activities. Almost half of women aged 18 to 24 say that the detention centre does not provide for activities, and almost half say that they do not participate in any activities that are provided. Detainees within this category frequently describe a disinterest in activities provided, and a physical inability to participate in them due to bodily "pain" or "feeling tired". They are also more unaware of the activities than when compared to males.
- *Detainees have greater access to sedentary and physical activities, but not to activities that would engage their mental capacities.* On average, activities that involve television, sports and outdoor space are more readily accessible to detainees than educational and religious/spiritual activities. Even books are not accessible to a significant minority of detainees.
- *Detainees either want to be able to connect with the outside world, or they want nothing at all.* When asked what activity they prefer to have, insofar as the detention centre could reasonably provide, detainees replied by requesting computers and Internet, "freedom" and "nothing". The irrelevance of the latter two responses reveals the inherent absurdity of the question that was asked – detainees would rather attend to their lives outside of the detention centre than worry about what the detention centre does, or does not, provide for.
- *Asylum seekers and minors report having little access to activities that would enable communication with the 'outside world'.* Compared with others, detainees within these two groups report little access to the Internet, telephone and television. The first two are important because asylum seekers, by the very nature of their legal situation and requisite need for information and assistance from others, might be at a disadvantage without access to activities that connect them to the 'outside world'. Minors might be made further vulnerable to the negative effects of detention if they are unable to access support on the outside.

8. LEVEL AND QUALITY OF MEDICAL CARE PROVIDED IN THE DETENTION CENTRE

8.1. Level of access to medical care

If 'safety' can act as a measure against 'vulnerability' in detention – at least in its most basic sense, as protection from harm – then the level and quality of medical care within the detention centre can serve to mitigate any damage that is done to a person's physical and mental integrity as a consequence of being in detention.²⁷ Detainees were asked to describe both the level and the quality of the medical care that they receive in the detention centre. Appropriate medical care may ensure that persons with pre-existing physical conditions, such as chronic hypertension, diabetes or viral diseases, can continue to receive unabated treatment. It can also treat physical conditions that arise as a consequence of detention, such as skin infections, gastro-intestinal problems and improper nutrition intake. Just as importantly, good medical care may ensure that persons with a history of psychological trauma are not neglected and made vulnerable to retraumatisation in detention.²⁸ Even persons with no prior history of trauma may experience severe mental health effects in detention if appropriate medical care is not provided for. The provision of medical care can act as a safety valve for detainees – as a way to identify signs of physical and mental deterioration, and as a way to minimise potential harm done to detainees.

8.1.1. Average data findings

Almost all of the detainees interviewed state that there is some type of medical staff within the detention centre. Well over half say that they meet with someone in the medical staff at least once per week, or as often as needed. Just under 20 percent of detainees say that they meet with the medical staff only once per month or even more infrequently. When asked what kind of medical staff is available, most detainees say that doctors, and to a slightly lesser extent nurses, are most accessible to them. But 87 percent say that psychological staff is not available in the detention centre. Most detainees report having had a medical exam upon arrival to the detention centre, and most agree that medical staff communicates in an understandable language. One quarter say they do not understand the language used by the medical staff, with almost half admitting a reliance on co-detainees for translation or interpretation assistance. A minority of these detainees say that they would want the services of professional interpreters or translators, and an even small number say that they would expect the staff to provide linguistic assistance.

The data shows that language, *per se*, emerges as an important factor in migrants' lives within the detention centre. A 26-year-old Eritrean man detained in Malta insists that having a translator would be "very important" for him, "to explain my problems ... I can't do that in English or Maltese". "Nobody [of the medical staff] spoke to me", explains a 21-year-old Somali woman detained for more than nine months at the time of her interview, "There was no interpreter. I wish he [the interpreter] were there. I wish I [could] understand".

8.1.2. Disaggregated data findings

Irregular migrants more frequently report having access to doctors and psychological staff than asylum seekers do. Despite this, more asylum seekers say that they have had a medical exam upon arrival to the detention centre. Minors report the most frequent access to the medical staff when compared to other age categories. Nevertheless, 19 percent of minors say that they are unaware of the medical staff in the detention centre – nine percent more than the total sample average, and more than any other age category. "I've never seen a doctor while in here", admits a

²⁷ For the purpose of this report, "medical care" is defined to include general care, emergency and specialist care, and mental health care.

²⁸ For more on the risk of the retraumatisation of asylum seekers in detention see: Silove, McIntosh & Becke (1993). Risk of retraumatisation of asylum seekers in Australia. *Australia and New Zealand Journal of Psychiatry*, 4(27), 606-612.

16-year-old Nigerian boy detained in Bulgaria for three months at the time of his interview. Further, 46 percent of the minors interviewed say that they did not receive a medical exam upon arrival to the detention centre. This age group most frequently reports not being able to understand the language used by medical staff than when compared to all other age groups.

In general, women report having slightly more access to medical staff, especially doctors, than men do. But a specific look at women aged 18 to 24 reveals that they more frequently report being unaware of medical staff than when compared to other groups for age and sex. Overall, however, male detainees seem to fare slightly worse than females in regards to medical care. They report having less access to medical staff, and less report having had a medical exam upon arrival to the detention centre than when compared with women.

8.2. Quality of medical care in the detention centre

8.2.1. Average data findings

Approximately one-third of detainees say that the quality of medical care in the detention centre is poor – just over one quarter say the quality is good. A smaller percentage felt neutral, perceiving it as neither instrumental nor detrimental to their situation in detention. Detainees who feel negative about the state of medical care most often said that they possess medical needs that are left unattended. “Very poor. Only basic needs are attended”, says a 27-year-old Iraqi man detained in Latvia.

“The medical staff makes us pay for medicine. As a refugee, how can I pay? They offer only basic treatment ... the doctors do not care about my situation.”

Male, 26-years-old, Turkish illegally staying migrant detained in Lithuania

A number of detainees say that they are only provided with pain relievers for all types of medical complaints. A Nigerian man detained in Malta says that the medical care is “worse than at home [Nigeria]. Only paracetamol²⁹ is given to us, for everything”. A detainee in Spain laments that the medical care in his detention centre is “awful ... because I need specific medical treatment and they give me downers instead”. “Whatever problem we have”, states a Moroccan man detained in Greece, “they give us a pain relief tablet”. A number of detainees even say that the medicines that they receive are expired.

“They give me the same pills for different problems”

Male, 25-years-old, Serbian asylum seeker detained in Hungary

“They give us drugs without giving its name (even for paracetamol). They always say ‘it will pass, it’s only stress.’ I don’t understand how they work. Not everything is stress ... it’s real.”

Female, 24-years-old, Cameroonian rejected asylum seeker detained in Belgium

²⁹ Paracetamol is a medication used to ease mild or moderate pain, such as headaches, sprains, toothaches or the symptoms of a cold. It can also be used to stabilise a fever for persons who have influenza. Source: <http://www.nhs.uk/Conditions/Painkillers-paracetamol/Pages/Introduction.aspx>

Up to 43 percent of detainees express a desire to receive additional medical services, including access to medical specialists such as dentists, gynaecologists, psychologists and cardiologists. The vast majority of detainees do not place blame upon the medical staff. Instead, 87 percent of those interviewed said that they would rather have greater access to medical care that would address their real needs: “something to cure my skin problems”, “problems with my eyes”, “a specialist in asthma”, treatment for “hepatitis C”, “more attention to my diabetes”, “a psychologist”, are examples of just some of the medical needs expressed by detainees.

8.2.2. Disaggregated data findings

There is little variation between asylum seekers and irregular migrants in regards to perceptions and opinions about the quality of medical care in the detention centre. There is more variation when the responses from ‘rejected’ asylum seekers and “Dublin II” asylum seekers are examined, and also when duration of detention is factored together with legal status. Concerning the first two, slightly more than one third within each say that the quality of medical care in the detention centre is poor. Standing alone, the findings from these two groups are already above the total sample average with regard to negative opinions of medical care.

Adding to that finding, the data shows that asylum seekers and irregular migrants who are detained for more than 90 days are far more negative about the quality of medical care in detention than when compared to other disaggregate groups by legal status. More than half of irregular migrants detained for more than 90 days feel that the quality of medical care is poor – more than any other group from within the entire data set. Strikingly, there is a large gap in the opinion of the medical care between asylum seekers and irregular migrants detained for more than 90 days, and those detained for less than 90 days (see table 16). These findings show that duration of detention can be major factor in the opinions asylum seekers’ and irregular migrants’ have of the quality of medical care.³⁰

Table 16: Detainees’ opinions on the quality of medical care within the detention centre, by legal status

	Good	Poor	Neutral
<i>Average:</i>	28%	33%	19%
Legal status			
Asylum seekers	29%	33%	19%
Illegal migrants	27%	32%	20%
“Dublin II” asylum seekers			
“Dublin II” asylum seekers	11%	39%	31%
“Rejected” asylum seekers	17%	39%	23%
Duration of detention			
Asylum seekers detained for <90 days	24%	27%	22%
Asylum seekers detained for >90 days	36%	43%	15%
Duration of detention by legal status			
Illegal migrants detained for <90 days	31%	27%	22%
Illegal migrants detained for >90 days	13%	56%	14%

Discrepancies in the data set also appear when age is considered. Up to 44 percent of detainees aged 18 to 24 feel that the quality of medical care is poor – eleven percent more than the total sample average and more than all other age categories. Paradoxically, this group also more frequently feels positive about the quality of medical care. This contradiction can be explained when the time period of detention is considered: the mean duration of detention for 18 to 24 year olds who feel positive about medical care is 3.04 months; the mean duration of detention for those who

³⁰ Approximately half of sample of asylums seekers detained for >90 days were interviewed in Malta, where prolonged detention is frequent.

feel negative is 4.23 months.³¹ Just over one quarter of women aged 18 to 24 feel that the medical care is good. But when this finding is compared to other groups by age and sex it shows that females of this age are the only group whose positive rating of medical care falls below the total sample average. In general, the percentage of detainees who feel negative about the quality of medical care increases until 25 to 34 years.

Table 17: Detainees’ opinions on the quality of medical care in the detention centre, disaggregated by age

	Good	Poor	Neutral
Age (in years)			
10-17	32%	18%	11%
18-24	28%	27%	26%
25-34	25%	39%	17%
35-44	32%	32%	18%
45-64	31%	31%	20%

An examination of duration of detention independent from other variables reveals that people who were detained for 121 to 150 days at the time of their interview most frequently report that the quality of medical care is poor. Closely following this group are those who were detained for 91 to 120, and 61 to 90 days at the time of their interview, respectively. As with age, a trend emerges that depicts detainees’ opinions of the quality of medical care becoming worse as the duration of their detention endures. The trend stops at the 121 to 150 day period, whereby detainees’ reports decrease in their level of negativity. Importantly, this finding lends further support to the finding that duration of detention – across legal status and on its own – seems to factor highly in detainees’ perceptions and opinions of the quality of medical care in the detention centre.

Table 18: Detainees’ opinions on the quality of medical care within the detention centre, disaggregated by duration of detention

	Good	Poor	Neutral
Detention duration (in days)			
0-30	36%	34%	30%
31-60	39%	33%	28%
61-90	31%	45%	24%
91-120	39%	47%	14%
121-150	33%	48%	19%
151-180	44%	33%	22%

Half of the women aged 18 to 24 express a need for additional medical services. Women in this group describe the need to meet with medical specialists, such as gynaecologists and dentists. In fact, over 90 percent within this group say that they want to receive access to more appropriate medical care. Elsewhere, we find that detainees aged 45 to 64 and people detained for 121 to 150 days more frequently express a need for additional medical services than when compared to the total sample average.

“I have a lot of prescriptions but I don’t have the medicines.”

Female, 22-years-old, Nigerian asylum seeker detained in Malta

³¹ Ironically, the highest percentages of respondents in both categories were interviewed in Malta.

“I think I need special treatment for my headaches, which are sometimes so bad that I feel nauseous.”

Female, 24-years-old, Guatemalan asylum seeker detained in Belgium

8.3. Chapter summary

Detainees were asked about the level of medical care within the detention centre, and the resulting quality of care that they receive. The availability and quality of medical care within detention centres factors highly in the experiences that asylum seekers and illegally staying migrants have in detention. The experiences JRS has had with accompanying detainees in Europe has shown that many people enter detention with pre-existing medical conditions, or, the imposition of detention itself leads to the onset of previously inexperienced conditions. In other cases, detention exacerbates long dormant medical conditions such as those related to mental trauma. The restriction of detainees to a confined space thus forces them to be dependent on the medical services provided by the detention centre itself. Their inability to select appropriate medical care for themselves is severely curtailed, leaving them with a stark choice: accept whatever medical care the detention centre provides irrespective of its quality, or live without medical care irrespective of one’s medical needs. Among the major findings presented in this chapter are:

- *In general, detention centres are only able to provide very basic medical care to detainees, irrespective of their medical needs.* On average, detainees say they have access to doctors and nurses, and that they have access to basic medical care whenever they need it. Most do not have access to medical specialists such as psychologists, gynaecologists and dentists. In cases where detainees need specialised treatment, detention centres may transport them to medical providers in the outside world. But even for this detainees often say that the response time of the detention centre staff to their needs is inadequate.
- *Language is a major factor in detainees’ ability to access medical care.* Detainees who need linguistic assistance often rely on co-detainees for help. But according to those who were interviewed, medical staff within the detention centres where DEVAS was implemented are generally unable to provide services in languages that detainees might understand. According to detainees, professional interpreters and translators are not made regularly available.
- *Young detainees frequently report dissatisfaction with the medical care in the detention centre.* When compared to the total sample average, minors more frequently report to be unaware of the medical staff, go without a medical exam upon first arrival to the detention centre and are unable to understand the language used by the medical staff. Half of the women aged 18 to 24 report a need for additional medical services, and over 90 percent say that they need better medical care.
- *According to detainees, the quality of the medical care provided within detention centres is poor.* Even the provision of basic medical care does not meet the needs that detainees report to have. A large number of detainees say that they receive pain-reducing medication, such as paracetamol, for whatever medical problem they report. In some cases even this medication is found to be expired and thus inadequate for use.
- *The duration of detention is a major factor in detainees’ opinions of the medical care within the detention centre.* Asylum seekers and irregular migrants who were detained for more than 90 days at the time of their interview report greater dissatisfaction at the provision of medical care within their

detention centre than when compared with those detained for less than 90 days. People who were detained for up to five months at the time of their interview are more negative about the state of medical care within the detention centre than when compare to other detainees by duration of detention. Detainees who feel negative about the medical care are detained on average for one and a half months longer than detainees who feel positive about the medical care.

9. PHYSICAL HEALTH WITHIN THE DETENTION CENTRE

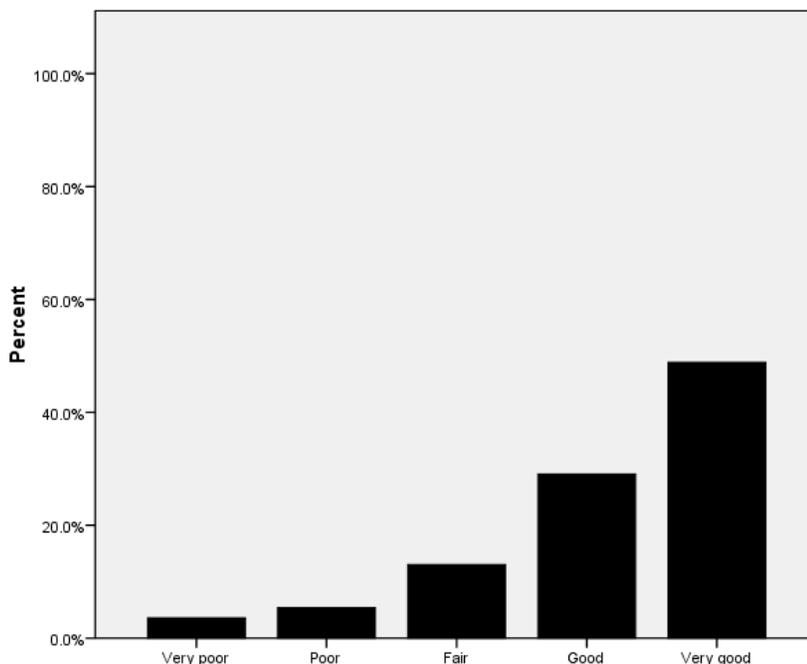
9.1. Detention impact on physical health

Detainees were asked to rate their level of physical health before and during detention, using a scale of one to ten, with one being “very poor” and ten being “very good”. They were also asked if detention has had an impact on their physical health, and if so, to describe this impact. The purpose of this questioning was to assess the extent to which detainees possess pre-existing special needs or vulnerabilities, and to assess the extent to which detention might impact a person without any pre-existing conditions. If safety is an antidote to vulnerability, and if medical care serves to limit one’s level of vulnerability, then ‘physical health’ can serve as an indication of what one’s level of vulnerability may actually be. People who enter into detention with weak physical health may be especially vulnerable to the environment of detention, particularly if the living conditions are poor. But even persons who enter into detention with relatively normal or strong physical health may *become* vulnerable as a consequence of detention, particularly if the level of medical care is poor, or if they experience too much psychological stress, or if the hygienic and sanitation conditions are lacking. Poor physical health can serve as a strong precursor to vulnerability, as someone who is physically weak becomes susceptible to further degradation in body and also in mind.

9.1.1. Average data findings

Only nine percent of the detainees that were interviewed said that their physical health prior to detention was “poor” (see chart 2). Almost half of the total sample said that their physical health was “very good” before detention. Taken together, 78 percent of those who were interviewed said that their physical health was “good” before they were detained.

Chart 2: Detainees’ physical health prior to detention

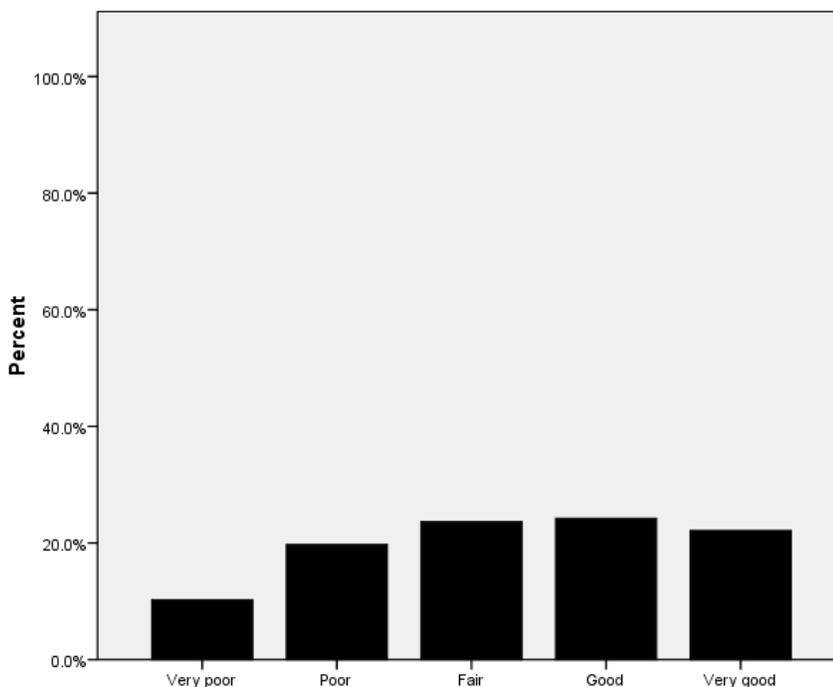


Detainees present a far different picture of their physical health during detention (see chart 3). Almost one-third describes their physical health as “poor” in detention – 21 percentage points more than what it was before detention. About one quarter say their physical health is “very good” in detention, a marked decrease from their description of their physical health before detention.

More than half admit that detention has impacted their physical health. Among this group, 67 percent say that the impact has been negative. Most detainees relate their physical problems to the living conditions in the detention centre. “Its cold here, “ says a 17-year-old Guinean boy waiting for a “Dublin transfer” in a Belgian detention centre: “I have problems with my skin. I’m spending all night rubbing my skin.” A 60-year-old Ukrainian woman detained in the Czech Republic blames her physical ailments on the conditions of confinement. “That is why I am ill”, she says, and reports having “higher blood pressure” as a result of prolonged immobility.

The simple lack of fresh air, due to prolonged periods of stay within the interior of the detention centre, brings negative consequences to detainees’ state of physical health. “I have difficulty breathing”, explains a 24-year-old Afghani asylum seeker detained in Greece, “I take medication but I need fresh air, and here we do not go out at all. Sometimes I cannot breathe at all.” Many other detainees complain about the quality of the food in the detention centre. As a result, a number say they eat very little. The psychological stress of detention, according to detainees, often impedes their ability to eat.

Chart 3: Detainees’ physical health during detention



Approximately one-third of detainees attribute their poor state of physical health is to the psychological stress they experience in detention. Detainees frequently describe being “nervous” and having “headaches” as a result of stress, or as they call it: “thinking too much”. This is a recurring theme in detainees’ statements. A 19-year-old Palestinian woman detained in Greece says that she has asthma, and when she gets nervous the asthma “becomes worse.” Detainees with pre-existing medical conditions often report that their situation worsens as a result of detention, due to living conditions or psychological stress, but also due to the lack of appropriate medical treatment.

“In detention, the pain started to come because of the stress. The old pain started to come all over my body. My heart, the stress, my head and the pain: that is my illness. I’m too stressed. There is too much pressure so I have to calm down.”

20-year-old male Sierra Leonean asylum seeker detained in Belgium

Only 10 percent describe the impact detention has on their physical health as positive. Some of these persons have migrated under very difficult circumstances, and thus view detention as a respite from the hardships they suffered on the way to Europe. A 22-year-old Somali woman who came to Malta to seek asylum says, “After the journey we all were in bad shape. Now my health is good.” In other cases detainees’ lives prior to detention were problematic, and being in the detention centre has allowed them to receive treatment for alcoholism and drug use, for example. “Before I was in prison [the detention centre] I drank a lot of alcohol”, explains a 48-year-old Algerian man detained in Portugal, “...now I stopped everything.” Other detainees said that being in the detention centre at least provides them with a shelter, regular meals and a bed.

9.1.2. Disaggregated data findings

People who were detained for 121 to 150 days at the time of their interview report some of the most negative findings in regards to physical health and detention. Only ten percent within this group describe their physical health as “poor” prior to detention, with 66 percent saying that it was “good”. But when asked about their level of physical health during detention, 72 percent say that it is “poor” – 62 percentage points more than what it was before detention. Eighty five percent said that detention impacts their physical health, and within that group, almost everyone says that the impact is negative. Weight loss, anxiety, stress and the poor living conditions of the detention centre make up a large part of their complaints. The lack of fresh air within the detention centre comes up again: “Bad air, no ventilation ... blood coming out of my mouth when I wake. Doctors give me medication but it has no effect because I am locked in a place without air”, says a 27-year-old Liberian man detained in Sweden for 148 days at the time of his interview.

In general, the data clearly shows that percentage of detainees who describe their physical health in detention as “poor” increases as the length of detention endures (see table 19). This trend abruptly stops at the 121 to 150 day period. Similarly, the data indicates that the percentage of detainees who feel that detention has negatively impacted their physical health increases as detention length endures (see table 20).

Table 19: Percentage of detainees who describe their physical health in the detention centre as “poor”, by number of days in detention

	Percentage (Total sample average: 30%)
Days in detention	
0-30	25%
31-60	28%
61-90	25%
91-120	41%
121-150	72%
151-180	26%

A broader examination of physical health and duration of detention shows irregular migrants and asylum seekers detained for more than 90 days more frequently describe their current physical health as “poor” than when compared

to the total sample average. These two groups also more frequently say that detention has negatively impacted their physical health than when compared to the average. In particular, just over half of the asylum seekers within this category attribute the negative impact of detention on their physical health to the existing living conditions.

Table 20: Percentage of detainees who feel that detention has negatively impacted their physical health, by number of days spent in detention

Percentage (Total sample average: 67%)	
Days in detention	
0-30	67%
31-60	57%
61-90	80%
91-120	76%
121-150	93%
151-180	57%

Besides duration of detention, age may be a factor in how detainees' physical health might be impacted by detention. The data shows that the percentage of detainees who report that detention has negatively impacted their physical health decreases as they become older (see table 21). Minors are the only age group where most feel that detention has not impacted their physical health. Nevertheless, for those minors who do admit such an impact, 71 percent say it has been negative. Elsewhere, 73 percent of women aged 18 to 24 say that the impact of detention on their physical health has been negative. Almost one-third within this group attributes the negative impact to the lack of appropriate medical care in the detention centre.

Table 21: Percentage of detainees who report that detention negatively impacts their physical health, by age

Percentage (Total sample average: 67%)	
Age	
10-17	71%
18-24	67%
25-34	69%
35-44	62%
45-64	65%

9.2. Chapter summary

Detainees were asked to describe their level of physical health before and during detention. The purpose for this line of questioning was to determine the extent to which detention impacts people who have pre-existing medical conditions, and also people that enter into detention relatively healthy. In this context, 'physical health' is used as an indicator to assess one's actual – or potential – level of vulnerability at its commonly recognised form: that of physical weakness. The findings from this chapter include:

- *Detention harms otherwise physically healthy people.* The vast majority of detainees describe their level of physical health prior to detention as being "good". But far fewer detainees answered in the same way when asked to describe their physical health while in detention. Although a number of detainees in the sample possess pre-existing conditions, such as asthma, chronic pain or medical illnesses, most say that they entered detention with generally good physical health. Adding to this, a majority of detainees say that detention has a negative impact on their physical health.

- *A variety of conditions affect detainees' physical health.* Many attribute the negative impact to the living conditions, such as the lack of fresh air or the mere confinement to one location. Others attribute the impact to the psychological stress they experience in detention, leading to a reduced appetite and higher blood pressure, among others. Yet in other cases detainees say that the restrictive nature of detention actually helps overcome pre-existing problems such as alcoholism, drug addiction, or even homelessness. However these findings are very much the exception.
- *Physical health deteriorates as detention endures.* Whereas one quarter of detainees detained for 0 to 30 days describe their physical health as being poor, 72 percent of people detained for 121 to 150 days describe it in this way. The data indicates a steady upward trend of physical health becoming worse as the length of detention endures. The same finding applies to those who feel that detention has negatively impacted their physical health.
- *Younger detainees suffer more negative consequences than older detainees.* The percentage of detainees who report negative physical health impacts in detention decrease as the sample becomes older. Moreover, the numbers indicate that minors and women aged 18 to 24 more frequently experience negative physical health consequences than when compared to other detainees.

10. MENTAL HEALTH WITHIN THE DETENTION CENTRE

10.1. Detention's impact on mental health

Detainees were asked to describe their mental health in the same way as they did for physical health: by rating their level of mental health before and during detention on a scale of one to ten, with one being “very poor” and ten being “very good”. They were additionally asked if detention impacted their mental health, and if so, to describe the manner of the impact. The purpose of this questioning was to determine the extent to which detention affects the mental integrity of the person, since vulnerability is relevant not only within the context of physical weakness, but mental weakness as well. Persons with pre-existing mental health conditions, such as post-traumatic stress disorder, may find it very difficult to cope with the environment of detention. The risk of retraumatisation runs high since many detention centres have a ‘prison-like’ atmosphere where a number of adversities exist. Yet just as with physical health, people with otherwise normal or strong mental health may suffer as a consequence of detention. This may be especially true if there is a lack of mental health services, or if the person is in prolonged detention and does not receive sufficient information or social support. While vulnerabilities in physical health may be easy to identify and treat, vulnerabilities in mental health are harder to identify, monitor and treat because they so often pass unnoticed to untrained observers.

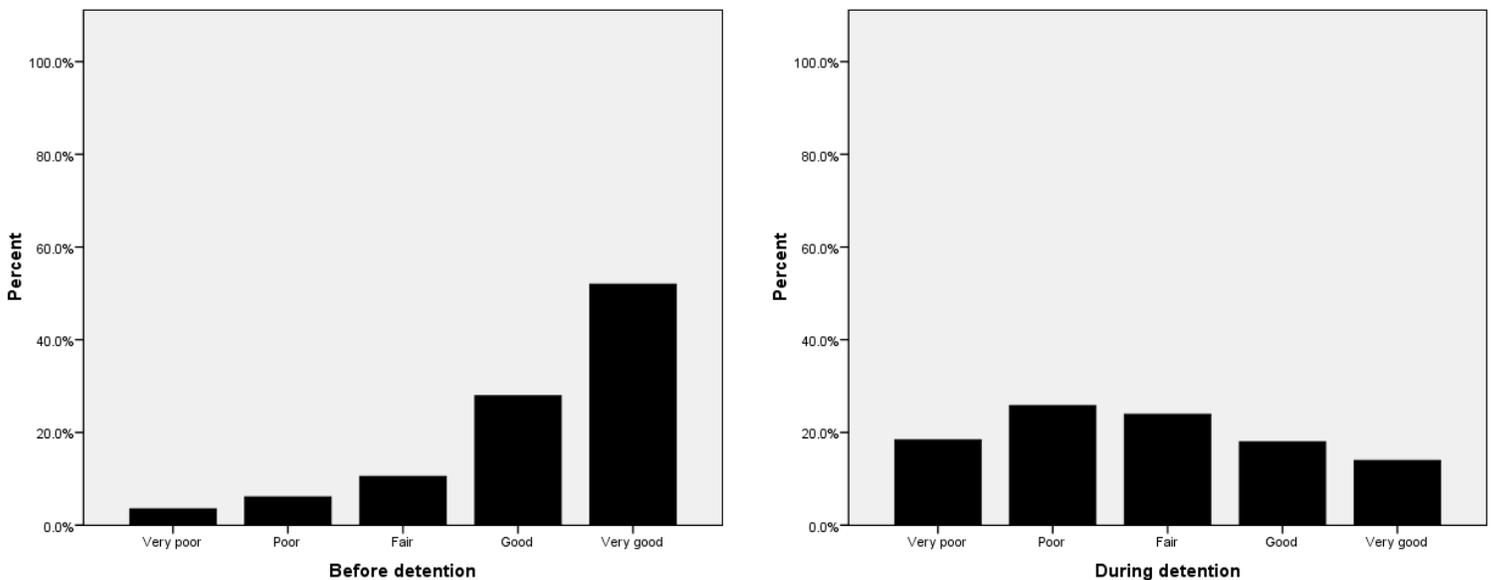
10.1.1. Average data findings

The vast majority of detainees describe their mental health prior to detention as being “good”. However, most say that their mental health is “poor” while in detention. The data shows a 34-point increase in the percentage of detainees who feel that their mental health is poorer in detention than what it was before. In addition, it shows a 48-point decrease in the percentage of detainees who feel that their mental health is better in detention than it was before (see charts 4 and 5). An overwhelming majority of detainees said that detention has impacted their state of mental health, largely in a very negative manner.

Detainees describe the mental health impact of detention in a variety of ways. Grouped together, their statements reveal the impact detention has on their mental health in five ways: firstly, as a consequence of detention itself; secondly, the living conditions; thirdly, psychological stress; fourthly, medical problems; and fifthly, past trauma and the expectation of difficulties in the future. Almost half of detainees’ statements that are attributed to the first

category, 'detention itself', describe various "unspecific factors" that are present within their experience in detention. In other words, most of the detainees in the sample were unable to articulate the specific reasons why detention negatively impacts their mental health. A 35-year-old Nigerian asylum seeker, for example, describes the "great shock" that he experienced upon his detainment in Cyprus. According to him, "being brought to prison was unexpected." When asked to describe how detention impacts his mental health, a 38-year-old Ukrainian asylum seeker detained in the Czech Republic can only say "it is very hard to stay in here." Many others describe being fearful because they have never before experienced detention. "It is my first time in a prison", says a Palestinian woman detained in Greece, "so it is difficult." Detainees frequently describe their detention centre as a "prison", and attribute the mental health impacts they feel to being kept within a confined space with little indication of when they might be released. "I am locked in – that is the problem", says an Azerbaijani woman detained in Sweden. A 34-year-old Cuban man detained in Slovenia explains, "I am not used to being locked in." Regardless of their legal situation, detainees perceive their situation as one of punishment, and as such they do not understand the reasons for their detainment.

Chart 4 and 5: Mental health in detention, before and during



A number of detainees explain that their poor state of mental health in detention comes as a result of being disconnected from friends, family and other sources of support in the outside world. "I'm in a cage, it is hurting me", said a Ukrainian man detained in the Czech Republic, "The telephone is not enough to keep in touch. I feel like crying sometimes." Others feel that detention has disrupted their life plans, and there are those who feel that the imposition of detention has severely eroded their human rights. "I am not a criminal, but I am in a prison," says a Nigerian man detained in Hungary, "I have nothing to do for the whole day. It is horrible." Anger is palpable among the detainees that were interviewed – anger at the perceived injustice of their situation, and anger at their perceived powerlessness.

"I miss my children and wife. The biggest problem is not being able to communicate with them. I do not know if they are alive or dead."

46-year-old male Somali asylum seeker detained in Malta for 167 days

Almost one third of detainees' descriptions about the impact detention has on their mental health can be attributed to stress. But just as they are unable to articulately specify which aspects of detention impact their mental health, detainees in this group are mostly unable to pinpoint the reasons why they feel stressed in detention. They described feeling severe "tension" as a result of "thinking too much". The psychological stress makes many feel "tired", "sad" and "nervous". Others express deep self-worry and self-uncertainty. "I don't know what will happen", says a 36-year-old man from Gabon seeking asylum in Belgium, "if they accept me or send me back. My life is in danger."

A significant minority of detainees attributed the mental health impact they experience in detention to psychological issues. Detainees express this impact by describing the trauma of their journeys, or the trauma they experience as a result of being separated from family. "Every day it hurts", says a Rwandan asylum seeker detained in Belgium, "...I have been threatened. I have dreamt a lot about members of my family who died." A woman detained in Ireland says, "I suffered depression in Zimbabwe, but it is worse now since I've been in prison." Sadness, irritability, anger, and despair are some of the most prevalent emotions that are described by detainees. Mental tension, sleeplessness and appetite loss are among the more frequent ways in which detainees link their mental state to their physical condition.

A smaller, but no less significant, number of detainees express anxiety at the prospect of being returned to their country of origin. "Tension has made my pain much worse," says a 47-year-old Palestinian man detained in Sweden, "I sometimes cry, feel pain when I think about my problems, if they send me back to Palestine." A 38-year-old Ukrainian asylum seeker retells of the difficult position he now faces while detained in the Czech Republic: "It may happen that I will be deported back to Ukraine, where I cannot go. It's very dangerous for me there. I'm a political refugee. To go back to Ukraine where I think they could kill me – these are very hard thoughts." For some detainees, the shock of being put into detention has displaced the expectations they had of seeking safe haven in Europe. "I was very happy to arrive in Europe," says a Somali woman detained in Malta, "but then I was put into detention and after all the months here I received a rejection. I am very depressed. Sometimes I just cry and cry the whole day."

10.1.2. Disaggregated data findings

Detainees aged 18 to 24 most frequently describe themselves as having poor mental health in detention. But the data indicates that minors more frequently express negative mental health problems as a consequence of detention than when compared with other age groups. Almost everyone in this group say that detention impacts their mental health, and among those, approximately half say that the most negative impacts of detention come as a result of detention itself. Compared with other ages, this group of detainees more frequently reports experiencing tension, stress, worry and self-uncertainty. In addition, they often attribute the mental health consequences of detention to being disconnected from the outside world, and to the disruption detention imposes on their life plan.

Alongside age, the data shows that duration of detention is a factor in how detainees mentally cope with being in detention. The entire group of persons detained for 121 to 150 days at the time of their interview say that detention has negatively impacted their mental health. From that group, 71 percent attribute the impact to detention itself – at a rate of approximately two times more than the average detainee. As found in the average findings, detainees within this category are frequently unable to articulate exactly how detention impacts their mental health. The same can be said for stress: over half attribute the mental health impact to "stress", but in many ways they are unable to pinpoint the most stressful aspects of detention. Those who are able to provide more descriptive responses frequently point to the self-uncertainty they experience as a result of not having enough information, or being unaware of when they will be released or how their family is coping on the outside.

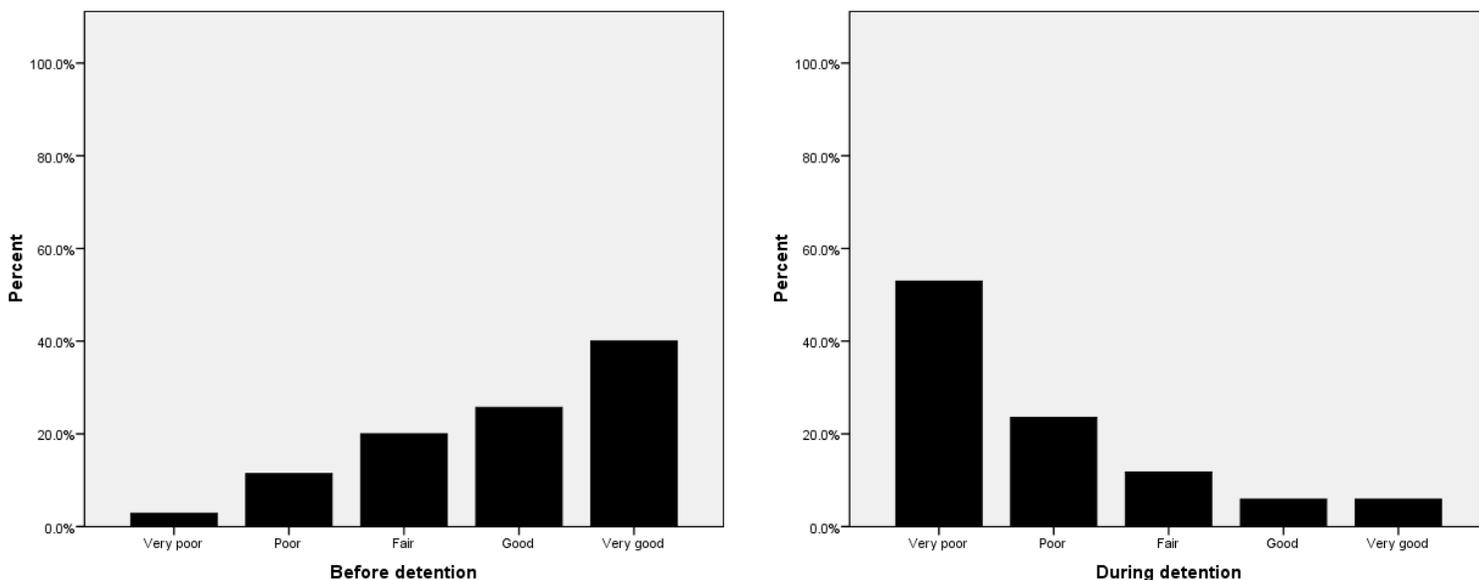
Besides the general atmosphere of detention itself, all of the detainees within this group point to the inadequate state of the living conditions in the detention centre as a reason for their poor mental health. In this case detainees frequently complain about the poor quality of the food, the unseemliness of the detention centre, the difficulties in

cohabitating with other detainees and the relations with detention centre staff. The negative responses made by persons within this category reflect the general trend shown by the data: that mental health of detainees worsens as the length of detention endures.

The data does not indicate a significant departure from the average for detained asylum seekers and irregular migrants. Detainees in these two categories respond in ways that reflect their respective situations: asylum seekers appear to experience general shock at their detention, and difficulty coping with the trauma that gave way to their flight to Europe; irregular migrants seem to be more worried about what might happen to them upon deportation, and what will become of their lives once they return to their country of origin. But the data shows that detention has a significant impact on the mental health of asylum seekers in the so-called “Dublin II” procedure, and of asylum seekers whose application has been rejected. In the case of “Dublin II” asylum seekers, 77 percent describe their mental health as being poor while in detention – 33 percent more than the total sample average. Just over half of the “rejected” asylum seekers who were interviewed describe their mental health as poor while in detention, and 95 percent say that detention has impacted their mental health. Compared to other groups, “Dublin II” and “rejected” asylum seekers appear to suffer the worst mental health impacts in detention.

The numbers indicate a 63-percentage point increase in the number of “Dublin II” asylum seekers who report poor mental health before and during detention (see charts 6 and 7). Asylum seekers in this category attribute the mental health impact of detention mostly to the stress of uncertainty, and to stress as a result of worry. “I don’t want to leave Sweden,” says a 30-year-old woman detained in Sweden, “I don’t want to go to Germany or Kosovo. There are soldiers shooting in Kosovo. It is not good for me or my daughter.” Rejected asylum seekers experience similar mental health impacts, but with an extra burden: that of failure. A 27-year-old Rwandan woman in detention frames her rejection as a “terrible failure”. “I don’t expect things to get better”, she says. An Afghani man fears the “terrible things” which “await” for him in Afghanistan. Persons within this category frequently talk about their need for anti-depressant medication, their inability to sleep and the anxiety that is the consequence of an uncertain future. A few even admit harbouring thoughts of self-harm.

Chart 6 and 7: Mental health in detention for “Dublin II” asylum seekers, before and during



Detainees were asked to rate their level of mental health before and during detention on a scale of one (very poor) to ten (very good). They were also asked if detention has had an impact on their level of mental health, and if so, to describe the impact. While physical health may be a more obvious indicator of vulnerability, the ability of an asylum

seeker or irregular migrant to mentally cope with their situation of confinement becomes all the more apparent. The traumatic pasts and uncertain futures of many of the detainees who were interviewed reveal the fragility of their mental health, and their vulnerability to further mental harm. But the data also shows that detention weakens persons who might otherwise have normal or strong mental health. The findings within this chapter inform us that

- *Detention negatively impacts the mental health of detainees.* When asked to rate their mental health prior to and during detention, the average findings show that a high percentage of detainees report poor mental health as a result of their detainment.
- *Detention is itself a primary determinant factor in the negative mental health impacts described by detainees.* Many detainees were unable to specifically articulate the reasons why they feel their mental health is negatively affected in detention. Instead, they more frequently described being “shocked”, “fearful” and “depressed” at their situation.
- *Psychological stress comes not only from detention itself, but also as a consequence of poor living conditions, self-uncertainty and isolation from the outside world.* Detainees’ inability to establish a perspective of their future, due to a lack of information and disconnection from the outside world, places a great deal of psychological stress upon their shoulders. This stress often leads to deeper anxiety and depression.
- *Prolonged detention compounds the adverse mental health consequences of detention – but newly arrived detainees suffer just as much.* The figures show that mental health steadily worsens as detention endures. But the differences in mental health impacts between detainees in the first month of detention and those in their fourth or fifth month of detention are not wide.
- *Age and legal status are two important factors for how detainees mentally cope with detention at a personal level.* Minors and persons 18 to 24 frequently report adverse mental health impacts as a result of their detention. Asylum seekers express mental shock at being detained, while irregular migrants express anxiety and uncertainty about what may happen to them once they are expelled. A high percentage of asylum seekers in “Dublin II” detention and those with rejected applications experience very adverse mental health impacts as a result of their detention.

11. SOCIAL INTERACTION WITHIN THE DETENTION CENTRE

11.1. Level and quality of interaction among detainees and with staff

Detainees were asked to describe the level and quality of their social interaction with co-detainees and with staff. Being isolated from the outside world means that detainees exclusively rely on the social environment within the detention centre to have their needs met. As a consequence, detainees are subject to the prejudices of co-detainees and staff. Detainees whose culture and ethnicity are widely accepted within the detention centre may find that social interaction improves their ability to cope with the adverse impacts of detention. Those who are not accepted, or those who find themselves in the minority within the detention centre, may find that social interaction only exacerbates the difficulties they face and thus make them more vulnerable to physical and mental harm. Vulnerability, therefore, might be viewed as a condition that is affected by personal and social circumstances: detainees can be either supported by persons in their social network, or they can be further weakened by the lack of support or by additional adversities imposed by the persons within their social network.

11.1.1. Average data findings

Few detainees say that their interaction with others is negative. Most report positive, or at least satisfactory, social experiences in detention. The majority of detainees who say that they interact well with others do not elaborate except to say that it is “good”, or “fine” or “without any problem”. A minority of detainees say that their linguistic capacities are a reason for the positive level of social interaction that they experience. Detainees who report negative social experiences also tend not to elaborate upon the reasons. But a small number point to inter-cultural and linguistic differences. Some describe not having good relations with persons of particular nationalities, while others describe the difficulty of having to interact with people who speak different languages.

Approximately one-third of detainees say that social problems exist within the detention centre. Most attribute the problems to inter-cultural tension, while a significant minority say that problems arise simply as a consequence of detaining a large group of people in one location. One person describes detention as a “bad place for everyone”. Other detainees tell of problems that arise out of “trivial” matters, or out of competition for services that are insufficiently provided for, such as telephones and televisions. Problems that arise between men and women, or between groups of particular religions, are reported in only very few cases. Whenever a problem arises, most detainees say that they feel that they can go to the detention centre staff. But almost one-third says that they would rather take up their problems with co-detainees.

11.1.2. Disaggregated data findings

The level and quality of social interaction does not greatly differ among the different groups within the total sample. Smaller, but no less significant, variances arise when age is factored. Minors, for example, are among the most positive in their description of social interaction with others. However, almost half say that they do not have someone to go to whenever a problem arises. Approximately half of women aged 18 to 24 say the same. According to them, if they were willing to speak with anyone it would most likely be the medical staff within the detention centre.

The data shows that, in general, social interaction becomes more negative as the length of detention endures (see table 22). According to the findings, people who are within the first month of their detention more frequently report positive social interaction than those who are in their third or fourth month of detention. Similarly, people who are in their fourth or fifth month of detention more frequently report having been witness to problems between detainees than those detained for only one month. Those in their fourth month of detention more frequently attribute these problems to ‘common life’ in detention, and also inter-cultural tension, than when compared to newly arrived detainees.

A broader look at duration of detention reveals that asylum seekers who were detained for more than 90 days at the time of their interview more frequently report problems between detainees and that they do not have someone to go to in case of a problem, than when compared to asylum seekers detained for less than 90 days. This finding holds true when irregular migrants are considered.

Table 22: Percentage of detainees who say that problems exist between detainees, by duration of detention

Percentage (Total sample average: 37%)	
Days in detention	
0-30	30%
31-60	37%
61-90	44%
91-120	35%
121-150	45%
151-180	40%

11.2. Chapter summary

The isolation from the outside world that is imposed on persons as a result of being in a closed detention centre means that detainees must rely on the social network within the detention centre in order for their needs to be met. As a consequence, detainees are subject to the attitudes and prejudices of co-detainees and of staff. An ability to function within the social network may enable a detainee to better cope with the adverse affects of detention. Alternatively, isolation from the social network may further exacerbate the negative aspects of detention, and may thus make the detainee more vulnerable to physical or mental harm. Thus we see that vulnerability carries social, as well as personal, consequences. The findings from this chapter tell us that

- *The environment of detention has a negative impact on the level and quality of social interaction, between detainees and between detainees and staff.* The mix of cultures, nationalities and languages within detention centres makes conflict inevitable. The data shows that the longer people are detained, the more frequently they describe social interaction within the centre in negative terms.
- *The presence or absence of language capacity within detainees plays an important role in the quality of social interaction.* Detainees with language skills more readily adapt to the different types of people they are in detention with. Alternative, the absence of such skills fosters isolation, or opens particular detainees to abuse from more dominant social groups.
- *Young detainees are especially susceptible to social relations within the detention centre.* Minors and persons aged 18 to 24 more frequently report having witnessed problems between detainees than other age groups. Additionally, they more frequently report not having someone to go to in case of a problem.

12. COMMUNICATION WITH THE OUTSIDE WORLD

12.1. Ability to communicate with the 'outside' and personal visits in the detention centre

Detainees were asked about the presence of family and friends in their country of origin, and in the country where they are present (at the time of the interview). They were also asked to describe which means they normally use to contact persons on the outside, and the extent to which they receive visitors from the outside. Since detainees are especially subject to the social environment within the detention centre, it is important to assess the extent to which they are able to access social networks that exist outside of the detention centre. Access to external resources could enable detainees to receive information about their legal situations, to stay in contact with family, relatives and friends and to receive social assistance that might not be available within the detention centre. The inability to access these and other resources on the outside might further exacerbate one's vulnerability the negative consequences of detention.

12.1.1. Average data findings

Most detainees report having family in their country of origin, and just over half admit that their family back home are sufficiently supporting themselves. But slightly more than one-third of detainees say that their family back home depends on them for income, and are thus not receiving support as a result of the person's detention. The migration to Europe has been a lonely endeavour for many within the sample: 42 percent say that they do not have family or friends in the EU host country where they were interviewed. The telephone remains the most widely used means of communication for detainees. But only two percent say that they regularly use the Internet.³² Likewise, detainees

³² 50 percent of this group were interviewed in Sweden, where Internet access is made available to detainees.

hardly use the post as a means of communication with the outside world.³³ Almost 80 percent of those interviewed said that they do not receive visits from persons in the outside world.

According to the majority of detainees, the telephone remains the most important means of communication. But many detainees say that they cannot use their personal mobile telephones. Detention centre staff often requires, as a policy, detainees to relinquish such devices. The alternative for most, then, is to use landline public telephones within the detention centre or to purchase telephone cards from the detention centre staff.³⁴ While telephones may be technically available, detainees say there are not enough to satisfy the needs of everyone. As a consequence they consider themselves to have little access to it. Alongside the telephone, an important minority of detainees said that they see the Internet as the most important means of communication. But the vast majority of detainees who would like the Internet do not have access to it. In the end, the data indicates that almost half of the entire DEVAS sample say that they do not have access to their preferred means of communication.

The number of visitors that detainees report to receive does not make up for detainees' lack of access to the telephone and Internet. In general, detainees who do claim to receive visitors are in the minority. Those who are the exception more frequently report receiving visits from friends and religious/spiritual persons than from family. Half of the entire sample reports to receive visits from lawyers.³⁵ Similarly, almost half of the sample report to receive visits from non-governmental organisations.

12.1.2. Disaggregate data findings

A comparison between asylum seekers and irregular migrants in detention reveals few yet striking differences. If isolation were to be defined in terms of the presence of a social network outside of the detention centre, then the data shows that asylum seekers seem to be affected (see table 23). They less frequently report having family or friends in the host country, and as a result they do not receive nearly as many visitors as irregular migrants do. In particular, asylum seekers in detention while awaiting a "Dublin II" transfer are more isolated than irregular migrants, and even more isolated than asylum seekers with rejected applications.

Table 23: Personal visits to asylum seekers and irregular migrants in detention

	Asylum seekers		Irregular migrants	
	Yes	No	Yes	No
Friends/family in the host country	47%	53%	69%	31%
Use of personal visitations as a means of communication	12%	88%	29%	71%
Visits from family	9%	87%	23%	75%
Visits from friends	20%	76%	40%	58%

Minors are shown to be especially isolated from the outside world. Half of the persons interviewed in this age group report not having family or friends in the host country, and almost half say that they do not have familial connections in their country of origin. Up to 83 percent say that they do not receive any personal visitors; and 68 percent report not having access to their preferred means of communication (the telephone). Only 23 percent within this age group say that they receive visits from lawyers – approximately one quarter less than the total sample average, and lower than when compared to other age groups. Looking to the next age group, women between 18 and 24 years also show to be isolated from the outside world. Almost half report not having family or friends in the host country, and

³³ 20 percent of this group was interviewed in the Czech Republic.

³⁴ All detention centres surveyed in this study prohibit detainees from using their personal mobile telephones. Sweden, for example, offers detainees replacement mobile telephones, as a policy, from the staff. Detainees must still purchase telephone cards in order to make calls.

³⁵ Belgium, the Czech Republic, Germany, Slovakia and Sweden contain the highest concentration of detainees who report to receive visitations by lawyers.

just over one third say they do not have family in their country of origin. Sixty percent say they cannot access their preferred means of communication (the telephone).

The isolation of the younger detainees in the sample reflects a trend in the data: isolation from the outside world decreases as detainees become older (see table 24). Although a number of these detainees were interviewed in Malta and in Greece, it is worth noting that particularly isolated detainees are found in over half of the 21 EU Member States where the DEVAS project was implemented.³⁶

Table 24: Percentage of detainees with access to family, friends and lawyers, by age

	Family in country of origin (Average: 78%)	Family/friends in host country (Average: 59%)	Visits by family (Average: 16%)	Visits by friends (Average: 30%)	Visits by lawyers (Average: 47%)
Age (in years)					
10-17	59%	50%	12%	23%	23%
18-24	79%	46%	13%	24%	51%
25-34	81%	63%	19%	32%	51%
35-44	82%	69%	18%	37%	51%
45-64	64%	62%	19%	39%	65%

The data does not demonstrate a similar trend in regards to duration of detention. If isolation were to be defined by the lack of access to family and friends, and even lawyers, then a person in their fifth month of detention may be just as isolated as someone in their first week. Yet the data does reflect some discrepancies between averages found in the entire sample, and averages found in groups of asylum seekers and irregular migrants detained for more than 90 days. In particular, asylum seekers and irregular migrants detained for more than 90 days report to receive much fewer visits from friends and family than the average. Asylum seekers within the same category more frequently report not having access to their preferred means of communication – the telephone – than when compared to the average and even to irregular migrants detained for the same length. Adding the factor of duration of detention to the category of detained asylum seekers shows that they are a rather isolated group, in terms of their lack of access to a social network existing outside of the detention centre.

12.2. Chapter summary

If the restrictive environment of a closed detention centre means that detainees must rely on social networks within the detention centre itself, then the existence of any lines of communication with persons or organisations in the outside world would likely have a high impact on their overall experience in detention. A detainee who has regular access to the telephone, to visits from family or friends and even to lawyers may be better able to cope with the negative aspects of detention, in that he or she may have access to legal information and news related to family developments, for example. Conversely, a detainee who does not have lines of contact to the outside world may instead fare worse in detention, as their sense of isolation would likely grow and thus impact their mental well being. Vulnerability is a factor with both personal and social ramifications. Personal weaknesses can be simultaneously lessened or deepened based on the level of support provided by a social network. The closed environment of detention makes the existence of social support all the more important for detainees. Main findings from this chapter indicate that

³⁶ Including Bulgaria, Netherlands, Portugal, Slovenia, Slovakia, Austria, Belgium, Czech Republic, Germany, Hungary, Spain and Romania

- *Detainees lack family and friends in the host country.* Almost half of the sample admits that they do not have relations to anyone in the host country. Those who were interviewed were more likely to receive assistance from strangers than from familiar persons.
- *The telephone is the most widely used means of communication, and according to detainees, the best way to stay connected to the outside world.* Based on their statements, detainees have very little access to the Internet and to personal visitors. The telephone is a more reliable means of communication, and more widely available. However, many detention centres prohibit the use of personal mobile telephones, which detainees find more important than the landline telephones available in many centres. Mobile telephones are more important because they are portable, and contain personal data such as the telephone numbers of family and friends.
- *Asylum seekers are particularly isolated from the outside world.* Compared to irregular migrants, even when duration of detention is factored in, asylum seekers receive less personal visits from family and friends, likely owing to the lack of familial and friendly network in the host country.
- *Isolation from the outside world decreases with age.* According to the data, older detainees more frequently reported to have good access to means and lines of communication than younger detainees did. Detained minors and women aged 18 to 24 stand out from the sample as having little access to a social network outside of the detention centre.

13. THE IMPACT OF DETENTION ON THE INDIVIDUAL

13.1. Nutrition and sleep

The DEVAS project uses ‘nutrition’ and ‘sleep’ as two indicators to better understand detainees’ perceptions of the quality of the living conditions in the detention centre, and also to measure the personal impact that may come as a result of these living conditions. Detainees were asked to discuss their opinion of the suitability of the food provided in the centre, whether the quality of the food has changed their appetite and if such a change has had an impact on their well being. Following this, detainees were asked about how well they sleep in the detention centre, and to elaborate upon whichever response they offered. Nutrition and sleep are important indicators for vulnerability because they can impact a person’s physical and mental integrity. Insufficient nutrition might not only lead to fluctuations in weight and energy but also to cognitive capacities, such as the ability to concentrate and to articulate oneself.³⁷ The lack of sleep not only affects one’s level of energy and cognitive capacities, but it might also lead to emotional imbalances.³⁸ In a situation of closed detention, the ability to eat and sleep in a manner that sufficiently meets the needs of the mind and body can impact one’s level of vulnerability to the environment of detention.

13.1.1. Average data findings

The majority of detainees say that the food served to them in the detention centre is unsuitable. From this group, 41 percent attribute their dislike of the food to its poor quality. While many define “poor quality” as food that is tasteless,

³⁷ An article by Kenny, Silove and Steel (2004, *Medical Journal of Australia*, 180, 237-240) explore the legal and ethical implications of detained asylum seekers who are on hunger strike. After one week of strike, the person “experiences dramatic weight loss”, along with “fatigue, headache, faintness and dizziness” (p.238). None of the detainees interviewed for DEVAS were in the middle of a hunger strike. But the article does indicate some of the consequences detainees may face as a result of poor nutrition. A report by Manandhar, Share, Friel, Walsh and Hardy (2006, *Food, Nutrition and Poverty Among Asylum-Seekers in North-West Ireland*) states that “fear over a food supply that is controlled by (unknown) others can lead to alarming psychosocial issues for asylum seekers. Hunger strikes are common in detention centres, protesting their lack of control and disempowerment” (p.25).

³⁸ References in the scientific literature to insomnia within the situation of immigration detention are widely available. For example, see: Koopowitz and Abhary. (2004). Psychiatric aspects of detention: Illustrative case studies, *Australian and New Zealand Journal of Psychiatry*, 38(7), 495-500.

others say that the food is often under-cooked, or is simply unsuitable for consumption. A Libyan man detained in Belgium echoes others when he says that the food is “not cooked enough”, and is “almost always expired”. Most detainees expressed very strong negative opinions about the quality of the food, frequently describing it as “awful”, “terrible” and “uneatable”.

A minority of detainees attribute their dislike of the food to the little variety offered to them. Within this group there are frequent complaints of eating similar meals everyday, such as rice, pasta and potatoes, or bread and cheese. Others complain about not getting enough fruits in their daily meals. The significance of the food for detainees is better understood when factoring in the length of their detention. One detainee says, “I cannot eat anymore ... always the same thing for five months”. An Iranian man, detained for almost two years, says he is “sick” of eating the “same thing” for the duration of his detention.

On average, detainees say that their appetite has changed during their detainment. From this group, 90 percent say that they have lost their appetite as a result of the quality of the food. This loss in appetite has worsened many detainees’ situations. Oft-repeated statements such as, “I don’t feel like eating because of all the problems”, or, “I eat less because I am thinking too much”, give an indication as to the effect of stress – imposed by detention – on detainees’ appetites. “I eat less because I am not hungry”, says a 16-year-old Pakistani boy detained in Greece, “I am not working here, we are sitting all day, so I am not hungry.” Many detainees connect their loss of appetite to the lack of nutritional variety offered by the detention centre staff, and to the quality of the food that is on offer. Detainees complain of gastro-intestinal problems such as constipation and diarrhoea. Other detainees report forcing themselves to eat despite the poor quality of the food and the mental stress they experience. “I have to force myself because I know I need to eat”, says an Ecuadorian man detained in Spain, “I’ve lost weight”. Weight loss is a frequently reported consequence of the poor quality of the food and of decreased appetite. In some instances detainees describe losing as much as six or eight kilograms in a matter of weeks. These negative opinions prevail over detainees who feel positive: in that regard, less than ten percent said that they have gained appetite in detention and feel better as a result.

Just as most detainees dislike the food, a majority say that they do not sleep well during the night. Of this group, 61 percent attribute their inability to sleep well to stress and worry, or in their words, “thinking too much”. Detainees describe a seemingly endless playback of their anxieties and fears, particularly about their families in the outside world, and what will happen once they are released from detention. A Ghanaian woman detained in Germany speaks for many other detainees when she describes her nights in the detention centre: “In the night my head is heavy, and my body is very hot. I sweat. I am not OK. When I came here, I was not like this.”

“Tensions, worries about my future, missing home and family, fear of deportation to Russia ... In detention, you have too much energy that you can’t use. That keeps you awake.”

20-year-old Russian man detained in Latvia for seven months

Almost one quarter of detainees who say they do not sleep well at night specifically blame the living conditions in the detention centre. Hot temperatures and the lack of fresh air, either due to improper ventilation or to the number of persons sharing one dormitory, is a problem for many detainees. The social atmosphere within the detention centre that comes as a result of detaining people in close proximity to each other prevents some from sleeping when they would like to. “I read most of the nights in the corridor,” admits a Ukrainian man detained in the Czech Republic, “I don’t want to disturb my roommates at night because I make noise with my teeth when sleeping. So I only sleep during the day.” Detainees frequently describe nights filled with noise, either from airplanes – due to the detention centre’s proximity to an airport – or from co-detainees who are sick and moan or scream throughout the night as a consequence. Others say that the lights are frequently left on during the night, preventing them from sleeping fitfully in darkness.

A small minority of detainees describe experiencing vivid nightmares or physical problems that prevent them from sleeping. According to detainees, the detention centre authorities distribute sleeping pills as needed. Often this is their last line of defence against another sleepless night. “I only sleep well if I get my pills ... Otherwise the pain in my legs keeps me awake.”

13.1.2. Disaggregated data findings

The data reveals few variations from the average in the way that different groups within the total sample feel about the quality of the nutrition in the detention centre. Exceptions are found for people detained for 61 to 90 and 121 to 150 days at the time of their interview. Approximately three quarters of each group states that their appetite has changed in detention; 98 percent of those detained for 61 to 90 days, and 100 percent of those detained for 121 to 150 days say they have lost their appetite during detention. A broader examination of duration of detention and nutrition reveals that asylum seekers and irregular migrants who are detained for more than 90 days feel more negative about the food in the detention centre than people detained for less than 90 days (see table 25).

Elsewhere, women aged 18 to 24 years also show to be an exception to the average. In their case, 80 percent report disapproving of the food in the detention centre, and 96 percent say they have lost their appetite as a result.

Table 25: Detainees’ negative responses regarding nutrition in the detention centre, by legal status and duration of detention

<i>Percentage of detainees who ...</i>	Asylum seekers detained for		Irregular migrants detained for	
	<90 days	>90 days	<90 days	>90 days
Feel the food is unsuitable	58%	70%	61%	73%
Experience a change in appetite	51%	74%	58%	72%
Have lost their appetite	87%	95%	86%	95%

The duration of detention also seems to have an impact on sleep. Approximately three quarters of people detained for 121 to 150 days at the time of their interview say they do not sleep well at night. People within this group frequently cite stress and worry as reasons. Looking at others, men and women aged 18 to 24 point to similar reasons when asked to explain why they cannot sleep. But in general fewer variations exist in the data when examining ‘sleep’ as an indicator for detainees’ well being. Young people and those in prolonged detention appear to suffer more acutely than others, but these variables offer little explanation as to why they feel differently than other groups. Detainees’ opinions and experiences in regards to sleep and nutrition are mostly similar – besides the exceptions described above – irrespective of legal status, sex, age and duration of detention.

13.2. Detainees top difficulties in detention

Detainees were asked to provide an indication of the biggest difficulties they face in detention. This was done in order to elicit information that depicts, as accurately as possible, their own feelings about their situation of detainment. Put in another way, the question was presented as an opportunity for detainees to describe their detention in their own words. In turn, they express such “top difficulties” in a broad variety of ways. But despite the variations in age, sex, legal status and duration of detention, and even the place of detention, detainees more or less articulate their difficulties in detention in a similar manner to one another, allowing the DEVAS research team to situate their statements within four broad categories: detention *itself*, living conditions, stress and medical problems. In doing so, a conception of ‘vulnerability’ emerges that is based on detainees’ own experiences, rather than on the perceptions of external stakeholders. Thus a complex understanding of ‘vulnerability’ is revealed, showing that alongside specific categories of vulnerability that already exist, there are a number of factors present within a

detainee's situation that determines, to a large extent, the level of vulnerability he or she may have to the situation of detention.

13.2.1. Average data findings

The most frequently reported difficulty in detention is the negative impacts caused by detention *itself*. Half of the sample rate this as their primary difficulty in detention, and as many as 42 percent rate it as their second most-experienced difficulty. A large majority of detainees are unable to point to a specific difficulty about their detention. Instead, many offer broad and abstract reasons such as “being detained”, “the detention itself”, “my situation”, “being locked”, “that I cannot get out” and “being in here”. These *unspecific negative factors*, as we call them, are present within the majority of detainees’ responses that are about their biggest difficulties in detention. The mere situation of closed detention, and the ensuing restriction on their freedom of movement and the imposed isolation imposed from the outside world is the biggest difficulty that detainees grapple with.

Yet in many cases detainees do cite more specific difficulties, such as their loss of rights, their disconnection to the outside world and the disruption of their life plan. A 28-year-old Palestinian man detained in Sweden says he used to be a translator in his home country, and that he had wanted to continue his studies. His rejected claim for asylum, and his consequent detainment has blocked these plans. “My life has stopped”, he says. Detainees express deep worry about their family, and their inability to provide support while in detention. “The hardest thing for me is being without my children”, says a 29-year-old Nigerian woman detained in Ireland. Many detainees perceive that their freedom has been seriously infringed upon, and that their situation is akin to imprisonment. “The fact that I am in prison and that I cannot get out” is the biggest difficulty for a 16-year-old Pakistani boy detained in Greece; many others share these sentiments.

“The fact that they treat you like any other prisoner: like a criminal when you go to court, or when you go [to the authorities] to answer questions. I made a complaint about that in court. I was not handcuffed, but they put you in a prisoner's car; they way they treat you isn't right.”

27-year-old Congolese asylum seeker detained in The Netherlands

The second most frequently reported difficulty in detention is the factors related to the living conditions in the detention centre (see table 26). A large number of detainees express strong dissatisfaction at the food provided to them. But others cite “sleep deprivation”, or “dirty toilets”, or “the lack of sports facilities”. The unhygienic condition of the space within the detention centre bothers many detainees. While the living conditions, *per se*, are very problematic for detainees, they also point specifically to issues that arise from cohabitating with so many others. The mix of cultures and nationalities, newly arrived detainees and long-term detainees, families and single persons, for example, cause a great amount of frustration among persons who are primarily worried about their own situation. The inability to communicate in a common language exacerbates co-habitational tension in the detention centre. Added to this are problems associated directly with the manner in which staff treats detainees. A smaller, but no less important, number of detainees describe situations of “abuse from detention centre staff”, “shouting between policemen and detainees”, and the “lack of respect” shown by the staff.

Table 26: Frequently reported difficulties made by detainees concerning the living conditions in the detention centre

“There is no outdoor space to play, walk or sit.”	<i>17-year-old Afghani detained in Greece</i>
“No clean air.”	<i>31-year-old Belarussian detained in Sweden</i>
“Lack of something to stimulate the mind.”	<i>36-year-old Congolese detained in Malta</i>
“Cultural differences [among detainees].”	<i>62-year-old Serbian detained in Slovakia</i>
“The closed windows.”	<i>42-year-old Moroccan detained in Belgium</i>
“No possibility for self-education.”	<i>18-year-old Eritrean detained in Latvia</i>
“The strict programme. We are not allowed to go out.”	<i>19-year-old Pakistani detained in Romania</i>

The third most frequently reported difficulty in detention is the factors associated with stress. In this respect, detainees repeatedly express feelings and experiences that are replete with self-worry, fostered by a fear of being sent back to their home country, and self-uncertainty that comes as a result of not having a clearly defined plan. The “sense of unfairness” due to the lack of clear information about their case and situation – as specifically expressed by a Bangladeshi man detained in Cyprus but also by many others – is a leading factor in the stress that they feel. Prolonged detention, or simply being unaware of a release date, adds to this tension. Statements such as “waiting and not knowing when detention will end”, “not knowing anything about my case”, “I don’t know how long I have to stay here”, recall an image of someone who is stuck in a very negative situation and uncertain of what to do next.

These sentiments are closely associated with those made by detainees concerning the difficulties posed by detention and the living conditions of the centre. But they are also related to concerns about family, relatives and friends in the outside world. The negative consequence of being “stuck” in the detention centre not only concerns the ability to provide for oneself, but also to provide for loved ones. A Sri Lankan asylum seeker detained in the Czech Republic, for example, is worried about his wife because he “can’t earn money to send” to her. “Being separated from my wife and child” is one of the biggest causes of stress for a 21-year-old Kazak man detained in Lithuania for just over three months at the time of his interview. Detainees frequently repeat “separation from family” as a reason for their feelings of insecurity in detention, and also the stress that they report to experience.

The fourth most frequently reported difficulty in detention is the factors association with medical problems. In this context, detainees express problems linked to mental and physical health. Detainees regularly cite the non-treatment of chronic ailments, such as diabetes and bodily pain, and inadequate medical care for acute medical concerns, as factors that exacerbate the difficulties imposed by detention. “Lack of adequate health services”, “especially in emergency cases” is, according to detainees, a serious problem within the detention centre. Moreover, the inability to sleep properly affects detainees’ level of energy and predisposition to mental health stress.

In this regard, detainees are less specific about the mental health problems that they experience. This may be due to their inability to access psychiatric or psychological care in the detention centre, as described in Chapter 8 of this report. Without any consultation, it would be very difficult for someone in closed detention to articulate their state of mental health other than to describe themselves as being “sad”, “fearful”, “anxious” or “thinking too much”.

Statements such as “I can’t think straight about my problems”, “my life is over”, “my mind is not well” and “being alone” are conceptualisations of poor mental health that are frequently made by detainees.

13.2.2. Disaggregated data findings

The difficulties that are present within the situation of closed detention do not affect one group of detainees more than another. The data shows that detainees experience very similar problems irrespective of age, sex, legal status and duration of detention. A 30-year-old single man, for example, may suffer from the same mental health problems as an 18-year-old single woman. A person in their fifth day of detention may experience similar self-uncertainty as a person in their sixth month of detention. Nevertheless, the numbers do indicate that some groups report particular types of difficulties more frequently than other groups, and at a higher percentage than found in the total sample. But these differences may owe more to individual factors and contextual settings rather than to homogenous group factors.

An examination of the four broad difficulties that detainees experience in detention – detention *itself*, the living conditions, stress and medical problems – shows that minors are particularly concerned about the negative impacts fostered by detention itself. While it is true that a majority of these detainees were interviewed in Greece, where poor conditions of detention are well documented,³⁹ they were also interviewed in ten other EU Member States.⁴⁰ According to the minors who were interviewed, the mere imposition of closed detention and the consequent restrictions on movement and contact with the outside world is very negative. A 16-year-old Nigerian boy detained in Bulgaria, for instance, misses going to school, and a 14-year-old boy detained in Greece cannot call his parents in Pakistan when he needs to. “Being detained is the most difficult thing”, says a Somali asylum seeker awaiting a “Dublin II” transfer from The Netherlands. A 17-year-old Ghanaian asylum seeker says that he does not know how he will be able to “rebuild” his life after being in detention. Although detained minors most frequently cite the negative aspects of detention itself, they also point to the lack of activities and the mix of nationalities in the detention centre as being problematic. In Malta, a 17-year-old girl is worried about the other men she is detained with, saying, “Detention is not safe and secure for me as a single woman being detained with men.”

Similarly to minors, persons detained for 121 to 150 days at the time of their interview more frequently point to detention *itself* as their primary difficulty in detention when compared to the rest of the sample. The sense of imprisonment figures prominently in the experiences of this group. “They keep me here for too long”, says a Lebanese man detained in Bulgaria for five months at the time of his interview. When asked to state her biggest difficulty in detention, a 23-year-old Somali woman simply says, “I am imprisoned”. The stress of uncertainty and dissatisfaction with the living conditions are additional difficulties they report to experience. But people detained for less than 90 days – asylum seekers and irregular migrants – also express very similar difficulties. Closed detention is a new experience for many persons within this category. Thus detainees describe their “shock” at being detained, while many others decry the prison-like living conditions of the detention centre.

Other groups that frequently report difficulties in detention are women aged 18 to 24, and asylum seekers in “Dublin II” detention. Detainees in both of these groups regularly point to the problems associated with detention *itself*, and the stress they experience as a consequence. Many women aged 18 to 24 identify their difficulties with the living conditions in the detention centre; the poor quality of the food in the centre was of special concern to this group.

³⁹ For more information on the treatment of migrant children detained in Greece, see, for example: *In the Migration Trap: Unaccompanied Migrant Children in Europe*, Human Rights Watch World Report essay, January 2010; *Greece: Unsafe and Unwelcoming Shores*, Human Rights Watch, 12 October 2009; *Left to Survive: Systematic Failure to Protect Unaccompanied Migrant Children in Greece*, Human Rights Watch, 11 December 2008; *The Dublin II Trap: Transfers of Asylum Seekers to Greece*, Amnesty International, 22 March 2010; Report of Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe following his visit to Greece on 8-10 December 2008; *The Truth Must be Bitter, But It Must be Told: The Situation of Refugees in the Aegean and the Practices of the Greek Coast Guard*, ProAsyl, 2007.

⁴⁰ 39 percent were interviewed in Greece; 11 percent in Malta; 7 percent in Bulgaria, Netherlands, Portugal and Slovenia; 4 percent in Austria, Belgium, Czech Republic, Germany and Hungary.

13.3. Living with the difficulties of detention

Detainees were asked to speak about the way in which they live with the difficulties of detention described in the previous section. The intention here was to acquire an understanding of how such difficulties might change during the course of detention, and to identify points in time when these difficulties might be most severe. In addition, detainees were asked about their eventual departure from the detention centre, and, to describe the personal impact they feel if they are unaware of when they will be released. The purpose of this questioning was to reveal the scale and scope of the difficulties detainees report to experience, so as to investigate in greater detail detainees' personal sense of vulnerability within the environment of detention.

13.3.1. Average data findings

A majority of detainees say that the difficulties they experience tend not to change over the course of their detention. For these persons, life in detention is a situation where one day segues into the other without any major difference. Their lives become static. But for those who do experience a change in the difficulties of detention, most would say that the difficulties become worse. A Kosovar man detained in Slovenia, for example, says that detention is “getting worse”, making it “more difficult to live without a life perspective.” A Tunisian man detained in Spain admits becoming “more desperate over time”. An Afghani detained in Romania says he feels as if he has “aged 20 years” since he was first detained.

A minority of detainees admit that the difficulties they first experienced in detention have improved during their detention.⁴¹ Some describe having learned to adapt to the adversities of detention, while others attribute the improvement of their situation to the provision of psychological care or medication. Yet others come to the detention centre after having lived homeless on the street, or having had problems with alcohol and drug abuse. It is important to note that almost none report a marked improvement in the *conditions* of detention, in the sense that a bad practice was ameliorated. Instead, detainees describe an adaptation to the circumstances of detention, in the sense that their personal disposition towards the situation of detention has improved.

But for a larger number of detainees, detention is an experience that brings negative consequences. Just over half of those interviewed can describe a specific time when detention became especially difficult. When asked, most say that “every day” they spend in detention is difficult for them. But approximately one quarter of these detainees specifically point to the very beginning of detention, or the “first days”, as many within the sample say. A Brazilian woman detained in Portugal says she felt “very trapped” during her first days of detention; a Cameroonian man detained in Belgium realised the difficulties he would face when he “entered the place” and “saw the bars” on the windows. Other detainees describe specific events as being their most difficult time in detention: A 19-year-old Serbian man detained in Hungary says it is in “the afternoon ... because we are locked in the room and there is nothing to do.” One man describes the frustration he felt when he learned of his father’s death, and being unable to attend the funeral because of his detention. A woman detained in Malta spoke of being informed about her daughter’s death in Somalia. The lowest point in detention for others is when they receive a rejection to their asylum application, or when they are told of their impending deportation. Some detainees say detention becomes difficult in the first weeks, while others describe the one-month mark as the tipping point. “After one month, I realised it was too long”, says a Gabonese man detained in Belgium.

Coping with the negative aspects of detention is especially hard for detainees who do not know what the outcome of their detention will be. Indeed, only a minority of detainees claim to know what will happen to them after detention: some know which country they will return to, while others know they will be released into the society of the country

⁴¹ 31 percent of these detainees were interviewed in Portugal, where psychosocial support is afforded to every detainee. Additionally, Portuguese law lays down a 60-day maximum period of detention. If the person is not returned to their country of origin by that time (since Portuguese law stipulates detention only for irregular migrants), they are then released into Portuguese society. According to JRS-Portugal, detainees are routinely informed of the 60-day maximum period of detention.

that is detaining them. Many more detainees are unsure of what to expect. Some say they are “ready for everything” and are “hoping for the best”; others are very pessimistic and worry that their lives will be endangered if they are not given either a protection status or permission to remain within the territory of the Member State that detains them. Most of the detainees that were interviewed do not possess any clear optimism or pessimism – they simply do not know, and are looking for almost any remedy to their situation of detention.

Startlingly, 79 percent of detainees in the sample do not know when they will actually be released from detention. The consequent personal impact of not knowing is very negative. A Ghanaian man detained in Germany compares his situation to being in a “dark tunnel” as a result of not knowing when he will be released; and his statement echoes those made by the vast majority of detainees. They report severe and persistent levels of stress, and express deep dismay at being unable to establish a life perspective for themselves and their families. “I want to set an agenda. I want to set plans for my future”, explains a detainee in Lithuania. Another detainee says, “I am living without having a plan for my future life”.

“I cannot plan anything with my family, with my mother who is taking care of my baby now. I cannot arrange for a flat for myself, to pay for it, because I do not know for how long I am going to stay here.”

25-year-old Ukrainian woman detained in the Czech Republic

Being unaware of the release date negatively impacts detainees’ ability to communicate to family, relatives and friends in the outside world. They longer their detention endures, the more they feel like “birds in a cage”, as expressed by a Albanian asylum seeker in detention. Worry for self and for loved ones, mixed with the uncertain circumstances and duration of their detention negatively impacts detainees’ ability to mentally cope with the adversities of detention. “I feel more depression” and “I am getting crazy” are frequently said by many of those who were interviewed. The stress of uncertainty leads to anxiety and this further leads to sleepless nights, depression and, for a minority of those interviewed, suicidal ideation.

“My life is over.”

28-year-old Palestinian man detained in Sweden for 15 months at the time of his interview

13.3.2. Disaggregated data findings

According to the data, the difficulties inherent within the situation of closed detention affect a broad range of detainees. But the numbers continue to show that particular groups stand out from the rest, in terms of the way they cope with life in detention and how the negative aspects of detention personally impact them. Individual factors such as age and duration of detention provide a more specific indication of how detainees fare in the situation they are in.

The data continues to portray minors as having great difficulty in coping with the adversities of detention. Slightly over half admit that they have experienced a change in the level of severity of the difficulties imposed by detention. From that group, 85 percent say that such difficulties have worsened – approximately one quarter more than the total sample average. Detainees within this group point out specific times or events that represent a low point in their time in detention. But for most other minors the difficulties of detention are a daily occurrence. Almost three quarters do not know when they will be released. As a consequence they report to experience very high levels of stress, tension, anxiety and self-uncertainty.

The experiences of people who were detained for 121 to 150 days at the time of their interview also stand out from the average as being particularly negative. Over 90 percent of people within this category were able to describe a moment, or a series of moments, when detention became especially difficult for them. For a man detained in Slovakia, the “time of Christmas” was very hard because he was without his family. Others talk of being unable to regularly communicate with their spouses and children. Three quarters of the detainees in this group admit that they do not know when they will be released from detention. A Syrian man detained in Hungary says that the impact of not knowing makes his life “less and less meaningful over time”. Others describe feeling a “mental blockage”, “uncertainty”, and nervousness.

A broader look at duration of detention reveals similar findings. Asylum seekers and irregular migrants that are detained for more than three months are more likely to say that detention has become harder to cope with than those detained for less than three months. Still, 82 percent of asylum seekers detained for less than three months do not know when they will be released from detention.

Difficulties persist for asylum seekers even when duration of detention is removed from consideration. Eighty percent of detained asylum seekers say that they do not know when they will be released from detention. Almost the entire sample of “Dublin II” asylum seekers, and asylum seekers with rejected applications, do not know when they will be released. The latter, in particular, have great difficulty coping with life in detention because they had hoped to receive a protection status in a EU Member State. The personal impacts on these asylum seekers are strikingly similar to the rest of the sample: stress, anxiety, uncertainty, worry and depression.

13.4. The impact of detention on self-perception

In an effort to better understand the personal impacts that are consequent to the situation of closed detention, detainees were asked to complete the sentence, “I see myself as ...”. The intention here was to ascertain how detainees self-perceive in an environment of restricted movement, of isolation from the outside world and where access to information is difficult to obtain. By asking them to describe how they perceive themselves, we may obtain a closer understanding of the factors that increase their level of vulnerability in detention.

13.4.1. Average data findings

On average, there is an even split between detainees who self-perceive positively and those who self-perceive negatively (see table 27). Despite the circumstances of their situation, many detainees are able to make very positive statements about themselves. This finding is striking because for almost the entirety of their DEVAS interview detainees made very negative statements about their situation, the conditions of detention, the lack of information, their isolation from the outside world, the mental and physical health impacts and so forth. Yet they become more positive when asked to depict *themselves*, and not the environment around them. Detainees with positive self-perceptions describe themselves as being resilient, strong, friendly, kind, hard working and eager to learn. Conversely, detainees who self-perceive negatively describe themselves in a severe manner, comparing themselves to animals, prisoners, pawns and being “less than human”. A disquieting number of detainees portray themselves as a “forgotten person”, or as “a criminal”. Others speak of themselves using words that depict mental health suffering. Indeed, 92 percent of detainees who negatively self-perceive also say that detention negatively impacts their state of mental health. While many detainees describe themselves as being “unlucky”, there remains still a strong sense of personal wrongdoing; that their detention and the consequent difficulties that they are subject to are no one else’s fault but their own.

Table 27: Positive and negative self-perceptions in detention; Completing the sentence, “I see myself as ...”

“...Someone with skills; a confident person.”	<i>Nigerian man detained in Ireland</i>
“...As somebody in transit.”	<i>17-year-old Kazak boy detained in The Netherlands</i>
“...A person who likes to help and support.”	<i>53-year-old Venezuelan man detained in Portugal</i>
“...An animal.”	<i>Iraqi man detained in Bulgaria</i>
“...A person of confidence. People come to me to get advice an information	<i>33-year-old Congolese woman detained in Belgium</i>
“...Stuck in one place”	<i>22-year-old Nigerien woman detained in Malta</i>
“...A Vietnamese person who came to Germany to have a better life.”	<i>40-year-old Vietnamese woman detained in Germany</i>

Over half of the detainees that were interviewed say that the environment of detention negatively impacts their self-perception. A 25-year-old Kosovar asylum seeker detained in Austria, for instance, says of his detention: “I feel that I’m not able to concentrate or learn anymore.” Detainees’ statements reveal that the situation of closed detention has deteriorated their self-image. Frustration, anger, sadness and despair form the basis of how they perceive themselves in detention. “I am not the same person as I used to be,” says a Nigerian man detained in Spain, “and I will never be the same again.”

13.4.2. Disaggregated data findings

The data reveals that detainees’ self-perception improves as the sample becomes older (see table 28). Whereas minors more frequently make negative statements about themselves, those aged 45 to 64 are more frequently more positive. But in their statements detainees do not portray age as a factor that impacts their self-perception. Whether they feel positive or negative, detainees offer similar statements irrespective of their age. A slightly different trend emerges when considering the impact of *detention* on self-perception: Minors feel more neutral, while 18 to 24, and 25 to 34 year olds more frequently say that detention has deteriorated their self-image.

Similarly to age, the data shows that self-perception becomes more negative as the length of detention endures. Whereas only one-third of detainees in their first month of detention self-perceive negatively, more than half do so in their fourth and fifth month of detention. Of those detained for 151 to 180 days at the time of their interview, 80 percent say that detention has negatively impacted the way they perceive themselves. Asylum seekers and irregular migrants who have been detained for more than 90 days harbour very negative self-perceptions than when compared to those detained for less than 90 days. Three quarters of both asylum seekers and irregular migrants detained for more than 90 days say detention has worsened their self-perception.

Table 28: Self-perception in detention, disaggregated by age

<i>Total sample average:</i>	Positive 39.3%	Neutral 21.1%	Negative 39.6%
Age (in years)			
10-17	24%	20%	56%
18-24	33%	24%	43%
25-34	43%	22%	35%
35-44	40%	21%	40%
45-64	43%	18%	39%

13.5. Existence of personal special needs, and vulnerabilities in others

At the end of their interview session, detainees were asked to describe the special needs that they might have in detention, and the special needs and vulnerabilities that they perceive their co-detainees to have. The intent of this questioning was to allow detainees to voice their personal needs, and the needs of others, in as concrete a manner as possible. Whereas for the entire interview detainees were asked to share their experiences in relation to the conditions and environment of detention, these final two questions focused on their experiences in relation to their personal selves. In doing so it was hoped that detainees could somehow articulate their own understanding of ‘special need’ and ‘vulnerability’.

13.5.1. Average data findings

Remarkably, 68 percent of detainees said that they do not have special needs that stand them out from the rest. This finding is notable because it may seem to contradict detainees’ previous statements about the negative aspects of detention. When asked to elaborate, most within this group of detainees indicate that they have the same needs as everyone else. “We are all the same here” and “we are all in the same situation” are common refrains from detainees. A Moroccan man considered the question, *do you have special needs that no one else has?* by saying, “It is difficult to say. There are some who have more needs than I. Some are in a worse position than my own. They cannot speak; they have to ask someone to translate.”

The majority of detainees who do admit having special needs provide examples that are not commonly regarded, such as language capacity. Many of these detainees point to their inability to speak the language of the detention centre staff, or the language spoken by other co-detainees. “I need an interpreter to make myself understood”, asserts a Guatemalan asylum seeker detained in Belgium. “I need somebody who understands my language,” says another. Alongside language, a number of detainees identify other special needs, such as for educational activities: whether it is for learning a new language, or having access to books or even access to formal education. Others describe their need for information about their family back home, affairs in their home country or about the asylum/immigration procedure.

Linked to this is the need for greater access to the telephone, or more importantly, access to their personal mobile telephones, and also access to persons in the outside world. Statements such as, “I need to see my children”, or, “I have to take care of my wife” are frequently presented by detainees as special needs. Other needs include access to the labour market and to financial resources in order to repay debt or support loved ones. Some detainees want better medical care, while others simply cite “freedom” as a special need. The data does not show a trend where one special need, or one set of needs, stand out from the rest. Instead a picture emerges of mixed needs that are exclusively related to the personal situation of detainees.

The exception to this lies with detainees who voice special needs that are more widely recognised, i.e. 'classic' special needs. Most within this smaller group of detainees especially point to medical needs. Some express the need for treatment for conditions they had before detention, such as diabetes, while others describe needing psychological support for their deteriorated mental health. This finding adds further weight to the medical needs expressed by detainees elsewhere in their interviews (see Chapter 8). Only one person specifically linked their special needs to their sex (a woman), and only one other person linked their special needs to their age (a minor).

As regards to the special needs and vulnerabilities of others in the detention centre, the detainees that were interviewed more frequently identify others as having 'non-classic' special needs. In particular, many detainees mention insufficient language capacity as being a factor of vulnerability in others. People who cannot speak the language of the detention centre staff, for example, are perceived to be more vulnerable than those who can because they are unable to communicate their needs. Detainees also recognise people in prolonged detention as being vulnerable, typically defining 'prolonged' as any period lasting more than two months.⁴² In addition, they identify elderly people, those without sufficient financial resources to support themselves and their families and those with little or no family connections as being especially vulnerable in detention. Some detainees identify 'nationality' as being a factor of vulnerability, saying essentially that the cultural characteristics of some nationalities place detainees at a permanent disadvantage to others in the detention centre. Persons with humanitarian protection needs, such as those who fled conflict or political persecution, are identified as being vulnerable. In other cases, persons who suffer from drug addiction are perceived as vulnerable, because in the detention centre they often go through the painful process of withdrawal with little to no medical attention. But there are detainees who feel differently: Approximately one quarter say that "everyone" is vulnerable in detention, and a much smaller minority – six percent – are not able to identify vulnerabilities in anyone.

13.5.2. Disaggregated data findings

The data does not reveal many variations from the average in regards to detainees' perceptions of having special needs. In general, detainees express similar needs to one another. Exceptions nevertheless exist, such as, for example, female asylum seekers and detainees aged 45 to 64. Both of these groups more frequently report having special needs than the total sample average. But besides the few female asylum seekers who identify their pregnancy as a special need, the needs that they express are not entirely different from the needs of other detainees; and the same can be said for detainees aged 45 to 64. Duration of detention does not seem to be a factor either – actually, perceptions of having special need decrease slightly as detention endures.⁴³ Young detainees report having special needs less frequently than the average. A high percentage of detainees aged 18 to 24 describe 'non-classic' special needs, but these needs do not altogether differ from those expressed by the rest of the sample.

13.6. Chapter summary

Throughout the DEVAS interview detainees were asked to describe the conditions of the detention centre, its staff, the quality of its medical care, the level of information they have and so forth. But at the end of the interview session, detainees were asked a series of questions relating to how they personally cope within the environment and adversities of detention: The impact of the quality of the food on their appetite and physical health, their ability to sleep fitfully at night, the primary difficulties they face in detention and how they cope with such difficulties. Additionally they were asked to describe the way in which they perceive themselves in detention, their possession of special needs and how they identify special needs and vulnerabilities in other detainees. The purpose of this

⁴² This is what many detainees have said. The author of this report refers to any detention period lasting more than three months as 'prolonged'. It is not intended to be a definition of 'prolonged detention', nor is it a position of the DEVAS project partners. Rather it is a reflection of the data, which shows a marked difference in the responses between persons detained for less than and more than three months at the time of their interview.

⁴³ This phenomenon may be due more to the decreasing sample size as detention endures, rather than the actual level of needs detainees possess.

questioning was to allow detainees to use their own words to describe how they are personally impacted by detention.

- *The quality of the food and the ability to sleep at night highly impact detainees' ability to cope with detention.* A majority of detainees expressed deep dissatisfaction over the quality of the food in the detention centre, and most said that they could not sleep well at night. Both conditions contribute to the level of stress detainees feel. In particular, the poor quality of the food contributes to an overall sense of 'inhumanity' among detainees. Conversely, the stress imposed by detention itself negatively affects detainees' motivation to eat properly, and their ability to get enough rest. Prolonged detention seems to exacerbate these negative effects.
- *The situation of detention itself is the biggest difficulty that detainees cope with.* The mere imposition of detention and all of its consequent effects – isolation from the outside world, poor communication channels, and its impact on physical and mental health – is an insurmountable difficulty for detainees. Minors and long-term detainees seem to especially suffer, but the negative aspects of detention affect everyone irrespective of age, sex, legal status, duration of detention and even location of detention. Detainees' express a very strong sense of personal wrongdoing and a feeling of imprisonment.
- *The difficulties of detention figure daily in the lives of detainees; any changes are usually for the worse.* The negative aspects of detention are persistent. While the data shows that these negative aspects may become worse as detention endures, the level of its severity is similar for all groups of detainees that were interviewed.
- *Most detainees do not know when they will be released.* Being uninformed, even in this small way, leads to very negative personal impacts for detainees. The absence of a future perspective prohibits detainees from finding ways to rebuild their lives after detention and to take care of their loved ones.
- *Detainees think positively of themselves, but struggle to continue doing so as their detention persists.* Despite the adversities they have described, detainees remarkably hold positive perceptions of themselves. But the environment of detention and the negative factors associated with have a significant deteriorative effect on their self-perception.
- *Most detainees do not admit to have special needs, but they readily point out needs in other detainees.* Detainees are apt to say that they have the same needs as everyone else. But those who do admit having special needs frequently describe needs that are not usually considered: language capacity, connection to family, possession of information and ability to communicate with the outside world. Detainees cite similar descriptions when describing the vulnerabilities of other detainees, prioritising language and familial connections as important factors of vulnerability.



ANALYSIS

- Why assess ‘vulnerability’?
- Vulnerability within the context of detention
- Assessing vulnerability in detained groups and individuals

14. 'VULNERABILITY' IN DETENTION

14.1. Why assess vulnerability?

Existing conceptualisations of vulnerability⁴⁴ and special need in detention mostly focus on pre-determined personal factors, such as unaccompanied minors, single parents with children, persons with medical illnesses and persons with traumatic histories. While these factors are based on a history of experience with detainees, they are 'pre-determined' because they continue to be applied by political, legal and humanitarian actors to subsequent groups of detainees with little further assessment of their validity to detainees' individual situations. The persons within these so-called 'vulnerable groups' are rightly given extra attention by policy makers and non-governmental organisations because they do possess special needs that should be looked after: unaccompanied minors may need the assistance of responsible adults, single parents with children may need help with childcare, persons with medical illnesses may need treatment and persons with traumatic histories may need psychological attention. The special needs of the persons within these categories are palpable.

Less clear is whether detainees who fall outside of these pre-determined categories – single adult men, married childless couples, prolonged detainees and persons with no history of medical or psychological trauma – also possess 'special needs' that require concerted attention. Moreover, pre-determined conceptions of vulnerability usually focus on groups who possess special *needs*, because it is easier to ascribe operational definitions to the latter than to the 'vulnerability' itself. Thus the notions of 'vulnerability' and 'special need' become blurred, and the understanding of who fits within each category and how a person qualifies to be in either category, becomes confused. This gap in understanding leaves three fundamental questions open to speculation: *What is vulnerability within the context of detention? What are detainees vulnerable to? How can vulnerability be assessed in individuals and in groups?*

14.2. Vulnerability within the context of detention

The methodological implementation of the DEVAS project, and the findings that were attained from interviews with detainees, offer another perspective on vulnerability and special need in detention. It is a perspective based on the voices of detained asylum seekers and irregular migrants rather than on pre-determined notions, and on the multitude of the factors that make up their experiences in detention. This is not to say that pre-determined criteria of vulnerability and special need are no longer worthy or unnecessary – the DEVAS research confirms that persons within pre-determined categories actually do have special needs and vulnerabilities. It is also not to say that the perspective offered by the DEVAS project is better than others – here too we see that the DEVAS project comes with its own limitations.⁴⁵

The results of the DEVAS project should rather be seen as an additional input into the long-standing discussion on the constitution of 'vulnerability' and 'special need' in detention, and one more tool which might be useful for policy makers, practitioners and detention monitors. Above all, the results of the DEVAS project should be seen as an

⁴⁴ The Reception Conditions Directive (2003/9) includes "vulnerable groups" such as "minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence" (art. 17.1). The Asylum Procedures Directive (2005/85) does not lay down a definition for vulnerable groups, but does place unaccompanied minors within this category, "on account of their vulnerability" (preamble 14). Guarantees for unaccompanied minors are laid down in Article 17 of the Directive. The Dublin Regulation (343/2003) does not define vulnerable groups, but does allow for certain procedures in the situation that an asylum seeker is an unaccompanied minor. The Qualification Directive (2004/84) and the Return Directive (2008/115) both define vulnerable groups in the same way as in the Reception Conditions Directive. Apart from governmental references to vulnerability is the standard set by UNHCR in their *1999 Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*: "single women, children, unaccompanied minors and those with special psychological or medical needs", as well as "unaccompanied elderly persons, torture or trauma victims, persons with physical or mental disability."

⁴⁵ Refer to the Introduction of this report for "methodological remarks" and "research limitations".

embodiment of detainees' voices for the purpose of using their accumulated experiences to ensure that detention, if used at all, reduces its harm to individual persons to the largest extent possible.

The findings of the DEVAS project show that 'vulnerability' is a complex and multi-layered concept that falls well outside the boundaries of predetermined categories. The data offers a story of detainees who not only have special needs such as medical problems, pre-existing traumatic histories and families to take care of, but also of detainees who *become vulnerable* to the negative effects of detention. Since every person possesses traits, characteristics and experiences that differ from one another, then we must assume that each person's 'level of vulnerability' also differs from one person to the next. Some detainees may find that they can cope with the adversity posed by detention; others find that they are easily crippled. Some detainees find that detention does not negatively affect them until after one or two months; others find that detention harms them from the very first day.

In and of itself, 'vulnerability' is a loss of control of oneself to someone, or some thing, with more power, thus making oneself susceptible to some type of harm. The picture that emerges from the data is one of the detained asylum seeker or irregular migrant someone who is trapped, isolated and cannot escape, and is thus vulnerable to further harm from internal and external factors. The detainee must therefore rely on their personal attributes, the people in their social network and the characteristics of their environment in order to free him or herself from that trap. Conversely, the same personal, social and environmental factors – or an absence of such factors – may hinder an individual's ability to free him or herself from this trap.

Within the context of detention and the data that was collected for DEVAS, 'vulnerability' can be conceptualised as a concentric circle of personal (internal), social and environment (external) factors that may strengthen or weaken an individual's personal integrity (see diagram on page 91). Put differently, the presence or absence of these factors may either empower a detainee to cope with the negative effects of detention, or they may expose the detainee to further harm. Factors interact at all levels of the concentric circle, and they can either positively or negatively impact each other. A detainee, for instance, has no control over the personal beliefs of a detention centre security guard, but the detainee's nationality may spark discriminatory behaviour from the guard. An individual in prolonged detention may not be able to communicate with his or her lawyer and thus remains poorly informed of the asylum procedure in the country where he or she is detained. The inability to communicate with a lawyer on the outside, and the resultant lack of information, may instil a deeper sense of personal uncertainty, stress and despair within the detainee: all of which may lead to a deterioration of their mental and physical health.

14.2.1. Personal factors of vulnerability

The DEVAS research shows that a determination of one's level of vulnerability to the negative aspects of detention should first begin with an assessment of personal factors. This first level of the concentric circle can simply be defined as the *sum of the individual's personal sense of agency*. It is a set of determinants that an individual personally carries with him or herself, all of which may hinder or improve the individual's ability to cope with the adversities of detention. The factors listed on the diagram on the preceding page are not exhaustive; nor, for this matter, are any of the subsequent factors presented in this way. Instead, each of the personal factors relates to experiences that were expressed by detainees in their interviews. Among the personal factors listed on Table 29 (see page 93), language capacity, level of awareness of the asylum/immigration procedure and state of physical and mental health were shown to have the most influence over an individual detainee's ability to cope with the environment imposed by detention.

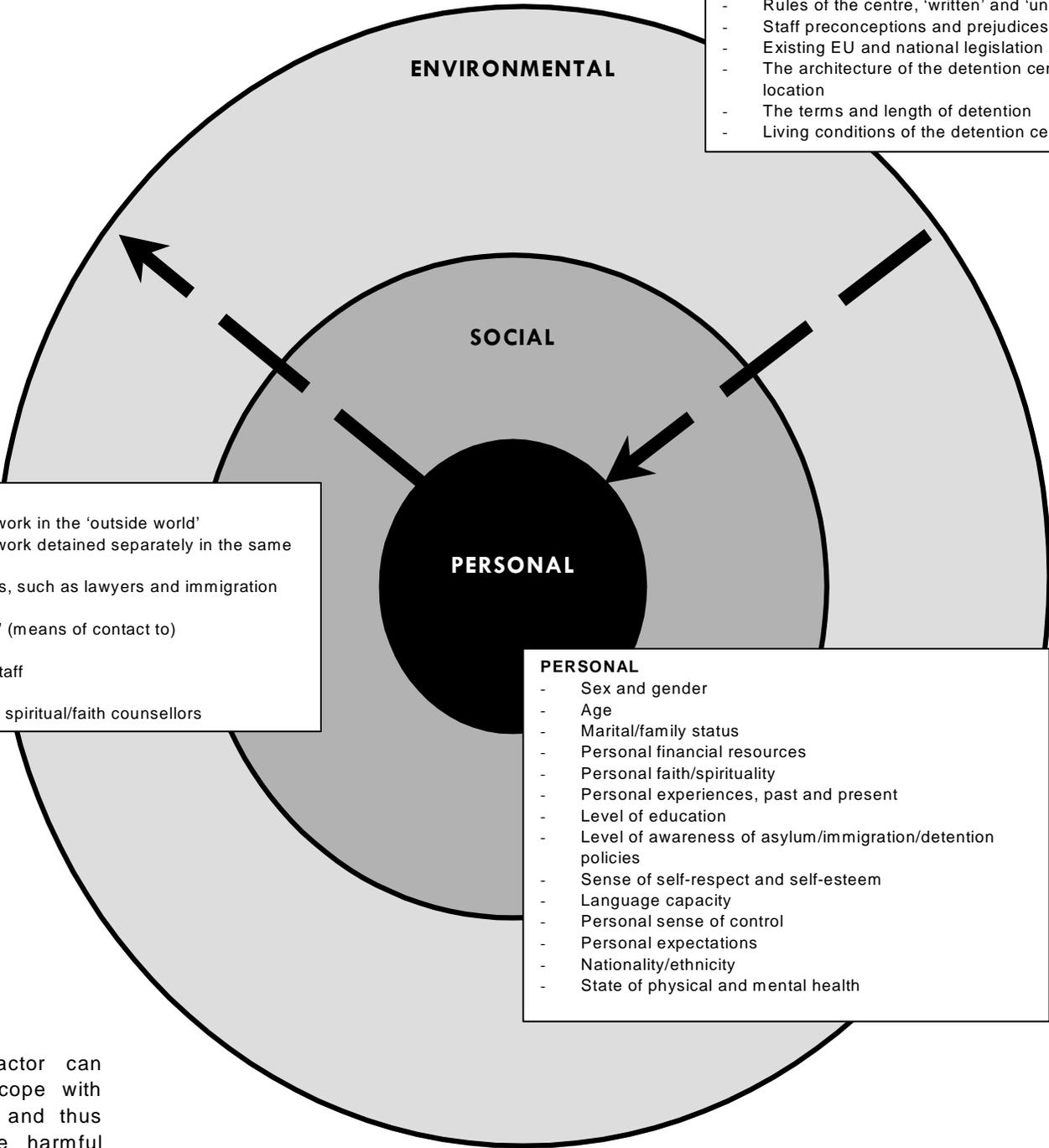


The Concentric Circle of Vulnerability

- SOCIAL**
- Family/friends network in the 'outside world'
 - Family/friends network detained separately in the same facility
 - Information carriers, such as lawyers and immigration authorities
 - The 'outside world' (means of contact to)
 - Co-detainees
 - Detention centre staff
 - Medical personnel
 - Visiting NGOs and spiritual/faith counsellors

- PERSONAL**
- Sex and gender
 - Age
 - Marital/family status
 - Personal financial resources
 - Personal faith/spirituality
 - Personal experiences, past and present
 - Level of education
 - Level of awareness of asylum/immigration/detention policies
 - Sense of self-respect and self-esteem
 - Language capacity
 - Personal sense of control
 - Personal expectations
 - Nationality/ethnicity
 - State of physical and mental health

- ENVIRONMENTAL**
- Rules of the centre, 'written' and 'unwritten'
 - Staff preconceptions and prejudices
 - Existing EU and national legislation and policies
 - The architecture of the detention centre and its geographic location
 - The terms and length of detention
 - Living conditions of the detention centre



At each level, any one factor can **strengthen** one's ability to cope with detention, or it can **weaken** and thus make one vulnerable to the harmful effects of detention.

The inability of a detainee to express him or herself in a language that the detention centre staff can understand may lead to a fundamental imbalance in the relations between the two. In this way, the detainee loses the capacity to verbally assert him or herself and becomes vulnerable to the personal and professional dispositions of the staff. Unsympathetic staff may become short-tempered with detainees they do not understand, which may lead to verbal and physical abuse. But even sympathetic staff may be unable to meet the needs of detainees who language they do not understand. Meanwhile, the detainee becomes dependent on the language capacities of co-detainees or on visitors from the outside world. If these resources are unavailable to the detainee, then he or she may be at risk of losing touch with the reality of their situation due to the lack of information; their level of vulnerability to the consequent negative effects of detention may thus increase. The opportunity to be informed in an understandable language is a widely recognised fundamental right.⁴⁶ In the context of detention, the ability for detainees to articulate themselves in their own language, or in a common language, is also very important as it is the primary way they can assert their rights in detention.

Closely linked to language capacity is detainees' level of awareness of Member State procedures on asylum and immigration. Detainees who receive information in a language they cannot understand may fall vulnerable to the closed environment of detention, especially since the ability to independently access information is restricted in many detention centres. Detainees frequently describe the lack of information as one of the more persistent difficulties they experience in detention; they want to know when they will leave, what will happen to them after detention and how they will care for their loved ones. The possession of information enables detainees to at least develop a perspective for their immediate future, and to establish a semblance of a plan for themselves and loved ones outside of the centre. Without this information detainees experience more isolation and high levels of psychological stress – all of which brings physical consequences as well.

Detainees find that their state of physical and mental health becomes vulnerable to the negative effects imposed by the closed environment of detention. Persons with pre-existing physical and mental conditions often fare worse, and otherwise healthy persons find that their overall health deteriorates. The psychological stress that was expressed by many detainees is closely linked to the lack of information, and to some extent, the inability to be understood in their language. As time passes detainees become more despondent and hopeless that their situation can be resolved in a positive manner. This stress affects their ability to properly nourish themselves, and as a result they may lose their appetite and experience the negative physical consequences of prolonged decreased food intake, not to mention insomnia and other physical manifestations of stress.

⁴⁶ The right to non-discrimination on the basis of language, and the right to be informed in an understandable language, is enshrined in: art. 2(2) of the International Covenant on Economic, Social and Cultural Rights; art. 2 of the Universal Declaration of Human rights; arts. 5(2), 6(3)(a), 6(3)(e), 14 and 1(1) of the European Convention on Human Rights and its Protocols; arts. 2(1), 40(2)(vi) of the UN Convention on the Rights of the Child; art. 1, 7, 16(5), 16(8), 18(3)(a), 18(3)(f) and 22(3) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. This right is also recognised in existing EU law related to asylum and migration: art. 5(2) of COUNCIL DIRECTIVE 2003/9/EC laying down minimum standards for the reception of asylum seekers; preamble 13, arts. 10(1)(a), 10(1)(e) and 17(5)(a) of COUNCIL DIRECTIVE 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status; arts. 22 of COUNCIL DIRECTIVE 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees who otherwise need international protection and the content of the protection granted; art. 3(4) of COUNCIL REGULATION (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national; preamble 21, arts. 12(2), 12(3) of DIRECTIVE 2008/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on common standards and procedures in Member States for returning illegally staying third-country nationals. This right is also recognised in the 1999 UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers.

Table 29: Personal factors of vulnerability

Personal factors	<i>Relation to detainees' actual experiences as recorded by the DEVAS project</i>
Sex and gender	Women expressed unease at being detained with men, and not having access to specialised medical treatments, e.g. gynaecologists. Men felt unable to fulfil their perceived role as familial caregiver; in some instances they reported experiencing frequent physical abuse in detention.
Age	Asylum seekers are highly concentrated in the group of detainees aged 10 to 17 and 18 to 24, and they are less informed than older detainees. Minors, in particular, more frequently report negative experiences than other age groups. The environment of detention is generally composed of adult populations, making young persons, especially minors, susceptible to harm.
Marital/family status	Many detainees with a 'single' status are lacking in supportive social networks. Those who are 'married' or have families suffer due to imposed separation. Detainees who maintain good communication with spouses or family benefit from the support that is given.
Personal financial resources	Detainees without money cannot purchase telephone cards in the detention centre, or support themselves in other ways. Their level of financial resources affects their capacity to continue supporting family during detention. Access to legal aid and representation often depends upon financial resources.
Level of awareness of asylum/immigration/detention policies	Detainees who are not fully informed of the Member State's asylum or immigration procedures express feelings of isolation, stress, uncertainty and deteriorated mental health. Unawareness of the length of detention exacerbates these negative effects. Detainees who are informed can at least establish a future perspective and plan for life after detention.
Sense of self-respect and self-esteem	Rejections of asylum applications, deportation decisions and prolonged detention seriously impact self-perception, holding very negative consequences for detainees' mental health.
Language capacity	Detainees who do not share a common language with detention centre staff and co-detainees express a deep sense of isolation and an inability to fulfil basic needs. The lack of mutual understanding may lead to verbal or physical abuse.
Personal sense of control	Inherent within the imposition of detention is the removal of personal control. Detainees become dependent on detention centre staff, and even on co-detainees, for needs fulfilment. Possession of information boosts detainees' sense of control over their situation, for example. Personal control mitigates the negative aspects of detention.
Personal expectations	Detainees may expect that their detention is a means to some other end, e.g. stay in the Member State, or an accepted asylum application. Poorly informed personal expectations lead to further negative consequences. Persons that are detained for longer than expected also express a deterioration of their personal integrity. Detainees express shock at the conditions of their detention due to their expectations that they would find safety in Europe.
Nationality/ethnicity	Detainees find comfort if others of their nationality/ethnicity is present in the detention centre. Conversely, detainees who are alone in their nationality/ethnicity express deep isolation. Certain nationalities/ethnicities spark prejudices and discriminatory behaviours from detention centre staff and co-detainees.
State of physical and mental health	Detainees with pre-existing physical and mental conditions suffer due to the lack of appropriate medical care in the detention centre. Detainees who have been persecuted view detention as yet another form of persecution. Poor material conditions may lead to physical ailments. Even persons who enter detention physically and mentally healthy express deterioration in their condition as detention endures.

14.2.2. Social factors of vulnerability

If we define vulnerability as a “loss of control over of oneself to some one, or some thing, with more power, thus making oneself susceptible to some type of harm”, then an assessment of a detainee’s personal factors would seem to be the most important act in determining his or her level of vulnerability to the negative effects of detention. But even detainees with a strong sense of personal agency may be made more vulnerable if they do not have a social network to rely on for aid and assistance. Just as important as the existence of a social network is the means to communicate with it. Thus the second level of the concentric circle may be defined as *the sum of the individual’s existing social network, and available means of communicating with that network*. It is made up of the persons, organisations or bodies in the detainee’s life who may lessen or increase his or her level of vulnerability to the adversities of detention. These social factors may also be labelled as ‘external factors’, in the sense that they are situated outside of the personal self. Yet these factors do not necessitate existence in the ‘outside world’, *per se* – such factors may also be present in the detainees’ social network within the detention centre. Among the factors presented in Table 30 (see page 95), those that seemed to influence detainees’ personal situations the most are family, relatives and/or friend in the ‘outside world’, the ‘outside world’ (means of contact to), co-detainees and detention centre staff.

Detainees frequently expressed that it was very important for them to maintain steady contact with family, relatives and/or friends in the ‘outside’ world. In doing so they can stay informed of family-related news, and they can also keep their family informed of their situation in detention. Others frequently described detainees who do not have this type of network as being vulnerable in detention. Certainly, if a detainee cannot rely solely on him or herself to cope with being in detention, then relying on family and friends networks on the outside becomes all the more important. Without such support detainees may become more vulnerable to the negative aspects of detention, such as its closed and isolative environment, and the physical and mental stress it creates as a result.

The ability to maintain communication with family, relatives and friends on the outside world depends on the means of contact to that are available to detainees. In most cases detention centres offer fixed landline telephones, but many detainees say that they cannot be accessed regularly, either due to the inability to purchase telephone cards, or to the mere unavailability of enough telephones for everyone. Use of this means of contact might thus depend on detainees’ personal financial situations, and on their level of existing relations with co-detainees and staff (who may facilitate, or impede, access to the telephone). Detainees are mostly unable to use their personal mobile telephones, which in many cases are confiscated by detention centre staff upon arrival. Since important telephone numbers are often stored on mobile phones, even fixed landlines offered by the detention centre become useless if detainees cannot remember which numbers to dial. Other means of contact, such as the Internet, are not widely available. Curtailing detainees’ ability to contact potentially supportive persons or organisations on the outside may consequently reduce their capacity to cope with the adversities of detention, making them more vulnerable to stress, mental and physical deterioration.

If detainees are unable to find support on the outside, or even to maintain contact with those on the outside, then their dependence on co-detainees might increase. Detainees that need to speak with the detention centre staff, or to the medical personnel, often rely on the language capacities of co-detainees. It is also done when seeking social and emotional support. But this factor may also be negative, as expressed by detainees who attribute their lack of safety to co-detainees. Personal factors such as nationality/ethnicity, age, sex and faith/spirituality highly impact relations between detainees. Persons who find others with common areas of interest might benefit from the support given; those who do not interact well within this social network may find themselves vulnerable to exclusion and stigmatisation from co-detainees, and also to verbal or physical abuse.

Together with co-detainees, the detention centre staff form an integral and immediate part of detainees’ social network in detention. In many instances detainees can only rely on the staff for the fulfilment of their basic needs. Staff persons that are unsympathetic, or even verbally or physically abusive, can very negatively affect the lives of

detainees. If detainees cannot trust staff persons, then the dynamic between the two becomes imbalanced. This holds strong consequences for the vulnerability of detainees, since they are already in a disadvantaged situation because they do not possess the same influence as the staff. Detainees who must rely on staff who hold prejudices and discriminatory attitudes, for example, may find that their situation in detention worsens due to the abuse or inattention they might experience as a result. Linguistic understanding between staff and detainees is vitally important in order for the two groups to relate well to each other. The inability of staff to comprehend the language of detainees is a source of social stress; and the consequence for detainees may be deepened isolation and the absence of important information.

Table 30: Social factors of vulnerability

Social factors	Relation to detainees' actual experiences as recorded by the DEVAS project
Family, relatives and/or friends in the 'outside world'	The presence of these persons in the Member State where the detainee is kept can serve as a support outlet for the latter. They can provide the detainee with news from the 'outside', legal information, material and even emotional support. The non-existence of such networks deepens detainees' sense of isolation. Conversely, the existence of familial networks may worsen the experiences of detainees who are unable to provide support themselves due to their situation in detention.
Family, relatives and/or friends detained separately but in the same facility	Detainees feel very negative if they separated from family or friends, but held in the same general facility. This imposed separation further exacerbates a sense of punishment, and also uncertainty and worry for others.
Information carriers, e.g. lawyers, NGOs, immigration authorities	Detainees who are able to meet with lawyers benefit from an improved understanding of their legal situation. But incompetent legal advice misplaces detainees' expectations. Visitations from NGOs serve as a source of information and connection to the outside world, and may mitigate uncertainty and isolation.
The 'outside world' (means of contact to)	Prohibiting detainees' use of their personal mobile telephones has the consequence of severing them from their social network, especially because important information is often stored on mobile telephones. It also fosters isolation because detention centres do not usually provide enough means of communication relative to the detainee population.
Co-detainees	Detainees benefit from the affinity of co-detainees with similar backgrounds, nationalities, ethnicities, language capacities and religious affiliations. But detainees who fled due to persecution may experience more suffering if they are placed with persons who exemplify the reason for their persecution. Detainees more frequently attribute their lack of safety to co-detainees than anyone else in the detention centre. Nevertheless, detainees do rely on each other for mutual support, such as for language translation and interpretation as well personal accompaniment.
Detention centre staff	As a consequence of their situation, detainees inevitably become dependent on the capacity of detention centre staff to fulfil basic needs. Well-trained, supportive and sympathetic staff can help to alleviate the negative effects of detention. Staff who are verbally or physically abusive damage the level of trust detainees possess towards them, and foster an environment of animosity.
Medical personnel	Most detainees describe the medical personnel as being unable to provide anything more than pain-reducing and sleeping medication, irrespective of the ailment. Nevertheless, the medical personnel play an important role in ensuring the health of detainees. In cases where such personnel are able to offer additional services, such as psychological treatment, then detainees seem to fare better.
Visiting NGOs and spiritual/faith counsellors	In many cases it is the NGOs who visit the detention centre that provide legal aid, asylum/immigration information, language assistance and medical

assistance. Visits from such organisations are important as they mitigate the isolation that detainees feel to the outside world, and serve to meet detainees' needs. Many detainees described relying upon their spiritual beliefs as a means of coping with detention. Detainees may thus benefit by meeting with spiritual/faith counsellors, or pastoral care workers.

14.2.3. Environmental factors of vulnerability

A detainee may exert a modicum of control over the personal and social factors that he or she possesses in the situation of closed detention. He or she may choose whom to socialise with, their manner of interaction with the detention centre staff; he or she may also work to improve, even if only slightly, their language capacity so they can communicate with co-detainees and staff and understand the information that is given to them. But he or she cannot exert any control over the factors in the larger environment that affect their level of vulnerability just the same.

These environmental factors, which make up the third level of the concentric circle, may be defined as *the sum of the determinants that exist in the individual's larger environment but which the individual cannot control nor influence, and which may still increase or lessen his or her level of vulnerability to detention*. These factors can be considered as "external" together with the social factors, because they exist outside of the detainee's personal self. Some of the factors described in Table 31 (see page 97) are closely linked to the social factors listed in the previous sub-section. The important difference is that social factors entail direct interaction with other persons and social networks. Environmental factors may include persons in the detainee's social network without entailing direct interaction; but as we shall see it mostly includes non-human elements. Among those that seemed to most influence detainees' level of vulnerability was the architecture of the detention centre, the terms and length of detention and the living conditions in the detention centre.

The well being of detainees seems to be very negatively affected by the prison-like architecture of many of the detention centres where DEVAS interviews took place. The bars on the windows and entryways, the restrictive rules and strict schedules and the high walls and barbed wire of the external perimeter of the centre foster within detainees a sense of wrongdoing. The prison-like atmosphere of detention especially has an effect on detainees with a history of trauma, perhaps due to a dangerous voyage to Europe or to persecution endured in their home country, and also on persons who expected to find safety and security in a EU Member State. As a result detainees experience shock and disbelief at their situation of detention and on the consequences it has on their personal condition. Although detainees are affected in this manner from the first week of detention, prolonged detainees become especially vulnerable to the prison-like atmosphere as seen in their worsened state of mental health and persistent reports of psychological and physical stress.

The prison-like architecture of the detention centre becomes more significant for detainees who do not know the terms and length of their detention. Even if detainees are aware of the reasons for their detention, e.g. for expulsion, they are less aware of the purpose for their detention if it endures for a prolonged period of time. Additionally, detainees who are detained for longer than expected see a sharp deterioration in their condition due to the ongoing exposure to the adversities of detention. Detainees who do not know when they will be released are unable to establish any life plan or perspective of their immediate future. They consequently become more vulnerable in detention due to physical and mental stress that weakens their general condition.

Poor living conditions in the detention centre intensify the negative effects that come as a consequence of the prison-like environment and the indeterminate duration of detention.⁴⁷ Overcrowded dormitories, unsanitary facilities and the poor quality of the food have a severe effect on the self-perception of detainees, many of whom compare themselves to animals as a result of the poor living conditions. But it is not only the extremely negative conditions that affect

⁴⁷ This is not to say that Member States do not legally define a specific duration period of detention. The usage of the phrase "indeterminate duration of detention" reflects detainees' frequently made statements describing their lack of awareness of their date of departure from detention.

detainees: the lack of intellectual stimulation, Internet accessibility and educational activities lend to an atmosphere of idleness. A consequence is the inability to sleep well at night, due to resting throughout the day, which exacerbates stress and worsens physical health. The incidence of skin problems as well as digestive ailments may increase among detainees living in poor conditions, as well as the incidence of psychological symptoms related to depression and anxiety.

Table 31: Environmental factors of vulnerability

<i>Environmental factors</i>	<i>Relation to detainees' actual experiences as recorded by the DEVAS project</i>
Rules of the centre, 'written' and 'unwritten'	Detainees tend to perceive the rules of the detention centre as a means of restriction, rather than maintaining order or security. They decry rules that keep them indoors for most of the day and require them to be in their cells between mealtimes. The rules often exacerbate detainee perceptions of the detention centre as a prison.
Staff preconceptions and prejudices	Detainees are unable to control or influence the staff's attitudes towards them. Many acknowledge that staff persons treat them well and maintain supportive attitudes. But others complain of racial and discriminatory behaviour from the staff. Detainees are vulnerable to negative staff attitudes because they often have no one else to turn to.
Existing EU and national policies on asylum and immigration	Detention conditions differ from one EU Member State to the next. Although the consequences of detention are similar across the EU, the variety in conditions means that detainees kept in one country might experience a greater level of vulnerability than detainees in other country. Thus detainees are made vulnerable to a policymaking process that prioritises the use of detention without sufficient regard for the lives of detainees.
The architecture of the detention centre and its geographic location	Many detention centres maintain a prison-like atmosphere, with barred windows and entryways, and strict schedules and rules. High walls and barbed wire fences are often found on the exterior perimeter. The poor quality of the conditions leads detainees to feel that they have committed a wrongdoing. The location of the centre, in some cases in very rural areas and in others next to airport runways, exacerbates a sense of isolation in detainees.
The terms and length of detention	Detainees frequently compare themselves with convicted criminals. But the difference between the two is that the latter will usually know when they are to be released, while the former does not. The severe environment of detention, together with an unclear understanding (of detainees) of the duration of detention, deepens detainees' level of uncertainty, stress and negative health impacts.
Living conditions of the detention centre	Poor living conditions, such as unclean rooms and unsuitable food, negatively affect the experiences of detainees. It lends to the prison-like atmosphere of detention. Inadequate living conditions make detainees vulnerable to adverse physical health impacts, such as skin and stomach ailments, and also to mental health problems akin to depression.

14.3. Assessing vulnerability in detained individuals and groups

The data shows that detention has the potential to harm many types of people: those with pre-existing special needs or otherwise healthy persons. It is important to stress that a person becomes vulnerable from the first day of their detention, as the individual's personal condition is instantly affected due to their disadvantaged and weakened position. From a State perspective, detainees are persons to be controlled and managed in order to affect policy towards a particular end. Such ends might be a final decision on an asylum application or a removal from the State's territory. The removal of personal control therefore makes detainees dependent on State authorities. As a consequence, detainees become vulnerable to the manner in which they are controlled by the State. Detainees' level

of vulnerability fluctuates in relation to the characteristics that they personally possess, the factors in their social network and the determinants in their wider environment.

The 'concentric circle of vulnerability' described in the preceding sections attempts to acknowledge the variety of factors that enable vulnerability in detained asylum seekers and irregular migrants. In this context it may be utilised as a tool to individually assess persons before detention, and also as a tool to continually determine the necessity and proportionality of detention. However, it is the position of JRS-Europe and its project partners that asylum seekers should not be detained, and detention for irregular migrants should be used as a last resort when non-custodial alternatives have been exhausted. Thus the 'concentric circle of vulnerability' may be additionally viewed as a tool to ensure that the implementation of detention – if used at all – does not cause unnecessary harm to individuals, and is not disproportionate to their actual situation.

The data reveals the presence of individuals and groups in the sample that seem to especially suffer from the negative consequences of detention. An application of the 'concentric circle' shows that there are indeed a variety of factors that impact the level of vulnerability within these persons. The following sections will examine in more depth how the 'concentric circle' tool may be used to assess the level of vulnerability of minors, 'prolonged' detainees, and asylum seekers in the total sample. An emphasis on these groups is not to say that they are more vulnerable than the rest. Rather, they have been identified because their statements emerge from the rest of the sample as being particularly indicative of vulnerability. They will be examined in the subsequent tables along the lines offered by the 'concentric circle' by identifying their relevant personal, social and environmental factors, but also in response to two questions: 1) what pre-existing needs and/or conditions do they possess that might make them vulnerable to the effects of detention? 2) What factors and/or conditions of detention might further impact their level of vulnerability to detention?

14.3.1. Minors

Among the most apparent of the *pre-existing conditions* within this group of detainees is their age: the youngest being 10 and the oldest 17 at the time of their interview. Their youth means that they are psychologically and physically susceptible to the behaviour and attitudes of the adults that make up the detention centre staff, and also of adult co-detainees⁴⁸. As a consequence they are vulnerable to physical injury from staff members who are abusive. Moreover they are vulnerable to mental injury not only from staff, but also to the conditions and environment of detention and all of the negative factors that are entailed. This disadvantaged position is exacerbated since over half of these detainees were asylum seekers at the time of their interview, with one quarter coming Afghanistan and Pakistan – countries where personal security is often compromised. Many within this group report difficulties in communicating with the detention centre staff, due to their unfamiliarity with the language of the host Member State. Furthermore, they came to Europe knowing little about the asylum and immigration policies of the Member State they arrived to, and the reasons for which they may be detained.

The difficulties posed by these pre-existing conditions are compounded when put together with *factors within the situation of detention*. The inability of the detention centre to provide sufficient linguistic assistance means that these detainees may become further isolated from important sources of information, and also from medical treatment since they cannot adequately communicate with medical staff. The closed environment of detention limits their ability to contact the 'outside world'. A significant number of these detainees lack family, relative and friend networks in the host Member State, which deepens their sense of disconnection. Many within this group feel unsafe in the detention centre, owing to verbal and physical abuse that they have experienced from detention centre staff and co-detainees. The mere situation of their confinement and the poor living conditions affects their physical and mental health, and

⁴⁸ In some instances minors with parents are separated from the rest of the detainee population. Among those interviewed for DEAVS, some were detained with the general population, while others were kept in specialised facilities.

may lead to long-term psychological trauma. The lack of educational opportunities may make it all the more difficult for detainees within this group to resume their lives post-detention, due to the interruption in their education.

Table 32: Factors affecting the level of vulnerability to detention for MINORS

Personal factors	Social factors	Environmental factors
<p><i>Legal status</i></p> <ul style="list-style-type: none"> Over half are in need of international protection 	<p><i>Detention centre staff</i></p> <ul style="list-style-type: none"> 1/3 report verbal abuse; most blame the staff 1/4 report physical abuse; most blaming the staff 	<p><i>Architecture/location of detention</i></p> <ul style="list-style-type: none"> Many were interviewed in Greece and Malta; both are known for poor detention conditions
<p><i>Nationality</i></p> <ul style="list-style-type: none"> 1/4 are from countries of conflict and social strife 	<p><i>Co-detainees</i></p> <ul style="list-style-type: none"> Reports of good relations with co-detainees; more interaction with them than with staff 	<p><i>Living conditions</i></p> <ul style="list-style-type: none"> Most have no access to educational activities, nor access to the computers and Internet Over half feel negative about the dormitories
<p><i>Possession of information</i></p> <ul style="list-style-type: none"> 1/3 do not know the reasons for detention Most are uninformed about the asylum procedure 	<p><i>Networks in the centre</i></p> <ul style="list-style-type: none"> Almost all say they have no one to go to in the centre when problems arise 	<p><i>Rules of the centre</i></p> <ul style="list-style-type: none"> More frequently unaware of the centre's rules than other age groups
<p><i>Personal safety</i></p> <ul style="list-style-type: none"> Feel more unsafe than other age groups 	<p><i>Medical personnel</i></p> <ul style="list-style-type: none"> Almost 1/3 do not understand the language of the medical staff 	<p><i>EU and national asylum/immigration policies</i></p> <ul style="list-style-type: none"> Some await a "Dublin II" transfer in detention, and report to understand little of this process The asylum procedures of Greece and Malta are restrictive. Refugee recognition rates in Greece are low
<p><i>Physical & mental health</i></p> <ul style="list-style-type: none"> Physical and mental health has deteriorated as a consequence of detention High rates of reported stress, uncertainty 	<p><i>Family, relatives, friends in the 'outside world'</i></p> <ul style="list-style-type: none"> Almost half do not have these networks in their home country Half do not have these networks in the host Member State 	<p><i>Staff preconceptions and attitudes</i></p> <ul style="list-style-type: none"> Detention centre staff have used racial epithets against detainees
<p><i>Self-perception</i></p> <ul style="list-style-type: none"> Over half hold negative self-perceptions 	<p><i>Means of contact to the 'outside world'</i></p> <ul style="list-style-type: none"> Most do not receive personal visitors Many report difficulty accessing the telephone 	
<p><i>Personal experiences</i></p> <ul style="list-style-type: none"> Most say difficulties have worsened in detention 	<p><i>Information carriers</i></p> <ul style="list-style-type: none"> Only 1/4 say they have met with lawyers 	

14.3.2. 'Prolonged' detainees

The average duration of detention in the DEVAS sample is three months. But within the sample there are persons who were detained for as long as 31 months at the time of their interview. Thus for the purpose of this analysis, we

define “prolonged detainees” as those persons – asylum seekers and irregular migrants – who were detained for more than three months at the time of their interview.⁴⁹

There are a number of *pre-existing conditions* that might impact the level of vulnerability of persons within this group. Firstly, the data reveals that 65 percent of detainees held for more than three months are asylum seekers. As such, these persons may have been fleeing from a severe risk of danger to themselves and also to their loved ones. They may have also incurred a level of trauma, either in their country of origin or in the process of their flight. Secondly, many within this group come from countries where conditions of persecution are known to exist, such as in the region of East Africa. Additionally, about one-third of the asylum seekers within this group claim to be uninformed of the asylum procedure; and most say that they need more information about asylum and immigration procedures. Any information that they do know of was given to them either during their arrest for detention, or during official procedures with State authorities. Many came to Europe knowing little of what to expect. The lack of awareness of asylum and immigration procedures in the EU, and the fact that many are seeking protection and may thus be fleeing from persecution and conflict, constitute important pre-existing conditions that may impact their level of vulnerability to the situation of closed detention.

There are a number of *factors within the situation of detention* that might aggravate the vulnerabilities already present within this group of detainees. Most apparent is the long-term nature of their detention, which average almost eight months,⁵⁰ and the quality of the living conditions in the detention centre, which most feel very negative about. Their level of physical and mental health has deteriorated as a result of the negative factors associated with detention: the poor quality of the food, the inability to sleep properly, the psychological stress of uncertainty and the limited means of contact to the outside world. The long-term nature of their detention – mixed with the negative consequences described above – may foster conflict between detainees and with detention centre staff, as evidenced by their frequent reports of having experienced physical and verbal abuse from staff and co-detainees. Moreover, the general situation of detention has a strong negative impact upon self-perception.

Table 33: Factors affecting the level of vulnerability to detention for *PROLONGED DETAINEES*

Personal factors	Social factors	Environmental factors
<p><i>Legal status</i></p> <ul style="list-style-type: none"> Well over half are in need of international protection 	<p><i>Detention centre staff</i></p> <ul style="list-style-type: none"> Little contact with health and psychological staff Most feel that the staff does not meet their needs 	<p><i>Architecture/location of detention</i></p> <ul style="list-style-type: none"> Many of the centres where detainees were interviewed have prison-like atmospheres
<p><i>Nationality</i></p> <ul style="list-style-type: none"> ¼ are from countries of conflict and social strife 	<p><i>Co-detainees</i></p> <ul style="list-style-type: none"> Co-detainees are the primary source of physical and verbal abuse 	<p><i>Living conditions</i></p> <ul style="list-style-type: none"> The poor state of conditions in the centres have a physical and mental health impact on detainees Quality of nutrition and of sleep are poor

⁴⁹ The DEVAS research methodology did not intend to establish a definition of “prolonged detention”; and nor is it the intention of this report to arrive at such a definition. The analysis in this sub-section simply reflects the group of detainees who fall outside of the average on the variable “duration of detention”.

⁵⁰ This statistic should not be confused with the average duration of detention of the entire sample, which is 3.01 months. This figure comprises the average for asylum seekers and irregular migrants detained for more than three months at the time of their interview; in this case the exact statistic is 7.74 months.

<p><i>Possession of information</i></p> <ul style="list-style-type: none"> • 1/3 do not know the reasons for detention • 1/3 are uninformed about the asylum procedure 	<p><i>Networks in the centre</i></p> <ul style="list-style-type: none"> • Inter-detainee relations are reported to be poor 	<p><i>The terms and length of detention</i></p> <ul style="list-style-type: none"> • The average detention period is almost eight months • Detainees are mostly unaware of when they will be released
<p><i>Personal safety</i></p> <ul style="list-style-type: none"> • Many experience verbal and physical abuse from co-detainees and also detention centre staff 	<p><i>Medical personnel</i></p> <ul style="list-style-type: none"> • Less frequent access to medical personnel than other detainee groups • Most feel negative about the quality of the care • Half say they need more medical services in the form of improved quality of care 	<p><i>EU and national asylum/immigration policies</i></p> <ul style="list-style-type: none"> • Current EU legislation does not promote short time periods of detention • National legislation of where detainees were interviewed allows for detention of asylum seekers and irregular migrants for longer than three months⁵¹
<p><i>Physical & mental health</i></p> <ul style="list-style-type: none"> • Physical and mental health has deteriorated as a consequence of detention • High rates of reported stress and uncertainty 	<p><i>Family, relatives, friends in the 'outside world'</i></p> <ul style="list-style-type: none"> • Over half do not have family, relatives or friend networks in their home country 	<p><i>Staff preconceptions and attitudes</i></p> <ul style="list-style-type: none"> • Detention centre staff have used racial epithets against detainees; smaller numbers have committed physical abuse
<p><i>Self-perception</i></p> <ul style="list-style-type: none"> • Over half hold negative self-perceptions; these self-perceptions worsen as a result of detention 	<p><i>Means of contact to the 'outside world'</i></p> <ul style="list-style-type: none"> • Many do not receive personal visitations • But many do receive visits from spiritual/faith counsellors • Telephones are not readily available; Internet is unavailable 	
<p><i>Personal experiences</i></p> <ul style="list-style-type: none"> • Most say that their difficulties have worsened in detention 	<p><i>Information carriers</i></p> <ul style="list-style-type: none"> • Over half receive visits from lawyers 	

14.3.3. Asylum seekers

As a group, asylum seekers are not generally considered as meeting criteria of vulnerability and special needs *per se*. Yet the DEVAS research shows that asylum seekers on many levels fare quite negatively in detention than when compared to other groups. The most apparent *pre-existing condition* within this group is their legal status. As asylum seekers it may be the case that they are fleeing from a severe risk of danger to themselves.⁵² A number of asylum seekers alluded to past traumas and negative experiences that continue to impact them in detention. Added to this is the finding that almost half reported to be uninformed about the asylum procedure in the Member State where they were detained at the time of their interview. If these persons did in fact have protection needs, then their unawareness of the asylum procedure would put them at a significant disadvantage. It might also increase their dependency on detention centre staff and national authorities for accurate information; sources that may be biased or inaccurate if relations between the two are obstructed in any way.

Factors within the situation of detention may deepen the vulnerabilities that these asylum seekers already have. Most notable is the long duration of detention: an average of 3.5 months. The time spent in detention aggravates a number of factors, such as the poor living conditions, the prison-like environment of detention and asylum seekers' inability to get reliable and accurate information about their case and the reasons for their detention.

⁵¹ Malta, Bulgaria, the Czech Republic and Slovenia are the top three countries with the highest concentration of asylum seekers and irregular migrants detained for more than three months at the time of their interview.

⁵² The DEVAS research methodology did not assess detainees for their need of international protection; and neither was it the intention of the DEVAS project to assess legal protection needs.

Table 34: Factors affecting the level of vulnerability to detention for ASYLUM SEEKERS

Personal factors	Social factors	Environmental factors
<p><i>Legal status</i></p> <ul style="list-style-type: none"> Asylum seekers, they may be fleeing from severe risk of danger or persecution 	<p><i>Detention centre staff</i></p> <ul style="list-style-type: none"> Little contact with health and psychological staff Most feel that the staff does not meet their needs 	<p><i>Architecture/location of detention</i></p> <ul style="list-style-type: none"> Many of the centres where detainees were interviewed have prison-like atmospheres
<p><i>Nationality</i></p> <ul style="list-style-type: none"> Many flee from dangerous situations and from persecution in their home countries; consequently they may be endangered if returned 	<p><i>Co-detainees</i></p> <ul style="list-style-type: none"> Co-detainees are a primary source of physical and verbal abuse 	<p><i>Living conditions</i></p> <ul style="list-style-type: none"> The poor state of conditions in the centres where detainees were interviewed have a physical and mental health impact
<p><i>Possession of information</i></p> <ul style="list-style-type: none"> Many are uninformed of the asylum procedure where they are detained. ¼ are unaware of the reasons for their detention 	<p><i>Networks in the centre</i></p> <ul style="list-style-type: none"> Despite occurrences of abuse, inter-detainee relations are reported to be mostly positive 	<p><i>The terms and length of detention</i></p> <ul style="list-style-type: none"> The average detention period is 3.5 months, among the highest in the total sample Detainees are mostly unaware of when they will be released
<p><i>Personal safety</i></p> <ul style="list-style-type: none"> Many experience verbal and physical abuse from co-detainees and also detention centre staff 	<p><i>Medical personnel</i></p> <ul style="list-style-type: none"> Most feel negative about the quality of the care More than half say they need more medical services in the form of improved quality of care 	<p><i>EU and national asylum/immigration policies</i></p> <ul style="list-style-type: none"> Current EU legislation provides little standards for the detention of asylum seekers National legislation of where detainees were interviewed allows for detention of asylum seekers for at least three months⁵³
<p><i>Physical & mental health</i></p> <ul style="list-style-type: none"> Physical health is affected, but not too differently from the average Asylum seekers report deteriorated mental health due to psychological stress, self-uncertainty, isolation from the 'outside world' 	<p><i>Family, relatives, friends in the 'outside world'</i></p> <ul style="list-style-type: none"> Over half do not have family, relatives or friend networks in their home country 	<p><i>Staff preconceptions and attitudes</i></p> <ul style="list-style-type: none"> Detention centre staff have used racial epithets against detainees; smaller numbers have committed physical abuse
<p><i>Self-perception</i></p> <ul style="list-style-type: none"> Almost half hold negative self-perceptions; these self-perceptions worsen as a result of detention 	<p><i>Information carriers</i></p> <ul style="list-style-type: none"> Over half receive visits from lawyers, and others receive visits from NGOs and spiritual/faith counsellors 	
<p><i>Personal experiences</i></p> <ul style="list-style-type: none"> Many report having experienced traumatic situations in the past, which continue to negatively affect them while in detention 		

⁵³ Malta, the Czech Republic and Slovenia are the top three countries with the highest concentrations of asylum seekers detained for more than three months at the time of their interview.



CONCLUSIONS

- Research implications
- Recommendations for EU and Member State policymaking and practice on the detention of asylum seekers
- Recommendations for EU and Member State policymaking and practice on the detention of irregular migrants

15. THE IMPLICATIONS OF THE DEVAS RESEARCH FOR POLICY AND PRACTICE

The data that was collected from one-on-one interviews with 685 detained asylum seekers and irregular migrants in 21 EU Member States reveals a set of implications that impacts the manner in which the EU uses detention in policy and in practice. While the DEVAS research sample does not purport to be statistically representative of the population of migrant detainees in the EU, its size and scope does permit the issuance of observations based primarily on the personal experiences of detainees. Above all, the DEVAS project rests on the voices of detainees and on the way they perceive their situation of detention to be. Thus the project relies on the assumption that detainees know best how detention does or does not affect them, and which vulnerabilities and special needs they may or may not possess. The following pages shall further elaborate on the implications to be made from the research, and on the conclusions it holds for EU and national-level policy and practice concerning the detention of asylum seekers and irregular migrants and the consequences thereof.

15.1. Research implications

The data reveals that detention is implemented in a broad variety of cases and situations. Everyone, from asylum seekers to irregular migrants, from minors to older persons, and from medically ill persons to the healthy, can be subject to detention irrespective of their special needs and vulnerabilities.

Detention is used in a mostly indiscriminate manner with little deference to personal choice and preferences. The cases that were recorded and the persons who were interviewed demonstrate a situation where detainees can do little to alter their circumstances within the detention centre. Detainees must accept the state of living conditions within the detention centre, and cohabitation with persons of differing nationalities, cultures and even personalities and temperaments. They must accept the restriction on their freedom to move about as they please, even within the confines of the detention centre. Although exceptions may exist in some Member States for persons with special needs,⁵⁴ the 'average detainee'⁵⁵ will find that he is unable to exercise a degree of personal choice and must therefore accept detention as one accepts a punishment, rather than an administrative procedure.

The results show that persons with officially recognised needs, such as minors, young women and the medically ill, are indeed negatively impacted by detention. The adult environment of detention immediately puts minors at a disadvantage, especially if they are unaccompanied, because they are vulnerable to the behaviour of the staff and to the prison-like atmosphere of detention, for example. The data findings show that women, especially between the age of 18 and 24, especially suffer from adverse mental health impacts. The medically ill may not be able to receive the treatment they need because the detention centre only provides for basic medical care.

In almost every case, the study shows that detention has a distinctively deteriorative effect upon the individual person. Only in very few cases do detainees describe their personal situation as having improved after detention; and just as few say that detention has not impacted them whatsoever. The vast majority of those who were interviewed describe a scenario in which the environment of detention weakens their personal state. The prison-like environments within many of the detention centres where interviews took place, the isolation from the 'outside world', the unreliable flow of information and the lack of means to get information lead to mental health impacts such as depression, self-uncertainty and psychological stress, as well as physical health impacts such as decreased appetite

⁵⁴ Many Member States do make an effort, in policy and practice, to identify detainees with special needs and to afford them discriminatory treatment. For example, persons with psychological trauma may be referred to mental health practitioners, and unaccompanied minors may be placed in specially designated centres that provide extra support. Despite these exceptions, the DEVAS research shows that, for the most part, detainees are treated as one homogenous group with little distinction for subjective elements.

⁵⁵ Any use of the term 'average detainee' within this report is strictly based on the statistical average of the total sample that was assembled and analysed for the DEVAS project.

and varying degrees of insomnia. The manner in how detainees see themselves is significantly impacted by detention. In this context, self-perception becomes an important indicator of the effects of detention because as an administrative measure, *per se*, it should not bring such detrimental personal consequences.

The data shows that detainees are vulnerable to the environment of detention, and that these effects are as apparent in the first month of detention as they are in the sixth month. Detention weakens persons with pre-existing special needs, but it also weakens otherwise healthy people. The negative environment of detention and the restriction upon personal choice and movement places the asylum seeker or irregular migrant in a situation in which they become stuck. The detainee must then rely on his or her personal capabilities, the resources of their social network in and outside of the detention centre and on the factors in their wider environment in order to be able to cope with the adversities imposed by detention.

Vulnerability, therefore, is shown to be a multi-layered concept where the presence and interaction of personal, social and environmental factors determine the extent to which a detainee is susceptible to personal harm that is often the consequence of detention. Detainees who do not share a common language with detention centre staff or with the national authorities, and are unaware of the Member State's asylum and immigration procedures might be more vulnerable to the negative aspects of detention than someone who is the opposite. Detainees who have a network of supportive family or friends, and have regular access to lawyers and visiting organisations might find that they can better withstand isolation in the detention centre. Persons who are kept in detention centres that have barred windows and entryways and unsanitary living conditions, and who are detained in Member States where the duration of detention is ill-defined may suffer considerably with each passing day due to the prison-like environment, and to the inability to establish a future perspective for themselves.

In general, detention centres are unable to sufficiently respond to the ensuing vulnerabilities and special needs fostered within detainees as a consequence of detention itself. Many detention centres are only capable of providing rudimentary medical care for uncomplicated ailments. Even in these cases detainees may be given pain-reducing medication irrespective of their medical complaint. Those who experience mental health problems are usually unable to access psychological services. Moreover, existing criteria for "vulnerability" often focuses on persons with presumptive special needs – parents with children, unaccompanied minors and trauma victims – without a holistic assessment of how that person may actually be vulnerable to the environment of detention. Thus detention centres may not be able to identify persons who are particularly affected by detention if they do not possess such officially recognised special needs. Personal factors alone cannot adequately determine one's level of vulnerability in detention: social and environmental factors must also be assessed, along with the way in which these factors interact with one another.

The biggest implication from the DEVAS research is the way in which detention – frequently implemented as a tool of asylum and immigration policymaking for the EU and its Member States – leads to high rates of vulnerability in people. It calls into question the proportionality and necessity of detention in relation to the ends it seeks to achieve: that is, to systematically manage migration flows so that States may enforce their asylum and immigration policies. But the research reveals that the human cost of detention is too high, regardless of the achievability of these ends because

- The negative consequences of detention and its harmful effects on individual persons are disproportionate to their actual situations, in that they have committed no crime and are only subject to administrative procedures, and

- It is unnecessary to detain persons and thus make them vulnerable to the harmful effects of detention because non-custodial alternatives to detention do exist.⁵⁶

These implications necessitate a review of the way detention is applied towards asylum seekers and irregular migrants in EU- and national-level policymaking, and in the way detention is implemented in practice.

15.2. Recommendations for EU- and Member State policy and practice on the detention of asylum seekers

15.2.1. EU policymaking

The institutions of the European Union and its Member States have an important role to play in the way asylum seekers are received and treated within the territory of the EU. The legal minimum standards that have been established at the end of the first phase of the *Common European Asylum System*, and in the Reception Conditions and Dublin Regulation, provide very little guidance for the use of detention, and for the treatment of asylum seekers with special needs. As a result, asylum seekers can expect to encounter different policies and procedures in each of the Member States, especially concerning the use of detention.

In an effort to reduce these discrepancies, the European Commission in December 2008 published a set of proposals to legislatively amend the so-called Reception Conditions Directive and the Dublin Regulation. Both pieces of law currently provide for few guidelines on the terms and conditions in which Member States may hold asylum seekers in detention, even though detention is actively implemented within both of these legal contexts.⁵⁷ The Commission's proposals to "recast" these laws acknowledge the frequent use of detention by Member States, and thus provide detailed legal provisions on how detention should be implemented. These provisions are based on the principal that "Member States may not hold a person in detention for the sole reason that he/she is an applicant for international protection",⁵⁸ and that "detention shall be ordered for the shortest period possible."⁵⁹ Notably, the Commission's proposals emphasises that Member States may detain asylum seekers "when it proves necessary" and "on the basis of an individual assessment of each case."⁶⁰ Guidelines for the treatment of "vulnerable groups and persons with special needs" are provided for, focusing mostly on minors, women and families.⁶¹

Taking the Commission's proposals into account, the DEVAS research findings allow us to put forth a series of recommendations that aim to further improve future EU policymaking on vulnerability within the context of detention for asylum seekers.

⁵⁶ The existence of workable alternatives to detention for asylum seekers and irregular migrants is documented by a variety of actors, such as UNHCR, the International Detention Coalition, JRS-Europe, all of which can be found on http://www.detention-in-europe.org/index.php?option=com_content&task=view&id=90&Itemid=212. In 2009 the Spanish Commission for Refugees, CIRE (of Belgium), the Flemish Refugee Council and the Hungarian Helsinki Committee published a paper entitled, *Good Practices for a Europe of Protection*, citing, among other things, alternatives to detention: <http://www.vluchtelingenwerk.be/bestanden/publicaties/trio-memorandum.pdf>

⁵⁷ The applicability of the Reception Conditions Directive to persons in detention has been contested by Member States, see Bührle, Cornelia and JRS-Europe, 30 June 2006, *Administrative Detention in the Context of the Reception of Asylum Seekers*: <http://www.detention-in-europe.org/images/stories/reception%20cb.pdf>. Article 14.8 allows Member States to "exceptionally set modalities for material reception conditions different from those provided" within the article, and "for a reasonable period which shall be as short as possible." Asylum seekers "in detention or confined to border posts" may be thus excluded. The Dublin Regulation contains no guidelines for the implementation of detention.

⁵⁸ Article 8.1. of the re-cast Reception Conditions proposal; Article 27.1 of the re-cast Dublin proposal

⁵⁹ Article 9.1 of the re-cast Reception Conditions proposal; Article 27.5 of the re-cast Dublin proposal

⁶⁰ Article 8.2 of the re-cast Reception Conditions proposal; Article 27.2 of the re-cast Dublin proposal

⁶¹ Article 11 of the re-cast Reception Conditions proposal

RECOMMENDATIONS OF THE DEVAS PROJECT FOR EUROPEAN UNION POLICYMAKING CONCERNING VULNERABILITY WITHIN THE CONTEXT OF THE DETENTION OF ASYLUM SEEKERS

EU Recommendation 1

Asylum seekers should not be detained during the asylum procedure.

It is not appropriate for asylum seekers to be detained because there should neither be a presumption that they have committed a wrongdoing, nor a presumption of rejection or removal while they are in the asylum procedure. Furthermore, the legal complexity inherent within the asylum procedure means that asylum seekers should access all means of support at their own volition; the closed environment of detention cannot provide this. The negative impacts of detention, and the vulnerabilities it creates, make the asylum seeker less able to present his or her case in an appropriate way, calling into question the fairness of the asylum procedure.

EU Recommendation 2

Non-custodial alternatives to detention for asylum seekers that respect their human dignity and fundamental rights should always take precedence before detention.

Asylum seekers, due to the legal complexity of their situation and the asylum procedure, require a level of care and support that cannot be provided in a detention centre. In particular, detention cannot be implemented if there is no assessment of their special needs and vulnerabilities at the beginning, because it would then not be known how they might cope within the environment of detention. This is why non-custodial alternatives to detention should always take precedence.

EU Recommendation 3

A system of qualified identification of asylum seekers' special needs and vulnerabilities should be designed and implemented at ports of entry, be they land, sea or air, for the purpose of avoiding the use of detention.

This identification should be done as soon as possible after entry. It can help to ensure smoother procedures at later stages, a more efficient use of State resources and a higher degree of safety and care for asylum seekers' potential vulnerabilities. Most importantly, an appropriate assessment of special needs and vulnerabilities can ensure that detention is not used for persons who may be particularly harmed by it.

EU Recommendation 4

A qualified identification system should be individually based and holistic, taking into account the personal, social and environmental factors that are present within the asylum seeker's situation.

Factors such as legal status, country of origin, marital status, the possession of information, the presence of supportive social networks and the state of physical and mental health highly impact detainees' level of vulnerability to detention. These and other factors should be assessed in order to determine an individual asylum seeker's vulnerabilities, and the types of concrete special needs he or she may possess.

EU Recommendation 5

If the detention of asylum seekers cannot be avoided, and if all non-custodial alternatives have been exhausted, then detention should be subject to regular tests of necessity and proportionality; the duration of detention should be for as short a time period as possible.

Criteria for the necessity of asylum seeker detention should adhere to the 1999 UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers. Regular tests of necessity and proportionality should be conducted on a monthly basis by the relevant judicial authority.

EU Recommendation 6

If detention cannot be avoided, then asylum seekers should be given appropriate and effective legal aid and/or assistance from the very first day of their detainment.

The legal complexity of asylum procedures in the EU, mixed together with the precarious situation of asylum seekers, means that they may not be able to adequately fulfil all of the asylum procedures in a manner that serves their best interests – especially if they are in detention. Legal aid and/or representation are thus vitally necessary.

EU Recommendation 7	<i>Detained asylum seekers should be given regular and transparent access to all information concerning their asylum case and the terms of their detention, in verbal and written form, and in a language they can understand.</i> The isolative environment of detention means that extra efforts should be made to inform asylum seekers as well as possible on all details that concern their situation. The regular provision of information is a key step in lowering asylum seekers' vulnerability to the adversities of detention.
EU Recommendation 8	<i>Detained asylum seekers should be afforded all means of contact to the 'outside world'.</i> Detained asylum seekers should be able to contact family, relatives, friends and other supportive persons who are in the 'outside world'. The DEVAS research shows that it can reduce psychological stress, and it can help prepare detained asylum seekers for their eventual release from detention.
EU Recommendation 9	<i>Detained asylum seekers should be given regular access to activities that engage their physical and intellectual capacities.</i> The monotony of detention that comes as a consequence of its isolative environment can have a negative impact upon the physical and mental health of detained asylum seekers. Time spent in detention should not be 'wasted time'; instead, detainees should be afforded activities that help them to pursue their goals.
EU Recommendation 10	<i>Detained asylum seekers should be given regular access to appropriate and relevant medical care, including mental health care.</i> Medical care, as well as mental health care, should be made available everyone in the detention centre. In the case that such care only exists outside of the detention centre, the staff should ensure that access remains unhindered and facilitated.

15.2.2. Member State policymaking and practice

While EU policy on asylum seekers and detention is being debated,⁶² Member States can take steps toward improving the immediate situation of asylum seekers in their territory. They can do this by implementing current EU asylum law in a manner that best serves the interests of asylum seekers, and in a manner that narrowly restricts the use of detention.

RECOMMENDATIONS OF THE DEVAS PROJECT FOR MEMBER STATE POLICYMAKING CONCERNING VULNERABILITY WITHIN THE CONTEXT OF THE DETENTION OF ASYLUM SEEKERS

MS Recommendation 1	<i>Article 18.1 of the Asylum Procedures Directive, "Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum", should be adhered to in all circumstances.</i> Member States should make this principle applicable for reception conditions and for asylum seekers in the "Dublin system". It should be the one principle that applies to all circumstances. In this context, "detention" should be defined as confinement to a particular place and therefore also covering the situations at the port of entry.
MS Recommendation 2	<i>If detention cannot be avoided, then Article 18.2 of the Asylum Procedures Directive stipulating, "Where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review" should be strictly adhered to.</i> Access to regular judicial reviews is important in order to

⁶² As of this writing, the European Parliament and Council of the European Union are engaged in co-decision negotiations on the Commission's proposals to amend the Reception Conditions Directive, Dublin Regulation, Qualifications Directive and Asylum Procedures Directive. These negotiations are foreseen to continue forth during the second half of 2010.

	continually determine the necessity and proportionality of detention. This is especially necessary for detainees to know when they will be released from detention. The data findings show that not knowing the release date places a great deal of psychological stress upon detainees. Therefore, such judicial reviews should be effective, transparent and should occur at least once per month.
MS Recommendation 3	<i>Detained asylum seekers should have regular access to visitors from the ‘outside world’, including the UNHCR, lawyers, civil society organisations and also family, relatives and friends.</i> Alongside this, detained asylum seekers should have access to persons in their social network that help them cope with the negative effects of detention, e.g. spiritual/faith counsellors, psychosocial care providers – all of which may greatly limit the level of vulnerability asylum seekers may experience in detention.
MS Recommendation 4	<i>All guarantees and protections contained within the Reception Conditions Directive should be extended to asylum seekers in detention.</i> This should include rights to information, medical care, education and vocational training. In the case of Article 14.8 allowing Member States to “exceptionally set modalities for material reception conditions different from those provided ... when the asylum seeker is in detention”, such modalities should include strong safeguards that monitor the level of vulnerability of detained asylum seekers.
MS Recommendation 5	<i>Health care provision – foreseen in Article 13 of the Reception Conditions Directive – should include sufficient resources to care for the mental health needs of detained asylum seekers.</i> Access to mental health professionals such as social workers, psychologists and psychiatrists, should be afforded to asylum seekers who need such services; these services should be available from the first day of their detention.
MS Recommendation 6	<i>Detention centre staff persons should receive sufficient training in order to respond to the vulnerabilities and needs of detained asylum seekers.</i> Article 24 of the Reception Conditions Directive – ensuring the necessary training of staff – should be implemented so they can be able to respond appropriately to asylum seekers’ concerns and needs. In particular, staff persons should be trained to identify signs of vulnerability within detainees.
MS Recommendation 7	<i>Access to translators and interpreters should be ensured for asylum seekers who need it.</i> The inability to speak the same language as detention centre staff, the asylum authorities and even with co-detainees has a profound effect on one’s ability to cope with being in detention. Translators and interpreters can help detained asylum seekers with understanding the information that is given to them, and they can also help to maintain good relations between staff and detainees.

15.3. Recommendations for EU and Member State policy and practice on the detention of irregular migrants

15.3.1. Detention within the context of removal

In 2008 the European Parliament and the Council adopted the Return Directive,⁶³ which provides for common standards and procedures for the return of migrants who are irregularly staying in the EU territory. Chapter IV of the Directive provides a set of legal provisions concerning “detention for the purpose of removal”. It lays down certain conditions in which an irregular migrant may be detained,⁶⁴ and requires that detention be “for as short a period as possible and only maintained as long as removal arrangements are in place”.⁶⁵ Additionally, the Directive provides

⁶³ 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.

⁶⁴ Ibid, article 15.1(a, b)

⁶⁵ Ibid

for judicial review of the lawfulness of detention if an administrative authority orders it,⁶⁶ and if detention is prolonged. The most controversial aspect of the Directive concerns the duration of detention: Member States may detain irregular migrants for as long as six months, with the possibility of extension for up to twelve months in certain cases.⁶⁷ Alongside these provisions, the Directive lays down a definition of “vulnerable persons” as including “minors, unaccompanied minors, disabled people, elderly people and pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.”⁶⁸ Concerning the detention of vulnerable persons the Directive stipulates, “Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.”⁶⁹

In a way the Return Directive reflects the situations of the detained irregular migrants who were interviewed for the DEVAS project, in that it requires certain procedural safeguards to be made available. Excepting the duration of detention that it sets, the standards within the Directive may have the potential to ameliorate some of the hardships that irregular migrants face in detention, such as: the review of detention at “reasonable intervals”⁷⁰, the opportunity for visitations from “relevant and competent”⁷¹ external organisations and the systematic provision of information explaining “the rules applied in the facility ... and rights and obligations.”⁷² Furthermore, the Return Directive at least defines “vulnerability”⁷³ in a manner that covers some of the groups identified by the DEVAS project.

The first problematic aspect of the Return Directive is that Member States are left with too much discretion in how to apply their return procedures, including detention within the context of removal. This means that while an irregular migrant may receive certain support in one Member State, such as mental health care and a short period of detention, an irregular migrant in another Member State may be subject to opposite conditions. Secondly, the minimum duration of detention that it sets – six months, not counting the twelve-month extension – is already far too long. The DEVAS research findings show that detainees become increasingly vulnerable to the negative consequences of detention as the period of detention endures – vulnerability is particularly high after three months in detention, but even within one month detainees may suffer considerably. Thirdly, the Directive’s definition of “vulnerable” groups ignores those irregular migrants who do not possess officially recognised special needs, such as single adult men and women, or persons who cannot speak the language of the host Member State. Finally, the Directive contains no provision for an individual assessment of irregular migrants in order to determine whether detention is both necessary and proportionate to their situation, in relation to the individual factors of vulnerability that they may possess. If certain persons are not fit for the environment of detention, then non-custodial alternatives should be made available.⁷⁴ The Directive does stipulate that detention can only be applied “unless other sufficient but less coercive measures can be applied effectively in a specific case.”⁷⁵ However the usage of the phrase “specific case” excludes the systematised implementation of alternatives to detention for larger groups of irregular migrants.

Taking into account the elements within the Return Directive that relate to the detention of irregular migrants, the DEVAS research allows us to propose a set of recommendations that aim to improve government policymaking in

⁶⁶ Ibid, article 15.2(a, b)

⁶⁷ Ibid, articles 15.5 and 15.6 (a, b)

⁶⁸ Ibid, article 3.9; the same definition is found in the RC Directive

⁶⁹ Ibid, article 16.3

⁷⁰ Ibid, article 15.3. “Reasonable intervals” remains undefined in the legal text. JRS-Europe would argue that a review of detention at least once per month would satisfy the minimum criteria for being “reasonable”.

⁷¹ Ibid, article 16.4. The problem still remains that such organisations would be unable to visit detention centres in border and transit zones, as Member States may exclude such zones from the scope of this Directive (see Article 2.2).

⁷² Ibid, article 16.5. Information about the rules, rights and obligations within detention should be in languages that detainees can understand. The DEVAS research reveals cases in which detainees say they are unable to communicate with detention centre staff due to a common language gap, and that no other means of translation or interpretation were provided. In many other cases detainees were only able to learn of the rules within the detention centre from co-detainees.

⁷³ Ibid, article 3.9

⁷⁴ In 2009 Belgium has implemented an alternative to detention for irregularly staying families with children. Instead of closed detainment, families with children are housed in open facilities and are each assigned a State caseworker. The role of the case worker is to not only prepare families for the possibility of return, but also to assist them with finding means to obtain a legal residence in Belgium. Thus far the alternative has been favourably received by families and by Belgian state authorities.

⁷⁵ Ibid, article 15.1

this area. But since the deadline for national transposition has not yet passed,⁷⁶ it is too early to indicate in which specific way EU policy in this area can be improved since the common standards contained within the Directive have not yet been sufficiently tested in the Member States. Thus the main target of the following recommendations will be targeted towards Member States' efforts to transpose the Directive into their respective national legislation.

RECOMMENDATIONS OF THE DEVAS PROJECT FOR MEMBER STATE POLICYMAKING CONCERNING VULNERABILITY WITHIN THE CONTEXT OF THE DETENTION OF IRREGULAR MIGRANTS FOR THE PURPOSE OF REMOVAL

MS Recommendation 1 *Detention for irregular migrants should only be used as a last resort.* The negative effects of detention are so great as to warrant its spare use. Detention should only be applied in cases of strict necessity, and in a manner that is directly proportionate to an individual person's situation.

MS Recommendation 2 *Article 15.1 of the Return Directive stipulating “sufficient but less coercive measures” should lead to the establishment of non-custodial alternatives to detention that respect the fundamental rights and human dignity of individual persons and families.* The optimal way to reduce people's vulnerability to detention is to limit its use by instituting viable alternatives to detention. Only by removing persons from the closed and isolative environment of detention can they best prepare themselves for the possibility of return, but also for the possibility of legal residence within the Member State should the opportunity present itself.

MS Recommendation 3 *The criteria foreseen in Article 15.1(a, b) for the purpose of determining whether an irregular migrant should be detained should go beyond the “risk of absconding” and the hampering of the “return or ... removal process” to include a holistic assessment of the person's level of vulnerability to detention.* The DEVAS research shows that all types of persons are vulnerable to the negative effects of detention, irrespective of whether or not they possess officially recognised special needs. Holistic individual assessment criteria should include a review of the personal, social and environmental factors that are present in an individual's situation, such as their legal status, the presence of supportive social networks and their level of physical and mental health.

MS Recommendation 4 *If detention cannot be avoided, then it should be strictly set for “as short a time period as possible and only maintained as long as removal arrangements are in progress”, as laid down in Article 15.1 of the Return Directive.* The DEVAS research shows that while detention carries negative consequences from the first days of its implementation, the personal circumstances of detainees deteriorates as the time period of their detainment endures. Alternatives should be immediately sought when detention is no longer necessary or proportional.

MS Recommendation 5 *The situation of individual detainees and detained families should be reviewed at least once per month, using holistic assessment criteria to determine the personal impacts of detention.* Ongoing assessments are the only way to ensure that harmful effects of detention are minimised as much as possible. Detention centre staff, especially social workers or staff who have received sufficient inter-cultural or psychosocial training within the context of detention, may be among those who conduct these assessments.

⁷⁶ The deadline for Member State transposition of the Return Directive is set for 24 December 2010. As of this writing, most Member States have not yet communicated national transposition measures to the European Commission.

MS Recommendation 6 *The provision of information on “rules ... rights and obligations” in detention – as foreseen in Article 16.5 of the Directive – should be provided in a language the detainees can understand.* Many of the persons interviewed for the DEVAS project have never before been in a situation of detention. The stress of detention and its isolative effects means that detention centre staff should make an effort to immediately inform detainees of all rules, rights and obligations. Language is a key factor of vulnerability because it facilitates communication and understanding. This is why it is important that such information be given in an understandable language.

MS Recommendation 7 *The provision of “legal assistance and/or representation” – as foreseen in Article 13.4 of the Directive – should be provided to all detainees at no additional cost, and in a language that detainees can understand. Such legal assistance and/or representation should extend to detainees who challenge the lawfulness of their detention.* The DEVAS research shows that the legal complexities of detention can have an adverse affect on detainees because they are unsure of how to proceed and how to alleviate their situation. Legal assistance and/or representation is a key factor of vulnerability in detention; without it detainees are left disempowered and with further deteriorations in their mental health.

MS Recommendation 8 *Detained irregular migrants should have the opportunity to establish immediate contact with supportive persons or bodies in the ‘outside world’, as foreseen in Article 16.2 of the Directive.* Detainees should be able to communicate by fixed-line and mobile telephone, especially since the latter often contains vital contact information that detainees need. Internet stations should be made available, as this would allow detainees to search for support if they lack a social network in the Member State.



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NATIONAL REPORT: AUSTRIA

By: *Caritas Austria*

1. INTRODUCTION

Caritas Austria conducted interviews with eleven detained asylum seekers and irregular migrants. Additionally, five staff from NGOs working in the detention centres were interviewed, and five interviews were conducted with members of staff of the detention centres being researched. Altogether Caritas Austria was able to conduct 21 interviews.

Caritas obtained access to the detention centres in Eisenstadt (province Burgenland), Feldkirch (province Vorarlberg), Graz (province Steiermark), Salzburg (province Salzburg) and Vienna (province Vienna). This represents five centres out of the total of 14 detention centres in Austria (as of 26th Nov. 2009). These centres often form part of prisons for administrative detainees, whose policies are generally bound by the Foreign Aliens Police Act (*Fremdenpolizeigesetz*); but the Detention Regulation (*Anhalteordnung*) also lays down relevant rules, procedures and policies. As a consequence there is no separate accommodation or houses for immigration detainees – instead they are kept in prisons. There is however a separate area for them within the prison. The capacities of most centres are fairly small.

To gain access to detainees a person or organisation needs to have direct contact with a detainee, unless you are a relative or visitor arriving during official visiting hours. This means that Caritas had to be granted permission from the Ministry of Internal Affairs in order to conduct the research. The process of obtaining permission initially went very fast. Verbal assurance was provided from the national authorities that access would be allowed within days; but then months were spent waiting for the written confirmation. Information sharing about our project within the centres was erratic: in one centre nobody had been informed about our visit despite the fact that there had been written communication and a number of telephone calls.

Only the staff of Caritas Austria could be interviewed with the “NGO questionnaire”. Attempts were made to interview Diakonie Osterreich and Verein Menschenrechte Österreich (VMÖ): two NGOs who regularly meet and work with detainees. However, Diakonie had recently lost its mandate to be present in the detention centres, meaning they could not be interviewed; VMÖ refused to take part in the study.

The willingness of the detention centre staff to participate in the study highly varied. In one centre no staff was willing to take part, while in another centre all staff members were very interested and ready to support our work on the project.

Nearly all of the detainees that were interviewed are male, because there were only a few women in detention during the time of the interviews; and most of them did not agree to take part. Some questions in the detainee questionnaire were misunderstood in part or entirely. This may have been a consequence of detainees not being accustomed to answering open-ended questions, or because some of the questions may have been difficult for them to answer in their present circumstances.

A positive output of the project was that by visiting different centres in the same period, and by talking to staff members it was possible to compare national regional standards in depth, such as the daily routines, which are

handled differently in the centres. Some centres try to work together with NGOs to create sporting activities; other centres refuse these kinds of activities because they have concerns about security. There were also differences not only in detention conditions but also in the legal advice and the social counselling services that are provided.

2. NATIONAL LEGAL OVERVIEW

2.1. Legal grounds for detention

In Austria the legal grounds for detention are based in the Aliens Police Act (*Fremdenpolizeigesetz, FPG*), which came into effect on 1st January 2006. This is complemented by the Detention Regulation (*Anhalteordnung*), which came into effect on 1st May 1999, but was revised again on 1st January 2006.

2.2. Legal grounds for minimum age for detention

Legal grounds specify that people as young as 16 can be detained, but that they should be placed in separate accommodation and away from adults.⁷⁷ If under-aged persons are detained together with parents they can choose a separate and/or common room. From the age of 16 years onward the Aliens Police Act regulates that these minors do not have to be legally represented; for those under 14 years of age detention should not be imposed at all (but due to alleged security reasons that can happen).⁷⁸

2.3. Legal grounds for the detention order

The legal premise in Austrian legislation for ordering detention for asylum seekers is based on the Aliens' Police Act, while for irregular migrants it is the Foreign Police Law.⁷⁹ There is no judicial authority to order detention, as this is done by the Aliens' Police.

2.4. Legal grounds for judicial review of the detention order

The competent judicial authority is the Independent Administrative Senate, which has to control the legitimacy and proportionality of the detention after six months. Otherwise judicial review is only done upon appeal.

2.5. Legal grounds for the right of appeal against the detention order, or to challenge detention

It is possible for detainees to file a complaint against detention (*Schubhaftbeschwerde*). This is an objection against: the imposition of detention as such, the continuation of detention despite reasons against it (such as sickness, high psychological stress etc.) or the lawfulness of the detention. Legal grounds for detention have to be present according to the law and the proportionality principle has to be applied accordingly.

It is additionally possible to complain against violations of the house rules (the conditions of detention). However this can be seen rather as a form of soft law, as it is rare to have actual consequences from the submission of complaints.

The result of an appeal against the first instance decision in the asylum procedure might change the legal backdrop for detention and therefore render it unlawful according to law and/or jurisdiction.

⁷⁷ RIS - Bundesrecht - Fremdenpolizeigesetz 2005 (Fremdenrechtspaket 2005) Art. 3 § 79, RIS - Bundesrecht - Anhalteordnung § 4
⁷⁸ §4 Abs. 4 AnhO

⁷⁹ Asylum seeker detention is based on Aliens Police Act § 76 Abs. 2 FPG – Schubhaft; Irregular migrant detention is based on Foreign Police Law § 76 FPG – Schubhaft.

2.6. Legal grounds for the right of information about the detention order and/or the reasons for detention

Generally detainees are informed about their rights through the Aliens' Police, which is the responsible authority.⁸⁰ Non-governmental organisations that are entrusted with social counselling in the centres also inform detainees about the reasons for their detention. However, in Austria the provision of legal advice falls under the responsibility of the Interior Ministry.

2.7. Legal grounds for the duration of detention

The duration of detention should be as short as possible, but can be imposed for up to six months, and in certain circumstances for up to 10 months within a two-year period. After six months various legal provisions provide for a judicial review concerning the reasons and lawfulness of the continuation of detention.⁸¹

2.8. Legal grounds for the provision of health care and the scope of health care benefits, and for the provision of social services

The Detention Regulation provides for the provision and scope of health care, which says that health care has to be provided by a medical officer or, in the case of minors, by a paramedic.⁸²

2.9. Legal grounds for contact with the outside world

Generally the legal basis for visitation can be found in the Detention Regulation, which stipulates the following:

- *Family members and friends*⁸³: efforts should be done to enhance the duration and frequency of visits, especially for family members.
- *Pastoral workers*⁸⁴: Detainees should be free to attend any religious service and receive visits of pastors at any time.
- *Officials of the consulate/embassy of the country of origin*⁸⁵: Consulate and embassy officials are allowed to visit detainees to a "necessary extent" at any time, if possible within the official hours; and telephone calls to embassies and consulates should be free of charge.
- *International organisations and NGOs*⁸⁶: Relevant international organisations are subjected to the same rules as officials of embassies and consulates; Austrian NGOs entrusted with social counselling in the respective centre may visit detainees within the official visiting hours. Often, these NGOs have special visiting hours.
- *Other visitors*⁸⁷: Within the official visiting hours (normally twice per week), visits of private persons can be received.

All of these options can be suspended during a hunger strike.

2.10. Legal grounds for the provision of legal aid

According to the national system of legal aid, private lawyers that provide *pro bono* services can be sought for if the procedure is already at the stage of a high court, such as the Administrative or Constitutional High Court.⁸⁸

⁸⁰ Aliens' Police Law (acc. § 76/2 FPG, RIS - Bundesrecht - Fremdenpolizeigesetz 2005 (Fremdenrechtspaket 2005) Art. 3 § 76).

⁸¹ Foreign police law: RIS - Bundesrecht - Fremdenpolizeigesetz 2005 (Fremdenrechtspaket 2005) Art. 3 § 80

⁸² RIS - Bundesrecht - Anhalteordnung § 10

⁸³ RIS - Bundesrecht - Anhalteordnung § 21

⁸⁴ RIS - Bundesrecht - Anhalteordnung § 11

⁸⁵ RIS - Bundesrecht - Anhalteordnung § 21: §21 Absatz 3 AnhO

⁸⁶ RIS - Bundesrecht - Anhalteordnung § 21

⁸⁷ RIS - Bundesrecht - Anhalteordnung § 21

Detainees are free to pay for their own lawyer, but special rules apply for visits and calls.⁸⁹ Access to free legal counselling from NGOs or lawyers is not guaranteed.

2.11. Legal grounds for the protection of persons with special needs

Austrian law contains a few regulations for the protection of persons with certain special needs:

- *Unaccompanied minors*: Minors can only be detained if appropriate facilities are provided. They have to be detained in separate rooms, but if there is a parent in detention they have to be detained together.⁹⁰
- *Single parents with minor children*: Parents and children must be kept together in detention.⁹¹
- *Families*: Families should be detained together, except if it is not in the interests of their well being.⁹²

Previous regulations concerning victims of torture and violence as well as traumatised persons have been abolished some time ago.

2.12. Alternatives to detention and legal basis

The Aliens' Police may require that a person report daily to officials. These persons may be accommodated in specialised facilities.⁹³ 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".⁹⁴

2.13. Legal grounds for providing release from detention

The cessation of detention is specified in RIS - Bundesrecht - Fremdenpolizeigesetz 2005 (Fremdenrechtspaket 2005) Art. 3 § 81. In short, release from detention can be provided if, according to the legal grounds of detention explained in the beginning of this report, it has exceeded its legal duration limit, or if the Independent Administrative Senate decides that detention must end on the basis of other legal grounds that are found upon appeal or judicial review.

3. OVERVIEW OF NATIONAL DATA FINDINGS

3.1. Basic information

The majority of the detainees interviewed are male and single, and of the average age of 27. The apparent youth of persons within the data set may be due to the fact that persons under age 30 were more willing to take part in the study than others. More than half of those interviewed are from African countries such as Mali, Tunisia, Nigeria and Gambia; others are from Palestine, Kosovo, Serbia and the Philippines.

The average duration of detention is just over one month; the maximum amount of time that one person had been detained was 100 days. The majority of those interviewed are asylum seekers, with two persons in "Dublin II" detention and one irregular migrant, as well as one rejected asylum seeker facing deportation. All of the interviews

⁸⁸ Federal Law Gazette: BGBl. II Nr. 439/2005

⁸⁹ Detention Regulation (§19, §21 AnhO)

⁹⁰ Aliens Police Act: RIS - Bundesrecht - Fremdenpolizeigesetz 2005 (Fremdenrechtspaket 2005) Art. 3 § 79

⁹¹ Aliens Police Act: RIS - Bundesrecht - Fremdenpolizeigesetz 2005 (Fremdenrechtspaket 2005) Art. 3 § 79

⁹² Aliens Police Act: RIS - Bundesrecht - Fremdenpolizeigesetz 2005 (Fremdenrechtspaket 2005) Art. 3 § 79

⁹³ Aliens Police Act (§ 77 FPG).

⁹⁴ Asylum Law (§12 Abs. 2 AsylG)

were conducted in English, perhaps reflecting that fact that most of those interviewed had been detained on arrival, did not speak German and were not integrated into Austrian society.

3.2. Case awareness

The lack of information seemed to be a recurring theme among those questioned. More than half felt the need for more information about the procedure, the duration of the detention or his rights. For example, one detainee wanted to be able to make a phone call to his lawyer, others wanted to know how and when, or whether they would get asylum. Most felt completely uninformed about the asylum procedure. Detainees who needed more information said this was important because it affected their anxiety levels and mental health: "I would have the feeling that it saved my life. I'm only thinking about what will happen to me, I'm always anxious and nervous, and it would calm me down." A few detainees also reported that this uncertainty caused them to feel sick and weak.

Recent changes in funding have meant that social counselling services have been greatly diminished. Remaining services include return counselling and counselling prior to detention. Legal counselling has also been recently excluded from funding support, which might account for why detainees feel so badly informed.

3.3. Space within the detention centre

When asked about the room in which they are required to sleep and about the space in the detention centre in general, the answers leaned towards the negative. Most detainees did not report feeling overcrowded in the centres; although many detainees also said they did not have a place in which to be alone. "Everything is closed; I don't have any space where I can be alone. Always noise." One detainee complained about being locked up in a small space, and only being let out for one hour a day. Another detainee complained that the policemen were drunk, and that he did not understand their rules, for example why the cells were closed at 6pm, why people were not allowed to visit other cells at night, and why the detainees were seldom allowed showers. Less than half of detainees described their room and centre space as "ok". The biggest problem seemed to be related to mere detention, rather than the condition of facilities: "The room is ok, I just don't want to be closed in"; "Being detained is not life" and "It doesn't make me feel good".

3.4. Rules and routine

Clear house rules do exist, and they are distributed to detainees at the beginning of detention and are visibly posted on boards within the detention centre. These rules are translated into different languages and most of the detainees can understand them. The problem is that detainees do not always understand the whole content or the reasons why a particular rule exists. Thus they feel uninformed or do not know how to behave as a result.

Most of the detainees stated that the daily routine is understandable: wake up times, cleaning times, when to take meals, and the time spent in open areas or outside. Detainees mostly agree with the rules, but some just accept them: "I have no other chance than to follow them".

But some of the detainees felt that there were no clear rules. This may result from the misunderstanding of their situation or perhaps from their lack of understanding about the house rules within the detention centre. It also might result from the fact that they do not want to accept that the facility is actually a prison. This may reflect their level of misunderstanding or even resistance to living in prison like conditions. One person complained about the lack of control over his own life: "There exists no individuality in organising my day-to-day life. One has to get up, although you fall asleep very late, or you have to clean your room even though you did it the day before."

3.5. Detention centre staff

The average detainee is in contact with the security staff at the centre, as well as doctors, cooks and other housekeeping staff. Detainee responses about detention centre staff were rather varied, perhaps owing to the fact that they are treated differently by all types of staff: "It completely depends on who is on duty", and "A few really try their best and are friendly, a few really take their time and are unfriendly." Most described the staff as helpful, within the limits of what they can provide. While contacts with staff were usually reported as being positive or neutral, in some cases very negative situations were reported: "A lot of them don't respect us, especially when they are drunk. They don't listen to us and don't fulfil the rules so they have less work. They put our lives at risk."

Related to this are communication difficulties due to a lack of common language. Detainees are in direct contact with detention staff, lawyers and NGOs who speak German, but hardly any detainee speaks German and only some speak English. If the detainee hardly speaks English then the centre staff often cannot communicate with them at all.

3.6. Level of safety within the detention centre

The typical detainee feels safe inside the centre. He has not experienced verbal or physical abuse, either from co-detainees or from staff. Detainees' descriptions of the detention centre as a safe place is corroborated by responses from the detention centre staff and NGO questionnaires, as well as by Caritas' own independent observations.

Most attribute their safety to the security guards. However, a few alluded to the idea that detention itself makes one feel unsafe: "There is nothing to fear, except your own situation"; "I think too much, I'm stressed, I'm sick". One person remarked that particular behaviour of staff was making them feel unsafe: "In prison, you always feel unsafe. If I have health problems, policemen don't believe me. They don't come. And they are drunk."

3.7. Activities within the detention centre

According to detainees, no activities are offered. The only 'activities' mentioned as being accessible were telephone and television. Moreover, detainees felt unsatisfied about their level of access to the centre's outdoor grounds. The centres that took part in the study have an outside court, but the detainees are allowed to use the court only once a day for a specified period of time. Few detainees use the outside court for walking around. Sometimes they are allowed to play football but there is no chance to practice other outdoor activities.

When asked what activities could be reasonably provided by the centre, the detainees reported that opportunities for physical exercise would be appreciated, as well as access to education. Otherwise detainees asked for a variety of activities: "Sports equipment, more hours out of cell, work"; "I would like to watch TV until late. Sports equipment would make my life feel easier because I would calm down. I can only phone my family when Caritas give me their phone. Telephone access for everyone would be necessary."

3.8. Medical issues

The data shows that detention, in general, brings negative consequences to detainees' health. The detainees did not, however, report problems in accessing medical services. All are aware of the presence of a medical service and could access it frequently, with most detainees reporting visiting medical personnel more than once a month. The detainees reported having access to doctors, and some reported having access to psychologists. Despite this, almost half reported needing further access to medical services, and among these, one wanted a psychologist, one wanted medication for insomnia, one wanted dental treatment and one wanted a psychiatrist with a translator.

Physical health

Detainees typically reported a heavy degradation in physical health during their time in detention. For some this was related to the facilities: "Yes, there is no fresh air, bad food, and I sleep badly", "Because there are no sports

opportunities.” Others related this more to the psychological effects of being in detention: “The longer I am here, the more I get stomach problems because of medication. Prison is responsible for this: I think all day long about how long I’m here and I can’t move or do sports”; “I don’t feel happy here”.

Mental health

Detainees reported an even stronger deterioration in their mental health. In addition to the above-mentioned reasons, detainees also said that the uncertainty about their future was affecting their mental health: “I can’t stand to be closed in especially since there are no reasons. I’m always nervous and unsure about my future: therefore I get tense and aggressive and very irritable”. Similarly, one man felt that the unfairness of the situation affected his mental health: “I’m not guilty, it’s not right to keep me in this jail”. Others said that being apart from their family was causing them mental anguish: “I’m sad, I cry, I can’t sleep. I feel lonely here, I think of my children.”

3.9. Social interaction within the detention centre

The typical detainee feels positively or neutrally in his relations with co-detainees. Only one person said that there were problems: “Some people are difficult, shouting, knocking at the doors.” It is difficult to form a picture of social interaction in the centre from this data, in particular why so few problems between detainees were reported. One detainee said that he was so happy to meet a fellow countryman because they had the same culture and understanding, and this was something that brought them together. On the other hand, it was observed by NGO staff that even if detainees come from different cultures they share similar experiences when they are in detention; this can serve as a basis for good communication.

3.10. Contact with the ‘outside world’

Detainees’ contact with the ‘outside world’ varies a lot and generally is not easily facilitated. The reception of personal visits are privileges of certain detainees who have spent time living in Austrian society, and thus have family and friends in the country. Those without family in Austria do not receive personal visits, which might have negative impacts on their mental health. Most detainees reported having family back home and, quite often, family members counted on them for financial support. This brings pressure on the detainees, as they are not able to fulfil this duty any longer due to the circumstances of their detention.

The telephone is still the favoured means of communication; but most would like better access to it. The main problem is that only pay telephones exist, and most of the detainees do not have the money to buy telephone cards. “I would like to have more access to the telephone. I can’t afford the telephone, pre-paid-cards are too expensive, when I will be released, I will be in contact with them again.” Using the Internet is not possible as there were no facilities for it; in any case it may be difficult to make the Internet available again due to previous difficult situations, according to interviews with staff.

Generally lawyers and religious persons do not visit detainees. Although such visits would be permitted, only a few detainees take advantage of this opportunity.

3.11. Conditions of detention and nutrition

Most detainees said they were dissatisfied at the quality of the food provided in the centre. Amongst the complaints are that it does not cater for vegetarians, those on Ramadan or those with other special religious diets, that it is not well cooked, that they are not used to it and that there is no variety. Some complain that is simply bad: “The food does not suit me at all. But this has nothing to do with my culture; the food is simply not good. Especially the salad is unappetising.” Over half say that they have lost their appetite in detention, with some saying that this has resulted in them losing weight and feeling weak.

3.12. Conditions of detention and the individual

Almost all detainees reported having problems sleeping. Most put this down to stress and worry, rather than on the living conditions. Uncertainty about the future seemed to be important in explaining why people felt unable to sleep: “Nightmares, afraid that I have to go back don’t know what will happen”; “Thinking and thinking about my future; a lot of nightmares.”

When asked about the difficulties faced in detention, the most oft-repeated point is being confined: “being detained”, and “that I cannot get out”. Another difficulty mentioned by many was the lack of information about their case, in particular for how long their detention would endure. Other problems were lack of possibilities to do exercise, missing family members and general stress.

One striking finding was that ten out of the eleven detainees interviewed do not know the outcome of their detention, or the date of their release. According to detainees, this leads to considerable mental distress: “I will still feel insecure after release because I can’t concentrate anymore. I think I’ll go crazy”; “I become depressed”; “I feel very insecure and worry about my future”.

Despite these difficulties, detainees perceive themselves in positive terms: “I am full of joy of living”; “I am a strong person, know what I want and how to achieve it. I’m very social”; “I take care for my family alone, I’m a strong person”. But many say that detention has negatively impacted their self-perceptions: “I am not full of the joy of life. My body reacts in a different way and I started smoking.”; “I feel I am not able to concentrate or learn anymore.” Only three people said that detention had not impacted their self-perception.

Most detainees did not consider themselves having special needs, and when asked to identify those who needed special help, two people identified an elderly man as vulnerable, and one person mentioned someone who was “speaking to himself and shouting at the TV.” Another person identified those who don’t speak the language as being vulnerable.

4. ANALYSIS OF THE DATA AND CENTRAL THEMES

4.1. The meaning of vulnerability within the context of detention

The DEVAS research that has been done in Austria lends toward a new concept of vulnerability for persons in detention. The research also shows how people may become vulnerable as a result of detention.

Vulnerability can be understood as the inability to counter an external negative impact with one’s own means and resources. Officially, pregnant women, elderly, the young, and people with disabilities and medical illnesses are recognised as being vulnerable in detention, amongst others. The findings of this study show that **mental and physical stress** is also a strong source of vulnerability, and one that affects **almost all persons in detention**.

4.2. Factors of vulnerability

Vulnerability results from a variety of factors, primarily falling within two categories. One category concerns the **personal factors** of a detainee. Generally it can be said that a person with strong mental and physical health will possibly have better resources to deal with the challenges and difficult situation of detention. Therefore such a person might have the ability to cope with the situation. Contrary to this assumption, the DEVAS interviews showed that even strong and healthy persons may experience a very difficult time. The DEVAS data from Austria draws attention to the degradation of mental health during detention. This can be found in the answers to the part of the survey that deal

directly with mental health, which saw the detainees report a huge drop in their mental health during detention. It can also be seen from other responses: detainees reporting become anxious and nervous as a result of lack of information; detainees feeling like they are suffering psychologically because they do not know when they will be released; the fact that almost all detainees reported having problems with sleeping due to anxieties and worries; and a perceived drop in their physical health, often explained by the worries that they face. In fact, some detainees seem to be saying that detention may have permanently affected their mental health. "I will still feel insecure after release because I can't concentrate anymore. I think I'll go crazy." More evidence for how detainees felt detention had affected their mental health can be found in the section about self-perception, where people who felt "strong" when they went into detention then described themselves negatively later on.

Other personal factors affecting vulnerability are the health of the detainee and the family circumstances, as well as their legal situation. With such a small sample, it was difficult to draw any firm conclusions on how these affected vulnerability, except to see that detainees mentioned health problems as something that made them feel worse in detention (for example, problems sleeping). We did not interview people with significant health problems. Some detainees mentioned missing family members, and the fact that most of these detainees felt a financial responsibility to provide for their family in their home country probably added to their sense of frustration and isolation while in the centre. It was difficult to compare those in different legal situations, as most of those interviewed were asylum seekers, but it is clear that the uncertain nature of the asylum system was causing considerable stress.

While it is clear from our data that detainees experience a steep decline in mental health, there was no one personal factor that stood out that made a difference: perhaps strengthening the argument that detention was a cause of vulnerability for everyone, and not just for those with 'classical' vulnerabilities.

The **social and environmental sphere** comprises all the factors which arise from the environment in which the detainee is and his or her interaction with all groups of individuals.

On the face of it, the data shows that some factors that might create vulnerability are absent. For example, most detainees felt safe in detention, and did not have significant problems with staff or with other detainees. Also, detainees felt neutral or positive about the spaces in the detention centre, and did not report any significant problems with facilities or overcrowding.

However, this effect on well being seems from the data not to depend so much on the conditions and personal circumstances of detainees, but more generally to the fact of being in detention itself. This can be seen in a number of places in the data: when asked about the main difficulties of their lives in detention centre simply being locked up was one of the most common factors mentioned; in the section about space, instead of complaining about size or facilities, many detainees said that the fact that it was a prison was the worst thing; when asked for the reasons for the physical and mental degradation of their health, detainees mentioned the fact of being behind bars. Also, the fact that people have to follow certain rules in detention and are not free is mentioned as a source of frustration.

Apart from this general negative effect of being locked up, two other external factors arise from the data as a possible cause of vulnerability: lack of information and lack of activities. One can see this problem with communication of information at several points in the DEVAS data: more than half needed access to more information, mostly about their asylum case and their date of release, and some related this to a fall in mental health; contact with the outside world was limited because of expensive phone cards; ten out of the eleven detainees interviewed did not know when they are going to leave the centre, and this led in many cases to detainees saying that they this effected them very badly mentally; and not knowing what was going to happen is mentioned as one of the biggest problems for detainees. Related to this, there seems to be a problem, concerning a general lack of understanding or acceptance about why one is locked up. For example, many detainees do not understand why they are kept in prison, although they have not committed any criminal offence.

This situation is very common in Austria, because of changes in law and also because of a new government. After 2005 the asylum law was followed by six amendments and at the beginning of 2010 the alien's law amendment will come into effect. Those amendments are very complicated and strict, which leads to a more complex and harsher system. Moreover the new ministry of internal affairs supports these stricter regulations for aliens, especially for asylum seekers and illegal migrants. Due to this situation it became very hard to predict when the detainee will be released.

In addition, there were some problems related to language and communication within the detention centre, particularly for detainees who do not speak English or German. Many detainees did not have friends or family outside of the centre, owing to the fact that most of them have recently arrived. They therefore have very few visitors, which leads to more feelings of isolation and means that the detainees to rely on information provided solely by those in the detention centre.

The challenge here is to try to understand the underlying problems. It seems that it is not the lack of information that is given to detainees *per se*. Generally at the very first stage, when migrants are detained, they are informed about their rights and their legal status by the Aliens' Police. Then the counselling organisations try to clarify questions or to explain it again. But the organisations are not allowed to give legal advice. It was felt by NGOs that the initial shock of detention makes detainees less receptive to information or to explanations of their legal status. Regarding communication and language barriers, providing more information is not the problem: rather, the problem lies with providing information in a language that can be understood.

The second external factor that comes through from the data is the lack of **activities** and opportunities for physical exercise. Detainees say that doing nothing or not having the opportunity to participate in activities makes detention worse. Social workers clearly point out that **engagement in a daily routine** supports mental well being. This would be very appreciated by the detainees. Social workers have tried to organise a variety of activities, such as sporting tournaments; and these tournaments have been very successful. But other activities, such as painting workshops, have been refused by the centre staff because of security reasons.

5. CONCLUSIONS AND RECOMMENDATIONS

The results of the project conceive of 'vulnerability' as a set of multi-layered factors that adapt to the particular personal, environmental and social determinants that one carries with him or her self. As described above, vulnerability is not established by the compliance with all criteria on a black and white list that can be applied to all persons and to all situations.

It has to be pointed out that detention should always be *ultima ratio*: used only in cases where no other possible legal means are purposeful. This is backed up by the findings of DEVAS in Austria, which clearly show that detention exacts a very heavy toll on detainees. The data even suggests that detention itself is the leading cause of vulnerability in detention centres. Because of the amendment that came into effect in Austria at the beginning 2010 detention may now be applied in the case of Dublin procedures under many different circumstances. This could lead to an excessive appliance of detention in cases where the lawfulness of the detention might be very debatable, as already happened after the last amendment in 2006. At that time the interpretation of legislation was at least partly revised by jurisdiction.

It is the practice in Austria that detainees are held in prisons; and prisons were not conceived for this purpose when they were built. Therefore the Ministry of Internal Affairs and its subordinate authorities have a responsibility to ensure that adequate standards are met. The **human rights advisory board has issued recommendations** for detention carried out by security authorities. These recommendations are formulated to establish national standards that are

monitored regularly. These **standards** describe that detention should be carried out for security reasons only and without any of the characteristics of arrest.

Caritas wishes to highlight the necessity of **monitoring** the implementation of these recommendations and the adherence to standards. A report of the Human Rights Advisory Board (established due to the 10th anniversary of the board, "*10 Jahre Menschenrechtsbeirat - Themenschwerpunkte des MRB aus 10 Jahren*", 2009) shows that detention conditions are still a critical point in Austria.

The DEVAS results show a strong link between detainees' state of mental health and self-uncertainty. Not knowing about his or her situation but moreover not knowing how long he or she has to stay in detention are one of the main issues detainees have to deal with. **Communication** starts at the very first moment when the detainee is informed about his or her situation, and there is a need for adequate communication during the whole detention. Adequate communication requires that translators be available to provide written information documents in other languages, and that alternatives are made for persons who are illiterate. Moreover, adequate communication would be supported by the joint accommodation of spouses, siblings and families.

More activities and greater access to outdoor facilities should be provided. Here once more the fact that detention is carried out in prison is a distinct disadvantage. The prison-like atmosphere means that detainees are possibly handled too strictly and therefore hardly any outdoor activities or projects are implemented. There should open areas for detainees where they can move about freely, which would support detainees' sense of independence and therefore help to reduce vulnerability

The **negative consequences** of detention on asylum seekers and irregular migrants may never be resolved. The project is beginning to show us that the negative effects of detention are great and the system of detention may always make people vulnerable to harm: "You will never believe what detention can do to a person, until you have the possibility to see him in both situations - in detention, but also as a free person," a NGO colleague said. These recommendations are the minimum set of requirements that should improve the circumstances of detention. It is extremely important to explain to detainees that they are not "prisoners", but detained due to reasons stated with the aliens' law.



NATIONAL REPORT: BELGIUM

By: *Jesuit Refugee Service Belgium*

1. INTRODUCTION

In the course of this study, the Jesuit Refugee Service Belgium interviewed 39 asylum seekers at various stages of the procedure and 25 irregularly staying migrants awaiting deportation⁹⁵, for a total of 64 interviews. The interviews were conducted by members of the staff of JRS-Belgium in three detention centres in Belgium, over the months of February until July 2009. Twenty five detainees were interviewed in the Transit Centre 127, located at the Brussels National Airport. This centre hosts a population of asylum seekers who were denied access to the Belgian territory and whose procedures are processed in the centre. Irregularly staying migrants who are to be deported quickly are also maintained in this centre. Fifteen persons were interviewed in the detention centre 127bis and 24 persons in the detention centre of Bruges (referred to as CIB). Those two centres mostly receive irregularly staying migrants awaiting deportation, for detention periods that are typically longer than in Transit Centre 127. Asylum seekers are also to be found in those centres, especially rejected asylum seekers and persons who are in Dublin procedures.

Furthermore, a social worker of the centre 127bis and a member of the direction of Transit Centre 127 agreed to meet JRS-Belgium during the course of this study. Such an interview was however not possible in the Centre of Bruges, due to the lack of volunteers among the staff. Interviews were also conducted with NGO workers who visit the Transit Centre 127 and the Centre of Bruges.

JRS Belgium wishes to express its thanks to the Belgian Aliens' Office for granting access to those three centres in the framework of this DEVAS project, as well as to the management of these centres for the help we received in the practical implementation of the project.

2. NATIONAL LEGAL OVERVIEW

2.1. Legal grounds for detention

A) Asylum seekers:

Asylum seekers presenting their applications **at the border** – in most cases at the Brussels National Airport – and who have been denied entry to the Belgian territory can be detained for up to two months, on basis of the article 74/5, §1 to 3 of the law of the 15th of December 1980, in order to process their asylum applications. This period can be extended of maximum 15 days if an appeal is lodged against a negative asylum decision. If the appeal is rejected, the detention can be extended to up to five months, under strict conditions, in order to expel the person.

Asylum seekers who have been refused refugee status or subsidiary protection status by the General Commissioner for Refugees and Stateless can also be detained on the basis of the article 74/6, §1 of the law of the 15th of December 1980 for the duration of the **appeal procedure**, if deemed necessary in order to remove the person from

⁹⁵ For the purpose of this study, 'rejected asylum seekers' who went through their asylum procedures in detention are included among the asylum seekers (two cases), while 'rejected asylum seekers' who have been arrested after the end of their procedure are included among the irregularly staying migrants (nine cases).

the Belgian territory in the case of a negative decision in appeal. The article 74/6, in its paragraph §1bis also provides a list of cases in which an asylum seeker might be detained, insofar as the person would be in irregular stay in Belgium if he had not introduced an asylum application. The cases are varied (non-collaboration, lack of respect of the procedure deadlines, multiple asylum applications). This article is in practice mostly used to detain persons who apply for asylum while already detained. For the purpose of the article 74/6, the detention can only last two months – insofar as the procedure was not concluded negatively – and is extendable to five months under strict conditions explained in §2 of said article.

The law of the 15th of December 1980, in its article 51/5, §1er provides that, during the procedure of determination of the responsible state under the application of the **Dublin Regulation**, the applicant can be detained for up to one month. This detention is extendable for up to two months in particularly complex cases. In its article 51/5 §3, it also provides that an asylum seeker for whom a responsible Member State has been determined can, if necessary, be detained for up to one month in order to proceed to the transfer.

B) Other cases:

Irregularly staying migrants who have received an order to leave the Belgian territory because they do not possess the required documents – a majority of the detained irregularly staying migrants – are detained on the basis of article 7 of the law of the 15th of December 1980. This article provides that they can be detained for two months, extendable up to five, insofar as a deportation is still possible.

Foreigners who had a permit of stay valid for less than three months and are ordered to leave the Belgian territory for **other reasons** than the simple lack of documents, fall under the application of the same art 7. They can be detained in a similar fashion as irregular migrants. This covers, for example, people exercising a professional activity without permit, people with insufficient means of subsistence, people deemed to be a threat to public order or national security, etc.

2.2. Legal grounds for the minimum age for detention

There are currently no legal grounds preventing the detention of minors.

An order of detention might be issued with regards to the parents, and the children would stay with them in application of the article 8 of the European Convention of Human Rights (right to family life). Only families with minor children applying for asylum at the border were detained at the time of this study.⁹⁶

Article 41 of the law of the 12th January 2007 (concerning the reception of asylum seekers and other categories of foreigners) specifies however that unaccompanied minors presenting themselves at the border must be assigned to a specific observation and orientation centre.

2.3. Legal grounds for the detention order

The detention orders find their legal grounds directly in the texts that provide the basis for detention, as detailed above in section 2.1. Those texts specify that the Minister or his delegate issue the detention order. The Minister is the person in charge of immigration, and the Delegate is in general the Director of the Aliens' Office (Office des Etrangers / Dienst Vreemdelingenzaken).

2.4. Legal grounds for judicial review of the detention order

⁹⁶ This practice has ended since the 1/11/09, following a ministerial decision.

There is no legal ground in Belgian law providing for an automatic judicial review of detention orders. There is however one exception. When the Minister decides to detain an irregular migrant or a rejected asylum seeker for a fifth month, he is obliged to refer this decision to the “Chamber du Conseil/Raadkamer” who must review the lawfulness of this decision (see for example, art. 74 of the law of 15th December 1980).

2.5. Legal grounds for the right of appeal against the detention order, or to challenge detention

In all cases considered above, the detained person can petition from the first day for release in front of the Chamber of the Council (Chambre du Conseil/Raadkamer), as provided for by the articles 71 to 73 of the law of 15th December 1980. The Chamber will only consider the legality of detention. The foreigner can make the petition once a month. The decisions of the Chamber are subject to appeal in front of an Appeal Court (Chambre des Mises en Accusation/Kamer van Inbeschuldigingstelling).

2.6. Legal grounds for the right of information about the detention order and/or the reasons for detention

As a general rule, the Royal Decree detailing the working of the detention centres (Royal Decree of the 2nd of August 2002) provides in its article 17, al.3 that the director of the centre, or a delegate, must inform the detainee of the reasons of his detention. This must be done in a language he can understand.

With respect to asylum seekers, the Royal Decree of the 2nd of August 2002 further specifies in its articles 71/2bis (Dublin cases), 74§2 (various cases), 75§3 (asylum seekers after a negative decision at the first stage of procedure), that the detainees must be informed of their detention orders, which are written and should be motivated in law and in fact. All detainees must sign the decision to confirm that they have been informed of it. They should also receive a copy of the decision.

2.7. Legal grounds for the duration of detention

The duration of detention has already been discussed in section 2.1 of this national report.

It must be further noted that if a person refuses to take a return flight organised by the Belgian authorities, the detention period is said to start anew from that day. This practice is grounded in the jurisprudence of the Belgian *Cour de Cassation* and of the European Court of Human Rights.

2.8. Legal grounds for the provision of health care and the scope of health care benefits, and for the provision of social services

The articles 52 to 61/1 of the Royal Decree of the 2nd of August 2002 regarding the working of the detention centres guarantee that the detainees have a right to healthcare. It is either provided free of charge by the centre’s doctor or by a private doctor chosen by the detainee, at his costs. If necessary, the centre’s doctor can send the detainee to a specialised medical centre.

The articles 67 to 70 of the same Royal Decree also establish a social service in each centre. The missions of this service are to accompany the person, socially and psychologically, during his stay in the centre and to prepare him for his return. Furthermore, the director of the centre has to ensure that recreational, sportive and cultural activities are organized.

2.9. Legal grounds for contact with the outside world

The articles 34 to 36 of the Royal Decree of the 2nd of August 2002 regarding the working of the detention centres gives a right of visit to the family of the detainees. In particular, the detainee can receive his wife in an intimate setting

once a month, this right being only applicable after one month of detention.⁹⁷

The article 37 of the same Royal Decree also consecrates a right of visit for the friends of the detainee. However, those visits are subjected to prior approval by the centre's director.

Visits by pastoral workers are authorised by the article 46 to 51 of the Decree. Officials from the person's consulate or embassy are also authorised to see him (article 32). Finally, the Minister can grant to NGOs the right to visit the centre, as provided for by the articles 45 and 73 of the decree.

2.10. Legal grounds for the provision of legal aid

The right to legal assistance is found in the articles 62 to 66 of the Royal Decree of the 2nd of August 2002 regarding the working of the detention centres. Each detainee is entitled to a lawyer paid for by the Belgian State. The director of the detention centre is responsible for informing the detainees of this possibility. The detainees are entitled to contact their lawyer by phone at any time, free of charge, and the visits by the lawyer cannot be forbidden.

2.1.1 Legal grounds for the protection of persons with special needs

There is no single legal ground for the protection of person with special needs. The article 41 of the law of the 12th January 2007 (concerning the reception of asylum seekers and other categories of foreigners) specifies that unaccompanied minors presenting themselves at the border must be assigned to a specific observation and orientation centre. Those particular centres are open reception structures.

As exposed in section 2.8, persons requiring special medical attention might be sent to a specialised medical centre by the doctor attached to a detention centre (article 55 explicitly states the case of childbirth, life threatening afflictions and more widely "afflictions which cannot be properly treated in the centre"). The articles 115 to 117 of the Royal Decree of the 2nd of August 2002 regarding the working of the detention centres finally deal with the persons susceptible of committing suicide. The direction of the centre must dedicate a special attention with respect to those persons when identified by the medical service.

2.12. Legal grounds for alternatives to detention

In the case of persons who entered illegally on the Belgian territory, or who are residing illegally in Belgium and who introduced an asylum claim, the article 10 of the law of the 12th of January 2007 (concerning the reception of asylum seekers and other categories of foreigners) states that those persons are assigned a place to register themselves, and article 11 states that they are assigned to a particular reception centre, as place of registry.

As written above, article 41 of the law of the 12th January 2007 (concerning the reception of asylum seekers and other categories of foreigners) specifies that unaccompanied minors presenting themselves at the border must be assigned to a specific observation and orientation centre.

More recently, the Royal Decree of the 14th of April 2009 established "return houses" for families with children. Families who have been ordered to leave Belgium might be assigned to one of these houses in order to prepare their deportation. It might concern irregularly staying migrants as well as asylum seekers under the Dublin regulation. Families applying for asylum at the border were not eligible for stay in those houses at the time of this research.

⁹⁷ This right was not of application for the whole period of the study. The disposition providing for it only entered into force in June 2009.

2.13. Legal grounds for providing release from detention

In the case of asylum seekers in detention, if the asylum procedure cannot be processed in two months, plus the two weeks granted to write the appeal claim, the person must be released.

With regards to the other categories, the detention can only be extended, as seen in section 2.1, if the Belgian authorities can justify that the necessary measures to proceed to a deportation have been taken in the first seven days of detention, that those measures were executed with due diligence and that there is still a possibility to deport the detainee within a reasonable delay. If a detainee is granted a permit of stay due to pending procedures or procedures initiated while in detention, then he shall be released.

The articles 9 and 61 of the Royal Decree of the 2nd of August 2002 also provides that the director of a detention centre must inform the Aliens' Office if he notices that there are serious elements justifying the release of a detainee, especially in medical cases.

3. OVERVIEW OF NATIONAL DATA FINDINGS

The persons interviewed for this study were two-thirds men and one-third women – a proportion roughly reflecting the balance of sex in the detention centres. The average age among interviewees was of 30. The vast majority was single (75%), but this figure is inflated as it only takes into account official relationships. Quite a few detainees reported long standing relationships or prospects of marriage. The sample was varied in terms of nationalities, even if half of the persons interviewed were coming from sub-Saharan countries, especially the Democratic Republic of Congo.

For the persons in the centres 127 and 127bis, the average length of detention at the time of the DEVAS interview was similar: one month. For the persons in the centre of Bruges, the detention had been longer, up to an average of one month and a half. This reflects the fact that the maximum detention time in the 127 is of two months and a half, to be compared to five months in Bruges. In our sample, the average detention periods are not significantly different for asylum seekers and irregularly staying migrants.

3.1. Case awareness

Almost all detainees have at least some awareness for the reasons of their detention. This information was usually provided by the Belgian authorities (mainly by the centre staff or the police at the airport). However, asylum seekers consider themselves badly informed about their ongoing procedures. Only one third says that they are correctly informed. On a scale of 10 (10 being fully informed), the average score given is a low 4.77. In consequence, a majority of the asylum seekers have questions they feel unanswered, most of those relating directly to the procedure or detention.

According to the interviews conducted with the staff:

- The detainees are provided with information regarding their situation either during the “intake” (an introduction time detainees go through when arriving at the centre) or through an initial meeting with a social worker;
- Information materials about the procedure are available in 12 different languages;
- Formal decisions are notified promptly by the social worker;
- Contact with the lawyer is free through the phone.

It still appears from the detainees' answers that these measures do not alleviate the feeling of misinformation. According to the NGOs interviews, even those basic guidelines are not always met; many detainees are not in possession of a copy of the documents concerning themselves. The NGOs stress that linguistic and cultural differences often mean that the message passed on by the social worker is either not understood or misunderstood. Important documents come either in French or Dutch and are at best roughly translated by the social assistants at delivery.

3.2. Space

Very few interviewees feel positive about their rooms. This perception is heavily dependent on the centre considered: in the CIB, the percentage of unambiguous negative perception is rising to 87%, for roughly 50% in the 127 and 127bis. The complaints are related to social issues of cohabitation, in rooms hosting a large number of occupants (up to 15-20 occupants per dormitory). The bad general climate of the rooms (smell, noise, excessive temperature) was also frequently pointed out. Detainees were less negative in the centre 127bis, where they share rooms of four. Dirtiness was singled out though, as explained below.

The reactions about the centres' other areas (refectory, common rooms, lavatories, etc.) are also negative, but slightly less so. The lack of cleanliness is pointed out in the centre 127bis; while the centre is cleaned regularly, the walls and furniture are covered with graffiti. The difficulties of interacting in a small space are pointed out in the centre 127. In the CIB, the common rooms where detainees stay all day long are described as too small with respect to the number of residents, hot and extremely noisy.

Those two last problems directly relate to the lack of privacy available in the centres. One detainee out of two indeed feels that the centre he is living in is overcrowded, a feeling shared across all the centres. Almost all interviewees see no place in the centre where they could find a sense of privacy. As a detainee of the CIB states: "Sometimes you search for a place to rest but it is not possible. You want to pray, the others play pool... You have to ask for respect, this is not easy. You cannot find a quiet place here. People play the music very loud."

From the reports of NGOs and our own visits, such feelings match the reality of the physical layout of the centres. It should be noted that the prayer room set up in the centre 127bis is perceived by some detainees as such a place of privacy. On the contrary, the fact that prayers are held by Muslims in the common room is repeatedly noted as a source of tension by the detainees of the CIB.

3.3. Rules

85% of the persons interviewed had some knowledge of the rules of the centre, regarding daily routine and what kind of behaviour was expected of them. As a rule, detainees did not think they could require a change or were pessimistic about possible changes, with the notable exception of the centre 127bis. There, both detainees and staff questionnaires gave examples of concrete changes in daily practices, related to food, access to showers and such. During one visit in the framework of this research, tense protests were witnessed, leading quickly to more changes.

3.4. Staff

The detainees say they mostly interact with the security staff and the social service. Even if they do not mention spontaneously the medical staff, they are actually aware of their existence. In line with what was witnessed by NGOs in the visited centres, interactions with the social services are more widely reported in the 127 and 127bis, where the social workers are relatively easily accessible, whereas interactions with security staff are put forward in the CIB. While detainees are free to roam in between their rooms and the common areas in the 127 and 127bis, the regime in Bruges is more prison-like in its daily functioning. The guards have to accompany the detainees from one room to another many times a day. The guards are thus brought more in contact with the detainees in a position of authority.

It must be mentioned at this point that educators are present in Belgian centres. Many detainees indeed refer to them in their answers. In charge of providing recreational, cultural and educative activities to the detainees, these members of the staff are reported very positively by the detainees as being “easier to speak with”, and “closer to us”.

As said above, the centres 127 and 127bis distinguish themselves from the CIB by the quality of interaction with the staff. Positive figures go up to 50% in the centre 127 and 127bis and down to 12.5% in the CIB. Negative answers, which are quite consistent at around 20%, do not account for this variation. The difference consists in detainees who feel that the quality of staff interaction varies. The detainees express in those answers that some members of the staff are friendlier and more likely to support their needs while others are not. A particularly worrying trend is the fact that social workers are mostly perceived negatively in the CIB. Many detainees state explicitly that they do not want any contact with them anymore, unless forced, as the social workers are seen in being only interested in return.

A young woman sums it up: “Guards: They call us by our tag number ‘Miss Z99’. The chief don’t know my name; I’m a person, and this is not good. It really depends from one guard to another. Some let us rest five minutes before turning off the lights. With some it is: ‘poof, off’. Some are friendly though. I don’t go to see the social workers anymore; all they say is: ‘you must go’.”

Other detainees also explain that they have to select the guards or social workers to whom they will approach for a service. “Sometimes, they give you what you need, sometimes not. And no means no. It depends a lot on the mood of the guards though. We learn to see if someone is in a good mood before asking.”

The detainees usually feel that they can receive some form of help from the centre staff but, once again, most of the answers received are fairly nuanced. The reportedly received help consists mostly in items of daily life given by the security staff or small favours. This matches the staff questionnaires which insist on the flexibility of the guards and educators in supporting the daily needs of the detainees. For the centre 127, the assistance received from the social workers to contact the outside world is pointed out positively, particularly for contacts with the family in the country of origin.

It is comforting that very few cases of discrimination based on nationality, race or religion are reported. If a third of the detainees say that they experience some form of differentiated treatment from the guards, it is more often positive discrimination than negative and often linked to personal reasons. Still, among some detainees (especially detainees originating from the Democratic Republic of Congo), there is a strong uneasiness with the use of Dutch by the staff in front of detainees (all three centres visited are located in the Flanders and are mostly staffed by Dutch speakers). Unable to understand what is said, they suspect it to be derogatory racial comments or insults. One detainee reported a serious case of violent behaviour from the staff; he however admitted that he initiated the fight when refusing to go in isolation. This matches what is said by the NGOs. While violence is not encountered daily in Belgian detention centres, NGOs mention cases of unnecessary force in the dealings of the security staff with more agitated or violent detainees.

3.5. Safety

A more surprising result of the research is that a significant proportion of the detainees do not feel safe in the centres, a third of them even feel unsafe. The reasons are varied. The proximity of the centre 127 to the airport’s runways is certainly frequently mentioned in the interviews. The centre is indeed situated right next to the runway of the airport. The other reasons given are more varied and less centre-specific:

- Potential risks coming from other detainees because they are drugs users, coming out of jail or simply because they could “loose their mind and hurt anyone”;
- Feeling of being watched over all the time by the guards;
- Potential damages made to one’s health by lack of proper care, both psychologically and physically.

Mocking or insults have been experienced by a third of the detainees; half of it comes from other detainees, half of it from the centre staff (security staff almost exclusively). The cases reported erupt in daily life's disputes that escalate: refusal to light up a cigarette, conflicts around TV's use and so on. Reports of violent altercations involving the interviewees, either with the staff or the other detainees, are extremely limited. However, many a detainee in the centres 127bis or in the CIB has been witness of violent altercations. During a visit for this research, such a fight happened once in common areas right in front of the interviewer.

3.7. Activities

Detention centres in Belgium offer activities of various kinds. Educators are responsible for organising those. A centre will usually offer creative and entertainment activities (handicraft, painting, etc.), basic languages classes, some possibilities for sport as well as access to books, television and an outdoor place. The interviewees as a whole are aware of the activities offered in the centres and participate at various degrees in those activities. The persons strongly insist on the function of stress relief played by those activities (60% of the participants), more so than on the pleasurable aspect. Out of 25% who choose not to participate, half simply have no desire to do so but more than a third consider that they are too stressed or are feeling too depressed to participate. This feeling of being too low mentally to participate is twice as often encountered among women than men. A few detainees state that the activities are inadequate: "too childish", "inappropriate for someone of my age". From the NGOs' perspective, some of the activities offered, such as t-shirts painting or small handicraft, are purely occupational and unlikely to seriously interest the main group of detainees: young grown up men.

3.8. Medical

In all detention centres, a medical service is guaranteed by the presence of nurses and a psychologist as well as the presence of part time physicians. All interviewees are aware of the presence of those medical staffs. In their large majority, they either know they can access it on demand or they actually meet the medical service frequently. However, only one third is aware that a psychologist is present within the centre.

Persons with a limited command of French, Dutch or English report problems in communicating with the medical service: "I have pain at one side in my head which causes impacts my eyesight; it's because in Colombia I had a treatment for epilepsy, and since then I have pain in my head whenever I'm worried. But I couldn't explain this to the doctor in the centre, because he doesn't understand me." Such cases represent 16% of our interviewed sample but this figure is probably understated, as we mostly interviewed persons who had at least some command of those languages. When there are linguistic problems of communication, the medical services seem to use informal means of translation (co-detainees, nurses) rather than calling to trained translators, despite the obvious privacy concerns.

As a whole, the interviewees report a degradation of their physical health (from an average of 7.57/10 before detention to an average of 5.76/10 at the time of interview, 10 being best) and they add that detention itself had a negative impact in two third of the cases. The reasons given are equally spread on the facilities of the centres, the lack of appropriate treatment and psychological reasons linked to detention and/or procedures. On the side of mental health, the detainees report an even stronger degradation (from an average of 7.80/10 before detention to an average of 3.72/10 at the time of interview). When asked to explicit this degradation, 39% allude to unspecified serious stress and worries and 34% allude to mental health problems such as losses of memory, serious sadness, concentration problems, inability to sleep or headaches.

Half of the detainees express being unsatisfied by the medical services offered by the centres. They feel that they are seen a priori as liars, people exaggerating their troubles or requiring undue attention. In consequence they would not receive proper care. Some detainees see also the medical service as "working for the administration" and, as such, not really interested in their well-being. According to detainees, the medical services often hand out the same medicines – usually painkillers – for all the lesser afflictions. When drugs are provided, they are often given without

label or explanation notices. Furthermore, they feel outraged that the medical service would constantly refer to their symptoms as consequences of stress: "I'm losing weight; I already lost 12kg here. The doctor says it is stress. They only have this word to say ... stress". While it might be a correct assessment, it is perceived as a minimization of their situation.

30% of the detainees consider they need further medical attention than what it is available in the centres, mostly under the form of visits to specialists (dentists, ophthalmologists but also radio for formerly broken bones, etc.). These demands particularly come from asylum seekers detained at the centre 127, who have just arrived in Belgium and come from countries with limited medical capacities. Such visits do actually take place in clearly urgent and identified cases, as confirmed by detainees themselves as well as the staff and the NGOs. Quite a few interviewees indeed describe an improvement in their situation since their arrival. There seems to be severe restrictions however on treatments that are not deemed necessary by the physicians in the centres, irrespective of earlier prescriptions. "I need an operation for my legs. My first meeting with the specialist was cancelled because of my first detention. A second meeting is uncertain. In Bruges, the direction told me it was too expensive."

3.9. Social interactions

According to the detainees, their social interactions with other detainees are good or at least without problems. Half of them however acknowledge problems ranging from disputes to fights in between the other detainees. They do not relate those problems to inter-cultural or inter-religious tensions but rather to personal characters and the tension of common life in detention, something confirmed by staff and NGO questionnaires and already alluded to it in the section dedicated to the centres space. The problems noted above with regards to people arguing over prayer in common rooms are the only reported cases of inter-religious tension. Most people (but one) in fact consider these conflicts as a problem of space and cohabitation rather than actual religious confrontations.

This being said, persons who are not members of majority groups in the centres (in practice, persons not coming from either Africa or from the Maghreb) express the idea of being isolated. They more readily see the centre as a place where fights occur. As a woman who only spoke English told us: "It is difficult to establish contact with the Africans, the Arabs. How can I communicate with them without arguing?"

Detainees usually find a person to trust inside the centre (at least 70% do), which is as likely to be a co-detainee as a member of the staff. This division crosses all divides (ages, sex, origin, status...).

3.10. Contact with the 'outside world'

In general, the person interviewed had family in the country of origin (80%) and, in a significant number of cases (25%), those family members rely on the financial help of the person detained in Belgium. The detainees in their large majority have also family or friends in Belgium. Whether for communication inside Belgium or abroad, the telephone is the most employed tool of communication by far (used by 81%) and is considered by many as the optimum tool of communication in their situation. In comparison, visits by family or friends concern one third of the interviewees. If people have access to public phones as well as, in some centres at least, to their own mobile phones, effective access to the telephone is restricted by the cost of communications. Half of the persons who consider the telephone as the best mean of communication consider at the same time lacking an effective access to the telephone. "I don't have contact with my wife anymore. When you have money, then you can call, and if you really don't have anything, then you can try to ask your social assistant". If the staff indeed attempts in many cases to facilitate communications, these efforts still fall short of the needs.

The requests for Internet access are also important and are coming from persons from all origins. Some detainees in the centre 127 report the possibility of accessing Internet in the framework of their asylum procedure or in order to contact their families. The staff and NGO questionnaires points out that this remains an informal procedure in the

centres where it is practiced, at the discretion of staff.

The right of visit for lawyers is effective, but far from being always used by lawyers. Still, most of the detainees (and almost all asylum seekers) have met their lawyer, usually when going to court or to administrative hearings. Chaplain visits are common place as well as NGO visits.⁹⁸ Calling the lawyer by phone is free and the staff from the centres also allows at times the detainees to contact the NGOs free of charge, especially in the centres 127 and 127bis.

3.11. Family

If only one person had children with her in the centre, one fourth of the interviewees have children living outside the centre (see section above).

3.12. Nutrition in detention

The vast majority of detainees are not satisfied with the food provided and, in consequence, they eat less than before. The stress also compounds to reduce appetite. In the centres 127 and 127bis, the inadequacy in between the food provided and the detainees' culture is pointed out first while, in Bruges, the first point raised is the variety and the quality of the food. However, in all centres, the religious needs of the interviewees were reported as being catered for. This is mostly valid for Muslims. Hindus are arguably less numerous in detention, but said however that they had the feeling to receive less attention.

3.13. Detention and its impact on the individual

Sleeping is problematic for 75% of the interviewees. The worries and the stress associated to the detention and procedures are quoted first by half. The physical living conditions (especially the planes' noise in the centre 127 and the noise made by other detainees in the CIB) come second.

When we asked the detainees what the first difficulty in detention was, the answers were mostly spread along two axes: detention in itself being experienced as difficult (the simple shock of being detained, especially for asylum seekers at the border, the feeling of being cut from the external world, the feeling of being deprived of one's rights) and the living conditions (especially cleanliness or rather lack of, food and the daily routine). Asking for the second and third difficulties, the same issues come back, with a special emphasis being put on communication problems and a loss of autonomy (being forced to follow the group or act as told by the staff). If a significant minority of detainees expresses the idea that detention is getting more unbearable as time goes by, many detainees say that it was difficult from day one and stays so. And this even among detainees who have been detained a long time.

Nearly all detainees have experienced detention as particularly or too difficult to bear at one point. For some, it is at the beginning of detention (for 12%). For some, it is after more than one month of detention, a strong turning point (for 22%) and, for others, this feeling emerges after a particular event such as being brought to court or learning of a procedure results (for 32%). In three cases, suicide was expressly mentioned with seriousness.

The outcome of detention is an unknown for almost all detainees. If some detainees have a slightly better idea of when they will leave the centre, a large majority does not. The impact is without surprise mostly reported as "stress and worries" but quite a few (15%) directly relate mental health problems directly to this uncertainty. This matches the perception of the NGOs who notice that faced with the uncertainty of procedures, some persons will grow apathetic and detached or, at the contrary, anxious or even aggressive. Even in the case of denied asylum seekers or illegally staying migrants for whom the issue of detention seems at first clear cut (deportation), uncertainty is very present. In

⁹⁸ This is however inflated by the fact that the persons interviewed usually were in contact with the NGO before the interview was conducted.

practice, many who are issued expulsion orders are not actually deported or are only deported after a long period of uncertainty. This could be for various reasons: successful petition for releases, prospects of regularisation, lacks of documents, delayed answers from a third member state in Dublin II procedures.

When asked to describe themselves, the interviewees still do so positively for half of them. A fifth of them describe themselves negatively. A strong 75% of the detainees however say that detention had a negative impact on them, in terms that match what is described above: "I find myself aggressive. Outside I wasn't like that. You get attached to small things here." Or: "I'm too disabled in my head to make decisions for myself anymore. I cannot even decide if I should petition for release in front of the judge for example."

A fourth of the detainees consider having special needs beyond the usual categories of vulnerability. The two points coming out most are at first people who cannot speak any common language neither with the centre staff nor with the other detainees. The people unable to speak any common language are also recognized by both staff and NGOs as having particular difficulties in their daily life in the centre. Secondly people who have family outside the centre describe themselves as having special needs. The hardship of being separated from one's children and/or wife or companion is often reported in the interviews. It is further aggravated when the detainee knows that his/her family needs support; a support he cannot provide considering his situation. The special needs identified by the detainees among other detainees are very classical: older people, sick people, minors and pregnant women.

4. ANALYSIS OF THE DATA AND CENTRAL THEMES

Being detained is shocking, difficult to live with. This simple fact is at the core of what is reported in the interviews. Whether or not the centre is considered positively, whether or not information is received or understood, whether or not the relations with the staff are positive, whether or not the centre is experienced as a safe place, detention itself comes back again and again in the words of most of the persons we interviewed. No analysis can spare the expense of dealing first with this central human issue.

This is clearly exposed by the fact that a large majority of detainees say that detention has impacted their life and that such an experience was difficult since the very first day. Detention of course comes with its unavoidable corollaries: interruption in one's life plan, feeling of rights' deprivation, loss of personal autonomy, immersion in an unknown and somehow threatening social setting. As seen in the section above, those are the difficulties mentioned first by detainees.

Detention is even more shocking to the asylum seekers. First it is unexpected. Few among the persons interviewed expected detention. Then comes the experience of being criminalized. As a woman told us, "I came here for help and I found myself in prison." The physical settings of all detention centres is coming heavily into play: barbed wire fences, guards in uniform, locked doors and windows. Security practices reinforce this impression. Being cuffed at the occasion of transfers or when brought in front of the judge is an experience mentioned frequently by detainees. And, finally, the cohabitation in between asylum seekers, especially in the centres 127bis and in Bruges, and illegally staying migrants who are directly transferred from prison blurs the lines definitely. In front of those facts, the well-intentioned efforts of the staff do little to alleviate the feeling of being somehow punished.

The fact that some asylum seekers are actually fleeing experiences of arbitrary detention or persecution is also to consider. In a few but significant cases, the persons interviewed shared that being detained was a constant and painful remembrance of what they had endured at home.

More generally speaking, detention focuses detainees on their pre-existing problems. Detention is then experienced as a standstill, or even a regression, on the path of improving one's condition. Particularly exemplifying was the case of a man whose drug rehabilitation was interrupted when he was arrested in order to proceed to his deportation.

Unable to act on his problems anymore, he spent the whole interview coming back to it again and again. In similar cases, people shared that this powerlessness was overwhelmingly occupying their thoughts.

Intertwined with detention are the procedures. The persons we met could be described as such: persons waiting in a peculiar environment for a vital decision about their future, decision over which they have no grasp. Stress and worries are prevalent in a detainee's life. The consequences of "thinking too much", as the detainees express it, are numerous and widespread in the answers received: inability to sleep, lack of appetite, loss of energy and irritability in common life. This prevalence of stress is also exemplified by the psychosomatic medical conditions reported and the way those are answered to by the medical service of the centres. One of the main sources of worries reported by detainees is unsurprisingly the asylum decision itself (or, for illegally staying migrants, procedures surrounding the deportation) but, in fact, all the acts surrounding the procedures are experienced as an opportunity or a threat.

We are not equipped to diagnose strictly the combined psychological impact of detention and uncertainty. However, the serious degradation reported by the detainees in their mental well being is particularly telling, both in strength and magnitude. It certainly matches the experience of both staff and NGOs. The symptoms reported by detainees such inability to sleep, loss of memory, difficulty to concentrate, lack of appetite, anguish, apathy, ... are noted by all actors in detention.

Case awareness

In this context, the bad score given by detainees with regard to the information received about their ongoing procedures is worth being taken into account. The current efforts by the staff or the procedural safeguards into place are still not sufficient to guarantee a feeling of understanding of the procedure in the detainees. The complexity of the procedure means that, for many detainees, information leaflets and official documents are confusing and require further explanation. The social workers in charge of the procedure may not always have the time for such work, as exemplified by the questions people still had with regards to their procedures. People with lower education or coming from different cultural backgrounds also find themselves lost in those documents or misunderstand them. Detainees often do not understand what their lawyer is – or could – be doing for them. Communication with the lawyer is reported as often scarce and the information given difficult to grasp. The persons with low level of education, lack of knowledge of French or English and coming from a different culture are particularly at risk. This last category is also reported by both staff and NGOs as the most difficult to approach and support in practice.

The waiting periods before administrative or judicial decisions are also experienced as period of "not knowing what is going on" by the detainees, especially by the persons awaiting an answer from another country in the frame of Dublin procedures. One time information is thus insufficient and the explanation must be given again as the days go by. It is particularly difficult for the detainees to understand why procedures are taking so long; would it be for procedures of identification (in the cases of illegally staying migrants awaiting deportation) or the procedures of determination of the state responsible for the asylum claim (Dublin II cases). The limited amount of actual contact reported by some detainees with their lawyer reinforces this problem, especially in the cases of complex procedures. A typical question among detainees was "I would like to know what my lawyer is doing now".

Finally, a basic level of trust is required for information to be received properly. As seen above, many interviewed detainees bluntly say that they do not wish to meet the social assistants in the CIB anymore; the perception is that they are only interested in return procedures. While it can be understood that, in a centre hosting mostly people awaiting deportation, the issue of return is important, the very direct approach taken by the CIB's social service, as reported by detainees ("The first thing they told me, when I arrived here, was to bring my luggage because I was leaving soon"), is deterring the detainees to search further contact. In a centre hosting a mixed population of asylum seekers and illegally staying migrants, the negative perception held by illegally staying migrants is passed onto the asylum seekers. In the NGOs' experience, the work climate in the CIB, strongly focused on returns, is effectively little conducive to a proper accompaniment of asylum seekers.

Detention and the uncertainty around the asylum or deportation procedures are by themselves sufficient to make any amount of time spent in a detention centre a difficult time. It cannot be stressed enough that persons who report no problems with the practical aspect of detention (contacts with the staff, food, material conditions, etc.) or even are positive about it – which is not uncommon among persons who just fled areas of conflict –, insist also on the hardship of being constantly centred on their procedure and awaiting decisions, in a setting where there is little else to do. Some factors however further aggravate the situation and could be alleviated. The issues of healthcare, privacy and of the communications with the outside world are exemplary.

Healthcare

Access to the medical service is not the primary problem, with permanencies organized in all centres. Neither are the treatments offered as it can be argued that the medical services in the centres actually do provide proper service in most cases, as exemplified by the number of detainees reporting having been sent for examinations in hospitals or to a dentist. Still, the global detainees' perception is that they do not receive proper attention from the medical staff. What can explain this discrepancy?

Firstly, some reported objective practices are prone to raise suspicion in between the detainees and the medical service. Being offered only painkillers in many occasions, often unlabelled, is very strongly perceived as a lack of interest and care from the medical staff.

Secondly, in some cases, detainees do not receive the treatment they feel appropriate to their condition. While the Belgian legislation provides for the possibility of receiving the visit of an outside physician, it seldom happens in practice. Because of the cost, lack of awareness, lack of available doctors, the possibility of having a counter expertise is practically inexistent. This situation reinforces the feeling of dependence and frustration.

The lack of awareness among detainees about the presence of a psychologist in each centre is also a darker point. So is the feeling expressed by some detainees that going to see him/her is useless. While the detainees report generally a worse mental condition in detention, they might not under those conditions receive the attention they need. From the NGO and staff questionnaires, it appears that persons are only erratically referred to the psychologists, depending on how untrained members of the staff are able to detect the worst cases over time. The possibility of receiving the visit of an external psychologist or psychiatrist is almost null, unless in the cases where the lawyer organizes it himself.

In this context, the initiatives launched in the centre 127, as reported by the staff, are a step in the right direction. Multidisciplinary team meetings held thrice a week include discussion of the psychological state of the detainees. Members of the staff in close contact with the detainees are invited to fill in observation sheets, upon which the centre psychologist can act pro-actively. These changes have indeed been noted positively by the NGO visiting the centre in the last months, especially the increased visibility of the centre's psychologist. It must be said however that those initiatives are quite recent and are not yet adequately reflected in the detainees' answers.

Privacy and cohabitation

It is acknowledged by all actors that privacy is virtually nonexistent in detention centres. The problem is especially severe in the centres 127 and the CIB. A strict "group regime" is of application in the CIB. This means that detainees sleep at night in dormitories accommodating up to twenty, are brought together to the refectory at fixed hours for meals and outdoor recreation and are obliged to stay together in noisy common rooms for most of the day. Such a system makes it impossible to find privacy, in a centre where detainees can stay there for extended periods of time (up to 5 months among the interviewees). In the centre 127, the detention periods might be shorter but the lack of privacy is even direr. The centre is built out of stacked prefabricated units and is quite small. The common area is

dominated by the blasting noise of the TV. While women and men have different dormitories, those are literally next to each other and the doors do not lock. Some women report men entering their room either during day or night. While they do not report malign intent in those visits, this completely undermines any sense of privacy they might have had. This lack of privacy has at least two main consequences. On one hand, it reinforces as time goes by the feeling of being deprived of one's rights. The detainees experience a forced cohabitation and cannot escape from it. On the other hand, this cohabitation prevents them to find some forms of stress relief. A typical example is the difficulty to find a place to pray. It is also difficult in most centres to find a place where to reflect upon one's situation or simply where to rest during the day.

Not only are detainees unable to find a place where they can feel at ease, they are also forced to stay all day long among a group where tensions could be high at times. It is less the case for the centre 127, where NGO and staff findings support the overall good atmosphere reported by detainees. Tensions are however commonly reported in the other centres. As exposed in the previous section, the accumulated stress might translate into aggressive behaviour, attachment to small details, irritability. Those conditions explain for part the fact that detainees do not feel safe in the centres. The perception of the threat that *"other detainees might go crazy and try to kill someone"*, as found in detainees' answers, is certainly fuelled by the daily disputes or fights. The detainees mostly perceive those altercations as a consequence of the nervous state of their co-detainees.

Finally, the detention centres host a highly diverse population, in terms of cultures, languages, nationalities. Even if most of the detainees downplay the conflicts issued from those factors, it is worth taking particular notice that detainees who feel marginalized in the centre because they are neither originating from Arabic countries nor Sub-Saharan Africa are more sensible to the latent violence in the closed centres.

Communication with the outside world

While, for detainees, visits are certainly the most appreciated way of entering in contact with one's family or friends, this form of communication knows some serious limitations. The family may or not be in the country, the costs for coming to the centre are not insignificant and the friends may be in illegal stay in Belgium, to only review a few of answers. It appears thus from the detainees questionnaires that the telephone is today the most significant window to the outside world for detainees. Considering the important number of answers which touch the question of access to the phones, it is also a point of concern for most detainees. Furthermore, the ability of keeping in touch with one's family, either in Belgium or in the country of origin, is of particular importance for those persons who have children or spouses outside the centre.

Communication towards the outside world, especially for those people who have difficulties to communicate inside the centre for language reasons, is not a trivial issue. For some detainees, it is the only place to receive moral support throughout their detention time. For asylum seekers, it is the only way to actually request some important materials to document their cases.

This raises a few issues, the first being the financial one. Calling cards for the public phones found in all centres are particularly expensive. If some detainees can afford to use this system, either by receiving external support or by doing small cleaning jobs inside the detention centre, it is not the case of all. The possibilities of actually being given a small job are perceived as erratic at best and the payment rate is insufficient to purchase a call card frequently enough.

Secondly, equal treatment is not guaranteed across the centres. The structural answers given vary widely from a centre to another. While the easy access to one's own mobile phone in the centre 127 appears positive in front of the restrictive approach (public phones only) taken in Bruges, it is not perfect: what of the persons who arrived without their own mobile phones? Communication might seem easier in the 127bis where detainees get access to mobile phones provided by the centre but the limitations of the system (they only get access to the phone for 30 minutes per

day) leads to many frustrations. The imperfection of the system is partially corrected by informal practices. In some centres, it appears that the social staff will allow some detainees to make use of telephones outside of the common rules or help them for long distance calls, if they perceive those detainees as needing it.

Finally, Internet is today an important mean of communication, including towards developing countries. Similarly to what happens for the telephone, Internet access is sometimes granted in the 127 or 127bis, once again at the discretion of the social service, more particularly in the case of asylum applications. If infrastructure and security reasons may prevent an unrestricted Internet access in all centres, it is difficult to comprehend why widely different policies are applied today. Furthermore, while the importance of communication is today acknowledged by the practice of the centres' staff, the rules governing it are unclear and possibly open to the arbitrary.

5. CONCLUSIONS

At this point, JRS Belgium wants to reiterate its constant position with regards to the administrative detention of asylum seekers and illegally staying migrants⁹⁹:

- No asylum seeker shall be detained during his or her asylum procedure.
- Administrative detention of irregular migrants shall be avoided to the utmost extent possible.

In light of this research, the relevance of those two points is clearer than ever. From the interviewees' answers, it appears that detention itself is not harmless. It imposes an extra layer of negative constraints on individuals already dealing with painful procedures. This has a real human cost. Persons who experience the negative consequences attached to detention considered those as a punishment, especially if detention lasts. Any policy of detention must thus take the potential suffering of the detainee into account and balance it against policy arguments.

When it comes to asylum seekers, the difficulties of detention as experienced by the persons we met cannot be put in balance with the practical advantages the Belgian State might find in their detention. The European Commission in its report to the Parliament and Council on the implementation of the reception directive from 2007 highlighted that "given that according to the Directive detention is an exception to the general rule of free movement, which might be used only when 'it proves necessary', automatic detention without any evaluation of the situation of the person in question is contrary to the Directive"¹⁰⁰. The Belgian policy of routinely detaining asylum seekers, either at the border and/or during Dublin II procedures, does not comply with this requirement.

Furthermore, the question raised in the same report from the Commission, question addressing the procedure of identification of vulnerable asylum seekers is still left unaddressed. No such procedure of identification is in place in Belgian detention centres to date.

In the short term, the current situation has to be improved on some practical points.

With regards to the medical service:

The concerns voiced by the detainees about their health in detention go beyond the simple delivery of efficient healthcare. In order to relieve part of the detainees' stress, these concerns must be seriously heard and dealt with. We thus invite the Aliens' Office as well as the directions, medical services and psychologists of each centre to:

- *Establish integrated health teams, including also the psychologist of the centre, in order to deal with the*

⁹⁹ Position which follows the 14-point position on detention released by JRS-Europe of March 2008 and available on <http://www.detention-in-europe.org/index.php?option=content&task=view&id=210>

¹⁰⁰ http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0745en01.pdf

detainees' concerns in all their aspects so that any detainee who refers himself to the medical service experiences being heard and dealt with appropriately.

- *Set up procedures to refer pro-actively detainees to the centres psychologist in all necessary cases.*

With regards to the role of the social workers:

As exposed, trust can exist in between detainees and members of the staff. Trust in between the detainees and the staff in charge of informing them about administrative and court decisions is furthermore necessary for the correct reception of information. However, the involvement of the social workers as return officers in the enforcing of the deportation procedures significantly hinders that trust, even for asylum seekers. We thus recommend to:

- *Guarantee that all detainees can meet, in practice and at their request, someone able to properly inform them without being associated with the deportation procedures. This would be best accomplished by the dissociation of the roles of social worker and return officer in detention centres.*
- *The social workers of the centres to make a greater use of professional interpreting services, in order to be certain that the decisions communicated to detainees are properly understood, as well as their consequences.*

With regards to the functioning of the centres:

Detention centres, as they are currently managed, are perceived to be “prisons” by the detainees. Both the experience of criminalisation and the loss of autonomy are weighting heavily on the detainee well being. As outlined in the recent report of the Belgian Federal Ombudsman, the “closed centres” should switch towards a model granting greater autonomy to the detainees and weighting in security measures as secondary. We thus recommend to the responsible authorities to:

- *Review the practices surrounding the transfers to the tribunal and especially to end the use of cuffs when detainees are brought in front of the Courts and Tribunals.*
- *Re-think the physical layout of the detention centres in order to provide a greater internal autonomy to the detainees and to pursue the considered projects on this topic.*
- *Avoid as much as possible the mixing of asylum seekers and persons coming straight from prisons, by initiating the return procedures during the time of their imprisonment.*

With regards to the communications to the ‘outside world’:

While things are moving in the right direction with the liberalization of the use of mobile phones in the Belgian centres, there are still a lot of discrepancies, from one centre to another. We thus invite the directions of the centres to:

- *Harmonize the initiatives taken with regard to mobile phone use along the current most liberal practices;*
- *Take into account with special care in the design of those initiatives the persons without financial resources;*
- *Level the field with regard to internet access, by providing at least email access to all detainees, if necessary under supervision of the educators;*
- *Take into account the geographical proximity of the detainees to their social network when assigning a detainee to a detention centre.*



NATIONAL REPORT: BULGARIA

By: *Bulgarian Helsinki Committee*

1. INTRODUCTION

The DEVAS Project in Bulgaria followed the aim to research and identify the national detention conditions and practices and what was their effect on the asylum seekers. The research also focused on what other groups of vulnerable detainees could be identified in detention centres and to collect, summarise and analyse the situation in existing national detention facilities from the prospect of the detainees themselves.

In order to fulfil this task Bulgarian Helsinki Committee as the national project partner obtained permission to extend its visiting hours to Busmantsi detention centre, near the capital Sofia - presently, the only existing detention facility for aliens in the country's territory. The detention centre administration was introduced to the content of the detainee questionnaire, planned the number of interviewees (30 individuals) and the approximate time limit of each interview. Communication was also made to the management of the Migration Directorate of the MOI in order to get authorisation for interviewing two members of the staff. Finally, other NGOs involved in activities in Busmantsi detention centre were asked to consent to fill in a questionnaire designed to draw conclusions on their working experience in the facility; Caritas-Bulgaria was the NGO to answer positively.

Additional categories of people were added to the research: recognised refugees, and persons who have been granted asylum but who were detained after an issued expulsion order on national security grounds.

Only one detention centre was accessed because there is only one functioning detention centre for aliens in the country's territory. The capacity of the national detention centre is approximately 300, thus the chosen number of persons to interview - 30, represented 10% of all detainees. The interviewees among all detainees were selected on the principle of diversity, but the percentage of women compared to men in detention was significantly lower; thus only 5 out of 30 interviewees were women, composing only 16% of all interviewees.

All persons interviewed were asked to sign a consent form stating that the interviews were conducted according to their free will and for the purposes of the DEVAS project.

The most important impediment that was encountered during the project was the lack of resources to engage interpreters in the interviewing process. It limited the selection of people whom the project could interview as far as this selection was preconditioned to a great extent by the possibility to communicate in spoken either by the interviewer, or, by the detainee, language.

Among the stated categories of third-country nationals under the DEVAS project methodology as subject of research, in Busmantsi detention centre were established following groups of detainees that fell under the specified categories, namely:

- *10 applicants for international protection and 2 recognised refugees* - persons who apply for asylum while they are administratively detained for illegally staying in the Member State / persons who have been granted asylum, but who were detained after an issued expulsion order on national security threat grounds;

- *8 irregular migrants awaiting deportation* - persons who are in administrative detention for illegally staying in the Member State, in view of being returned to their country of origin or a country of transit;
- *10 rejected asylum seekers* - persons whose asylum applications have been denied by the Member State authorities, and are thus administratively detained in view of being returned to their country of origin or a country of transit.

The demographic profile of interviewees is the following: 43% were from Middle East, 20% from Sub-Saharan Africa, 16% from ex-USSR, 15% from Asia and 6% from Europe. Detailed data breakdown as follows: 5 Iraqis (male), 5 Nigerians (male), 2 Lebanese (male), 2 Armenians (male), 4 Palestinians (2 male, 2 female), 2 Russians (male and female), 1 Albanian (male), 1 Algerian (male), 1 Afghani (male), 1 Vietnamese (male), 1 Indian (male) 1 Kosovar (male), 1 Iranian (male), 1 Somali (female), 1 Tunisian (male) and 1 Ukrainian (female).

2. NATIONAL LEGAL OVERVIEW

2.1. Legal grounds for the detention / detention order

Detention of aliens in Bulgaria can be ordered on the basis of the Law on Aliens in the Republic of Bulgaria (enforced on 27.12.1998). The law does not provide an explicit rule for detention of asylum seekers. Temporary detention may be implemented for the period between the submission of asylum application at the border and the issue of a release letter from the State Agency for Refugees /Art.58(4), Art.67a(2)-1 of the LAR/. The SAR may conduct the Dublin procedure in the detention centre /§5 of the Transitional Clauses of the LAR in conjunction with Art.14 of Ordinance №332 from 28.12.2008/. In practice it was never applied until September 2009 when problems with capacity of the Reception centres for asylum seekers occurred and the asylum administration started fingerprinting under Dublin regulation prior releasing the asylum seekers from the detention centre, if they applied after their detention. This practice concern only persons who applied for asylum while they were already administratively detained for illegally staying in the Member State. The general national term used to regulate the administrative detention of aliens is “coercive accommodation” under Art.44 of the Law on Aliens. It is a measure applied in cases where a deportation or expulsion order was issued on the basis of, respectively, illegal residence or national security concerns.

Law on Aliens - Article 44(6) (Last Amendment, SG No. 36/2009) In the cases where the alien, who has been imposed upon a compulsory administrative measure in compliance with Article 39a,pt. 2 and 3, is declared with an uncertain identity, prevent the execution of the order or there is a possibility of his hiding, the authority, which has issued the order, may issue an order for a compulsory accommodation (detention) of the alien in a specific shelter for a temporary accommodation of aliens in order to organize their deportation to the border of the Republic of Bulgaria or their expulsion.

Comments and recommendations: Bulgaria was one of the few EU member states to fail in providing the legal safeguard of an automatic judicial revision of the detention order. This safeguard was met in national criminal proceedings (Article 64 of the Criminal Procedure Code) for all individuals, irrespective of their nationality or origin, if accused in committing a crime, but it was not guaranteed for those immigrants who were subjected to administrative detention for violation of the national immigration regime for the sake of securing their deportation. This approach was found to be discriminatory by nature and in direct violation of the *right to liberty and security* of the person under Article 5 (3) of the European Convention on Human Rights (ECHR) and Article 15(2).a) of 2008/115/EC Return Directive. Judicial control in cases of detention for deportation should be immediately initiated by the police authorities that applied the detention measure; its scope should extend over the legal grounds and actual necessity of the detention in each individual case in order to meet the generally recognised legal standards for protection of the right to freedom of all human beings.

2.2. Legal grounds for judicial review of the detention order and the right of appeal against the detention order, or to challenge detention

After the legal questionnaire was answered a major amendment of the Law on Aliens was introduced on 15 May 2009 explicitly providing for the right to appeal:

Law on Aliens - Article 46a. (New, SG No. 36/2009) (1)The Order for a compulsory accommodation in a special shelter (detention centre) can be appealed within three days of the actual accommodation in the administrative court in the area of the headquarters of the authority, which has issued the contested administrative act. The appeal does not suspend the execution of the order.

Comments and recommendations: Although the adoption of an explicit provision on the right to appeal the detention orders was admitted as a significant national progress, however, the deadline for submitting the appeal was found to be unreasonably short. It undermined the possibility of the detainee to organise his defence in terms of proper research of the facts and circumstances that motivated the detention as well as to develop legal arguments against it. This ability was additionally hindered by the fact that the detention orders were not served in the language spoken by the alien, neither any interpretation services were ensured. Lastly, having the fact that the deportation orders have been in general awarded with the effect of an immediate implementation, and thus the aliens were usually immediately detained, the tight appeal deadline proved to be highly disproportionate to the extent of pure formality and obvious uselessness.

2.3. Legal grounds for the right of information about the detention order and/or the reasons for detention

Administrative Procedure Code - Article 59 Para 2, item 7: When the administrative act is issued in a written form it must state, *inter alia*, (7). the appeal deadline and the appeal authority;

Comments and recommendations: Legal aid in Bulgaria is not provided for administrative proceedings. Therefore, in terms of safeguards for the access of aliens to information and legal advice national detention legislation suffers major deficiency.

2.4. Legal grounds for the duration of detention

Introduced on 15 May 2009 with amendment of the Law on Aliens:

Law on Aliens - Article 46a. (New, SG No. 36/2009) (3) Every 6 months the director of the special shelter for a temporary accommodation of aliens (detention centre) presents a list of the aliens who have resided in it for more than 6 months due to obstacles occurred for their deportation from the country. The list is sent to the administrative court of the area where specific shelters are located.

(4) After the expiration of each 6 months of accommodation in the special shelter for temporary accommodation of aliens, the court officially passes a decision for extension, termination or substitution of detention with another measure in a closed session. The court decision is not subjected to further appeal.

(5) When the court revokes the detention or determines the release of the alien, s/he is immediately released from the detention centre.

Comments and recommendations: Legal arrangement of the judicial control over detention duration also does not meet the general legal standards. Although detention duration is set to be automatically revised by the court when 6/12 months deadline has expired, the law is not clear on the transposition of Article 15(5) and (6) of 2008/115/EC explicit prohibition of prolongation of the detention in excess of thus set maximum terms of duration; to the contrary, the law determines court's competence to "extend" the detention, which is in direct violation of the above mentioned

acquis communautaire. Additionally, no legitimate reasons were stated to support the regulation of this judicial control as held in closed sessions without the presence of the detainees and, thus, in violation of the *habeas corpus* principle and the right to oral hearing before the court.

2.5. Legal grounds for the provision of health care and the scope of health care benefits, and for the provision of social services

Law on Health care - Article 99: (1) The state provides the organisation and finance for urgent medical assistance. (2) Urgent medical assistance is provided in cases when there was a sudden deterioration in the health condition of the person that requires an immediate medical assistance.

Comments and recommendations: The law failed to recognise the needs for medical treatment of those detainees who suffer chronic diseases and who, by definition were deprived from access to general health and medication services. Similar situations as for the convicted criminals who serve prison sentences have been already solved in the law by obligating the state to cover under the budget their health insurance costs (Article 40 (3) item 6 of the Law on Health Insurance).

2.6. Legal grounds for contact with the outside world

Ordinance № 1-13 from 29 January 2004 of Ministry of Interior - Art.15, item 4 of on the rules for administrative detention of aliens and the functioning of the premises for aliens' temporary accommodation: The detainee has a right to have: [...] (4). Meetings with lawyers, relatives, acquaintances, official representatives of relevant embassies or consulate services.

Comments and recommendations: In practice, the right to contact with outside world was affected quite negatively by the fact that detention centre's administration and, especially security guards were severely understaffed and lacked opportunity to provide sufficient time for each individual to spend with his/her family members, lawyers or other visitors during the designated for this purpose days/hours.

2.7. Legal grounds for the provision of legal aid

As the Law on the Legal Aid (in force as of 1 January 2006) provided for means of state sponsored legal aid (legal representation) solely at the court stage, if the latter has been reached by means of submitted appeal, the detainees are deprived from legal aid while pending in detention.

Comments and recommendations: The right to enjoy free legal aid is a legal safeguard that should be mandatory in all cases where the right to freedom and security of person is involved.

2.8. Legal grounds for the protection of persons with special needs

Ordinance №332 from 28.12.2008 for the responsibilities and coordination among the state agencies, implementing Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003, Council Regulation No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention and Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 - Article 16, Para 2: Detention is not applied in cases of asylum seekers from vulnerable groups such as unaccompanied minors, pregnant women, individuals with physical or mental disabilities who should be transferred to the premises of the State Agency for refugees.

Comments and recommendations: In practice, the lack of capacity in the national reception centres for asylum seekers resulted regularly in detention of individuals, representing all vulnerable groups mentioned, including people with physical or mental disabilities, pregnant women and families with minor children.

Also, for legal grounds for accompanied and unaccompanied minors, *Ordinance № 13-1695 from 26 September 2006 of Ministry of Interior - Article 9:* Persons who cannot be detained in special shelters (detention centres): (5) minor and adolescents;

In contradiction with:

Law on Aliens - Article 44, Para (9): (New, SG No. 36/2009) Exceptionally, if there are circumstances under Paragraph (6) for the accompanied and unaccompanied juveniles or minors it is issued an order for a compulsory accommodation in a special shelter up to three months. At the special shelters referred to in Paragraph (7), there are separated rooms for the accommodation of juvenile and minor aliens that meet their certain needs and requirements.

Comments and recommendations: None of these legal standards on detention of accompanied or unaccompanied children is met in practice.

2.9. Legal grounds for alternatives to detention

Law on Aliens - Article 44, Para 5: (New, SG No. 36/2009) When obstacles exist for the foreigner to leave the country immediately or to enter another country the alien shall be obligated to appear daily in the police office according of his stay or residence following by an order of the institution which has issued the order for compulsory administrative measure as determined by the regulations for implementation of this law until the obstacles cease to exist.

Comments and recommendations: In practice this measure has not been applied widely enough, despite the evident advantages in terms of safeguards for the right of freedom for the aliens and cost effectiveness from the prospective of the government.

2.10. Legal grounds for providing release from detention

Law on Aliens - Article 44 (6): (Last Amendment, SG No. 36/2009) In the cases where the alien, who has been imposed upon a compulsory administrative measure in compliance with Article 39a,pt. 2 and 3, is declared with an uncertain identity, prevent the execution of the order or there is a possibility of his hiding, the authority, which has issued the order, may issue an order for a compulsory accommodation of the alien in a specific shelter for a temporary accommodation of aliens in order to organize their compulsory walking off to the border of the Republic of Bulgaria or their expulsion.

Read in conjunction with,

Law on Aliens - Article 44 (8): 8)(New, SG No. 36/2009) The accommodation (detention) lasts to the revocation of the circumstances under Paragraph (6), but not more than 6 months. An exception can be made when the person refuses to assist the competent authorities, there is a delay in the process of obtaining the necessary documents for the removal or expulsion or when the person is a threat to the national security or the public order, and the period of accommodation may be extended further to 12 months.

Legal costs for appeal procedures, *Civil Procedures Code - Article 8, Para 2 and 3:* Fees and costs of the proceeding shall not be deposited by any natural persons who have been found by the court to lack sufficient means to pay the said fees and costs. Considering the petition for waiver, the court shall take into consideration: 1. the income accruing

to the person and to the family thereof; 2. the property status, as certified by a declaration; 3. the family situation; 4. the health status; 5. the employment status; 6. the age; 7. other circumstances ascertained.(3) In the cases covered under Paragraphs (1) and (2), the costs of the proceeding shall be paid from the amounts allocated under the budget of the court.

3. OVERVIEW OF NATIONAL DATA FINDINGS

Information collected on the basis of conducted interviews was analysed by the DEVAS Evaluation Committee in Brussels, which after an in depth analysis identified the following main problems and concerns vis-à-vis the detention population in Bulgaria.

3.1. Basic information

Having average length of detention of 14.21 months (maximum 35 months) Bulgaria hit the highest detention duration among all 23 Member States participating in the project examination. Another alarming finding was the fact that the total months spent from detainees in the country prior detention was established to 88 months on average, which means that the country fails to provide adequate procedures for legalization or extension/prolongation of granted residence permissions. Detention population in Bulgaria has a larger than average in the EU number of married people and who have been in the country previously an extremely long time prior the actual detention. These factors may well make a difference to vulnerability as far as people with families, people who have been in detention a long time, and people who are well integrated in the host country and have few ties with their home country fall into very vulnerable and harmful situation especially in relation to their established family life and right to exercise it when faced with deportation.

3.2. Case awareness

Research established that the detention population is very badly informed. Some detainees are informed on the reasons for their detention quite late during following the arrest routine administrative procedures, which is a big concern. The fact that 1/3 of interviewed detainees want to know more information because it is a 'general right' points towards the fact that people in Bulgaria feel that their rights are not being respected. In general, the government fails to implement its obligation under Article 5 (2) of ECHR and Article 12 (2) of the 2008/115/EC Return Directive. Interpretation in language spoken by the detainee is provided when the detention orders is served; many were explained by immigration officer orally in Bulgarian that they were illegal. Thus, detainees are left unaware on specific reasons, facts and circumstances for their detention as well as on possibility to appeal and more important, on appeal deadlines which lead in the majority of the cases to missing the deadline and thus, access to independent judicial control over the police decision for detention. Having in mind short (3 days) appeal deadline as well as the lack of automatic judicial review of detention, the failure of the government to provide adequate information on the reasons for detention and due procedures to be followed reflects immediately in damaging the rights of detainees and causing additional reasons for vulnerability.

3.3. Space within detention centre

28% of interviewed detainees feel neutral and 38% to negative about the detention staff supporting their general needs. Majority report general inaccessibility of higher ranking staff that are authorised to make decisions or advise detainees on how to proceed to solve problems both from situation of detention and for its termination notwithstanding the method for it, release or deportation. BHC greatest concerns on the centre space relate to the lack of privacy not only in general, but also in dormitories that accommodate from 12 to 18 individuals in one room. Other NGOs visiting the detention centre on regular basis often receive complaints about the limitations imposed on

moving between the floors, but when at the end of researched period this movements were authorised the detainees' complaints reverted to the behaviour of the detainees coming from other floors and rooms being overpopulated and extremely noisy. Major concern of the detention staff was the lack of safety nets between the floors and the understaffed guards on duty (2 on each floor) who are considered incapable to react adequately in cases of violence among detainees and particularly, in cases of general unrest or riots. When asked to describe the centre fairly common were comments of detainees such as 'it's like Guantanamo' or 'it's not fit for humans'.

3.4. Rules and routines

Although the detention centre staff when asked could produce an information leaflet it seemed that the detainees were generally unaware about these written materials. Almost all of them are acquainted with the rules on sleeping, eating, bathing and other daily routines, however all of them thought the rules arbitrary not obligatory, but they stated the rules to be generally respected (68%). BHC is taking note on general lack of understandable information about the routine and in-house rules, particularly on the conditions to be put in an isolation cell which is considered as applied as a disciplinary measure, but to a great extent arbitrary and without clear rules on the maximum time limit that could be spent in.

3.5. Detention centre staff

Reports on being physically attacked are not registered. Only one person had filed a complaint, which was unsuccessful. However, detainees feel very unsafe in general. Reports for mocking by staff are worryingly common and underreported. The feeling of unsafely present in the detention centres referred to the power of the staff to use isolation in a single cell quite freely and uncontrolled by higher-ranking officials or court. NGOs state that the level of rapport between detainees and the centre's staff is considered unsatisfactory, as many detainees reported zero level of responsiveness to petitions for meetings with administrative staff and immigration officers. Problems that there are between the detainees and the staff could be illustrated with quoting the detainees when asked to describe their relation such as: "They don't support us. Nobody gives us information. To meet the director is like to meet God." Or "When they know you have money or something like that you are untouchable. I can't explain more than this."

3.6. Level of safety within the detention centre

Almost half, 44.4%, reported feeling 'very unsafe'. Mostly this is because of security guards or other general reasons not related to other detainees. One fourth of people have been mocked or verbally abused, and this is most likely to be by staff (over 70% of those mocked) while 28% of those mocked reported being mocked by other detainees. Several incidents of quarrels and fighting were reported among detainees and being detained for long time was stressed as reason for raise of aggression and mood alteration to worse. Unlikely to state having any special needs (68%), if they did the detainees in 22.7% stated to have same needs as everybody else, which in effect is assessed as actually saying that everybody who is detained has special needs that derive from the fact of detention which previously did not exist.

3.7. Activities within the detention centre

There are very few activities provided in detention. When asked about activities that could be provided, the detainees are most likely to state access to Internet (55.6%), and then freedom or nothing (25%). Thus, communication through the Internet could be defined as most important activity that could be provided in, rather than more education or sports activities, however, sports activities were also stated as an important stress relievers. Half and half split on whether activities are provided, but if they are, the detainees are 65% likely to take part, and the activities are most likely to be sport (84%). Reasons given for taking part were for mental / stress relief (40%), and physical exercise (25%). The reasons not to take part in activities (36.7%), it is mostly because the detainees feel physically unable or because they are not interested in the activities that are provided. Detainees state to have access to telephone (66%, but 33% say there is no access to phone) and TV, as well as outdoor space (76.7%). However, the BHC observations

prove that access to telephone is provided only to those who can buy telephone cards themselves. In general the report is that detainees do not have access to books, computers, Internet, education, sports equipment and religious space, although 33% of them said that there is and they practice their religion on regular basis. NGOs position is that there are very few activities provided but that most important to detainees seems to be the access to Internet.

3.8. Medical issues

Almost 90% of detainees report feeling unsafe because of the deterioration of their health and the lack of respect they feel in general due to being detained and under the control of others. In terms of medical services - existing medical staffs (doctor and a nurse) are seen less than once a month (62.7%), although 27% of detainees who report health problems see them once per week. All detainees report to have had medical examinations upon arrival in detention centre. Most of detainees reported that they can understand the language that the medical care is in, however 30% cannot and feel that the staff should speak more languages to solve this problem. It could be explained by the fact that large percentage of the detainees have spent long time in the country prior detention and had learned Bulgarian. Therefore, the complaint that the medical personnel do not speak any foreign languages should be assessed higher in the problem chart reported, in terms of meeting the communication need of immigrants who were detained short after or upon their arrival in the country. 93.1% of detainees report that they have had their physical health affected (only 6.9% have not). Physical health has on average dropped from 8.45 to 3.17. According to the detainees interviewed, this has almost nothing to do with availability of medical facilities, but is psychological (76.2%), followed by being affected physically by poor living conditions (19%). This finding demonstrate clearly that the mere fact of detention and being detained situation make people vulnerable *per se* resulting in immediate negative consequences on physical, but more significantly on the mental health of detainees (see below). 73% are negative about the quality of provided medical care, and 65.5% have specific medical needs that are not being met and need access to appropriate care for this. In terms of mental health - 96.3% of people report that their mental health has been affected. Mental health has dropped on average 9.21 to 2.68. The fact of being behind bars is the most given factor (46.7%) and the effect of it is very negative. As for other reasons for deterioration, living conditions are negligible (3.3%), while 33% say the deterioration of their mental health is because of stress and worries, 30% are specifically worried about their mental health. Detainees largely report the detention centre to have changed negatively their self-perception and self-esteem to the level of losing it completely. BHC considers the issue of poor level of medical services, which extent in general to inadequate drug treatment on irregular basis as the most serious of all problems in the detention centre. NGOs in general support that urgent medical cases or serious medical problems of the detainees cannot be treated immediately in detention and there are sent to external hospitals/clinics, which can condition grave health consequences due to the delay in time.

3.9. Social interaction within the detention centre

The detainees report to get along on well to neutrally with others and only 11% report to have problems with the co-detainees' interaction. When asked to explain they state it is most likely due to linguistic reasons. In general detainees (73.9%) do not report to the detention staff, if problems occur between them. This statement is supported by the BHC observation as when consulted to complain against a particular violation or co-detainee, detainees reject to do it. The problems itself are not seen as hugely significant by detainees and they explain them either as caused on individual dislike or by tension due to common life. However, BHC observations reveal that a lot of mistrust and tension is based on ethnic, religious or racial grounds. This observation is supported by the finding that 59.3% of interviewed detainees claim to have no-one to trust in the centre and those who do trust someone (40%) most say that they trust the staff (66.7%), thus only 1/4 say they trust other detainees.

3.10. Contact with the 'outside world'

In general, detainees report to have not problems with contacting people outside detention. All report to have contacts by phone; half also report having access to personal visits. Detainees who do not have family in the country of origin are 53% and only 23% of detainees had family that were in need of support. Most of detainees reported to have friends and family in Bulgaria (63%), 1/3 of them reported to have children outside the centre. They do contact them by phone, and half also report having access to personal visits. Phone contact, visitors and the Internet is cited as the best ways of contact. However, 14/30 detainees interviewed answered that the best method of communication would be to be free and be with their family, rather than a specific method of communication, i.e.: "To be free and out from this place, because I am not guilty", "To be free. To be with them and take care of them. They need me"; this explains why the majority say they do not have access to their preferred means of communication. 43% of detainees do have visits from a family member, 43% from a friend. 30% have been visited by a religious organisation. 3 people had been visited by UNHCR, 83% by lawyers, and 80% have been visited by NGOs (Bulgarian Helsinki Committee, Caritas, ACET Centre for Torture Victims).

3.11. Conditions of detention and the family

Only 6,6% of interviewed detainees had their family with them in the detention centre, all of them asylum seekers waiting to be released and to get access to asylum procedure. They reported to feel unsafe and uncomfortable being in conditions of detention and that see themselves as being persecuted again. BHC observe that due to the present institutional arrangement more asylum seekers who apply at country's borders are being sent to the detention centre directly causing the detention of families with children, which has great negative impact on their parent as they feel unable to provide normal and secure environment for their kids.

3.12. Conditions of detention and nutrition

The poor nutrition and bad quality of food seems to be a universal stress to all of the detainees. The food is largely reported as awful, without any variety and in very small portions. Many report stomach and gum problems as a result of it. Nearly three-fourths report that they don't sleep well. Stress is reported to be the principle cause (81%) with 14% citing living conditions (e.g. overcrowded bedrooms, noise, uncomfortable bed) as the problem. The detention staff recognises the poor quality of the nutrition provided, but report to have no means to improve it due to the tight budget allocated for it.

3.13. Conditions of detention and the individual

Up to 96% of detainees have negative self-perceptions. People describe themselves as animals [to quote]: 'Even the animals feel better than me' or 'I see myself as being treated like a slave or animal' that points to a generally inhumane nature of detention as an administrative measure to ensure deportation. The overwhelming problem that detainees face is simply being locked up, rather than specific conditions in detention, even though for example 100% of people say that the food is unacceptable. Even worsened or bad health condition has not being stated as big a worry as one might expect, perhaps because the health conditions are largely related as a result of being in detention. On the issue of outcome of detention - 0% report knowledge on the outcome, 0% know departure date. Not knowing this affects people to the worst as far as: being locked up effects to 66% of them, and the loss of rights affects to 27.3% of them, which was the highest score among all participating 23 member states. Asked to identify the most important reasons for vulnerability, almost none of the detainees who were interviewed mentioned classic vulnerable categories such as disability, health condition, pregnancy, and younger age. Instead the detainees focused on other, strikingly different than expected reasons - 1/4 mentioned that the most vulnerable are those who had been there a long time, and 1/3 mentioned as most vulnerable those detainees with families outside the detention centre.

Other key issues according to the detention centre staff

In general, the responses of the interviewed detention staff were quite formal and strictly abode by the written rules and regulations regulating minimum detention standards applicable.

Notwithstanding, when asked to state the factors that according to them might lead to changes in the detainees' mental well-being while they are in detention the response was [quote]: "Limitation of the freedom and free movement. The long duration of detention. Separation from relatives and friends".

Therefore, it can be fairly concluded that even the detention staff that was empowered by law and employment to administer detention as primary duty task, recognised the negative effect of detention itself to one's life and especially, in terms of its duration as well as the effect it had on individual's right to liberty and family life.

4. ANALYSIS OF THE DATA AND CENTRAL THEMES

Based on the analysis of the data collected and reflected, a number of factors were specified to determine a status of vulnerability - social, environmental and personal. The thorough analyses of these factors from the perspective of the ones who actually bare the consequences of being detained, of NGOs/civil organisations rendering assistance in detention centres as well as by the detention administration itself outline several areas that need immediate action.

4.1. General lack of information or insufficient/formal information about the legal situation in detention, and the status and development of asylum or immigration case;

Most important information missing is about possible outcomes of detention, release date and what legal or practical actions can be undertaken by the detainees themselves and who can assist them in order to accelerate the discontinuation of the detention in the most suitable for each individual situation method. The lack of information and uncertainty about the future has been reported as the most influential factor to create stress, psychological unrest, depression and losing of self-esteem. Mental problems caused by insufficient information, lack of prompt/accessible legal advice and loss of life control are reportedly stated by majority of detainees as the most common ones to have to deal with and main reasons for creating feelings of vulnerability and exposure. Detainees do have access to state provided psychological support, however this support and assistance is evaluated as insufficient having in mind that it is provided simply in the form of therapeutic conversations. Due to the gravity of deprivation of rights and liberties in detention and its affect to one's life, it is considered that no "understanding" is enough to render a healing effect to people in detention.

4.2. Prolonged detention, as far as deterioration in mental and physical health, is observed even after couple of weeks.

Prolonged detention to all detainees who suffer it evoke feelings of being imprisoned without guilt which create perception of having rights, but also lives broken and violated. Feelings of streets, anxiety and depression caused mainly of being imprisoned without stated legal reasons or for a very long time (2-3 years). Detainees consider negligence, incompetence or unavailability of the staff involved with their cases (examining immigration officers, lawyers, judges, etc.) to be the main reason for protracted detention. Level of rapport between detainees and the centre's staff is considered unsatisfactory, as many detainees reported zero level of responsiveness to petitions for meetings with administrative staff and immigration officers to clarify their situation and to get information on actions that can be undertaken by the detainees themselves to improve their chances for prompt release. This, together with the lost control over the life plan and uncertainty about the future, lack of legal aid and assistance provided in the

language that detainees can understand and broken family life and disrupted contacts with spouses, children and relatives create in detainee's unbearable mental and emotional suffering.

4.3. Poor material and services detention conditions

Food quality and quantity is of major concern. Nutrition is provided according to a very tight budget and is not meeting the DNV and vitamin requirements; quite often detainees report to be ill-, or even, under-nourished. Lack of adequate medical and mental health support, particularly for urgent medical cases or serious medical problems of the detainees cannot be treated immediately in detention and need to be sent to external hospitals/clinics, can condition grave health consequences due to the delay in time. The death caused by a gastric ulcer of a detainee that happened in the early autumn of 2009 proved it in the most tragic way. These environment factors are among those which can be immediately addressed by authorities and without great impediments in order to secure detainees from unnecessary physical and emotional hardship.

4.4. Detention, if applied pending an asylum procedure as far as asylum seekers report to suffer unexpected and unjust treatment after fleeing from persecution to safety and security.

Asylum seekers are individuals who are fleeing persecution and imminent harm to their lives. As a result, asylum seekers possess special needs that require special consideration, attention and assessment. Therefore, the government should institute a system of qualified identification of asylum seekers' special needs at ports of entry, be they land, sea or air and, especially - to avoid detaining them in closed institutions designed for deportation to the countries of origin. The legal complexity of asylum procedures together with the precarious situation of asylum seekers means that, if held in conditions of detention the government is not responding adequately to the protection needs of asylum seekers and is failing to provide asylum procedures in their best interest. Thus, the government should seek to avoid the detention of an asylum seeker at any cost as well as the state must provide appropriate and effective legal aid and/or assistance from the very beginning, i.e. as soon as the asylum status determination commences at the very first instance.

Based on observations and conclusions above following groups of detainees who share common reasons for vulnerability as a result of the detention could be identified, namely:

- People who have been detained for prolonged period of time;
- Asylum seekers, detained prior or during refugee status determination;
- Individuals, who have their families and relatives outside the detention centre;
- Individuals, who were detained after losing their residence permit;
- Parents, who are accompanied by the children.

5. CONCLUSIONS AND RECOMMENDATIONS

Detention and deprivation of freedom has a strong negative impact upon a person's life and well being. Significant decrease in the state of physical and mental health since detention is implemented is largely reported. This decrease proves to deteriorate the longer detention is continuing.

Lack of information proved to be of a major concern to all detainees disregarding their legal status or period of time they have spent in. Detainees unanimously express as dire need the access to more information about their asylum or immigration procedure, the reasons for their detention and the prospects for its duration.

Crucial factors supporting the detainees in meeting the challenges of their situation are access to legal advice and assistance as well as legal aid provided to all detainees. As far as detainees are in prison-like situation same standards, safeguards and practical arrangement as in criminal proceedings for protection of the right to liberty and security of person should apply automatically without any discrimination and/or limitation.

Poor material conditions in the detention centre as well as the lack of proper food, nutrition and medical care are the last group of national circumstances related to detention that are identified as country's specific to create additional factors for vulnerability of detained individuals.

5.1. Recommendations

General recommendations

Automatic judicial control must be applied immediately in cases of detention for deportation with scope to revise both legal grounds and actual necessity of the detention in each individual case in order to meet the generally recognised legal standards for protection of freedom of all human beings and to avoid violation of the *right to liberty and security* of the person under Article 5 (3) of the European Convention on Human Rights (ECHR) and Article 15(2).a) of 2008/115/EC Return Directive.

Deadline to appeal against detention under Article 46a. of the Law on Aliens should be made equal to general appeal deadlines in administrative procedures to avoid disproportionality and discrimination.

Legal aid should be provided to all detainees in order to render adequate means of assistance and qualified advice.

Article 46a.Para 4 of the Law on Aliens must be immediately amended in terms of deleting the right of the court to "extend" detention duration, if exceeding 6/12 months as being in direct contradiction with Article 15 (5) and (6) of 2008/115/EC Return Directive prohibition.

Legal arrangements for regularization as well as special, facilitated conditions for integrated individuals should be introduced in the immigration legislation.

Interpretation and improved means of communication, including access to the Internet and facilitated access to the telephone should be introduced in the secondary legislation regulating detention conditions.

Medical treatment of chronic diseases must be arranged using the approach as to convicted criminals who serve prison sentences by obligating the state to cover under the budget health insurance costs of all detainees.

Detention of children, accompanied or unaccompanied must be strictly prohibited.

Food and nutrition should be improved to meet DNV standards and quantity without any delay.

Specific recommendation related to asylum seekers

The detention of asylum seekers constitutes a double persecution because of the negative experiences they have already suffered as a result of fleeing from persecution and harm.

Detention conditions deprive asylum seekers from their legally recognised rights and entitlements they would otherwise have access to, if not detained.

As far as detention is used to ensure deportation/removal it is not appropriate to detain asylum seekers who are residing legally from the very moment of submitting an asylum application.

Most importantly, their detention is stripped from any reasons, legal or practical, as far as asylum seekers cannot be removed or deported on account of *non-refoulement* prohibition.

Detention, when implemented towards asylum seekers means that a presumption of their rejection and subsequent deportation/removal is applied in violation of *in dubio pro fugitivo* principle and standards for fair and efficient refugee status determination.

Therefore, detention of asylum seekers must be strictly avoided.

Specific recommendation related to irregular migrants

Persons with children, or families with children, are especially vulnerable to the negative effects of detention. Detention can cut families off from each other, and the prison-like environment of detention can have a traumatic effect on children and a destructive effect on familial interaction. Therefore, alternatives to detention for families with children, and persons with children, should be prioritised and exhausted before detention is implemented.

Free legal aid and/or representation can limit the most negative effects of detention, be it isolation, despair or deep uncertainty, because it can provide the irregular migrant with a set of expectations and a perspective of their immediate future. Such aid and assistance may also improve the efficient closure of their immigration case. It is important that this aid and assistance be communicated in an understandable language. Therefore, irregular migrants in detention should have access to free legal aid and assistance, provided to them in their own language or in a language they can reasonably understand.

Language is a critical factor for persons in detention. An inability to comprehend what detention centre staff communicates may mean that vital information is lost upon the detainee. Language incomprehension also increases detainees' sense of isolation and mistrust. Thus it is important that detention centres facilitate a greater language capacity that can meet the full range of detainees' needs.

In conclusion, it has to be underlined that the negative effects of detention are so great as to warrant that it should be used exclusively as a last resort. Alternatives to detention should always be identified and examined. Furthermore, the asylum seeker or irregular migrant should always receive an individual holistic assessment to determine their suitability for detention, should it be necessary and should all other alternative options be exhausted. If and only when detention cannot be avoided, then there should be frequent holistic assessments of the individual's status, and, frequent checks, including by the court, to determine if detention is still necessary and proportional to each individual situation.



NATIONAL REPORT: CYPRUS

By: *Symfiliosi*

1. INTRODUCTION

In February 2009 Symfiliosi sent letters to both the Ministry of Interior, which is the competent ministry for immigration and asylum, and the Ministry of Justice which is the competent ministry for the police and the prison system, requesting permission to visit three detention centres in different locations in Cyprus for the purpose of this study. The Ministry of Justice responded that the matter was outside its competency and referred us to the Ministry of Justice, which however did not respond in any way. On 30.03.2009 we phoned the Ministry and were informed that our request was still under examination pending clarifications awaited from the police. At the time it was pointed out to us by the Ministry official that our request would be granted, but we did not receive anything from them thereafter. On 13.04.2009 we sent another letter to the Ministry of Justice, which was followed a few days later by a rejection letter from the Ministry, arguing that asylum seekers are not detained in Cyprus. On 10.07.2009, following the resignation of the chief of police, we applied to the newly appointed deputy chief of police. The response this time was that we could interview 15 persons; all from a single detention centre (block 10 at the central prison). We wrote again to the police asking for permission to interview another 10 detainees – women, fact – held at another detention centre. The reply was negative. In August 2009 a researcher from Symfiliosi visited Block 10 and interviewed 14¹⁰¹ male and female third country nationals in detention, most of them former asylum seekers whose asylum application had been turned down and were detained pending deportation.

The detainees were selected by the police, who were also present during the interviews. Two questionnaires from detention staff were also completed: one was presented to our researcher already completed and the other was completed out by our researcher, following an interview with a female police officer working at the detention centre. Interviews were also conducted with two NGOs active in the field of asylum, namely Apanemi and Future Worlds Centre. Efforts were made to interview a third NGO active in asylum (KISA) but this was not possible due to the busy schedule of the person in charge. A third interview was also conducted with the head of the human rights section from the Ombudsman's office, which also serves as national equality body, in view of their investigations and reports on detention conditions. Symfiliosi would like to thank all persons interviewed for their input, as well as the two researchers involved, Maria Ioannou and Nicola Solomonides.

2. NATIONAL LEGAL OVERVIEW

2.1 Legal grounds for detention

The relevant constitutional provision is provided in Article 11 of the Cypriot Constitution, which guarantees the right to liberty and security for all. Sub-article 2 states that no person shall be deprived of his liberty save where, inter alia, the arrest or detention is intended to prevent unauthorised entry into the Republic.

¹⁰¹ Symfiliosi was granted permission to interview 15 detainees from one detention centre. Practical difficulties and constraints (similarity of cases; lack of time afforded by the authorities; no other females accepted to be interviewed) led to a sample of 14 interviews.

Asylum seekers: Article 7(4)(a) of the Refugee Law of 6(I)/2000 as amended prohibits the detention of an asylum seeker for the sole reason of being an asylum seeker. However under article 7(4)(a) detention is allowed by a Court Order either for establishing his/her identity or nationality in case the asylum seeker is not in possession of valid travel or identity documents; or for the examination of new elements which the applicant wishes to submit in order to prove his/her claim relating to his asylum application, in case his application has been rejected at first as well as at second instance and a deportation order has been issued against him/her. In practice, asylum seekers entering the country illegally are detained for the duration of their asylum procedure. Asylum seekers entering legally are usually not detained. However, there have been reports of several cases of asylum seekers unjustifiably detained and in some cases deported whilst their asylum application was still pending.¹⁰²

Irregular migrants: The Aliens and Immigration Law allows the detention of irregular immigrants, as they are considered to be “prohibited immigrants”, who are subject to expulsion defined as ‘deportation’. Deportation is dealt with by section 13(1) of the Aliens and Immigration Law¹⁰³ which empowers the Chief Immigration Officer to deport all third country nationals who have violated the conditions of their permit or have committed an immigration-related offence. Section 13(2) allows the “detention in custody” or in “other confined places”. In practice, the Chief Immigration Officer issues both detention orders as well as deportation orders without applying to the Courts to obtain any orders, a practice of questionable legality that has attracted criticism from both the Ombudsman and NGOs. For the detention to be allowable, the person must be served with an order to leave the territory. In cases where a migrant commits an offence punishable with imprisonment, the police may arrest and detain such a person even in the absence of a notification to leave the territory.¹⁰⁴

2.2 Legal grounds for the minimum age for detention

The Refugee law prohibits the detention of minors.¹⁰⁵ A “minor” is defined in the same law (article 2) as “a person who has not yet attained the age of eighteen”. However, the detention of minors seems to be allowed (and is in fact practiced) in fields outside asylum. Article 6(a) of the Law that Provides for the Rights of Persons Arrested and are under Detention, N. 163(I)/2005, in the case of an arrest of a person under 18 years old, the parents or guardian have the right to be informed. Under article 20 it is the responsibility of the person in charge of the detention centre to ensure that detainees under eighteen reside separately from the rest of the detainees and in separate cells from the opposite sex.

According to the immigration police, no orders for detention of minors are issued except where the minor is involved in serious criminal offences.¹⁰⁶ In all other cases, when the parents are detained, the child is placed under the care of the Welfare Services, which will in most circumstances place the child in a children’s home.¹⁰⁷

2.3 Legal grounds for the detention order

Any immigration related offences that contravene the general rubric of immigration under the ‘Aliens’ and Migration Law, Cap. 105 provide the legal basis for a detention order. Unlawful entry or stay constitutes a criminal offence under the Cypriot immigration law.¹⁰⁸ The most common immigration related offences are: overstay (i.e. having entered legally for a limited period, the third country migrant remains in the Republic after the expiry of the prescribed period);¹⁰⁹ or having entered on a valid permit, the subsequent breach of a term or condition relating to the permit.¹¹⁰

¹⁰² Some of these cases are recorded in the Ombudsman’s Annual Report for 2005, issued in December 2006, pp. 50-56.

¹⁰³ Cyprus/ Aliens and Immigration Law Cap. 105, as amended 1972-2007.

¹⁰⁴ Cyprus/ Aliens and Immigration Law Cap. 155, Civil Procedure law, section 14(1)(b).

¹⁰⁵ Cyprus/ Refugees Law N.6(I)/2000 as amended, article 7(4)(c).

¹⁰⁶ Interview with the Nicos Theodorou, officer of the immigration police, 24.06.2009.

¹⁰⁷ However, this was not always the case: the national NGO ‘KISA’, reports that in 2008 there were at least three complaints by the organisation that minors were detained.

¹⁰⁸ Cyprus/ Cap. 105 Aliens and Immigration, section 19.

¹⁰⁹ Cyprus/ Cap. 105 Aliens and Immigration, section 19(λ).

¹¹⁰ Cyprus/ Cap. 105 Aliens and Immigration, section 19(ι).

Also, if it appears, at some later stage, that the migrant concealed information about a previous conviction and that s/he had obtained a certain status by concealing this conviction (i.e. by deception) or “gained leave to enter or to remain by deception”, the immigration officer may also consider to be “conducive to the public good” to deport him/her. All the above are criminal offences and carry punishment of imprisonment up to one year or a fine or both.

2.4 Legal grounds for judicial review/ right of appeal against the detention order

There is no automatic judicial review; the detainee has to apply for it. Detainees have the right to appeal to the Minister of Interior seeking their release from custody. In addition, the Constitution provides for the right to apply to the Supreme Court for judicial review of any administrative decision, including the decision to detain, under article 146. If successful, the application under article 146 of the Constitution has the effect of cancelling the administrative decision complained of and the immediate release from custody. This procedure however is costly and is not covered by the legal aid law.

2.5 Legal grounds for the right of information about the detention order and/or the reasons for detention

Article 11(2)(4) of the Constitution provides that all persons arrested must be informed at the time of their arrest in a language they understand of the reasons for their arrest and must be allowed access to a lawyer of their own choosing. The Refugee law, article 7(5) provides that detained asylum seekers must be informed in a language they understand, of the reasons of their detention as well as their legal rights, including the right to hire a lawyer. Also, the Law providing for the rights of persons arrested and in detention, N. 163(I)/2005 which applies to asylum seekers and irregular migrants alike, provides in article 3(3) for the right of arrested persons to be informed immediately after arrest in a language understood by them of their right to contact personally by telephone (a) a lawyer of their choice and (b) in the presence of a member of the police, a relative or any other person. The same provision states that persons arrested must be immediately informed in which police station or detention centre they will be detained.

2.6 Legal grounds for the duration of detention

The Refugee Law 6(I)/2000, article 7(6) provides that an applicant's detention may not exceed eight days. The detention may be extended for further eight-day terms upon Order of the Court, but the total detention period shall in no case exceed thirty-two days. On a more general level, the Prison Law N.62(I)/96 prohibits the detention of a person in detention centres for a period longer than fifteen days. Detention for the purpose of deportation is limited to eight days unless the court authorize for more. Considerations such as the deterioration of the human rights situation in their country of return are not taken into consideration for persons who have not been granted refugee status or other type of international protection, nor is it a factor justifying longer detention in law

The above ceilings are not always respected; irregular migrants have in many cases spent months and sometimes years in detention.¹¹¹ A recent decision of the Ministry of the Interior provides that detainees held on immigration offences can be released after 6 months of detention provided they have not committed a serious penal offence and provided they apply to their embassies to obtain valid travel documents; in such a case they are granted leave to remain in Cyprus for 18 months, after which they must depart. As a result of this policy, there no longer many detainees held for long periods of time whilst in the past there had been cases where they had spent 2 or 3 years in detention.

¹¹¹ The long periods of detention have been severely criticised by national and international reports. At a meeting of the Parliamentary Commission on Human Rights dated 27/02/2007 the Ombudsman suggested a maximum period of detention of 42 days or three months be adopted, as is the case of Greece or France. According to the 2009 Amnesty International report, detainees held in Nicosia Central Prison for periods exceeding 18 months while awaiting deportation were released throughout the year, but no numbers or details are given: *Amnesty International Report 2009 - Cyprus*, 28 May 2009, available at: <http://www.unhcr.org/refworld/docid/4a1fadf3c.html> (04.09.2009).

2.7 Legal grounds for the provision of health care and the scope of health care benefits, and for the provision of social services

Article 23(1) of the Law that Provides for the Rights of Persons Arrested and in Detention N. 163(I)/2005 states that every detainee has the right at any time to be given medical examination or/and treatment or/and medical attention from a doctor of his/her choice and to contact the doctor for this purpose personally by telephone the presence of a member of the police or the prison personnel, depending on the case. In case the detainee does not wish to exercise the right to appoint a doctor of his/her choice, s/he has the right to be given medical examination and/or treatment and/or medical attention from a governmental doctor who is arranged by the person in charge of the detention centre. The detainee pays the costs of the medical examination and/or treatment, and also the medical attention from a doctor of his/her choice above.

Under article 24(1) the detainee must be provided, immediately after he is remanded in custody, with a document that contains in a language of his/her understanding the rights that are contained in the above article.¹¹²

The only provision in the law about the provision of social services to detainees is to be found in the Law that Provides for the Rights of Persons Arrested and in Detention N. 163(I)/2005 article 3(4) of which states that persons who appear unable to exercise their rights of contact with a lawyer or a relative/other person due to mental or physical disability shall be entitled to assistance from the state Welfare Services for the purpose of exercising these rights.

2.8 Legal grounds for contact with the outside world

Under article 3(1) of the Law that Provides for the Rights of Persons Arrested and in Detention N. 163(I)/2005 a person arrested by a police officer is entitled straight after his arrest to contact personally by telephone (a) with a lawyer of his choice and (b) in the presence of a member of the police, with a relative or any other person. Under article 5(1) detainees have the right to contact personally by telephone, in the presence of a member of the police, the Consulate or diplomatic mission of their country of nationality in Cyprus and in case their country of nationality does not have a Consulate or diplomatic mission in Cyprus, then either the Ombudsman or the National Organisation for the Protection of Human Rights 'ETHNOPAD' (an independent public body), so as to inform them of their arrest and detention. Under article 16(1) all detainees have the right to meet with a person of their choice every day for one hour in total in a special area of the detention centre. In the case of minors, the only person they are allowed to meet with is the parent or guardian. Under article 16(2) detainees are entitled to meet every day for one hour in total with a representative of the consulate or diplomatic mission of their country of nationality in Cyprus, or if there is no such consulate or diplomatic mission, with a representative of a human rights organisation. Under article 15(1) every detainee has the right to send and receive letters as follows:

- To and from his/her lawyer without the letters being opened or read by anyone;
- To and from the European Court of Human Rights, the Attorney General of the Republic, the Ombudsman and any international or national body with competence to investigate allegations of violations of human rights without the letters being opened or read;
- To and from related, friendly or other persons with whom it is in his/her legitimate interest to retain or to come in contact with, subject to the condition that its content be checked by a member of the police or the prison personnel in the presence of the detainee, and may not be sent or delivered in case it is discover that it contains

¹¹² A research project conducted in 2007 showed that there seems to be a general practice of suspicion towards those detainees who claim to be ill. All detainees interviewed claimed that they were forced to wait for weeks to see a doctor and in general the authorities and public hospitals viewed them with suspicion: *Creating and strengthening a sustainable network of civil society concerning administrative detention of asylum seekers and illegally staying third-country nationals across the 10 new EU Member States which acceded to the European Union on 1 May 2004* (<http://www.detention-in-europe.org/index.php?id=75&option=content&task=view>).

any illegal object or its content subjects the security of the detention centre or the detainees or other persons to risk or it is of criminal nature or may interfere with the investigation of offences.

2.9 Legal grounds for the provision of legal aid

The Law on Provision of Legal Aid N. 165(I)/2002 provides for legal aid only for criminal and civil law cases and excludes administrative proceedings.¹¹³ The exclusion from the scope of the law of applications to the Supreme Court to set aside administrative decisions is particularly detrimental for asylum seekers in detention, who have no other recourse against arbitrary or needlessly lengthy detention or arbitrary deportation. The law also extends legal aid to cases of human rights violations as these are defined inter alia in Part II of the Cypriot Constitution (which essentially adopts the European Convention on Human Rights) and a number of international conventions ratified by Cyprus.¹¹⁴ The scope of the law is restricted to cases where the offences involved are punishable with a term of imprisonment exceeding one year.¹¹⁵

The legal aid law was amended in recent months by Law N.132(I)/2009 which purports to transpose articles 15(2), 15(6) and 38 of Council Directive 2005/85/EC of 1st December 2005 laying down minimum standards on procedures in Member States for granting and withdrawing refugee status. The amendment extends legal aid to asylum seekers applying to the Supreme Court to set aside a negative decision either of the Asylum Service or of the Reviewing Authority concerning either the rejection of the applicant's asylum application or the cancellation of the applicant's refugee status. The amendment does not cover recourse against detention.

2.10 Legal grounds for the protection of persons with special needs

Article 5(2) of the Law that provides for the rights of persons arrested and are under detention, N. 163(I)/2005 states that in case of mental insufficiency a foreign detainee who is apparently not capable of understanding or to be informed that he has the right to contact/correspond or to fully appreciate his right, a member of the police must contact counsel or diplomatic mission in the Republic, the Ombudsman's Office or the National Organisation for the Protection of Human Rights, as the case may be. A provision in the Law on Psychiatric Treatment N. 77(I)1977 provides for the placement of offenders with mental disorders in suitable units in order to receive treatment and serve their sentence;¹¹⁶ however, no such units have been set up despite the debating of this issue amongst stakeholders for a number of years and as a result, patients with mental disorders are currently serving sentences in prison.

2.11 Legal grounds for alternatives to detention

There are no alternatives to detention in the Cypriot legal or policy framework.

¹¹³ An ECtHR decision against Cyprus dated 04.12.2008 on the issue of availability of legal aid in administrative proceedings, stated that "a question arises as to the conformity of such legislation with the requirements of Article 6 of the Convention" and that "there is a *priori* no reason why it should not be made available in spheres other than criminal law." *Marangos v. Cyprus*, Application no. 12846/05.

¹¹⁴ The European Convention on Human Rights, the Convention for the Elimination of all forms of Racial Discrimination, the International Covenants on Economic Social and Cultural Rights and on Civil and Political Rights, the European Convention on the Prevention of Torture and of Inhuman or Degrading Treatment or Punishment and the Convention against Torture and Hard or Humiliating Treatment of Punishment.

¹¹⁵ The Ministry of Justice has recently compiled a draft law to amend the Law on Legal Aid, currently under examination by the House of Representatives. The draft law aims at removing the restriction contained in article 4(1)(a) of the Legal Aid Law which restricts legal aid to offences punishable with imprisonment of over one year. The draft law follows a judgement of the Supreme Court in 2008 which found the said legal provision to be unconstitutional for unduly restricting access to legal aid; *Andreas Constantinou v. The Police*, Case No. 243/2006, 25.01.2008

¹¹⁶ Cyprus/ A Law providing for the safeguarding and protection of the patients' rights and for related matters N. 1(I)/2005, articles 37 and 38.

2.12 Legal grounds for providing release from detention

Where deportation orders cannot be executed, mostly due to lack of cooperation on behalf of the detainee for the issuance of travel documents, it is policy¹¹⁷ that the detention should in principle not exceed a period of six months, although there are still cases of detainees in detention for longer periods. If deportations cannot be executed within six months, migrants can sometimes be released under certain conditions and given a special residence and employment permit, provided they have not been found guilty in the past for criminal offences. The conditions of release, to be communicated in writing to the detainee, are:

- a. A special residence/ employment permit is issued, for a period of 12 months from the date of release¹¹⁸ on the condition that the released person cooperates with the Embassy of his/her country for the issuing of a passport. In case that that the person is issued with a passport, a residence/employment permit is issued for a period of 24 months from the date of his/her release, with a possibility of renewal.
- b. Prior to the issuance of the above residence/employment permit the migrant is obliged to sign a contract of employment with an employer who will be indicated and approved by the Department of Labour. Change of employer will be considered subject to approval by the Department of Labour
- c. The migrant is obliged to report a residence address within 15 days from release.
- d. The migrant is obliged to report to the nearest Police Station once a month and must report any change of residence address.

3. OVERVIEW OF NATIONAL DATA FINDINGS

When evaluating the results of the interviews it is important to note that, apart from the small size of the sample, the responses from the detainees lack a level of specificity that is needed to identify patterns and themes. A possible reason for this may be the presence of a staff person in almost every interview, which may have pressured detainees into reticence, or at least into giving answers that would not be considered as controversial. Also, the interviewees were selected by the authorities based on criteria that were not made available to us.

3.1 Case awareness

The greatest majority of interviewees were aware of the reasons of their detention. Immigration authorities were the main source of information for the detainees; most of them were informed about their reasons of detention upon arrest by the immigration office, although some wondered how their asylum application ended up in their detention. Some were arrested when they voluntarily visited a police station to report something (e.g. stolen documents), which increased their sense of unfairness and helplessness over the procedure. A lack of trust towards the authorities and particularly the immigration police is evident from many interviews. This leads detainees to question the veracity of information emanating from that source, which is often their only source of information. Half of them were in need of more specific information about their case and the other half said that the information they had was enough. Those who stated that they needed more information wanted to know more on immigration procedures and on how to adapt to their current situation.

In general, detainees seemed to accept detention as an expected outcome of their illegal status. Additionally, most of the detainees who said that they had all information they wanted, were people who either maintained a passive attitude towards their detention- had no other alternatives (see for example the Iranian who preferred detention to deportation) or were seriously thinking of conceding to their deportation.

¹¹⁷ Decision of Minister of Interior dated 21.05.2008.

¹¹⁸ According to section 9(2) of the Aliens and Immigration Law and Regulation 15(1)(b) of the Aliens and Immigration Regulations.

3.2. Space

Most of valid responses rated the room they slept in neutrally, some positively and few negatively. Most of the detainees who rated it neutrally were people who strongly believed that their detention was temporary and therefore characterized the lodgings as “tolerable for a temporary stay.” The vast majority rated the rest of the centre’s space neutrally and a few rated it negatively. In fact, there was not much of “other space” to which they had free access. For both female and male quarters the “other space” was merely a corridor.

Most of the male detainees did not feel that the centre was overcrowded. The majority also reported that they had a space in which they could be alone (with this space being their room – cell), although one detainee stated that the wing of the building occupied by the “Asians” was often crowded in comparison with the wing of the “Arabs” the situation is different regarding women detained in the neighbouring Block 9 where detainees have to share cells with other women detainees, there is no privacy and no other space in the centre except a corridor in front of the cells. One detainee complained about having to share space with “girls from the street”, the irony being that the women so described are most probably victims of sex trafficking.

The interview with Apanemi however reveals that Block 10, where all interviews were conducted, is in fact a lot better than other detention centres, with bigger and cleaner sleep quarters and with the possibility to spend an hour a day outdoors. In police stations that serve as detention centres, detainees are not afforded any time outside, there is no privacy; the space is too small, the ventilation is bad and the rooms are badly lit. These findings tally with the information derived from another study, based on an interview with a priest who regularly visits a number of detention centres¹¹⁹, as well as with the findings of the Ombudsman’s investigation.¹²⁰

3.3. Rules

Although the guards vaguely referred to the existence of rules without describing details, none of the interviewees described concrete rules and some even stated that there are no fast rules. One detainee noted that although detainees want to see some things changing in their detention conditions, they are not taking concerted action to bring their demands to the authorities. Another detainee reported that detainees must follow informal rules set by the ‘high-order’ detainees, meaning the detainees who have been in the centre for longer periods and/or who have better relations with the guards. None of the persons interviewed could make reference to a concrete set of rules to which the detainees and the staff have to adhere. This is why in reply to the relevant question the detainees merely described certain aspects of their daily routine, such as when they can walk outside, or use their mobile telephones. The detainees made particular reference to walks and use of mobile phones since these two were the most often used ‘conveniences’ they could have access to.

It can be derived from the answers of the detainees that a set of informal rules governed the frequency with which they could make use of these conveniences. Some of the detainees (the ones who were described as high-status detainees by one respondent) were allowed to carry their mobile phones even within their cells. This aligns with the allegations made by Apanemi that the guards try to create allies amongst the detainees, affording special treatment to some of them either because they are considered dangerous or in order to turn them into their trustees.

¹¹⁹ Actions in support of civil society in the EU member states which acceded to the EU on 1 May 2004: Creating and strengthening a sustainable network of civil society concerning administrative detention of asylum seekers and illegally staying third-country nationals across the ten new EU Member States.

¹²⁰ Report of the Ombudsman on the conditions of detention of foreigners in Central Prison and in Police Detention Centres, 2 February 2005.

3.4. Detention centre staff

All interviewees responded that they are most in contact with the guards in the detention centre. No interaction (at least on a daily basis) with other staff was reported. Half of the respondents described their interaction with staff as positive, a few described it as neutral and some stated it was varying depending on the guard.

The vast majority of detainees stated that they have not been subjected to discriminatory behaviour from the staff. Those who had experienced discrimination blamed ethnicity and nationality as a cause, e.g. 'Arabs and Iranians get better treatment than Asians'. A couple of interviewees stated that detainees are segregated by the guards according to their ethnic origin and that some detainees particularly those of Arab origin are treated more favourably by the guards. Another detainee expressed his dissatisfaction over the guards' behaviour and referred to bullying and mocking and to an incident where he was beaten up by other detainees and the guards did not stand up for him nor did they answer his demand to see a doctor after he was injured in the fight; instead the ex-director of the centre punished him for getting involved in the fight. The same detainee said that some guards denied him painkillers when he asked for them and once unplugged the phone when he wanted to use it.

When asked whether the staff supported their needs, most detainees who responded positively stated that the staff positively responded to their needs, a few said that the support was negative, and a few that it was varying depending on the guard's "good will" and the nature of the need. One detainee alleged that, following a suicide attempt on his part, a guard approached him and asked him for money in order to arrange for his release, but although the guard received the money he didn't do anything for the detainee's release. Another detainee reported that the guards' behaviour could sometimes be insulting. As to whether they had ever been mocked, the vast majority stated there have been no incidences of mockery; the 2 who reported having been mocked, blamed co-detainees and security staff respectively.

Physical assault by co-detainees was reported by only one of the interviewees. No one reported filing any type of formal complaint to the staff perhaps evidencing a lack of faith in the protection that the guards can afford to them in case of aggravation of the situation with their co-detainees.

The Ombudsman's representative stated that some guards behave in a gentle way and make an effort to help the detainees, others more violently, depending on the personal relationship between the detainee and the guard and on the character of the guard. He added that it is possible to see some very brutal guards and some very humane ones and referred to a case where a guard made extra effort to locate the detainee's family in Cyprus and put them in contact.

The Ombudsman's representative further stated that there have been cases of violence, usually from the guards and referred to ill treatment, insulting the detainees, use of violence etc. The two NGOs interviewed also referred to ill treatment and occasional violence from the guards towards the detainees. However, Apanemi was particularly critical of the staff, describing their interactions with detainees as "manipulative, rude, distant, cynical and patronising." Apanemi also accuses guards of bribing certain detainees to foster good relations, and in order to protect themselves from detainees that are considered 'dangerous'. Apanemi stated that detainees are "beaten by police (especially immigration) in order to drop their asylum application or in order to accept their immediate deportation." The practice of applying pressure (which can sometimes be physical violence) on asylum seekers to drop their asylum application has also been established by the Ombudsman, who has recommended that withdrawals of asylum applications be made only in the presence of members of staff of the Asylum Service; the recommendation was indeed adopted, however it is not certain that it has resulted in the eradication of this practice.

These accusations are not repeated in any of the interviews with detainees or with the Future Worlds Centre. With regard to the latter, given that they are an 'implementing partner' of UNHCR, they might be reluctant to offer any

controversial statements about the asylum procedure. However even the interview with Future Worlds centre makes reference to situations where immigration staff would threaten detainees and probably physically assault them too.

The allegations of Apanemi and of the Ombudsman's representative are based on complaints received from persons in detention and should be considered as valid at least with regard to the complainants involved. Whether a pattern of standard behaviour or policy may be inferred from these, is a matter for further research. There are however national and international reports supporting the picture of ill treatment painted by Apanemi.¹²¹

3.5. Safety

Nearly all the detainees, and virtually all of the women detainees, reported feeling safe inside the detention centre.

3.6. Activities

Nearly all of the interviewees said that the centre does not provide activities; the two that said that activities are provided (both are females) referred to "leisure time" and "ball game". Television and the telephone are the only 'activities' that male detainees reported having consistent access to. More than half of the respondents said they do have access to religious/spiritual space; one interviewee complained that while space is provided for Muslims, Christians are not afforded a similar space. There are even less activities or women in Block 9, who are not allowed out of the centre and have no TV or kettle to boil water.

Given the limited amount of activities detainees have access to, the majority of interviewees expressed the desire for a range of activities, including more TVs, more sports activities, sports gear and religious space. A few detainees said they didn't want anything and two said they wanted "freedom".

The kind of resignation that often prevails amongst detainees becomes evident from the reply of one woman detainee to the question "what could the centre provide that would have the most positive impact on your life": she replied that she didn't care as she didn't belong there, she was vague and indifferent and showed unwillingness to answer the questionnaire through to the end, preferring to talk about her case rather than about her detention conditions.

3.7. Medical

No one reported having been attended to by any doctor; only one detainee stated having had a medical exam upon arrival to the centre. The vast majority of detainees who gave an answer to the relevant question expressed the need for more medical services, mostly in the way of having doctors present in the centre. The services of a doctor or of qualified medical staff are also desired by the detention centre's staff for practical reasons, e.g. it would save them from arranging transportation for detainees to the hospital. The centre's director informed the interviewer that there was a doctor appointed to serve at the centre but had been removed probably due to limited financial resources. This

¹²¹ The Third ECRI Report on Cyprus expresses "concern with the extensive use of detention for both migrants and asylum seekers and the conduct of law enforcement officials, which included alleged cases of ill treatment." The report of the Bureau of Democracy, Human Rights, and Labour of the U.S. Government for 2007 issued on 11.03.2008, refers to a number of allegations of police misconduct, including the death of a Polish national in detention, noting that migrants arrested for illegal entry without identification were detained indefinitely and face discrimination while in detention (<http://www.state.gov/g/drl/rls/hrrpt/2007/100554.htm>). Also the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) dated 15 April 2008 regarding the visit of CPT to Cyprus carried out in December 2004 found that the detention conditions of foreigners detained on immigration offences were entirely unacceptable, whilst there were instances of violence from the guards which amounted to torture (<http://www.cpt.coe.int/documents/cyp/2008-17-inf-eng.pdf>). The Conclusions of the UN Committee against Torture on Cyprus (CAT/C/CR/29/1) of 18 December 2002 list under 'Subjects of concern' the "the existence of some cases of ill-treatment" of detained persons by the police. The Ombudsman's annual reports for the years 2005, 2006 and 2007 also criticise the conditions of detention as well as the length of detention of foreigners for immigration related offences, noting in particular the violation of the right to access to a lawyer (Ombudsman Annual Report 2005, page 37). According to the LIBE Report from their 2008 visit to Cyprus, in general NGOs have access to asylum seekers in detention, however, there are several cases where this has been made difficult by the police (Report from the LIBE Committee Delegation on the Visit to Cyprus (25 - 27 May 2008), Rapporteur: Jeanine HENNIS-PLASSCHAERT)

tally with the findings of a previous study on the subject, which established serious gaps in medical care and described situations where detainees had to wait for months in order to be visited by a doctor.¹²² Apanemi also reports instances where a diabetic detainee was denied his insulin injection and a female detainee was refused medical attention despite an intense breast pain. According to Future Worlds Centre, the guards are doing their best to transport sick detainees to the hospital but the list is long and it takes time.

3.8. Physical health

The detainees were asked to rate their physical health prior to and during detention on a 10-point scale ranging from 1 (very poor) to 10 (very good). The average physical health reported before detention was 9.50 and during detention it is 7.43. The majority of the respondents indicated that detention did have a negative impact on the respondents' physical health.

3.9. Mental health

The average mental health before detention was 9.86 out of 10 and 4.57 out of 10 during detention. A few interviewees reported their mental health as "very poor", and a few as "poor". Most of the responses indicate that detention has had a negative impact on their mental health, citing distress, insomnia, helplessness and depression as the main symptoms. They also indicated uncertainty about their cases, a disruption of their life plan and worries about their family and their future.

Detainees didn't come across as being preoccupied with what impact detention had on them perhaps because the majority saw their detention as a temporary state. Their future (fate) seemed to engage their thoughts and their concern about it also determined their feelings and mental state in general.

Apanemi reports that the situation is far worse with torture victims in detention who experience detention (confinement, insecurity, lack of access to information) as an additional trauma. Future Worlds Centre reports that detainees have suicidal thoughts and that the guards are trying to address these situations (e.g. by arranging visits to the psychiatrist) so as not to be held responsible in case "anything happens". The Ombudsman's representative confirmed that many persons suffer from suicidal thoughts and referred to instances where the guards called their office in order to come and assist the detainee in question.

3.10. Social interaction with others in the centre

When asked to rate the interaction with their co-detainees half of the interviewees described it as "good" and the remaining described it as neutral. When asked to comment on how the rest of the detainees get along with each other, half of them said that there are problems between detainees and they blamed either intercultural tension or tension brought about by 'common life' in detention.

The majority answered that they do have people they can talk to about their problems, such as friends and family outside the centre, or co-detainees. No one mentioned security guards, even though the female guard interviewed reported that she is often approached by detainees who want someone to talk to. She also reported having gone for walks with detainees who felt extremely distressed.

A number of Asian detainees report that there is segregation amongst detainees according to ethnic origin and that Arabs and Iranians are treated more favourably by the guards than the Asians. They also indicated that the wing of

¹²² Actions in support of civil society in the EU member states which acceded to the EU on 1 May 2004: Creating and strengthening a sustainable network of civil society concerning administrative detention of asylum seekers and illegally staying third-country nationals across the ten new EU Member States

the detention centre occupied by the Asians was often too crowded. Future Worlds Centre also reported having noticed that detainees are separated in groups based on religion and ethnic origin and that there are dislikes between the groups but could not report any serious clashes, but did observe that people in the same group are helping each other e.g. on language problems, submitting demands to the authorities etc. The interview with Apanemi also confirms the practice of grouping amongst detainees. The Ombudsman's representative stated that there is a differentiation of treatment depending on how well some detainees get on with the guards: if they are on "good behaviour" the guards may grant them more frequent opportunities for contact with the outside world. Later in the same interview, the Ombudsman's representative stated that people from different religious groups and countries are at the centre of conflicts, which are based on both personal issues and also on religion and race, and referred to the formation of 'cliques' based on religion and ethnic origin.

One detainee refers to 'high-order' detainees, usually Arabs who have been in the centre for longer than others and who bully the rest; he also reported an instance where he was beaten up by them and got no support from the guards. When asked whether he filed a complaint for the incident, he said that the guards would not listen. Whilst interviewing an Iranian detainee, the researcher noted that, unlike other detainees, he was allowed to have his mobile phone with him so it is possible that the allegations of favouritism are well founded.

Other detainees and especially the women reported good interaction amongst co-detainees as their "common fate united them".

3.11. Contact with the outside world

Almost all detainees reported having family in their country of origin; half of them said that their family needed their support. A large percentage of the interviewees reported having family and/or friends in Cyprus.

Most of them reported having access to the telephone, and describe it as their primary means of communicating with the outside world, although some stated that they were sometimes denied access to the phone. One detainee stated that he was sometimes denied "favours such as phone calls", implying that he did not consider he had an a priori right to use the phone. Three interviewees report wanting Internet access; this must be a demand also shared by a number of detainees, as the interview with Future Worlds Centre indicates. Interviews seem to suggest that detainees have access to a payphone and that free phone calls are allowed only for emergency cases. In general, detainees are entitled to receive visitors but according to Apanemi some detainees may be denied visits. Also, the Ombudsman's investigation into the conditions of detention of foreigners found that the authorities denied a number of detainees the right to see a lawyer, lest they receive advice on how to file an asylum application.¹²³

Nearly all detainees said that they receive visits from friends. From the 11 detainees that reported having family in Cyprus only three of them report being visited by family members. As for other people/ bodies visiting the centre, a few detainees reported having been visited by UNHCR officers and others reported having been visited by lawyers. Interestingly, none reported having been visited by NGOs, even though both Future Worlds Centre and Apanemi claim to be regularly visiting detainees. In any case, the detainees' assertion regarding NGO visits may suggest that NGOs are only granted very limited access to detention centres and/or that very few NGOs have the resources and capacity to offer any kind of assistance to them.

The interview with the prison guard indicates that detainees require prior permission in order to be visited by religious persons. One detainee stated that a Catholic priest visited him, and a previous study on detention conditions has also

¹²³ Ombudsman's report on the conditions of detention of foreigners in Central Prison and in Police Detention Centres, 2 February 2005.

established that a Christian orthodox priest had regular access to detention centres.¹²⁴ It is possible that permits for visits by religious persons, however it appears that the authorities maintain discretion as to which religious person visits the detainees.

3.12. Nutrition

A bit less than half of the detainees reported disliking the food provided by the centre, blaming poor quality. One of the two guards stated that the centre does not take into account the differences in the detainees' cultures and only provides different food when the attending doctor so requests. The other guard interviewed stated that whenever there are special dietary requirements for religious or other reasons these are communicated to the kitchen in order to be catered for. The Ombudsman's representative stated that detainees often request changes regarding the quality of food, or food for religious beliefs and his office mediates between the police and detainees, adding that the police usually cooperate but not always.

The female guard added that the detainees are consuming large amounts of food and are putting on weight. This contrasts with the Ombudsman's findings in this area which found both the quality and quantity of the food unsatisfactory; however this was more the case in other detention centres and less in the case of Block 10, where all the interviews took place and where 3 meals a day are offered, albeit of poor quality. Apanemi also reports that in other detention centres only one meal a day is offered.

Both NGOs report to have received complaints from detainees about the poor quality of the food. Future Worlds Centre reports that some detainees go on hunger strike but did not specify the demands of the detainees in such cases. The food is invariably described as bad. One detainee suggested that the food menu should be changed at least every 3 months and detainees should be allowed to receive food from their visitors.

There are no cooking facilities and detainees are not allowed to cook their own food. According to one of the two guards, this is due to safety reasons.

3.13. Difficulties in detention

The most commonly reported problem and most significant difficulty of the detainees' life in detention was reported to be the inability to sleep well due to excessive stress (e.g. constantly thinking about their situation). Most of these detainees attributed their inability to sleep in detention to the actual imposition of detention – the stress caused by detention, the disruption to their life plans and their loss of rights. Some reported inability to sleep because of noise in the centre. Others attributed inability to sleep to their worries about their future. One detainee stated that the mornings are particularly difficult when he wakes up and realises that he is in detention, as obviously his hours of sleep are his only distraction from his situation.

The difficulty ranking second to the inability to sleep was related to living conditions (e.g. quality of food, lack of activities, difficulties between groups of nationalities, lack of laundry facilities, no private visitation room, etc). Interviewees blamed detention itself for this set of difficulties.

The NGO interviews report having received complaints that lack of activity, isolation from the outside world, lack of access to legal assistance, deprivation of freedom and lack of access to daylight to be some of the hardest things about detention. Future Worlds Centre referred to frustration and irritability from prolonged detention and stress related to threats and abuse from the immigration police. The same NGO described detainees as "victims of bureaucracy" and "forgotten people". The Ombudsman's representative stated that people in detention awaiting

¹²⁴ Actions in support of civil society in the EU member states which acceded to the EU on 1 May 2004: Creating and strengthening a sustainable network of civil society concerning administrative detention of asylum seekers and illegally staying third-country nationals across the ten new EU Member States.

deportation are faced with the hard reality of having to leave a part of their lives behind, as most have lived in Cyprus for a long time, even up to 10 years. He describes them as 'shattered' and as 'people in the desert: they have no travel documents, and half their expectation is in their home country, and the other half is in Cyprus, leaving them somewhere in the middle of a 'desert'.

According to one of the guards, the detainees' main concern was their financial situation resulting from their inability to earn an income. The guard also reported that in a way detainees were 'relieved' not to have work-related stress; however this submission was not confirmed by any of the interviewees.

3.14. Personal impact of difficulties in detention

In response to the relevant question, interviewees tended to report specific times when detention became particularly difficult for them (e.g. one interviewee reported being attacked by co-detainees, another detainee reported how lonely he felt during religious celebrations) Many detainees reported experiencing increased distress, poor mental health, feelings of helplessness, of having been treated unfairly (by the immigration authorities, by their employers) and worrying about their future.

The impact reported by the NGOs interviewed, and by one of the guards, refers to depression, becoming introvert, deterioration of mental and physical conditions, particularly for victims of torture, fatigue, lack of energy, pain in the eyes as a result of inadequate light, frustration and irritability. It is striking that, according to the guard interview, detainees sometime open up their luggage and just stare at their personal belongings, probably a memento from the previous lives they left behind when they were arrested.

3.15. Outcome of detention

The majority of the interviewees reported knowing the outcome of their detention, in terms of what will probably happen (i.e. deportation – in all cases). Slightly more than half said that they didn't know their exact time of release from detention. Not knowing how much time they had until release from detention was reported to raise uncertainty and worries for themselves and their families.

3.16. Special needs and vulnerability

Only three interviewees reported having 'special needs', giving a rather liberal interpretation to this term. One of them said that he has special needs because he had been detained for a long time, and the other two said that they were unfairly treated by their employer (prior to detention).

Five interviewees said that there are other vulnerable people in the centre, namely people who are physically weak, or those who cannot speak English or Greek, people without travel documents, "Asians" and those with low self-esteem. NGOs had a good grasp of the meaning of vulnerability. Future Worlds centre stated that torture victims relive their traumatic experiences in detention and are in dire need for rehabilitation. Also women from patriarchal societies feel lost when they are detained separately from their husbands and pregnant women face particularly harsh and unhygienic conditions in police station detention centres. Apanemi confirmed the assertion about women from patriarchal societies feeling lost and added that men detained whilst their families are free suffer because they know their families cannot lead a dignified existence without the income generated by them.

The female guard defined vulnerability as being physically small sized, young in age and having a tendency to believe what other detainees are telling them. The guard also reports that there are women detainees who feel strongly against the prospect of their deportation and who need to be psychologically prepared. However, it appears that little is being done towards preparing these women or other vulnerable detainees for their deportation and for what awaits them upon return

4. ANALYSIS OF THE DATA AND CENTRAL THEMES

4.1. Possible violence and abuse

In spite of the methodological problems, the present study does shed some light, particularly into the less controversial subjects such as gaps in the level of information, gaps in medical care etc. However, when it comes to the more controversial issue of violence and abuse, the significance of the methodological limitations becomes more apparent. There is an abundance of evidence documenting abuse of the asylum system by the police, sometimes manifesting itself in violence by police officers against asylum seekers.¹²⁵ However this information does not come across in the interviews except perhaps indirectly in the case of asylum seekers who were arrested following the withdrawal of their asylum applications.¹²⁶

The stark contrast between the allegations presented in the various interviews regarding the use of violence is indicative of the situation in Cyprus, which for years does not allow for a frank and open debate on this subject. Most NGOs working with migrants, the Ombudsman as well as regular press and media reports refer to frequent abuses and violence against detainees, whilst the authorities, including MPs flatly deny this, often accusing the NGOs of 'self-flagellation',¹²⁷ 'exaggerations' and 'inaccuracies'. It is contended that under the current system and given the reluctance of the authorities to allow researchers and NGOs access to detainees, only organisations such as the CPT or the Ombudsman are in a position to adequately investigate claims of police misconduct in detention centres.

4.2. A gap in the level of information

From the interviews conducted there emerges a gap in the level of information which detainees are provided with regarding their cases. The fact that the two interviewed staff persons and Future Worlds Centre suggest that detainees are well-informed about their cases is most probably related to the fact that both staff and Future Worlds Centre are commissioned to supply this information and a gap in the level of information would also reflect negatively on them. In the interviews, half of the detainees said that additional information is needed but the answers supplied throughout indicate that there is a wider gap in information about rights in detention, rights in deportation proceedings, opportunities for legal recourse, etc. All detainees were aware that they would be deported; this information is probably already printed on their warrant for detention. However they all seem to be very anxious to find out when this would happen and what this would entail for themselves and their families and what rights they have in this procedure. Lack of information about their fate appears to be the most common source of distress, hopelessness and vulnerability, citing for instance the problem of lack of sleep and poor mental health.

¹²⁵ The Ombudsman's annual reports for 2005 refers to a case involving an Iranian asylum seeker, who was arrested and detained despite the fact that he was an asylum seeker and then unlawfully deported by the police against the express orders of the immigration department. In another case, the police directed the lawyer of three asylum seekers to send his clients to the police station to submit their asylum application but upon arrival arrested and removed them immediately. The Ombudsman was highly critical of the fact that, in the investigation that ensued, the police gave her inaccurate and misleading information in order to conceal the fact that the three persons left Cyprus against their will. Other cases involved the arbitrary closure of files of asylum applications because the district migration offices failed to notify the Asylum Service of the applicants' change of address; the unlawful detention and deportation of a Palestinian asylum seeker even after the migration department established that he had not changed his address; cases of deportations without due cause; cases of asylum seekers withdrawing their asylum applications under suspicious circumstances whilst in police custody; the groundless detention and issue of a deportation order against an unaccompanied minor asylum seeker, in violation of the Cypriot refugee laws and many more (see pages 51-58 of the Ombudsman's annual report for 2005). The Chief Immigration Officer has been repeatedly criticised both by the media as well as by the Ombudsman for practices that violated Cypriot and international human rights legislation.

¹²⁶ There are a number of Ombudsman reports as well as court decisions against the immigration police who one or way or another convinced asylum seekers to withdraw their applications so as to arrest and detain them with a view to deportation.

¹²⁷ This was the term used by then MP, now MEP, Antigoni Papadopoulou during the specially convened meeting of the Education subcommittee of Parliament 23.12.2008 following the racial attack on 14-year-old female pupil. She used this term to mock or reprimand those who insisted that there is a serious problem of racism and this is related to racially inflammatory contents contained in curricula, which urgently need to be reformed as part of the education reform program. Papadopoulou was at the time third Vice-Chairperson of the Committee on Economic Affairs and Development:
http://www.coe.int/T/E/Com/About_Coe/Member_states/e_ch.asp#TopOfPage.

4.3. Gap in medical care

The fact that the sample used in this study is rather small, the selection of interviewees was made by the police and the average stay of the interviewees was rather short (3.14 months) compared to others, may lead us into an underestimation of the problem and repercussions of lack of medical care. From the responses of the interviewees it is possible to infer at least a few of the characteristics of the system of providing medical care. First of all, no medical care is provided at the detention centre. Secondly, the detainees are not automatically taken to a hospital once they state that they need medical care: it is up to the guards to decide if the detainee in question should be transferred to the hospital. Thirdly, the method used to ascertain whether the need for medical attention is real or not is through questioning of the detainees by the guards. This practice is particularly problematic if one considers that the guards receive no training in identifying medical problems and particularly psychological or mental disorders often associated with detention and uncertainty about the future. Victims of torture, which are, according to one NGO, detained at Block 10 face a serious deterioration of their condition in the absence of any rehabilitation measures. .

4.4. Gap in social services and NGO support

There is no provision for any kind of social services to be provided to detainees. A sympathetic ear is apparently sometimes lent by the guards, especially in the women's ward in Block 9; but the guards have no training in this field and in some cases appear unfamiliar with basic concepts such as the definition of vulnerable groups. Some badly needed psychological support, counselling and advice on social matters is not available. This is particularly needed in the case of women awaiting deportation, women from patriarchal societies who experience a sense of loss when they are detained separately from their husbands, as well as men who had been the breadwinners of their families and, following their arrest, had to leave their families without any means of support. There are few NGOs interested in the fate of detainees or their families and even fewer who are willing to devote resources to irregular migrants detained and due to be deported. UNHCR does make some resources available for the support of asylum seekers, but this is usually restricted to legal advice on the asylum procedure and does not extend to the period after rejection of the application and prior to deportation. In other words there are no resources from NGOs or from other sources to assist persons awaiting deportation, as is the case with the majority of the detainees at Blocks 9 and 10, either by informing them of their rights in the removal proceedings or by offering support and NGO networks in the country where they will be deported to. Also the guards themselves and the authorities in general appear to have little confidence in NGOs and there is no structure in place for co-operation between NGOs and the authorities for the welfare of the detainees. It is particularly striking that when detainees appear to be having suicidal thoughts, the guards do not call on NGOs to come and offer support but call on the Ombudsman's office, which is staffed with lawyers, to come and assist the detainees

4.5. Segregation of detainees

It has emerged from a number of interviews that there is a practice of the detainees separating themselves into groups and there appears to be a contestation between the 'Arabs' and the Iranians on the one hand who seem to have spent longer time in detention and to get on with the guards and the 'Asians' on the other hand who feel disadvantaged and underprivileged. Some interviewees suggested that the guards encourage this segregation; on the basis of the evidence emerging from the interviews the practice of segregation appears to be at least condoned by the guards who apparently allocate cells to the 'Arabs' in a separate wing from the 'Asians'. The result of the segregation is of course the occasional fight, as described by one 'Asian' detainee, feelings of unfairness on the part of the 'Asian' detainees who see the 'Arabs' enjoying privileges denied to them, and the inability of the detainees to organise themselves so as to put demands to the authorities in order to improve their detention conditions. Instead their frustrations often manifest themselves in riots and in setting fire to the centre's equipment.

5. CONCLUSIONS

- 5.1. A major problem in assessing the detention conditions is limited access and severely compromised conditions of interviews and information gathering, applied not only for this study but also for all NGO studies in this area. This leads to a lack of understanding producing estimations which do not necessarily reflect the real picture
- 5.2. Detainees emerge as more distressed and worried about their future rather than about their detention conditions and regard detention as a temporary measure. This despite the fact that detention has obviously had a serious impact on their mental health, often manifesting itself in depression, suicidal thoughts, insomnia etc.
- 5.3. There is no system in place to ensure that detainees receive appropriate and human treatment. There are no concrete rules in place, a lot depends on the personality of the guard involved and in general guards have no training whatsoever in addressing the needs of vulnerable persons. This laissez-faire situation has resulted in the formation of opposing 'cliques' within the detention centres that often clash with each other.
- 5.4. The current legislative and policy framework which criminalises undocumented entry and stay and detains such large numbers of third country nationals has produced a new group of vulnerable persons and has left hundreds of families without any means of support.
- 5.5. Detainees appear to be poorly informed of their rights in detention, as a result partly of inaction on the part of the authorities, partly of inefficient implementation of policies and partly as a result of police efforts to restrict opportunities for filing asylum applications in an effort to deflate the numbers of asylum applications.
- 5.6. The legal aid law was amended in recent months by to extend legal aid to asylum seekers applying to the Supreme Court in order to challenge a negative decision either of the Asylum Service or of the Reviewing Authority (detailed in paragraph 2.10 of this Report). However asylum seekers arbitrarily detained continue to have no effective recourse to the Courts, unless their financial means enable them to pay high legal costs.
- 5.7. The study confirms a number of reports that illustrate longstanding problems that detainees face in obtaining the most basic medical care and psychological support.
- 5.8. A culture of concealing human rights abuses against migrants continues to be prevalent in Cyprus, judging from the fact that only one out of 14 interviewees reported police violence, when international organisations and national NGOs regularly report police misconduct.

6. RECOMMENDATIONS

- 6.1 **The authorities must grant researchers and human rights organisations access to detainees to properly investigate any allegations of ill treatment and generally monitor on a regular basis the conditions of detention.** Apart from access, this requires that the authorities refrain from any involvement in the selection and the process of interviewing of detained persons.
- 6.2 **The legislation regarding detention must be reformed by decriminalising illegal entry and stay and by introducing a presumption against the detention of immigrants and asylum seekers, ensuring that detention for immigration related offences be used only as a measure of last resort.** The Ombudsman's recommendations that alternative non-custodial measures, such as reporting requirements or an affordable bond, must be explicitly considered before resorting to detention. Reporting requirements should not be unduly

onerous, invasive or difficult to comply with, especially for families with children and those of limited financial means. Moreover, any conditions of release should be subject to judicial review.

- 6.3 **Opportunities and encouragement must be given to the detainees to organise themselves constructively**, so as to be able to have an effective representation *vis-a-vis* the management in order to be able to bring up complaints and recommendations and to diffuse the tension that was created between the 'cliques'".
- 6.4 **Regular information campaigns must be institutionalised, involving all stakeholders who are usually excluded (such as human rights organisations and migrant/refugee organisations)**, so as to inform the detainees about their legal position and rights in detention and in removal proceedings.
- 6.5 **The legal aid law needs to be further expanded to provide for the needs of asylum seekers beyond the asylum procedure *per se***, such as legal assistance for action against arbitrary arrest, detention and deportation.
- 6.6 **Regard must be had to the rights and needs of the families of detainees, who are often deprived of the only breadwinner in the family once the father is arrested**. Also detention often means the discontinuation of welfare benefit entitlements that leaves the detainees' families in a desperate situation. This must be addressed with decisive policy measures.
- 6.7 **The legislation must be amended to ensure that all immigrants and asylum seekers have access to individualized hearings on the lawfulness, necessity, and appropriateness of detention**. The authorities must ensure the adoption of enforceable human rights detention standards in all detention facilities those house immigration detainees, either through legislation or through the adoption of enforceable policies and procedures. There should be an effective independent monitoring mechanism to ensure compliance with detention standards and accountability for any violations: regular visits must be established by an independent committee for human rights to all detention centres to ensure that standards are met.
- 6.8 **Access to counselling, social and psychological support must be provided for all detainees from state psychologists as well as from NGOs providing such service**. Access to medical care within the centre is a necessity as are provisions for access to hospital medical care without submitting the detainee to unnecessary questioning. The guards must be better trained in human rights, as well as in recognition of symptoms of trauma in those detainees who are unable to express their needs to the guards. This procedure should be supplemented by involving the participation of NGOs specialising in the rehabilitation of victims of torture and in promoting the rights of mental patients, who should be invited to support and assist detainees in acquiring the medical attention needed
- 6.9 **A new approach to human rights is required by the authorities, the media and the public** so that possible abuses are seen as unacceptable and measures for a general improvement of the social position of migrants and asylum-seekers be seen as imperative.



NATIONAL REPORT: CZECH REPUBLIC

By: Association for Integration and Migration

1. INTRODUCTION

This report describes the situation of everyday life in three out of four detention centres that are currently being used for immigration detention purposes in the Czech Republic. It also includes national legal overview.

The findings in the report were elicited through direct interviews with 58 detainees, three NGO representatives who have access to the centres: Hana Franková, in charge of monitoring the situation in International airport Ruzyně reception centre for UNHCR purposes, working for The Organization for Aid to Refugees (OPU); David Kryška, lawyer, OPU; Martina Vodičková, social worker, Association of Citizens interested in Migrants (SOZE) and three staff members: two social workers (International Airport Ruzyně Reception centre and Bela-Jezova detention centre) and the director (Postorna detention centre).

There were a total number of three detention centres visited:

- Postorna detention centre, southern Moravia region, 50 km from Brno (only for men);
- Bela - Jezova detention centre, central Bohemia, 20 km from Mlada Boleslav;
- International Airport Ruzyně Reception centre, Prague.

The fourth one, Vysni Lhoty Reception centre (northern Moravia) was not visited as it has been moved to Zastavka u Brna (southern Moravia) at the end of the year 2009.

All centres were willing to cooperate in this study and interviewed detainees were chosen with help of social workers or accidentally.

2. NATIONAL LEGAL OVERVIEW

2.1. Legal grounds for detention

Three types of detention are governed by the Asylum Act; they are Dublin II detention, detention in the Reception Centre at the international airport and detention of asylum seekers in case their identity could not be reliably determined (i.e., he/she does not have a valid travel document or holds a forged identity document) or if the applicant presents a threat to state security:

Section 46 clause 3 of the Asylum Act provides for the Dublin II detention of a foreigner till s/he is transported to the Member State responsible for examining his/her application for international protection.

Section 73 clause 10 of the Asylum Act states that foreigners applying for international protection at the international airport shall be detained at the reception centre in the transit zone.

Section 46a clause 1 of the Asylum Act provides for the detention of asylum seekers when their identity was not ascertained unfailingly, applicant shows only his or her faked or retouched identity documents, or there is a supposition of threat that asylum seeker could endanger the safety of the state.

Three types of administrative detention of foreigners are governed by Act on the Residence of Foreigners:

Section 124 clause 1 of the Act on the Residence of Foreigners states that the Police can detain a foreigner older than 15 if procedures for removal have started and there is a risk that the foreigner might endanger state security, significantly disturb public order, or obstruct or hinder the execution of the removal decision, or if the foreigner is an undesirable person registered in the Schengen Information System.

Section 124 b of the Act on the Residence of Foreigners provides for the detention of foreigner for the time necessarily required, who didn't take the opportunity of voluntary repatriation under a special legal regulation in order of his or her exit from the territory if he or she didn't apply for international protection, although he or she was asked to do so; didn't travel abroad after the final termination of proceedings on the international protection within the time limit set by departure order or within 30 days, if departure order wasn't granted to the foreigner; or his or her permission of residence in the territory granted to beneficiaries of subsidiary protection has expired.

Section 129 of the Act on the Residence of Foreigners provides for the detention for the purpose of forwarding the foreigner or his transit to another state according to international treaty or EC law. This applies in cases when such an operation cannot be finished within 48 hours (72 hours when transit is carried out by plane).

2.2 Legal grounds for the minimum age for detention

According to section 46a clause 1 of the Asylum Act applicants under 18 shall not be detained or stay in the regime of detention.

Act on the Residence of Foreigners in its section 124 b empowers the Police to detain a foreigner older than 15. If minors are supposed to stay with their detained parents in the centre, they receive a status of "accommodated foreigner", as states section 140 clause 1.

2.3 Legal grounds for the detention order

The Asylum Act governing Dublin II detention and detention in reception centres does not provide for a detention order per se.

Section 124 clause 2 and section 124 b clause 3 of the Act on the Residence of Foreigners regulating administrative detention provides that the Police have to issue a written decision with justification included on detention specifying the legal grounds of the detention. The decision becomes legally enforceable upon its delivery or the foreigner's refusal to accept it.

2.4 Legal grounds for judicial review of the detention order

There is no automatic judicial review of the decision to detain.

The Asylum Act in its section 46a clause 3 provides for the possibility to take legal action against the decision on detention in the reception centre within 7 days since the delivery of the decision to the applicant; the fact of taking such legal action does not have a legal dilatory effect.

Similarly section 73 clause 5 of the Asylum Act provides for the possibility to take legal action against the decision about disallowing the entry to the territory within 7 days since the delivery of the decision to the applicant; the fact of

taking such legal action does not have a legal dilatory effect. In both cases courts shall see to such a legal action in preference, but in fact it hardly does. (Porizek)

Section 124 clause 5 of the Act on the Residence of Foreigners and section 200o of the Civil Procedure Code regulate appeals from administrative detention orders. In terms of these laws, the civil court has the authority to decide on the duration of detention or to order the foreigner's release if the legal reasons for continuing the detention have ceased to exist.

2.5 Legal grounds for the right of appeal against the detention order, or to challenge Detention

Section 46a clause 4 of the Asylum Act states there is a possibility to ask again for the review whether the legal reasons for continuing the detention still exist. Applicant may ask for this only after one month since the last decision on this question of Ministry of the Interior or the Court came into effect.

Section 73 clause 6 states that foreigner detained in the International airport reception centre is entitled to ask again for permission to enter the territory after one month since the last decision on this question of Ministry of the Interior or the Court came into effect.

For the right of appeal see section 2.4.

2.6 Legal grounds for the right of information about the detention order and/or the reasons for detention

The decision of the Ministry of Interior about the duty of stay in the reception centre up to 120 days comes into legal effect when delivered, as section 46a clause 2 states.

Section 73 clause 10 of the Asylum Act states that Ministry of the Interior instructs the foreigner in the fact that filing an application for international protection itself does not mean that the permission to enter the territory has been issued at the same time and that the foreigner is obliged to stay in the international airport reception centre during his application proceeds, if Ministry of the Interior will not decide otherwise. This instruction shall be done immediately after reception of the foreigner in the international airport reception centre.

Section 124 clause 2 of the Act on the Residence of Foreigners stipulates that foreigner may be detained only after a written decision with justification included was delivered to him/her or the foreigner refused to accept such a delivery.

2.7 Legal grounds for the duration of detention

Section 46a clause 1 of the Asylum Act provides for the Ministry to decide about the duty of applicant for international protection to stay in the reception centre till travel out for 120 days at the most, if identity was not ascertained unfaithfully, applicant shows only his or her faked or retouched identity documents, or there is a supposition of threat that asylum seeker could endanger the safety of the state.

Section 73 clause 10 of the Asylum Act states that foreigners may be obliged to stay at the international airport reception centre 120 days at the most.

Section 125 of the Act on the Residence of Foreigners states that administrative detention cannot exceed 180 days, beginning from the moment personal liberty is restricted. In the case of a foreigner younger than 18 years of age, the detention period cannot exceed 90 days.

2.8 Legal grounds for the provision of health care and the scope of health care benefits, and for the provision of social services

Section 88 of the Asylum Act provides that an applicant for international protection and his/her child born on national territory is provided with free health care. Such care must be within the scope of care paid from the health insurance, as specified by a special legal regulation, and also health care in connection with an imposed quarantine or any other measure taken in connection with protection of public health. This shall not apply if health care is provided in accordance with another legal regulation.

With respect to administrative detention, section 176 of the Act on the Residence of Foreigners stipulates that the foreigner will be for the time of detention provided with health care or the urgent one, in states that immediately threaten life, may lead due to deepening of pathological changes in sudden death, will without providing rapid care cause permanent pathological changes, causes a sudden pain and suffering, cause changes in behaviour and action, endanger himself/herself or his surroundings, or are related to pregnancy and childbirth, with the exception of artificial interruption of pregnancy at the request of the foreigner, or in connection with the imposition of a quarantine or other measures in the context of protecting public health. The cost of health care provided is paid by the State. If health care cannot be provided in the facility, the operator shall provide this care in a medical facility. If the foreigner at the time of detention causes to himself/herself an injury by his own will, it is his duty to cover the cost of treatment, including the costs actually incurred on the security and transport to a medical facility and back.

Social, psychological and other services are available in all cases as section 42 clause 2 of an Asylum Act and section 134 clause 4 of the Act on the Residence of Foreigners state.

2.9 Legal grounds for contact with the outside world

Legal grounds for contact with outside world are the same for Dublin II detention, detention in the Reception Centre at the international airport and detention of asylum seekers as stated in section 46a of the Asylum Act. Section 21 clause 1 of the Asylum Act provides for the right to legal assistance free of charge and for right to contact with the person providing legal assistance. The Asylum Act also provides for the right to receive visitors, mail and packages, and to use the public phone.

In the case of administrative detention, section 144 of the Act on the Residence of Foreigners provides that detainees may receive up to 4 concurrent visitors once a week. The length of the visit cannot exceed one hour. In justified cases, the manager of the facility or his representative, in agreement with the police, may authorize the reception of the visit in shorter period than one week and a longer duration; if permitted by the capacity of rooms for the reception of visitors, the number of people may be increased as well. There is no restriction on contact with persons providing legal assistance. Where a detainee is subject to strict regime, visits must take place in the presence of the Police.

2.10 Legal grounds for the provision of legal aid

Section 21 of the Asylum Act states that applicant for international protection has the right to ask for a legal counsellor who is working in area of refugee law to receive legal assistance and the right to contact him/her. Applicants may seek their own lawyer as long as they pay for their services.

Section 144 clause 3 of the Act on the Residence of Foreigners provides that detained foreigner has the right to receive visits at the facility from his lawyer or a representative of relevant organization, which can prove, that the subject of its activities is to provide legal assistance to foreigners. The right to contact him/her is not stated.

2.11 Legal grounds for the protection of persons with special needs

Unaccompanied minors, single parents or family with minor children or with adult disabled children, disabled people, pregnant women, persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence shall not be kept in detention for the reasons stated in section 46a clause 1 of the Asylum Act.

Ministry will permit to enter the territory to above-mentioned groups that applied for international protection in transit zone of international airport and transport these persons to the reception centre, as stated in section 73 clause 3 of the Asylum Act.

In the case of foreigners subject to administrative detention, section 141 of the Act on the Residence of Foreigners imposes a duty on the operator to take into consideration, as far as possible, any special religious, ethnic, or national characteristics, as well as any kinship and marriage relationships, age, and condition of health.

Unaccompanied minors are placed separately from adult foreigners and men are separated from women as a rule; however an exception can be made in the case of close family members. Detainees younger than 18 years or persons who have been declared incompetent for the purpose of performing legal acts are placed with a close family member or with the person into whose care they have been entrusted. These persons are not being detained in such a case but have the status of accommodated foreigner. Accommodated foreigner may leave the facility if care of him/her is assured in another way. In the case of a under-aged or a person deprived of legal capacity, may leave the facility only after written consent of the legal representative. The operator is obliged to enable to the foreigner, who is subject to compulsory education under a special law, the fulfilment of this obligation. If the detainee is an unaccompanied minor, the police will assign a guardian to him/her.

2.12 Legal grounds for alternatives to detention

There are no legal grounds for alternatives to detention.

2.13 Legal grounds for providing release from detention

Dublin II detainees are released on the moment of their transferral to the EU state which is competent to decide on his/her application for international protection or when he asks to leave the territory voluntarily.

There is no specific legislation concerning release from detention of asylum seekers held in detention under section 46a of the Asylum Act.

Section 73 clause 9 of the Asylum Act states that the permission to enter the territory is granted automatically (foreigner is moved to accommodation centre) in case that the court does not decide on the appeal against the negative decision of Ministry of the Interior on granting the international protection within 120 days since the foreigner filed an application.

Section 126b clause 2 of Act on the Residence of Foreigners states that in case the doctor declares that foreigner suffered such a damage on health that is of permanent nature, or if from the nature of the disease can be assumed, that his/her stay at the medical facility providing health care may be longer than the time remaining to the expiry of 180 days from the date of detention, the police will end the detention.

Section 127 of the Act on the Residence of Foreigners provides that administrative detention must be terminated without undue delay:

- a) When the reasons for detention cease to exist
- b) When a court orders release
- c) When international protection is granted

d) When the foreigner is granted a long-term residence permit for the purpose of receiving protection in the territory.

3. OVERVIEW OF NATIONAL DATA FINDINGS

3.1 Basic information

Of all detainees,¹²⁸ 29 were interviewed in Poštorná detention centre, 22 in Bělá-Jezová detention centre and 7 in Ruzyně reception centre. There were 15 women in detention interviewed, of whom 2 were pregnant and 2 were single mothers with one child living in the detention centre. All interviewed detainees were adult but one unaccompanied minor. Each interview took 30 to 70 minutes.¹²⁹

The age of detainees ranges from 17 to 58-year-old¹³⁰ and they were mostly single. They spent more or less 5 years in the territory of the Czech Republic, as many detainees are illegal migrants. Their experience with detention lasted from just a few days to many months (on average 5,69 months).

3.2 Case awareness

Of all, 37 the interviewees are applicants for international protection, of whom are 6 Dublin cases and the rest are illegally staying migrants. Absolute majority says they have been informed about their case (85 %). But the level of being informed itself seems to be problematic – in total 71 % of detainees report a need for more information. From the point of view of NGO workers the level of being informed is considered to be even smaller than detainees report simply because they don't know what kind of information they might be missing. Detainees need more information on the asylum procedure (almost 42 % of those needing information) and many of them do not understand the reason for their detention. Regarding Ruzyně Reception centre, detained applicants for international protection report to be very well informed about asylum procedure. They also receive information why they have been detained, however, it's still not well understood. "The man from the government told me the reasons, I could also read it written, but I don't really understand why do I have to wait here for such a long time". This kind of information seems to be explained in too legal way, which non-lawyers simply don't understand. In general, detainees want to know more information so they can prepare themselves for the future.

The ways of being informed are as follows: almost all say they have been informed through police and / or during official procedures and others while in the host country illegally. However, a social worker from Bela-Jezova detention centre admits that police misinforms detained foreigners quite often, for unspecified reasons. All proper information is provided in the detention centre itself by social workers or by NGOs then, as most of these agreed.

There was one Vietnamese unaccompanied minor interviewed in Bělá-Jezová detention centre who described his stay of at least one month in detention without a guardian being established. At a time of our visit, he spent more than 2,5 months in detention without any interpreter accessible, so he was completely unaware about his case until our visit.

3.3 Space within the detention centre

¹²⁸ Following countries of origin of interviewed detainees were represented: Ukraine (19 detainees), Vietnam (7), Mongolia (7), Nigeria (4), Turkey (3), Sri Lanka (3), Belorussia (2), Georgia (2), Macedonia (2), Algeria (2), Russia (1), Moldavia (1), Serbia (1), Kazakhstan (1), Palestine (1), Ghana (1), Cameroon (1). Nationalities of interviewed detainees are represented as follows: Ukrainian (15), Vietnamese (7), Mongolian (7), Nigerian (4), Turkish (1), Kurdish (2), Tamil (Sri Lanka) (3), Russian (4), Belorussian (2), Albanian (3), Georgian (1), Armenian (1), Moldavian (1), Carpathian Ruthenian (1), Algerian (2), Adai (Kazakhstan) (1), Palestinian (1), Ghanaian (1), Cameroonian (1).

¹²⁹ Variety of languages has been used: Czech (30), English (9), Mongolian (6), Vietnamese (4), Russian (4), German (1), Kurdish (1), Albanian (1), Arabic (1).

¹³⁰ Average 33, median: 31, mode: 29.

More than half of detainees feel neutral about the room they are required to sleep in. They would mostly say, "It's OK, it's not a big problem". Still 41 % feel negative and only a few feel positive about their room. The biggest problem is cohabitation issues rather than cleanliness, facilities or room climate. Common complaints include inadequate size of the room, for example: "there are four people in the room that is big enough just for two; there is no place to read, to write my letters, to pray." Some mentioned that people who snore at night should be accommodated together as a rule.

Detainees feel slightly worse about the rest of the centre space, 52 % feel negative. Facilities mentioned are more sports equipment, being able to be outside longer or having more outside space. Outside space is very problematic in Ruzyně Reception centre where a kind of semi-roofed room is situated on the side of runways, so it does not offer neither fresh air nor peace to talk to each other, no plants or trees are accessible. Indoor space here offers only air-conditioned air and natural light is only in a few rooms.

In general way, detainees complain mainly about 'prison-like' conditions which seems to be a particular problem in Ruzyně Reception centre and Poštorná detention centre: "I feel to be in normal prison; I can't get the bars out of my head." In comparison, Bela-Jezova detention centre offers bigger outside space surrounded by the forest and it was preferred for this reason by those who experienced both Postorna and Bela-Jezova.

Only 20 % of detainees feel the centre being overcrowded, most of these are in Postorna detention centre. All 57 % detainees report not having a space to be alone.

3.4 Rules and routine

Interviewed detainees mention routine rules, which are generally respected. Anyway, they complain about some rules, for example about the inability to use their mobile phones, where the telephone numbers of family and friends (in one case of a specialist doctor) are stored. New rule on impossibility to fax any legal documents to legal counsellors appeared to be a big problem in detention centres.

It is not allowed to have any personal electrical devices in detention centres; but radios with headphones are welcomed. Also, the inability to cook their own food and the strict meal times foster a prison-like environment among detainees.

It was also mentioned that some rules are missing, e.g. no clear rules about watching TV (how to agree on what to watch at the time when there are different language groups and only one TV set on the floor) and receiving and making phone calls (it is up to co-detainees to let to know to the others that somebody has a phone call) causes big tension among detainees.

According to the rules of the Bela-Jezova centre, unaccompanied minors occupy a separated floor where if there is just one person at a time, he or she stays in complete separation during most of the day and is in touch with other detainees only at a mealtime.

Suggestions to change some rules can be made, but they are not likely to be taken seriously in detention centres (Postorna, Bela-Jezova).

3.5 Detention centre staff

Detainees are most in contact with the detention centre's security staff and social staff. They feel rather neutral about staff interaction. The way the staff support their needs is relative to other countries fairly positive.

In general there is no discrimination. Anyway, around 20 % of detainees in the minority feel discriminated against, 61 % of those feeling discriminated against by staff members mentioned language as the reason. This is a problem for example for Vietnamese or Mongolian detainees but surprisingly some detainees reported that their social worker does not speak even English or Russian language: „social worker does not understand me and there is no interpreter available to ask for anything; I got a smelly pillow when I came here but social worker ignores my requests to change it because he does not understand me.“

3.6 Level of safety within the detention centre

The average level of safety shows that detainees feel generally safe inside the centres (8.4 out of 10) and NGOs workers would agree. Factors mentioned in relation to safety are mostly security guards inside the detention centres and policemen at the entrance. Centres in general prefer to place people of the same nationality and close language group on the same floor and into the same room. Groups of nationalities that are likely to provoke conflicts against each other are automatically placed on different floors (Postorna).

Significant minority, only one quarter of interviewees, have been mocked. Of those mocked, 70 % said it was most likely by other detainees and most likely for a mix of infrastructure, interpersonal and inter-cultural reasons. As staff members and also NGO workers say, it's mostly the result of stress and situation of being in everyday touch with the same people for quite a long time. For example, the choice of TV program or the usage of teakettles, are problematic areas. „The top stressful situation is when one person is using the phone and another one is waiting for a call from his family.“ Of those mocked, 80 % said they had been mocked 'sometimes' or 'often', rather than just once. Only a few reported to be mocked by staff which seems to reflect a minority that feels disrespected: „security guards call me names in Czech language, I understand these words but I don't understand why they're doing so.“ Verbal incidents between detainees and staff members come as well of course.

Physical assault is unlikely to happen. Only two interviewees said they had been physically assaulted and in both cases it was by other detainee or detainees rather than by staff members. This kind of situation is usually solved by moving the endangered detainee to another floor (Postorna), or to a protected zone (Bela-Jezova); this is a normal and available procedure even on request of the detainee.

Interviewees in general have not filed any complaints about the level of safety in the centre, but those who did, mention that their complaint didn't lead anywhere.

3.7 Activities within the detention centre

Almost all interviewees report there are some activities in the centres but not all of them do take part in these activities. Some even say there are no activities he would know about (4 %). Detainees most frequently report that they are provided some sports (for example football, volleyball, table tennis, fitness centre) and some report creative activities (e.g. sewing in Bela-Jezova, ceramics in Postorna, painting). Other activities include television watching or reading.

The reason for participating in activities is in general mental relief from the stress of detention and the uncertain situation. Anyway, many detainees say it's simply necessary to do something during the whole day while waiting for the decision on their case. "I need to spend the time here somehow and don't get silly." Those who do not participate in any activities mostly say that provided activities are not interesting for them or they are not able to participate for mental health reason. As social worker in Bela-Jezova admits, detainees are usually endangered by apathy already after three months of stay in detention. One example: "I used to sew, to do sports, I have read all Russian books they have in local library. But now I am just tired. The only thing I can think about is when I will go away."

Interviewees report the most widely available activity is television watching and reading books. However, more than 30 % don't have access to books mainly because these are not available in any language they would understand and some say there is lack of variety. Many detainees would like to have possibility to watch the movie till the end at night, but they have to switch the TV off at a concrete hour. As there is one TV per one floor in detention centres, the accessibility is also rather restricted for those in language minority. On the other hand, Ruzyne Reception centre offers TV in each room. Some detainees also report there is not enough or accurate sport equipment for outdoor or fitness activities, so they feel rather disappointed about the actual possibility to participate in these (Postorna). Interviewed unaccompanied minor was not even able to reach any activities besides watching Czech channels on TV because of his separation and language barrier.

Regarding religious space, almost one third of detainees report they have access to it, and they are almost all from Bela-Jezova, which is visited by an orthodox priest once a week. Places of prayer for Muslims are unavailable.

The detainees in the Czech Republic have no access to computers and Internet, which would be very welcomed by them. Internet connection is wanted to have easier contact with the outside world - getting in touch with family and friends for free and also possibility to read news in the variety of languages. Besides that, even more people (34 %) would like to have access to some kind of educational activities, mainly language courses. But only some report having access to it, as there is Czech language course in Bela-Jezova provided. Others say they don't want anything at all and some say they want 'freedom' rather than another type of activity.

3.8 Medical issues

The detainees report that there is medical staff in the centre, that is doctor and nurse, and they can visit him or her on the request. During medical exam, as the first one takes place immediately after the arrival to the centre, they usually understand the language and medical instruction, although 27 % don't; the provision of interpreters could solve this.

Regarding the quality of medical care, 37 % detainees are negative about it, 27 % report it being positive. The rest is rather neutral. Of those being negative almost all cited access to appropriate medical care to be the problem. Detainees mostly complain about being given pain relievers whatever health troubles they have and not being cured by appropriate medicine. This counts also for dental problems when detainees report they have only two choices: to use pain relievers or to pull the tooth out. More than 40 % report they need more medical services, e.g. access to specialists, such as gynaecologist, dentist, psychiatrist, psychologists. Staff members say there is always the possibility of external medical care in the nearest hospital, however some detainees report it's being difficult to get such an external care unless the situation is really grave. If there is a pregnant woman, she is being taken to hospital once a month for medical checks as a rule.

Physical health

Most of detainees openly admit that detention affected their physical health, 77 % reported negative impact and almost 7 % reported they were affected positively. In the conditions of the Czech Republic, the physical health on average dropped from 'good' before detention (on average 8.66 out of 10) to 'fair' during detention (on average 5.81 out of 10). They blame the existing conditions in facilities and stress imposed by detention and significantly less the availability of medical treatment itself.

Mental health

When it comes to mental health, the level of negative impact of detention is much graver. Almost 82 % report to be effected, all of them negatively. Mental health has dropped from 'good' before detention (on average 8.83 out of 10) to under 'fair' (on average 4.5 out of 10). First and foremost, they attribute this negative impact to the fact of 'being behind bars'. They feel that their mental health had been influenced by worries and general stress. Almost one

quarter of detainees admit they suffer from mental health problems and they attribute this to the life in detention. Secondly, they mention that their life plans were disrupted; they suffer from lack of contact with their family and with the outside world in general, or say they lost their rights in detention.

3.9 Social interaction within the detention centre

Except those cases, where detainees described being verbally mocked or physically assaulted, detainees report getting along neutrally with others. However, this attitude changes and it gets worse with number of days spent in detention. Less than one quarter of interviewees have said they were getting on badly and this happens mostly for intercultural reasons. Many mention that they don't get on with specific nationalities, or simply that they don't understand each other, could be linguistic or otherwise. This situation appears in spite of the fact that detainees are placed on the same floor according to their nationality, language group etc., because still some very different cultural groups have to co-exist together.

Many detainees say there are some problems among detainees. And again, most of these put this down to intercultural problems. Many others put this down to the very fact of being detained or say that it's caused by the tension due to common life together.

Most of detainees have someone to trust and it is in 90 % of cases detention centre staff, not other detainees.

3.10 Contact with the outside world

Although 81 % of detainees admit that they have family in the country of origin, whose members mostly have adequate support, it's typical for illegal staying migrants that they have also some family members and/or friends in the host country. On the other hand, there is a greater likelihood that applicants for international protection don't know anybody in the host country at all.

If they want to contact somebody from the outside world, they use public telephone (in 77.4 %). Detainees are given one 200 CZK phone card per three months in detention centres, which stays more or less for 20 minutes of calling. They are allowed to buy more of these phone cards but most of them do not have any money to do so. The preferred strategy is to make 'missed calls' to the families and then to wait for their response. Keeping and use of any mobile phone is prohibited, which has very negative consequence for detainees because the phone numbers of their family and friends are stored there. Only Ruzyně Reception centre allows detainees to see those phone numbers, without allowing them the use of the mobile phone itself. This rule has also harsh impact on work of NGO lawyers who are not allowed to use mobile phone during the consultation so they can't call interpreters. Nevertheless, detainees consider telephone to be the most important way of communication with the outside world. There is no Internet access, but it is said to be the second preferred method of contact. Only significant minority would prefer contact through visits because it might not be feasible for this group, for example because of the detention position and almost no public transport accessible or because family is in the country of origin. Personal visits have enjoyed only about 15 % of detainees; 70 % of those visits were by legal consultants, 29 % by friends and only 15 % have had a visit from family.

If we ask whether they have access to their preferred method of contact, they would say no in 83 %. That is mainly because of mobile phones and Internet are not accessible. Nevertheless, one pregnant woman mentioned the possibility to spend the visiting hour¹³¹ with her Czech boyfriend more in privacy to be her strong special need. This is in fact not possible because the security guard is always present in the visiting room. It means that other linguistic groups have an advantage of higher level of privacy when receiving a visit.

¹³¹ Visit of maximum 4 persons per one hour per one week is allowed.

3.11 Conditions of detention and the family

Almost half of detainees have children who are mostly outside the centres. Two single mothers with their child being accommodated in Bela-Jezova detention centre were interviewed. These both reported negatively about their children, citing lack of adequate nutrition, lack care supplies for children, place to play, and one saying that a sick child should not be placed in any detention centre.

3.12 Conditions of detention and nutrition

Detainees in general don't like the food that is served in the centres. It is because of its poor quality (half of responses) and because of lack of variety. Many report it is also because of they are not used to eat Czech meals that differs to their national cuisine (it causes problems especially to Asian people). Women described they are missing more fresh fruit and vegetable, more vitamins and that they are mostly losing their weight radically. Detainees mind they are not allowed to cook their own food. One third of detainees report their appetite had gone down and this made them feel worse, including stomach troubles.

Many detainees report they are hungry at night due to early dinner time and rather late breakfast,¹³² so those who don't receive any packages with food from the outside feel to be more vulnerable. Those two interviewed mothers with child report that they would appreciate to be woken up by the centre staff not to miss the time to go for breakfast. If it happens, nor they neither their children have nothing to eat till lunch. Pregnant women are in the same position as well. To take the served food to their room to feed the child at a time when he or she is hungry is very problematic. Pregnant women complaint about not receiving extra vitamins or calcium, and at the same time they are not allowed to receive these vitamins by post from their relatives. They are not allowed to receive more food in a package than the others (5 kilos is the maximum per package). The only extra food they receive in the centre is a piece of fruit per day. One pregnant woman mentioned that after 11 p.m. she has no access to fresh cold drinking water, only warm water from the shower is accessible.

3.13 Conditions of detention and the individual

Just over half of detainees report they don't sleep well at night and of these, almost 68 % cite living conditions as the reason, e.g. noises and uncomfortable sleeping facilities. Some also say they don't sleep because of uncomfortable thoughts and worries.

Difficulties in detention

When asked to mention the first most important difficulty in detention, 53 % mentioned something relating to the impact of being detained itself; i.e. being behind bars, their life plan was disrupted, lack of contact with the outside world and their loss of rights in detention. The biggest proportion, all 31 %, mentions simply being behind bars as their biggest difficulty. Then 17 % mention lack of contact with the outside world. Only almost 14 % say living condition is the biggest difficulty for them and only approximately 7 % mention worries.

Interviewed detainees attribute their second difficulty in detention more to state of living conditions within the detention centre and again to the impact of being detained itself. Just fewer than 10 % mention being cut off from family is their second biggest difficulty.

Again, as third biggest difficulty was mentioned living conditions and being locked up in general.

¹³² This is because of dinner starts more or less at 5 p.m. and breakfast at 8 a.m., this gap in receiving food seems to be too long.

There has been no change in difficulties. More than half of people (60 %) reported that there was a time in that life had become particularly difficult in detention, 44 % saying that it is bad everyday and 37 % saying it was worse at the beginning.

We still may have a look at the point of view of NGO legal counsellors, who say that the three biggest difficulties on the stay in detention are inadequate judicial review and arbitrariness in the behaviour of Police. They agree that also lost of personal freedom and isolation is very difficult to face to. For those who fled from actual war conflicts it is very important to know the news from their country and also to have any efficient way of contact with the outside world to be able to contact their relatives – especially in cases where they might doubt whether they are still alive, or not.

Outcome of detention

Only 25 % know the date they will leave detention and they mostly just count the rest of days till the maximum of 180, respectively 120 days of detention expire. Most describe that not knowing the date of their departure affects their mental health. Only 35 % are able to say they know the outcome of their detention.

Special needs and vulnerability in others

It is not likely that detainees admit they have some special needs, but if they do (30 % of them), then they don't mention classic needs, i.e. those sets of needs that are 'recognized' by existing laws and policies. Mostly, people mention family and being apart from loved ones as something that means that they have special needs. Some mention that they feel vulnerable because they don't speak Czech language, so they have less possibilities to ask for any kind of assistance. Also those who are not supported by their friends or relatives, for example those who don't receive packages with food or books in their language (via post service or visits) feel more vulnerable. Those who have any medical problem are likely to mention the inability to receive proper care. Person with specific case of vulnerability connected to psychological trauma was also interviewed: this man escaped from life-threatening event in which all members of his family had been killed. He succeeded to arrive by plane to the Czech Republic, where he applied for international protection. He spent in closed space of International Airport Ruzyně Reception centre as much as 3 months and 20 days at a time of the interview. He described that it was extremely hard for him, a person with such a harsh experience, to stay in this kind of jail for no reason, as he understood his situation.

On the other hand, detainees are more likely to be able to identify vulnerability in co-detainees. They cite classic needs (women with children, children themselves, unaccompanied minors, pregnant women, elder people, sick ones, those with psychological problems), but they mostly say that either everyone in detention is vulnerable, or nobody is more vulnerable than the others. They also mention that being apart from loved ones (their children, partners, etc.) makes people vulnerable. Many in detention described that people of weak characters or spiritually weak people are more vulnerable than others. Those who don't speak Czech are mentioned to be vulnerable group quite often and also those who spend in detention most of maximum 180/120 days.

Most of detainees said that being in detention had affected their self-perception negatively. Those who admit this are likely to become more passive and depressive, previously socially active people are falling into apathy.

4. ANALYSIS OF THE DATA AND CENTRAL THEMES

1. Detainees report a deterioration of physical and mental health: This is true even though they have been detained for relatively short periods. They are also suffering from loss of appetite and some have problems to sleep.

We had the possibility to meet detainees in variety of periods of their stay and those being detained for a few months

already reported that even if they faced the conditions in detention well at the beginning, after longer period of time they feel much more depressed, tired, their interest in any kind of activities disappeared and the only thing they could think about is how to get out of the detention centre. Some detainees suppose it will take some time to get back into previous mental and also physical health condition after being released.

Even if there is significant proportion of detainees stating that they are not getting the medical care that they need, it is interesting that this is not seen as the main cause of deterioration of physical health, and not at all a cause of deterioration of mental health. It certainly doesn't mean that access to appropriate care is not important, but it rather seems that being in detention itself causes health problems that simply providing more medical services will not solve. So we can say that their health is negatively affected by being detained itself rather than anything else.

2. Detainees have been informed about why they are detained, but still need more information: A majority of detainees (slightly over 70 %), all NGO representatives and one interviewed social worker admit that detainees are not well informed by the officials. NGO lawyers or staff members, such as social workers, fill this gap. In detention centres, this situation incurs quite a variety of problems: uninformed detainees who don't speak Czech or other helpful language might have more likely no way how to ask for more information, or it might take them much longer time. Secondly, for those who have the possibility to talk to NGO lawyers but need interpreter to do so, there might be no interpreter accessible even by phone (including translation of legal documents, decisions, etc.). Thirdly, uninformed detainees are catching information from other detainees where many rumours are being spread and this gives them unreasonable hopes or pointless worries – which has extremely negative impact on their mental health and psychic condition, as NGO representatives and social worker admit. In some cases, a co-detainee might be used as interpreter. If there is any, it's up to his willingness to do so and the quality of translation and also accessibility to, for example, NGO legal counsellors is questionable. In the context of the fact that Police itself seem not to be always providing the detainees with proper information, detainee might have little chance to create an accurate picture of his rights and future possibilities.

Regarding Ruzyně Reception centre, the reason why detainees have been detained is not well understood likely because it was explained in kind of 'legal language'. The other problem here is that applicants for international protection are not informed at all about conditions in accommodation centres, where they might get under certain circumstances. One of them mentioned that he didn't know whether it is possible to leave this kind of centre, or it is just another type of detention centre. Another one thought it was possible to find a job after his stay in actual detention, which was not true. So these detainees are also kept away from certain kind of information, for bad or for good.

Maximum duration of detention is well known to all detainees. However, most of them mention that 180 / 120 days are too much, mainly for mental health connected reasons. Many also mentioned that waiting for such a long time in detention seems to be just punishment for committing no crime. Those who knew they will be deported were mostly disappointed that even this procedure takes such a long time, i.e. it's wasting of their lifetime, mental and physical health, powers and money.

3. Communication problems: As we could see, being from a different linguistic group can have an isolating effect on detainees and this can make them vulnerable. Non-Czech speaking detainees feel discriminated by staff members because they don't receive the same kind of assistance as the others; 25 % do not have medical care in language that they understand so they can hardly share their health troubles.

4. Being cut off from family can make detainees vulnerable: When describing special needs, a large proportion of detainees talk about being cut off from family. It seems there are quite few visits and again, unsatisfactory communications. Approximately each second detainee has some children and most of those who have partners or other family members describe they are missing them a lot. From our observation, we could see that being in touch with friends and/or family plays extremely important role in the life of detainee. We have noticed also one request to

be moved to the other of the two detention centres, because of the family of detainee lived nearby.

5. Living conditions are hard, but the fact of being detained itself causes much more stress: From the mere fact of being detained and being forced to follow certain rules emerge some more or less harsh or inconvenient circumstances detainees have to face. In other words, detainees lost their power to take care about themselves in their preferable way and regime. Sometimes it seems that just a bit of tolerance of other human beings could solve certain kind of trouble, or from the side of member staff or from the side of co-detainees. However, there are some areas of living conditions in the detention system that are currently leading to certain types of vulnerability in general: the ways how to contact the outside world including legal counsellors and lack of preferable communication means, activities provided are not likely to offer suitable recreation of detainees, impossibility to own any electrical devices in detention centres (alarm clocks, radios, mp3 players, etc.), impossibility to choose or to cook preferred kind of meals, etc. Anyway, as there are no special rules set up for vulnerable groups in detention centres except from their separation according to their gender, age and other circumstances, we could see many particular problems that might appear to those with any kind of special needs. We could also see that these problems are not likely to find their positive and relieving solution. For details see the data findings above.

In comparison with other researched countries, we can say that there are certain conditions better than average in Europe, including feeling of safety, duration of detention, as well as peoples' feelings about the outcome of their detention. However, detention is still a very harsh regime in itself, seen by the way in which detainees describe the deterioration of their physical and mental health, and the way their perception of themselves have changed.

5. CONCLUSIONS AND RECOMMENDATIONS

- The detention itself has negative impact on detainees' mental and physical health. It emerges from our data that better and proper health care is needed, but even the best health care cannot exclude these deteriorative effects. Thus, detention should be imposed for the short period of time as possible.
- The legal overview shows us two connected issues. Firstly, due to the quite short 7 days period to take a legal action against the decision to detain and complicated accessibility to legal counsellors, in combination with the fact that courts might not in fact decide about these claims in short period of time, leads us to the conclusion that judicial review is rather inadequate and non effective. Secondly, there is no way for courts (of for Police itself) to order some alternative solution to the detention because alternatives simply do not exist. So there is no chance for foreigners to, for example, follow some concrete rules that would satisfy the states need to know where the foreigner is in case that decision on deportation has been released.

We recommend starting with automatic judicial review of decisions imposing detention. It is also important to state the exact time within which the courts' decision has to be released. Alternatives to the detention shall exist in the Czech legal system. These and other accurate steps might reduce the deterioration of mental and physical health caused by the detention itself.

- There is a certain lack of information on the reasons for the detention, asylum and deportation procedures and on the rights of detainees while being detained, and this situation exists for a variety of reasons. This also negatively affects mental health of detainees. We recommend providing detainees with accurate and easily understandable information, and giving them the possibility to have access to complete range of information in written form and in language they are reasonably supposed to understand. They shall have also a real possibility to reach legal counsellor and ask questions if needed. This means that counsellors should be provided with interpreters or they should have possibility to contact the interpreter while talking to the detainee.

- Language minorities felt discriminated against because no interpreters were accessible. We suggest creating a certain kind of efficient system how to get in touch with relevant interpreters when detainees, not only staff, need it. We would also like to recommend to Ministry of Interior and to the directors of these centres to employ social workers with language skills or at least to provide them with some language courses. English is a must in this international environment and it might happen that they will be able to find somebody speaking English-minority language rather than Czech-minority language.
- Activities are necessary for keeping good mental and physical health, mainly for stress relief and free time management. We believe, that well accessible and interesting free time activities might reduce the psychic tension of detainees and have a positive impact on their mental health. We could see that activities could be more usefully provided, and maybe directors of detention centres could ask the detainees themselves what kind of activities would be welcomed and try to cooperate.
- Contact with the outside world is also very important for mental health of detainees. We believe that allowing them to see their important phone numbers stored in their personal mobile phones may not endanger the safety or otherwise disturb the operation of the centre. More accessible public phones seems to be the necessity. We recommend allowing Internet access as a communication mean, at least for sending emails, etc. as it could be an easy accessible for-free communication.
- We could see that persons with psychological traumas are still being detained in the International Airport Ruzyně Reception centre. We believe that these people shall not be detained as they are much weaker to face the difficulties of detention itself and their recognition shall be made on professional basis.
- We believe that pregnancy of women shall be respected and they should receive proper nutrition and care, including possibility to take their food into their room, being woken up for breakfast, receiving more hygiene supplies, etc.
- Unaccompanied minors should not be detained. We could see the failure of the system when a 17-year-old boy ended up in isolation for up to three months without a guardian being established for at least one month, and without any interpreter accessible to this boy, whose only accessible activity was to watch Czech TV channels. These minors are supposed to be protected but their legal position might make their situation even more difficult. We suggest that no unaccompanied minor shall face the detention regime, especially not for such a long time and under these circumstances.
- It is questionable whether it is absolutely necessary to detain applicants for international protection in conditions where they have no access to the quiet outside space with fresh air, without fresh air and natural light accessible indoors. In the situation when the Asylum Act allows in its section 73 clause 2 to move some or all of detainees under certain circumstances (security, hygiene, capacity or other similarly fundamental reasons) to another type of closed facility in the territory and such a facility is legally considered to fulfil all needed criteria, the argument of necessity to keep these people in the very transit area of international airport seems to be vanished.



NATIONAL REPORT: GERMANY

By: *Jesuit Refugee Service Germany*

1. INTRODUCTION

JRS Germany provides pastoral service and legal advice in three detention centres: those in Berlin, Eisenhuettenstadt (Brandenburg), and Munich-Stadelheim (Bavaria). In these centres, our pastoral workers have full access to detainees and may enter the cell areas; however, in Munich access is limited to visiting hours. Access includes the permission to bring in certain goods for the detainees, like phone cards, tobacco or, in Berlin, cell phones without camera. In Berlin, we can also use a small office inside the facility, equipped with telephone and computer, which we share with the protestant pastoral workers.

The interviews for the study were conducted in the centres in Berlin and Munich, which we visit at least once or twice per week, in order to reach as many detainees as possible. As we had to ask for permission before carrying out research, we were glad that all authorities and ministries responsible for the detention centres supported our request.

Detention visitors interviewed 60 detainees in total; most of were interviewed in Berlin. Staff interviews were conducted in both centres. In Berlin, we interviewed the centre's psychologist; in Munich it was a social worker. Both of them are employed by the respective authorities that are running the facilities. The staff interviews in Berlin had to be approved by the head of the Berlin police, and were cross-checked, so it may in part reflect the "official" view more than that of the individual person.

The relatively small number of interviews did not allow for a distinction between the situations of detainees prior to detention. This situation may, however, be remarkably different. Some foreigners are detained after living in Germany for years as holders of a residence permit, which they lost due to a particular circumstance. This group tended to be the smallest in detention, and the duration of their detention the shortest, as they would regularly be given the opportunity to leave the country on their own, and even in case of forced return, they would generally have travel documents, making it easier for the aliens' departments to deport them quickly.

A large number of detainees during the period of this study were so-called "Dublin II cases", i.e. refugees who sought asylum in Germany, but waited in detention for transfer to the member state of the European Union responsible for their asylum case under the regulation (EC) no. 343/2003 (also known as "Dublin II regulation").

As the 16 federal states have different systems of detention (within correctional facility, in special detention centres and in both of it), it was near impossible to obtain an overlook over conditions in all states. JRS Germany tried this earlier by initiating parliamentary requests in several federal states, but data turned out to be not sufficiently comparable. A parliamentary request in the federal parliament ("Bundestag") returned comparative data on many aspects of detention, but even here it turned out that many federal states didn't collect data on relevant points, or did so on a basis that made the results incomparable.

The interviews, then, necessarily reflect only a part of the practice throughout Germany. It may be the better part, however, as most of our interviews were conducted in Berlin, which is one of the relatively small number of federal states who keep detainees exclusively in specialized centres, where rules are less strict and detainees are kept separated from criminals. In Munich, on the other hand, the detention centre is located inside a correctional facility taking in detainees prior to deportation in addition. Detainees are generally accommodated on a separate ward, but

some of them, especially women, still have to live among prisoners. House rules reflect this situation, paying respect to the stricter regime in a correctional facility, so the detention conditions in Munich are very different from those in Berlin. Here, rules are far stricter, and social interaction both with fellow detainees and the outside world is much more restricted. Take visiting times, for example: in Berlin detainees can receive visits every day of the week from 7-19 h, the duration is usually about one hour per day; in Munich only two visits, maximum one hour per visit, are allowed per month. Or regarding mobility: in Berlin the detainees have much more time to move outside of their cells at the floor and in common rooms as in Munich. Or regarding privacy and autonomy: in Berlin there are kitchenettes on each floor, where the detainees can prepare their own food whereas the detainees in Munich depend fully on the food of the prison. These circumstances, in turn, will have had a certain influence on the results of the study, as the statistics form sort of an average between poles that are at times very different.

For example, in the detention centre in Berlin, detainees have the possibility to meet in group rooms during daytime and cook their own meals from food their friends or relatives brought them. Even if there are up- and downturns (sometimes guards would inhibit relatives from bringing food with them for no evident reason), this was an important factor for Vietnamese or African detainees to assess their situation as more positive. On the other hand, detainees in the detention centre in Munich, placed in the correctional facility of Stadelheim, felt far worse about their personal situation.

The results may also be skewed in part as each of these detention centres has its own special situation. For example, there is a large Vietnamese community in Berlin, many of which live in illegality, and subsequently they are over-represented in the detention centre. So, the study might disproportionately high reflect their specific situation and views.

A joint characteristic is that both Berlin and Munich have large airports where many migrants arrive, and where those among them who do not have visas are frequently arrested on arrival. So, many of the immigrants detained here did not spend any time in Germany before (at least not in freedom), and frequently the authorities make attempts to push them off to other European states under the Dublin II Directive. So, usually a high percentage of detainees in both centres are Dublin II cases, which makes the situation there different from detention centres in other federal states without larger airports. However, the situation of detainees under Dublin II is less reflected in the study, as we preferred to carry out interviews with detainees we had time to build trust with over a certain period, which is usually not the case in Dublin II situations.

The results of the study, then, do not claim to be representative for detention practice in Germany in a scientific sense. They do exemplify, however, a number of serious problems that JRS Germany is confronted with in our service.

2. NATIONAL LEGAL OVERVIEW

Administrative detention in Germany is executed at the level of the federal states. However, the rules under which detention may be imposed belong to the law of residence, which is a domain of federal jurisdiction. Thus, legal provisions concerning the rules for imposing and carrying out detention can be found both at the national and regional level. While national law provides the requirements for imposing detention, the execution of detention is regulated only in part in federal law, but frequently amended in the law of the 16 federal states.

2.1. Imposing detention

2.1.1 Legal grounds for detention

Legal grounds for detention are to be found in Sect. 62 of the Residence Law ("Aufenthaltsgesetz"). According to this, there are two types of detention: Detention for preparation of expulsion/deportation ("Vorbereitungshaft") or Detention for enforcement of deportation ("Sicherungshaft").

"Sicherungshaft" according to Sect. 62 par. 2 Residence Law can be ordered to secure a person's deportation. Requirements are:

- Deportation must be feasible (e. g. necessary documents must be at hand or achievable within reasonable time),
- One of six reasons for imprisonment defined in the law must exist (e. g. illegal entry to Germany, reasonable fear that the person will abscond),
- Imprisonment must be in accordance to the principle of proportionality, i.e. pursue a legitimate goal, and be necessary and adequate (especially of interest with persons that belong to vulnerable groups and those who have already been held in detention for a longer period).

As an exception, up to two weeks of detention are possible even without one of the reasons for imprisonment, if all requirements for a deportation within this period are fulfilled.

"Vorbereitungshaft" according to Sect. 62 par. 1 Residence Law can be ordered to secure a person's expulsion and deportation. Requirements are:

- The decision to expulse or deport the person cannot yet be made;
- Deportation would be made impossible or severely hindered if the person wasn't detained (e. g. because he/she might abscond).

As this type of detention barely has a practical effect, the following remarks will concentrate on detention for enforcement of deportation.

2.1.2 Legal grounds for the detention order and for a judicial review

Legal grounds for the detention order are to be found in the constitution and in the Domestic Relations and Voluntary Jurisdiction Procedure Act (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit, FamFG).

Art. 2 par. 2 s. 2 of the German constitution ("Grundgesetz") calls personal freedom inviolable. Restrictions are only permitted on the basis of a formal law. Art. 104 par. 2 GG adds that the decision to deprive someone of his freedom may only be taken by a judge.

Consequently, detention may only be ordered by a judge. Responsible are the Local Courts. The aliens' department – or in some instances the Federal Police – may apply for it, and regularly does so. There is only one case in which the aliens' department itself is entitled to take someone in custody: when a judicial decision cannot be made beforehand and there is reason to believe that the foreigner will obviate deportation.

The FamFG then contains detailed requirements for the procedure to order detention. The person concerned must be heard before the decision. Other persons that may be heard (and regularly should in the interest of the person concerned, if they exist and are available) are his spouse, parents, children and a person of trust.

Only in cases where the alien has absconded or for other reasons the details of the case can't be resolved immediately, the court may make a preliminary decision without a hearing.

The aliens' department has to show credibly that the requirements of Sect. 62 Residence Law are fulfilled. It is also supposed to provide its file about the person concerned in order to give the judge a possibility to gather as good information as possible.

The alien has the right to be represented by a lawyer. However, often he will have to pay for the lawyer himself. While there is a possibility to receive financial support from the state ("Verfahrenskostenhilfe"), this is linked to a prospect of success, which is frequently denied by the courts.

As every detention order has to state the date up to which the person may be kept in detention at maximum, and detention may only be extended beyond this date on a new judge's decision, there is an automatic judicial review of the decision to detain.

The legal provisions for a detention order, then, are quite detailed and made to secure the rights of the person to be detained. It should be noted, however, that there is a lot of criticism by lawyers, NGOs and churches concerning the practice of detention orders. The quality of decisions by the local courts frequently falls behind the intention of the law, and standards for detention procedures which the constitutional court has set up in a series of decisions are not met in all cases.

2.1.3 Right of appeal against the detention order, and to challenge detention

The detainee has the right to appeal against the detention order. The appeal will be decided by the regional Court of Appeal, which has to hear the detainee (and other persons involved) again unless it is firmly convinced that this will lead to no new findings. If the Court of Appeal holds that detention shall be continued, the detainee has a further right of appeal to the Federal High Court, which will only judge the legal aspects of the case without hearing the detainee. So far, there are no or little experiences with this type of appeal, because a change in law just shifted the responsibility for it from the Higher Regional Courts to the Federal High Court in September 2009. There are assumptions from critics, however, that there might be a smaller number of favourable decisions in the sense of detainees in the future than there were in the past, since the access to the Federal High Court is more difficult (e. g., you need to be represented by a special lawyer accredited at the court).

Constitutional complaints have proven to be a last resort for many detainees. Over recent years, there has been a remarkable series of decisions from the Federal Constitutional Court pointing out the constitutional requirements for ordering detention.

The detainee also has the right to challenge detention at any time. The local court will decide upon the respective application; if the decision is negative, there is a right of appeal against this similar to the appeal against detention orders.

The right of appeal even continues when the detainee has been released (or deported). In these cases, he has the right to apply for the court to hold that the decision to detain him (and the subsequent execution of detention) has been illegal. If this application is successful, it may be the grounds to seek compensation from the state.

2.1.4 The right of information about the detention order and/or the reasons for detention

The detention order has to give the reasons why detention has been ordered. As the person concerned has a right to an interpreter in the court hearing if he doesn't understand German, the reasons will generally be translated for him. In practice, however, this often proves insufficient, as the reasons in detention orders are frequently short and formulaic. In addition to this, there is neither an obligation to take detailed notes of what is not said during the hearing, nor is the detainee entitled to get a written translation of the detention order and the protocol. Thus, many detainees complain that they received little or no information about why they were detained.

2.1.5 Minimum age

There is no provision in federal law providing a minimum age for detention. Still, a certain age limit can be derived from a conflict between residence and youth welfare law. According to youth welfare law, the youth welfare offices are responsible for any minor under 18 years who cannot be taken care of by his parents or other persons in charge. On the other hand, the Residence Law contains a clause stating that a foreigner who is 16 years or older must lead his own case without help of a legal guardian before authorities and courts. Notwithstanding that this clause is seen as a breach of the Convention on the Rights of the Child, arguably, 16 years should be the absolute minimum age for detention. Consequently, some of the federal states have introduced clauses in their own law that make detention of minors below 16 years illegal.

Still, in an answer to a parliamentary request (BT-Drs. 16/11384), the federal government revealed that between 2005 and 2007, at least 377 unaccompanied minors had been detained all over Germany, almost half of them (155) in Berlin. The youngest children detained in Berlin were only 12 and 14 years old (although they spent only one day each in detention).

Some of the federal states have regulations concerning a minimum age of 16. The regulations about minimum age do not, however, mean that these states would abstain from detaining children under 16. For example, the state Brandenburg keeps children younger than 16 in a youth welfare facility in Fürstenwalde. As another example, Schleswig-Holstein abstains from detaining unaccompanied minors under 16, but finds it appropriate to keep children from the age of 10 in detention as long as they are together with their mothers.

The topic gets more complicated as frequently, arriving refugees who claim to be less than 18 or less than 16 are not accepted as such. By estimation of staff members of either the youth welfare offices or the aliens' departments, sometimes accompanied by medical estimate, X-ray of the hand bones, denture examination and visual inspection of the genitals, their age is set to a fictitious date, frequently one that makes them over 18 or at least over 16, the latter allowing for detention in all federal states.

2.1.6 Maximum duration

The maximum duration for detention in Germany is 18 months. There are limits, however, that have to be taken into account before that maximum.

Detention is illegal if it is clear that for reasons for which the detainee is not accountable, the deportation will not be possible within the next three months (Sect. 62 par. 2 s. 4 Residence Law). The Federal High Court (Bundesgerichtshof) has held in a decision in the 1990's that this 3-month-limit must be taken into account in any court decision ordering or extending detention, and not only forward-, but also backward-looking. I. e., if initially the aliens' department claimed it would finish the necessary preparations for deportation of the person concerned within three months, and now two and a half months are over, but the aliens' department announces that they will need at least another month, the detainee would have to be released unless the delay is his or her own fault.

The next limit to be considered is at six months in detention. Detention may be extended beyond that date only in cases where the detainee works against his deportation (Sect. 62 par. 3 s. 2 Residence Law).

2.2 Executing detention

In Germany, detention is executed by the federal states. National law provides a basic regulation for those federal states that keep migrants in detention in normal prisons. Those federal states that run specialised detention centres either as an exclusive means to execute detention or in addition to detaining foreigners in correctional facilities then additionally need own regulations. However, some federal states that execute detention in normal prisons also have

additional regulations. As a result, there is a fairly confusing situation when it comes to the legal grounds for executing detention.

2.2.1 Federal law

2.2.1.1 Health care

The legal grounds for healthcare for detainees are set out in the Asylum Seeker Benefit Act (“Asylbewerberleistungsgesetz”). This law states in Sect. 4 that “in case of acute diseases or pain, necessary medical or dental treatment is to be provided including medication, bandages and other benefits necessary for convalescence, recovery, or to ease diseases or their consequences.” Further, according to Sect. 6, “other benefits may particularly be granted if they are essential in particular cases to secure subsistence or health”. In other words: unless a disease urgently demands care, it can be difficult to obtain the necessary treatment. For people with psychological problems or chronic diseases, it can be very difficult to actually get treatment. It is a familiar situation, too, that refugees who suffer from serious diseases are only given painkillers – sometimes due to language barriers that inhibit them from describing their problems in detail.

The Penal Law Act (“Strafvollzugsgesetz”) contains further clauses dealing with the right to medical care for inmates who do not have a health insurance. However, this will generally step back behind the Asylum Seeker Benefit Act.

2.2.1.2 Execution of detention in correctional facilities

Federal law takes into account that detainment is carried out in correctional facilities. In these cases, several clauses of the Penal Law Act are applicable. In combination with the house rules of the correctional facility, this generally leads to similarly restrictive rules for detention like for inmates who serve a sentence. This especially applies to contact to the outside world, which is regulated strictly for criminal offenders. Here, only minimum standards are granted: at least one hour of visiting time per month (Sect. 24 Penal Law Act); correspondence with friends and relatives is generally granted, but can be inhibited by the correctional facility by discretion, and it is also in the discretionary power of the facility staff whether phone calls are admitted.

On the other hand, the particular situation of detainees – considering inter-cultural differences, the particular problem that the ending point of detention is usually unknown to the detainee, or the specific problems of especially vulnerable groups – is not mirrored in the Penal Law Act at all.

2.2.2 State law

Since under the German constitution, a person can only be deprived of personal freedom according to a law, the federal states had to make additional laws wherever they detain foreigners outside correctional facilities, be it exclusively or in addition to also accommodating detainees in prisons.

Some of these laws consist of only one article referring to the federal Penal Law Act. Others contain general rules on police custody and are applied on detention, too. Only a relatively small number of federal states have made special laws and administrative regulations as legal grounds for the execution of detention.

2.2.2.1 Contact with the outside world

State law, like federal law, often provides regulations for visits, letters, presents etc. from the outside world. However, as these regulations concern security matters, and is too detailed to be cited here in full.

Contact with pastoral workers is granted both under federal and state law.

Some of the state laws explicitly mention visits by refugee NGOs (e. g., sect. 7 Berlin Deportation Custody Law; sect. 2.8.1 Berlin Deportation Custody Order), consulate/embassy staff (sect. 2.8.1 Berlin Deportation Custody Order) , members of the Committee for the Prevention of Torture (sect. 25 par. 2 Hessen Police Custody Order) or correspondence with members of parliament, the European Court for Human Rights and the Committee for the Prevention of Torture (sect. 7 par. 4 Brandenburg Law on the Execution of Detention outside Correctional Facilities) in addition to rules for visits by family members, friends or lawyers. Generally speaking, state laws tend to be more liberal about visits and correspondence, with even less restrictions for contact with lawyers, MPs, or NGOs.

2.2.2.2 Protection of persons with special needs

Some of the federal states have made special regulations for the protection of persons with special needs. However, most have not. The protection of special needs of persons belonging to vulnerable groups then is mostly a matter of case law, as even where there are no specific regulations, still, any detention order or detention condition has to comply with a basic rule, the principle of proportionality, and violations of this principle can be challenged in court. Unfortunately, this approach leaves the protection of vulnerable detainees mostly on their own hands, as many of them lack supporters or lawyers who could help them file claims etc.

Good practice examples include Berlin, Brandenburg, Hessen, Nordrhein-Westfalen and Schleswig-Holstein, where we find detailed laws and administrative regulations providing e. g. for the special needs of minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of torture or violence, traumatized persons, families, persons with suicidal tendencies, and long-term detainees who are detained six months or longer (although not every of the abovementioned states provides regulations for all of the aforementioned groups).

2.2.2.3 Social Services

Those federal states that have more detailed regulations, taking into account the protection of persons with special needs, generally also provide social services to detainees. There are differences concerning the details, however. While some states prefer to establish a system where social workers and psychologists are employed by the state (e. g., Berlin), others delegate these tasks to non-governmental agencies or volunteers (e. g. Schleswig-Holstein).

2.3 Alternatives to detention

Alternatives to detention are not regulated in the law. However, in application of the principle of proportionality, detention is not always ordered. The longer the person concerned already lives in Germany, and the more social relations he or she has, in other words, the less likely it is that he or she might abscond, the more often the aliens' departments will resort to other means. Sometimes residence documents are limited to very short periods, e. g. one week or a few days, and persons are requested to call in at the aliens' department or the local police station in order to ensure close contact to the authorities. For minors, accommodation in a youth centre or borstal can be an alternative.

3. NATIONAL OVERVIEW OF THE DATA FINDINGS

3.1 Basic Information

The average detainee in Germany is 30 years old, male, of Vietnamese origin, single, and has been in detention for 2.54 months before being interviewed. In other words, 81 % of detainees are men; 71.4 % are singles while only 21.4 % are married and 7.1 % divorced. 38.1 % of all detainees interviewed were from Vietnam, another 16.8 % from other Asian countries. 19.1 % came from Africa, 11.9 % from South-East Europe, and 7.2 % from the Middle East. It should

be noted, however, that most of the interviews from Germany were carried out in the detention centre in Berlin-Köpenick. As Berlin has a large Vietnamese community, many of which live in illegality, they tend to be over-represented in detention, too.

3.2 Case awareness

The vast majority of all detainees interviewed were illegally staying migrants awaiting their deportation. Only about one out of ten had applied for international protection. Of these, in one out of four cases their asylum applications had already been rejected.

While most interviewees said they had been informed why they had been detained, still the average level of how well detainees claimed to be informed about their asylum cases was remarkably low with 3.48 points on a scale from 1 to 10. However, it is not clear if this is linked to the structure of the questionnaire, as the question aimed at information about the person's asylum case, while only a minority of interviewees said they had applied for protection at all. Still, it was the impression of our pastoral workers that the main reason why detainees felt they weren't informed well was the difficulties of German law and the legal procedure, which refugees cannot understand.

If detainees had been informed, they were most likely to have been told by people not in charge like NGO members, lawyers or pastoral workers. Others had been informed by police, courts, the aliens' department or other administrative authorities. The information most frequently took place during official procedures or during arrest for detention.

This last answer indicates that at least a part of the interviewees had understood the question to aim at information about detention, as information on asylum procedures is usually not being given on the occasion of arrest, but during a hearing at the asylum authority. It should be added here that, according to JRS Germany staff experience, the standards for information about detention are frequently quite low. For example, while during court hearings the help of an interpreter is mandatory, no translation is usually provided during the arrest procedure. However, eventually one of the policemen arresting an illegal immigrant may speak English. Even during court hearings, it is common that important documents such as the detention application by the aliens' department or the court's detention order are only translated orally, and often even this translation is reduced to a short version of the actual document, sometimes leaving out important details.

Standards also seem to be varying between detention centres. While a staff member of Berlin detention centre pointed out that every detainee was given information about the reason for his/her detention within 24 hours after reception (however, without substantiating to what extent and in what language information was provided), the staff member of Munich detention centre said that normally the judge would inform detainees, but not always.

When asked if they needed more information, consequently, more than 60 % of the interviewees answered "yes". Specific information asked for concerned asylum or immigration procedures in the first place. About one fifth of detainees wanted to know more about reasons for detention or asked about the duration of detention. Individual questions completed the picture.

3.3 Space within the detention centre

Most detainees felt positive about their sleeping room or at least neutral. However, one third complained and said they were feeling negative. JRS detention visitors describe the rooms to be 10 to 15 square meters in size, providing room for four to six inmates, with only some rooms smaller, i.e. for one or two persons. Washing facilities are usually inside the sleeping room, the toilet being separated from the bedroom only by a curtain in Munich detention centre. Berlin detention centre additionally provides a separate room for families with children. In principle, there's also the possibility to have a room of your own; however, due to restricted capacity, only about one out of 25 detainees can

actually benefit from this. Wardens decide on an individual basis that will get the room; criteria are long stay, trouble the person might cause, or personal problems, such as disease, depression, and suicidal tendencies. Munich detention centre staff admitted that they do not always have enough space for detainees, the ward providing rooms for 34 persons, which then leads to detainees' accommodation in cells together with criminals.

Cohabitation issues and facilities were mentioned as main criticism. "Being in detention changed my mind", one of the interviewees said: "How wonderful it is to be outside." Another one added, "If I had known the detention centre, I would never have come to Germany."

As for the detention centres in general, a slightly lower percentage of inmates felt positive or neutral about the centre space, while about 40 % had criticisms. Here, facilities were mentioned as biggest problem. While most detainees said the centre was not overcrowded, a majority of almost two thirds of interviewees complained that there was no space to be alone. Some evidently suffered from this situation. "I feel like a dog, or worth less than a dog", one of the detainees told us. "Dogs go out every one, two or three hours. I only have the possibility to go out for one hour. But under control of police." Another detainee stressed the impact the living situation had on himself: "I am more introverted, I do not go out very often."

JRS visitors' observations confirm the view of the detainees. They are usually allowed to go outside only for limited time – one hour per day in Munich, one and a half in Berlin –, "outside" meaning the yard of the detention centre, observed by police. Inside, conditions are different. While detainees are allowed to change between cells and meet in group rooms for most of daytime in Berlin, in Munich, they are only allowed to go to the corridor for four hours per day, and are being locked in for the rest of the day. Our visitors also remarked that there is hardly any privacy inside detention, given the restricted space and four to six people in a bedroom. Frequently, the only space the detainees can use exclusively is a small locker to store personal belongings in.

3.4 Rules and routine

Rules for the detention centre are the strictest in Munich, where they apply to detainees and prisoners likewise. Even the detention centre in Berlin, where detainees are not mixed with criminals, is organized similar to prisons, and thus has very strict house rules. Consequently, asked about what kind of rules they had to follow in the detention centre, detainees were most likely to mention general rules on routine. These were also mentioned as the most important rules. Some detainees stated, however, that rules on behaviour or simply "all rules" were very important.

According to detention centre staff, rules are explained to detainees during the reception procedure in Berlin, while in Munich, they are handed out in a printout version in several languages.

Rules were widely seen to be respected by everyone; however, detainees did not see a chance for themselves to change the rules. More than 90 % denied this, and JRS detention visitors confirmed that there is practically no way detainees can achieve a change in rules. This was even admitted by the staff of Munich detention centre, while the staff member from Berlin answered that detainees could make suggestions, and even write letters to the centre administration, thus leaving open what chance a suggestion would have.

As one of the consequences of the routines, our pastoral worker in Berlin pointed out that time in detention is largely boring and detainees feel useless – "they cannot work or even cook for a large part of the day, and they do not know what will happen."

3.5 Detention centre staff

Detainees said they were mostly in contact with security staff and social services. Interaction with staff members was often described as varying. Only about a quarter of interviewees said it was positive, while roughly one fifth described

it as neutral, and slightly fewer detainees reported a negative interaction. From the view of staff, however, interaction was described as “fair”.

Some of the detainees we interviewed had evidently expected things in detention to be even worse. One of them told us, “I have a different feeling about the police now, because before I am very afraid.” Others stressed the negative experiences: “I feel dehumanised becoming a prisoner.”

A majority of almost three quarters of interviewees did not report discrimination; however, this indicates that more than a quarter made the experience of being discriminated against. If discrimination was reported, this was in most cases because of language or ethnicity. A little more than half of detainees felt that staff supported their general needs – but almost as many denied this.

Staff members denied in their interviews that there was active discrimination of staff against detainees. The staff member we interviewed in Berlin pointed out that staff tried to respect religious and ethnical differences and added, “Every attendant has his own way to deal with the detainees.”

According to JRS detention visitors, the interaction between staff and detainees was generally adequate; however, in some cases, verbal attacks and racist patterns were described. Language barriers were observed to be a main obstacle for interaction between staff members, who generally speak only German and, sometimes, also English, on the one hand and detainees on the other. “If a detainee speaks the same language, it’s easy”, our Munich visitor explained, “Otherwise, if the police asks something and the detainee doesn’t understand, they can be quite rude.” Some female staff members in Berlin were reported to behave less friendly (possibly a means to protect themselves). This was commented in the staff interview, “The women have another way to deal with the detainees.” The Munich staff member reported that female staff members were not totally respected by detainees from Arabic or African countries.

3.6 Level of safety within the detention centre

Detainees generally felt rather safe inside the detention centres. When asked to rate the level of safety they felt on a scale from 1 to 10, the average value was 6.76. As main reasons for this, detainees mentioned living conditions, other detainees, and the security guards. JRS detention visitors agreed that the level of safety was high; however, our Munich worker reported an individual case where a detainee had been put in the same cell with prisoners due to lack of space, and had been beaten up several times.

As measures to ensure a high level of security, staff members mentioned presence of police, and in Munich additionally alarm buttons in every cell and video observations. Staff members would monitor the interaction between detainees and intervene in case of altercations.

More than half of the interviewees said they had not been mocked. Of those who have been mocked, almost three quarters said that they have been mocked by the security staff; the rest reported to have been mocked by other detainees. Asked for the reasons for mocking, unfriendliness of staff, cultural reasons, and infrastructure reasons were the most frequent answers.

About 14 % reported to have been physically assaulted, in two out of three cases by other detainees.

Staff members both in Berlin and Munich confirmed that there had been altercations between staff and detainees. The reasons were sought on the side of the detainees – “because they want to call more often or do not want to stay in the centre; because they want to do something”. Berlin staff pointed out that, in case of arguments, the social service would be informed and would then intervene with methods of mediation and communication. In Berlin, there is

also a special training for attendants in police custody, while wardens in Munich receive no special training for work with migrants.

Only a small number of interviewees who had been mocked or assaulted filed a complaint. Those who did so said it had not been successful.

3.7 Activities within the detention centre

Almost all detainees say their detention centre provides for activities. Sports activities and religious activities are the most frequent ones. The vast majority of detainees take part in those activities, either for personal satisfaction, stress relief or physical exercise.

Access to books, telephones, television, sports, religious space and outdoor space is granted in Berlin. In Munich, telephones are accessible only if the detainee announces it to the social worker, and then between one and three calls per month are granted; however, eventually in-going calls may be received more often, but on another floor. At the same time, in Berlin it is possible for our pastoral workers to distribute telephone cards among detainees, and they are allowed to keep their private cell phones if these don't have a camera. In Munich, TV sets can be borrowed from the detention centre at a fee of 18 Euros per month. This is paid dear, compared with the roughly 28 Euro a detainee gets as pocket money in addition to free accommodation, food and things like clothing or soap.

Some of the detainees stated that access to books was denied, alongside with access to computers, Internet, and educational opportunities. As for books, this might be due to the fact that at least in Munich, there are no books in other languages than German, except a few in English. When asked where they'd like to see the variety of activities improved, almost half of the interviewees mentioned better living conditions, one out of five said he'd like IT and Internet equipment, and roughly 10 % would simply prefer freedom.

3.8 Medical issues

In both visited detention centres, medical staff is available. Detainees see them frequently, most of the interviewees said they see someone from the medical staff at least once per week. They are most likely to report access to a doctor. Roughly half of the detainees say that additionally they have access to nurses. Access to psychological staff was mentioned to a lesser extent. Still, only 62.5 % of all interviewees have had a medical examination upon arrival to the centre. The majority of detainees do not understand the language of medical instruction.

Quality of medical examinations sometimes leaves a lot to be desired from the point of view of detainees. There is a considerable language barrier between medical staff, who generally speak German and sometimes English, and detainees. Occasionally fellow detainees try to translate, and sometimes the authorities engage interpreters, but this is not generally the case. Under these conditions, misunderstandings with severe consequences may occur. In a case that was reported by our pastoral workers, a Vietnamese woman claimed to be pregnant on arrival, and denied to do the standard X-ray for tuberculosis. However, a quick test did not confirm the pregnancy, and she was suspected of faking. As a consequence, she was isolated in solitary confinement for about two weeks before a clinical test finally confirmed the pregnancy. In other cases, detainees got necessary treatment only with a delay or were given wrong medication that could have been dangerous for their health. In some cases, as a consequence, detainees simply would not go to see the doctor.

Only little more than a quarter of detainees feel positive about medical care. They have access to the appropriate services. On the other hand, almost as many feel bad about the quality of medical services. They say they do not receive the appropriate treatment. However, most detainees report that no medical services are lacking. Of those who are lacking medical services, one half says they are lacking access to appropriate medical care. Others say they would like to have better treatment from the existing staff.

Medical care outside the detention centre could sometimes be a solution, but is hard to obtain for detainees. Our pastoral worker in the centre in Berlin described several occasions where detainees were treated in normal hospitals, but these inflicted very serious health problems, like suicide attempts, severe skin diseases or kidney problems. In all other cases, detainees must rely on the medical standards available in the centre, which are not always the best. While detention centres generally have a physician, he or she is usually not a specialist for everything. Still, especially the doctor in the detention centre in Berlin was described to try and treat all kind of diseases and sometimes even mental health problems, which is in part beyond his skills. While there is a psychologist available, whose qualifications were described as good, the final decisions are up to the doctor, who is not a psychiatrist.

Staff members from both detention centres, however, assessed this point differently. It was admitted that examinations on arrival only cover certain severe infections like HIV or tuberculosis and are otherwise voluntary in Berlin, and non-existent in Munich. But while Munich staff admitted that medical services were not provided in a language detainees can understand, so other detainees had to translate, Berlin staff said language barriers were not a problem. Staff from both detention centres said that detainees had access to all kinds of necessary doctors, either inside the centre or outside.

3.8.1 Physical health

Almost three out of four detainees said their physical health had been affected by the situation in detention. They described, among others, symptoms like headache, fatigue, skin diseases or stomach pain. Physical health has on average dropped from 8.67 to 5.67 on a scale from 1 to 10 points over the time in detention. Interviewees were most likely to point to psychological issues as a reason for this. The condition of the detention facilities in general was also frequently mentioned. Roughly 14 % said they were lacking medical treatment and/or facilities. "The staying here wastes my time, energies, and health", one of the detainees we met said. Another one simply stated, "Detention creates pain."

Berlin staff confirmed the physical health problems detainees had mentioned and said that, as a response, they could see a doctor from the medical service. Munich staff also confirmed but said the centre itself didn't really have the means to respond.

3.8.2 Mental health

An overwhelming 90 % of all interviewees say that detention has an impact on their mental health. Problems described included sadness, feelings of anger, the inability to sleep, feelings of tension and stress, suicidal thoughts and confusion. Mental health has dropped on average from 8.67 to 4.93 on a scale from 1 to 10 points during the time in detention, that is, even sharper than physical health (see 3.8.1). As the reasons for this, detainees indicate detention impacts. Exactly one third mention unspecific detention impact. Evidently, the mere fact to be detained had a strong negative effect on the self-perception of detainees. "I am a good person, a person who has a future", one of the interviewees said. "But inside here I see myself as nobody." This perception was confirmed by our pastoral workers. "They don't know what will happen – deportation or freedom", one of our detention visitors said. "They do not know who makes the decision and when the decision will come. This means stress."

Another third see their life plan affected. "My dreams of life are in danger", one interviewee told us. About one out of five detainees mentioned a loss of rights. "I feel like a small child who lost his family and does not know who will take care of him", another interviewee described his feelings. The impact of living conditions was another issue. Living conditions in general were criticized broadly; other issues were complaints about treatment from staff, and cohabitation issues.

The impact of worries was also severe. More than 85 % of interviewees said they worried about themselves. Unspecific worries and stress were also mentioned as negative factors. "I feel like a bird who is arrested and can't fly

away”, one of the interviewees said. Detention visitors also described a negative impact of uncertainty. “They do not know what is going to happen, if they will be released or have to go back and what the situation in their country will be. They feel they are being treated like criminals without having committed a crime. They always ask: Why? Why? Why?”

Moreover, medical problems were mentioned as a reason for the decline in mental health by almost six out of ten detainees, and impact of external experiences was also quoted as a stress factor, as detainees expected difficulties in the future.

While a large number of detainees reported deterioration of either physical or mental health, bad health conditions could only in some cases be improved due to medical care. According to our detention visitors, better information about the situation and possible duration of detention could already help avoid a number of serious problems, and ease the situation for detainees. Closer contact to family members, either outside the detention centre or abroad in the country of origin, might also help, but is restricted especially in Munich detention centre.

Staff from both detention centres confirmed the mental health problems detainees had mentioned. Munich, again, said that their centre didn't respond to the needs with psychological problems in any special way. Berlin claimed that detainees could talk to the social service or a doctor, and that the doctor could send them to a specialist doctor in special cases.

3.9 Social interaction within the detention centre

In contrast to the influences of detention on their physical and mental health, almost three quarters of all interviewees marked the interaction between detainees as good. This was also the overall view of staff both in Munich and Berlin. However, roughly 10 % of interviewees referred to a bad atmosphere in the detention centre. While a majority of just above 50 % did not report any problems between detainees, others said they experienced problems. The main reasons given for this was inter-cultural tensions and tensions due to common life in detention.

Staff members pointed out that there were some groups among detainees who tried to dominate others and influence staff. Conflicts between detainees were linked to different cultures and individual ways to interact with others rather than to the overall situation in detention. The Berlin interviewee pointed out that with respect to minors, staff members acted in a friendly and caring way, and that interaction between detainees was encouraged by giving detainees from different floors the opportunity to visit each other once a week.

Most detainees reported they do not have a person to trust in the centre.

3.10 Contact with the outside world

Most detainees have a family in their home country. Two thirds say their family needs their support. The majority also has got friends and family in the host country. The most important way to keep in touch with the outside world is by telephone. In Munich, however, this is only possible to a restricted extent (see 3.7). Here, detainees tend to write more letters, and JRS provides stamps as a support. Personal visits are important for detainees in both centres and take place quite frequently. Telephone is also seen as the most effective means of communication by detainees themselves. Remarkably, other means of communication (e. g., internet) were hardly ever mentioned.

About one out of four detainees said he could receive family visits. More than half receive visits by friends. Frequently, detainees would also receive visits by lawyers and religious visits (which may reflect the work of JRS pastoral workers, but other denominations provide similar services at least in Berlin, too).

Our pastoral workers confirmed these contact possibilities largely. Remarkably, the possibility to receive visits from UNHCR was denied for Munich detention centre, even as visits from Amnesty International are possible there.

3.11 Conditions of detention and nutrition

Detainees generally don't like the food they receive. Almost 80 % uttered complaints. They complain about poor quality, would prefer food from their own culture and say there's little variety in the food actually served. Many also complain about the quantity. Our pastoral worker in Munich, who didn't have the possibility to see and taste detainees' meals, reported they referred to it as "horrible" and said they could not eat it anymore. Our pastoral worker in Berlin described the food there as "good for Germans, but bad for Asians", referring to the fact that it didn't cover the needs of the typical Asian diet based on rice and vegetables, which many of the Vietnamese detainees would have preferred.

Staff members had a different view on this issue. While Munich staff admitted that individual needs were only taken into account in case of Muslims or people with health problems, Berlin staff said that nutrition adapted to the needs of vegetarians, Muslims, people on diets and ill persons. Berlin staff denied that there was a kitchen for detainees to prepare their own meals and said there was only a hotplate to warm up food with. This does not coincide with reports from our interviewees, but possibly the reported kitchenette is not declared as such officially for security reasons.

In addition, many of the interviewees reported a change of appetite in detention. Most of these said they lost appetite. Almost everyone who complained about a change of appetite said this made them feel worse. Our Munich pastoral worker observed a loss of weight in numerous detainees due to the quality and possibly quantity of food.

While food seemed to be an issue especially for the Vietnamese in Berlin detention centre, who sometimes got angry because of the type of nutrition served, detainees from various nations said they'd rather cook for themselves, both for reasons of better food and to have a social occupation and reduce stress factors.

3.12 Conditions of detention and the individual

In addition to the health problems already mentioned above, almost three quarters of all detainees interviewed said they did not sleep well. This mainly results from stress and, to a lesser extent, from external reasons. Detainees mention feelings of restlessness as well as noise from co-inmates and guards.

Detainees were also asked what the top three most difficult things were during their time in detention. Impacts of detention itself were mentioned most often as the most severe issue, which split up in issues like feeling isolated from the outside world, complaints about a loss of rights or the feeling that the person's life plan had been affected.

Living conditions were also mentioned by a large number of interviewees to be the top difficulty, with living conditions in general – like accommodation, food, sanitation etc. – as main concern and cohabitation issues and treatment by staff way behind.

Other issues mentioned as top difficulty were the impact of worries or health problems.

In the second and third position, percentages varied, but again, impacts of detention were mentioned as biggest problem, followed by impact of living conditions, worries and medical problems. More than half of the interviewees said there had not been a change in these difficulties during their time in detention.

In contrast, staff in Berlin perceived cohabitation issues, money problems and (lack of) activities as the most difficult things for detainees, while Munich staff also agreed that uncertainty, the situation to be incarcerated without crime and boredom were the major problems.

In the perception of our detention visitors, the uncertainty as well about the duration and outcome of detention as about the procedures for detention and asylum were among the top difficulties detainees face, followed by the feeling to be treated like a criminal and a general feeling of helplessness. If these difficult conditions changed at all over the time of detention, the problems would rather increase. Pastoral workers were confronted with respective statements from detainees virtually in every encounter.

Most interviewees said that at some point, life in detention had become difficult for them and had even felt unbearable. Of these, almost three out of four said their life became difficult already after less than one month. Only a small minority said that they felt every day in detention was equally difficult for them. This coincides with observations from our pastoral workers that indicate a serious increase of stress already after one month in detention: “During the first four weeks they fight”, our Berlin detention visitor explained. “Then, we can see the first signs of stress and depression. After two months, things are getting even worse.” The average time detainees had spent in detention by the time of the interviews was 2.5 months.

More than half of detainees interviewed didn't know the outcome of their detention. Among those who didn't know the outcome, about one quarter felt pessimistic about their prospects, in contrast to one fifth who expressed optimistic feelings, and a small group who felt neutral. A large faction, however, seemed to have no opinion whether the outcome would rather be positive or negative.

Only about 14 % of interviewees knew their departure date from detention centre, whereas the vast majority didn't have an idea when they would be released. This coincides with the fact that, generally speaking, the German authorities give very short notice about the deportation date – it should be indicated one week before, but frequently, it is on the morning of the day on which deportation is to take place. A similar situation occurs if – for whatever reason – the detainee is to be released.

Not knowing about these things obviously leads to stress for detainees. More than 40 % complained about unspecified detention impacts as a consequence of the insecurity, one third said they felt their life plan was affected. Detainees are to a large extent worried both about themselves and others – almost three quarters of interviewees reported this. More than 40 % additionally reported mental health problems because of the uncertainty.

The burden that detention means to the individual was acknowledged by staff members too. Both in Munich and Berlin, they said that they see detainees as people in a very difficult situation that need help and support. Still, staff in Berlin had the perception that detainees were well aware of the outcome of detention, and that necessary information was given on reception and, in special cases, during detention either by staff or social service.

Our pastoral workers – together with visitors from other churches and NGOs – tried to relieve the burden of uncertainty by giving all available information during visits and by facilitating contacts to friends and families on the outside. Still, the negative effects were evident. “It's one hundred per cent stress for them”, our Berlin detention visitor commented.

Notwithstanding complaints about their personal situation, almost 90 % of interviewees said they had a positive self perception, with a small minority feeling neutral on this issue. Interviewees described themselves as “a funny and communicative person”, “a strong man with good character”, or as a “quiet and friendly person”. Often, they would point out positive characteristics and a caring attitude. “I am a man who loves working for family”, one detainee told us; another added, “I am capable to give for creating a better society”. “I am honest and smart as a human being. I always try to understand character”, one interviewee described himself, while a woman derived comfort in simply describing herself: “I am not too tall, I am not too fat, and my hair is dark. I am simple. I am beautiful.”

It should be noted, however, that almost three quarters of interviewees reported a negative influence of detention on the way they see themselves. “I feel crazy”, one detainee put it, and another explained: “I feel like a murderer who is

in prison and after some time is told to be killed because of his bad activity.” – About 10 %, in contrast, reported a positive influence.

More than half of detainees said they did not consider themselves to have special needs that other people don't have. This seemed to be their view on fellow inmates, too, as the question, whom they saw as the most vulnerable people inside the detention centre, was answered by four out of five interviewees by emphasizing that everyone in detention has special needs.

JRS detention visitors, however, were able to identify several especially vulnerable groups among detainees, including unaccompanied minors, families, older persons and traumatized or otherwise diseased or disabled persons. Among these, youths, families and people with mental health problems were seen as the ones with the most dramatic need for help. Sometimes it would be evident that a person had special needs, sometimes fellow inmates or even detention centre staff would ask our pastoral workers to look after somebody.

On the other hand, detention visitors perceived a general sense of vulnerability in all detainees, linked to the fact that they were detained in an uncertain situation and under conditions comparable to those for criminals without feeling that they had actually committed any crime.

Detention centre staff in Berlin responded that they saw people as vulnerable who did not have the ability to handle the difficult situation in the centre. However, vulnerability here was seen rather as a deficit of the individual, marked by a negative perception of police due to bad experiences in the country of origin or a lack in mental strength. But it was acknowledged that every imprisonment is an injury of self-determination. Munich staff remarked that, apart from feeling helpless and unjustly treated, detainees probably had a negative impression of Germany.

4. ANALYSIS OF THE DATA AND CENTRAL THEMES

4.1 Individual Situation

Although the average time in detention by the time of the interview is less than three months, we already see negative effects of detention.

Medical care is provided, but still detainees report a deterioration of their physical health. The reason for this is not so much a lack of access to medical treatment, but the fact of being behind bars and the psychological and physical consequences. Inmates of Berlin detention centre also reported that they had been given medicaments without an explanation what they were given and for what purpose. Consequently, some of them would refuse to take the medicaments.

Mental health also deteriorates, and at a rate faster than physical health. The detainees interviewed described as reason the psychological pressure they are under. Detention itself and the living conditions in detention have an impact on mental health, especially the uncertainty detainees are facing.

The majority of detainees also do not sleep well. Reasons for this are stress and psychological pressure in detention, but also external reasons, e. g. fear of return to their home country.

All in all, uncertainty about the outcome is characteristic for the situation in detention. Uncertainty causes worries and mental health problems.

The detainees' own perception of the development of their health is confirmed by observations of our pastoral workers. In part, it is even confirmed by staff members from both detention centres, even if these tend to some extent to play down the negative effects of detention and see individual deficits as the source of problems. Yet, the frequency and the extent to which detainees describe negative effects of the uncertainty they live in both on their physical and mental well-being is a strong indicator that it is detention itself that makes detainees more vulnerable, especially as the duration of detention expands to more than two or three months.

Detainees have a positive self-perception, but the time spent in detention has a negative influence also on the way they see themselves.

Although the majority of detainees has been informed about their case, the information is not detailed enough and not given continuously. They are lacking information on procedures and reasons for detention. This, again, contributes to uncertainty. A large quantity has been informed by JRS detention visitors or by their lawyer if they have one, but not sufficiently by the authorities. Lacking adequate information, detainees find it difficult to cope with detention or asylum procedures. In this situation, they rely heavily on qualified support. But only a minority has the means to engage a lawyer. Free and qualified legal assistance would be useful then to inform them properly about their prospects and help them secure their rights.

The situation in detention becomes difficult already after less than one month. Unspecific impact of detention, isolation from the outside world and living conditions in detention are the most prominent difficulties.

4.2 Social aspects

The interaction with staff (mostly security) is varying. It seems to depend very much on the individual person on duty if the relationship is good or bad. Many detainees report being mocking by the staff. The main reasons for these tensions seem to be difficulties in understanding each other because of language problems and lack of respect for their cultural background, according to observations from detainees themselves and detention visitors. Staff members, on the other hand, tend to seek the reasons for conflicts more in the personality of detainees than in their own and their colleagues' behaviour or in the general situation in detention. However, there seems to be a higher level of sensitivity towards the needs of detainees in specialized detention centres where staff has received an extra training how to interact with people from different cultures.

Interaction between detainees is good. A reason for this might be that many detainees have a similar cultural background. When there are tensions, they are most likely to be caused by inter-cultural differences. It is a general observation of our pastoral workers, though, that detainees tend to solve those problems among themselves, and not to disclose them to visitors.

Most detainees have relations in their home country. But there are also ties to Germany, as a large portion has got friends or family here. It is difficult, however, to uphold these contacts under the conditions of detention. Contact with the outside world is kept mostly by phone, not so much by personal visits. Personal contacts are much easier, however, in the specialized detention centre in Berlin, where rules are not as strict as in the correctional facility in Munich. It would be desirable, however, if contacts would be facilitated as much as possible, since our findings indicate that isolation from friends and families again contributes to the negative effects on detainees' physical and mental health.

Contact to third persons, like pastoral workers or NGO members, is not granted equally. In Munich, restrictions are stricter than in Berlin. This leads to fewer opportunities for detainees to receive support during their time in detention.

4.3 General situation in detention centres

The Interviewees have no complaints about centre space and rules. They feel safe in the detention centres, and some of them have even developed a more positive image of police compared to prior experiences. But daily routines are frequently boring and leave detainees with worries about their future.

Whether for stress relief, physical exercise or personal satisfaction, most detainees take part in activities that are offered in all three detention centres JRS is visiting. The main activities are sports offered by the detention staff and religious support offered by JRS. Interviewees complained that there are no educational opportunities and no Internet access.

If detainees were accommodated inside a correctional facility, like in Munich, several negative impacts were observable. Rules were generally stricter, and contacts to the outside world were subject to constraints. Staff members, usually working with criminals, would respond less to the needs of migrants. Sometimes when the centre was overcrowded, detainees would have to share cells with convicts. In this environment, they would feel even more to be treated like criminals, which caused a feeling of injustice.

Medical check-ups during reception procedures are restricted to checks for some serious infectious diseases and otherwise optional or even non-existent. Even later, some detainees do not go to see a doctor, or they do so but communication fails due to language barriers. As our pastoral workers observed, this gives way for some serious health problems with detainees to stay undiscovered. Hence, it would be preferable to make general check-ups mandatory and arrange for translation services.

Staff and detainees perceive the general quality of medical services differently. While staff members would generally point out that doctors and psychologists were available in the centres, and that detainees could be taken to specialist doctors outside the centres if they needed to, detainees themselves complained that they did not always get the kind of treatment they needed. This coincides with our pastoral workers' observation that it was in effect very hard to get specialist treatment outside the centre, and that this effort was usually only made for people in a dramatically bad state of health.

Nutrition is a general concern of many detainees. While taking into account some dietary rules (like no pork for Muslims), it is not adapted to the cultural background of the detainees. This leads to a decline in appetite and a loss in weight for some detainees; others get angry and argue about the quality of food. Berlin detention centre seems to have reacted to these criticisms and offers provisional kitchenettes, where detainees can reheat food that friends or relatives bring them during visiting hours, or prepare simple meals. From the perception of our pastoral workers, this not only improves the nutritional condition of the detainees, but also works as a social factor that improves the atmosphere in the centre.

4.4 Situation of especially vulnerable groups

Detainees do not report special needs for particular groups. They see everyone in detention as likewise vulnerable.

While this may on the one hand indicate that some impacts of detention – uncertainty about the future, feelings of helplessness, insufficient orientation about the detention procedures – make everyone vulnerable and on the other hand reflect a certain level of solidarity amongst detainees, the view of JRS detention visitors is slightly different. Often, it was clear that certain persons had exceptional problems. At times, even staff would ask our pastoral workers to take care of individual detainees because they had noticed that these persons were in a bad state. People that had an especially hard time in detention were those with psychological problems, but also unaccompanied minors or families. Due to the lack of proper check-up examinations on arrival, mental health problems often go undetected, sometimes for longer periods.

5. CONCLUSIONS AND RECOMMENDATIONS

In the words of the former director of the German Institute for Human Rights, Percy MacLean, detention should be organized as “normal life minus freedom”. While this may be a slightly euphemistic description, we do not even see this minimum level reflected in the overall situation of the detainees. While their basic needs are met – housing, nutrition, safety –, a remarkably high number of detainees reported physical or psychological health problems that worsened with the duration of detention.

JRS Germany recommends in accordance with Art. 15 Par. 1 of the Returns Directive (2008/115/EC) to make use of detention as a last measure only, i.e. as seldom as possible, and to keep it as short as possible. Taking into account the adverse effects of detention already during the first three months, 90 days should be an absolute maximum.

Our findings show that detainees suffer from uncertainty about the outcome of their detention. Even if most of the laws on detention state that the detainee has to be informed about the reasons for his detention and about his rights and duties inside a detention centre, a large number of interviewees reported that they had not been informed about these facts at all, or only in part, sometimes only at a later stage. More than 60 % of detainees said they needed better information about their case. This led to negative impact on their physical and mental health. Information is rather given by NGOs or pastoral workers, especially when it comes to continuous information over the period of detention. However, access to detention centres for detention visitors is restricted in some detention centres. Only part of detainees can afford additional qualified information by lawyers.

JRS Germany recommends strengthening the state's obligations to inform detainees about the reasons, rules and possible as well as maximum duration of detention in a language they can understand. NGOs and pastoral workers should have free access to detention centres during daytime and not be restricted to visiting hours. Free legal assistance should be granted to all detainees from the beginning of detention, comparable to a regulation for remand prisoners implemented in German law as of Jan 1, 2010.

Vulnerability was an important issue throughout the study. While the abovementioned effects of uncertainty, prolonged duration of detention and lack of information contributed to the vulnerability of all detainees, the specific needs of some distinct groups – unaccompanied minors, families, elderly people, traumatized, disabled or diseased people – need to be taken into account, too. While not all of these groups were encountered during the study (which may be a result of restrictions in its implementation), the study made clear that especially the detention centre in Munich, located inside a correctional facility, faced problems in meeting some vulnerable groups' needs. We especially see a need to improve health care for detainees with psychological problems, whose problems frequently are not detected or not properly dealt with. Also, the special needs of minors are generally not met in detention.

JRS Germany recommends in accordance with Resolution 1707 (2010) of the Parliamentary Assembly of the Council of Europe, par. 9.1.9, that vulnerable people should not, as a rule, be placed in detention and specifically, unaccompanied minors should never be detained. Where detention is inevitable, as an implementation of Art. 16 Par. 3 of the Returns Directive (2008/115/EC), which states that particular attention shall be paid to the situation of vulnerable persons, psychological examinations should be mandatory if there are any signs that the detainee suffers from respective problems; each detention centre should have specially trained staff who see every detainee on arrival and in regular intervals during his stay. JRS Germany further urges the German government to implement fully and unconditionally the Convention on the Rights of the Child, according to which detention of minors should be the absolute exception.

Almost 40 % of interviewees reported that they had not been examined by a doctor upon arrival to the centre. Those who did, or needed medical care later, indicated that severe language barriers had led to misunderstandings and, in some cases, wrong medication.

JRS Germany recommends a mandatory medical check-up for every detainee arriving in the detention centre. Translating services should be made available during doctors' visits to ensure a sufficient flow of information.

The comparison between the detention centres in Berlin – a specialized centre specifically for detainees – and Munich – a correctional facility also taking in detainees – show that living under the strict rules of a correctional facility means an additional burden for detainees. Further, the study strengthened the impression that a specialized detention centre is in a better position to respond to the specific needs of detainees, and especially of more vulnerable groups.

JRS Germany recommends to keep the negative effects of detention as low as possible by consequently separating detainees from prisoners and have special detention centres for them, as the Returns Directive (2008/115/EC) postulates in Art. 16 Par. 1: „Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.” That would allow for more liberal rules, that is, more normality.

Contact with family members either in or outside the detention centre or abroad in the country of origin proved to be an important factor to stabilize detainees' mental health, especially over a longer period of detention. However, contact possibilities are restricted to a low level in some detention centres, especially those like in Munich, where detainees are kept in a correctional facility. Telephone turned out to be the main means of communication with friends or family who cannot visit the detainee.

JRS Germany recommends allowing for visits from family and friends for at least one hour per day. Communication means like public telephones or private cell phones, if necessary without camera, should be made available for all detainees, and their use should be permitted without restrictions,

Besides the possibility to keep in touch with friends and families, support from NGOs and pastoral workers can play an important role for detainees. Often, it is through these contacts that detainees get detailed information about their situation, their prospects and their rights, which strengthens them and makes them more resistible to the negative impacts of detention. However, the study showed that access for NGOs was not granted equally. Especially for Munich detention centre both our detention visitor and the interviewed staff member said that visits by UNHCR did not take place there.

JRS Germany recommends in accordance with Resolution 1707 (2010) of the Parliamentary Assembly of the Council of Europe, par. 9.2.8, to generally allow for visits by UNHCR and other NGOs.

While the level of safety in both detention centres that were involved in the study was assessed as high both by detainees and staff members, still there are reports of altercation and discrimination by staff from both centres. The reasons often seem to be trivial – arguments start because detainees want to use the telephone more often. Methods of conflict resolution in Berlin, however, seemed to be less affecting in Berlin, which might be connected to a special training attendants in police custody receive here.

JRS Germany recommends a mandatory training for attendants in detention centres that should include, among other things, multi-cultural competences, diversity issues, awareness-raising for different religious and ethnic backgrounds as well as for the needs of especially vulnerable groups, and de-escalating conflict resolution methods. It would also be helpful if it were a condition of employment for staff to speak at least one or two mother tongues of larger detainee groups. Language courses for detainees might also be helpful to reduce misunderstandings.

Food was an important issue for detainees. A large majority complained both about the quality and quantity of nutrition and said this had a direct effect on their physical health. Detention visitors observed a loss in weight of detainees where complaints were particularly grave. Detainees also criticized that food did not take into account their cultural backgrounds, e. g. the characteristics of a typical Asian diet based on rice and vegetables. On the other hand, where detainees were allowed to prepare their own meals from ingredients friends were allowed to bring them, this turned out to be an important social factor, at the same time stabilizing detainees' mental health and improving the atmosphere in the detention centre.

JRS Germany recommends accounting for the cultural backgrounds of detainees in the choice of nutrition. Wherever possible, detainees should be given a possibility to prepare meals for themselves.



NATIONAL REPORT: GREECE

By: Greek Refugee Council

1. INTRODUCTION

This report is an attempt to understand vulnerability and its causes among persons under administrative detention in detention premises in Greece. For this purpose we have interviewed 20 detainees (men, women and minors) in the Detention Facility for Aliens - Central in Athens (Petrou Ralli- April 2009) and 14 out of 40 minors in the Detention Facility for Aliens in Amygdaleza (June 2009), a detention centre for minors. Around half of the interviewed detainees were asylum seekers, who applied for asylum in detention, and half of them irregular migrants. However, it should be noted that this is not a representative proportion between irregular migrants and asylum seekers in detention. Instead an attempt was made to interview more people who applied for asylum in detention. In each detention centre we further interviewed one staff member and a member of an NGO called "Medical Intervention" ("Iatriki Paremvasi"), which offers medical, social and psychological support to detainees. Interviews in the Petrou Ralli holding facility were conducted in April 2009 and those in Amygdaleza in June 2009.

We also asked written permission to visit either of two other Detention Facilities: the detention area of the Athens International Airport, where most detainees are asylum seekers returned from other European countries and others that attempted to travel illegally to another European country; and the detention centre called "Former Holding Facility-Helliniko". Unfortunately we were denied permission for both. The competent authorities cited work overload and multiple duties during this period as reasons. We then contacted orally the Aliens' Directorate again for permission to visit any other Detention Facilities in Athens –since it was already near our deadline for collecting interviews (July 2009)- but we received a similar answer.

All participants in the current research consented before being asked any questions and no particular obstacles had to be overcome during this phase. More difficult was the conduct of the interviews due to language barriers; in many cases co-detainees participated as interpreters with other interviewees.

At this point we would like to thank the competent authorities, who permitted and facilitated our access for long hours in the detention premises, police and ngo staff who participated in the interviews and all detainees, who consented to express their minds and feelings, although they knew that they wouldn't benefit from this procedure. Hopefully any results following this attempt will be for the benefit of individuals in detention.

2. NATIONAL LEGAL OVERVIEW

2.1. Legal Basis for Detention

Administrative detention exists only as part of deportation proceedings. The general rule is that no one can be detained without a judicial decision ordering his or her detention; the exception is that detention is legal if a deportation order (judicial or administrative) has already been issued or will be issued within three days. Thus, issues of administrative detention are closely connected with issues of deportation. Aliens may be deported if they have been convicted for a custodial sentence of at least one year for several crimes prescribed by law; also when they have violated the 3386/2005 Law regarding their entrance and residence in Greece, which mainly refers to their

undocumented and unlawful presence. Additionally aliens may be deported when their presence is dangerous to public health and they refuse to comply with the measures set out by the medical authorities or dangerous to public order or security of the country. According to the latest amendment of this provision (Law 3772/2009) an alien is deemed dangerous to public order or safety in particular, as long as they have only been *prosecuted* for an offence punishable by deprivation of liberty for at least three (3) months¹³³. This provision obviously violates the presumption of innocence. Further, there is in Greece a great number of crimes punishable by three months deprivation of liberty, and the great number of those can hardly be understood as injurious to the public order. So this provision, apart from violating a constitutional principle (presumption of innocence), is also disproportionately strict.

A deportation order however does not lead necessarily to detention: the person - in view of the general circumstances - has to be considered a suspect of escape or a danger to public order or likely to prevent or hinder the preparation of their departure or removal proceedings¹³⁴. In this case detention serves the purpose of safeguarding the execution of the deportation, and is thus upheld until the deportation takes place, but cannot exceed 6 months. An exception exists when the detainee is not cooperating or there are delays with the receipt of documents needed for the deportation; the detention can then be extended up to 12 months. There is an obvious influence of the 2008/115 EC (Return Directive) in the latest amendment (Law 3772/2009), which has seriously extended the detention period of aliens. At the same time however there was no legal requirement to improve the detention facilities or detention conditions, and on that ground Greece has been regularly criticized by national and European institutions and also convicted by the ECHR.

Pursuant to the latest amendment, it is a Police Director (a commissioned officer of a certain rank tasked with the particular duties ex officio or by appointment in larger districts) who decides both on the deportation and the detention of the alien. The deportee has at least forty-eight hours to present objections¹³⁵. That means that as soon as an alien is arrested and before the issuance of the deportation order, s/he has the right to submit objections against the detention and the future deportation order. Within five days of the issuance of the deportation order, s/he has the right to appeal against this decision before the Police Director. In practice, in most of the cases, the deportation order is accompanied by a detention order without any further explanation or particular justification for considering the deportee "suspect of escape or a danger to public order". This might be less common in cases of newly arrived immigrants, in particular of unaccompanied minors, families and others seen as vulnerable, and those whose deportation is regarded as unfeasible. In such cases, the detention may last a few days or weeks. In all cases aliens, against whom a deportation order has been issued, should be detained in Special Holding Facilities, and in case of

¹³³ Art. 76 of the 3386/2005 Aliens Law on "Entrance, residence and social integration of third country nationals in the Greek State":
"The administrative deportation of an alien is permitted if:
a. They have been convicted by a custodial sentence of at least a year or whatever penalty for violation of political crimes, betrayal of the country, crimes relating to trafficking and drug trafficking, money laundering, international economic crimes, crimes using high-tech instruments, currency offences, crimes of resistance, child abduction, against sexual freedom and economic exploitation of sexual life, theft, fraud, embezzlement, extortion, usury, the law on intermediaries, forgery, false certification, defamation, smuggling, for crimes relating to weapons, antiquities, to trafficking illegal immigrants in the country or to facilitate the transfer or promotion or securing accommodation for them to hide and if the expulsion was not ordered by the court.
b. They have violated the provisions of this Law
c. Their presence in Greek territory is dangerous to public order or security of the country. The alien is deemed dangerous to public order or safety in particular when they have been prosecuted for an offence punishable by deprivation of liberty for at least three (3) months. (Law 3772/2009 amendment in bold)
d. Their presence in Greek territory is dangerous to public health and they refuse to comply with the measures set out by the medical authorities for protection, although it has provided the necessary information."

¹³⁴ Law 3386/2005, Art. 76 as amended by Law 3772/2009. "3. If the alien, in view of the general circumstances, is considered suspect of escape or a danger to public order or prevents or hinders the preparation of their departure or removal proceedings, then with the decision of the institutions of the previous paragraph, a temporary detention will be ordered until the issue, within three (3) days, of the decision on expulsion. In case of a decision of expulsion, detention continues until the execution of the expulsion, but in any case cannot exceed six (6) months. If the expulsion is delayed because the alien refuses to cooperate or because there are delays of the receipt of necessary documents regarding the expulsion from the country of origin or provenance, the detention of an alien may be extended for a limited period not exceeding twelve (12) months."

¹³⁵ Law 3386/2005, art. 76 "Deportation is ordered by a decision of the Police Director and, when the General Police Directorate of Attica and Thessaloniki, the Commissioner for Aliens Police Director or senior officers, appointed by the General Police Director, after giving the alien at least forty eight hours to present his objections."

lack of these facilities, in the detention area of police stations. Minors and women are detained in separate areas, except in cases where the protection of minors or the perseverance of family unification must take precedence¹³⁶.

2.2. Detention conditions and rights of detainees

As the Committee for the Prevention of Torture (CPT) has also observed in the Report to the Government of Greece¹³⁷, detained irregular migrants remain under the same regime as criminal suspects. One of the reasons is that the joint ministerial decision prescribed in art. 81 (Law 3386/2005), which should define the terms and requirements for the opening of Special Holding Facilities for Aliens haven't been issued yet. There exists no regulation defining the way these Holding Facilities should work, no minimum standards set. Thus, the detention conditions and the rights of irregular migrant detainees derive from general legal principles and sometimes from particular provisions referring mainly to criminal suspects.

Right to information

Art. 76 of the 3386/2005 Law orders that aliens must be informed in a language they understand of the reason for the detention and also that communication with an attorney must be facilitated. There is no particular provision for the presence of an interpreter, and in usual practice neither lawyer nor interpreter appears. However, it should be mentioned that in a circular for the treatment and the rights of detainees by police authorities it is clearly stated that "...the detainee must, when brought before the police authorities, be fully informed of the reasons for his/her detention as well as about all the rights to which he/she is entitled during the period of detention (art. 9 ICCPR, art. 5 para.2 ECHR). To this purpose, detainees must receive an information leaflet, approved also by the Attorney's Office, in a language they understand, on their rights; these rights should also be clearly explained to them. In the case of alien detainees, who ignore the Greek language, an effort must be undertaken to explain these rights through the most suitable means (through an interpreter, a consular authority etc.). Police authorities are also obligated to display in the detention premises tables that describe the detainees' rights. ..."138. There is a similar provision in a recent Common Ministerial Decision (number 4000/4/46-a, 27/07/2009), which defined the details for the implementation of administrative and judicial expulsion orders for aliens, where it is stated that "The alien is informed in a language he understands and is given an information leaflet about the deportation procedure and his rights...."

Right to legal representation

Aliens also have the right to legal representation but they have to pay for these services. Furthermore, a lawyer's free access to the detainee and the offer of legal assistance is guaranteed under any circumstances, no matter whether this person is detained on the grounds of criminal or administrative procedures; this is enshrined in the provisions of article 6 of the ECHR.

The person under administrative detention also has the right to raise objections against the detention or extended detention before the Judge of the Administrative Court, in whose jurisdiction the alien is detained¹³⁹.

Right to Health Care

¹³⁶ Common Ministerial Decision, 4000/4/46-a, art. 5.

¹³⁷ Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Strasbourg 30 June 2009

¹³⁸ Treatment and rights of persons detained by police authorities, Ministry of Public Order, 4 July 2003

¹³⁹ Law 3386/ 2005, art.76 "3. ... The alien must be informed in a language he understands of the reason for the detention and his communication with the attorney facilitated. The alien detained, along with the rights that under the Code of Administrative Procedure, may also raise objections against the detention or extended detention before the Presiding Judge or before the by him appointed Judge of the Administrative Court, in whose jurisdiction the alien is detained."

Regarding the health care of detainees it should be mentioned that only in very few Holding Facilities there is medical staff appointed by the State. Art. 60 of the P.D. 141/1991 “competencies and in-service acts of the personnel of the Ministry of Public Order” defines that the Police Officer on duty takes care so that a doctor of the health services of the Hellenic Police, and in case of absence or obstacle, another doctor will provide the necessary medical treatment to sick detainees. Detainees also have the right to be examined by a doctor of their choice. The protection of the detainee’s health is a basic duty of the police authorities. In case the detainee falls sick, suffers a serious accident or enters a medical institution, the police are obliged to inform thereof the family members, and, in case there are no family members, any person indicated by the detainee. Finally, special medical care is offered to detainees who are drug addicts and whose life is in danger due to the deprivation syndrome (art. 60 para 3 cases 8, 11 and art. 67 para. 4 case 22 P.D. 141/1991). Art. 67 prescribe that women and minors should be detained in a separate area from men.

Police officials should furthermore be even more sensitive in case of detainees who are considered particularly vulnerable and whose rights need particular protection. Such, should, in principle, be considered minors, sick persons, alcoholics, drug addicts, illiterate persons, political refugees, asylum seekers and aliens in general. (Circular for the treatment and the rights of detainees by police authorities)

Communication between detainees in police custody and their relatives or other persons of their choice includes telephone communication as well as personal contact. The police must facilitate telephone contact between the detainee and their families in order to inform them, if they so wish, of the place and reasons of their detention. The police is also obliged to allow visits to the detainees on the basis of a schedule that sets the timetable, the place and the persons that are allowed to visit the detainees (art. 67 para. 4 case 12 P.D. 141/1991). It is underlined that the right of communication includes, in the case of aliens detained, the obligation to inform the consular authorities of their countries, the facilitation of the telephone communication between these latter and the detainee and the obligation for the police authority to allow consular staff to visit the detainee, unless of course this latter refuses to do so (art. 36 of the International Convention on Consular Services ratified by virtue of Law 90/1975).

The case of asylum seekers

Art. 13 of the P.D. 90/2008, which transposed art. 18 of the 2005/85 Directive, prescribes that an alien who applies for refugee status shall not be held in detention for the sole reason that he/she entered and remains illegally in the country. That is not the case when someone applies for asylum while in detention after the issuance of the deportation order. In this case the detention continues and the application of the asylum seeker must be examined with the utmost priority^{140, 141}.

The recent S.D. v. Greece judgment of the ECHR demonstrates the legal error of this provision and of the practice followed¹⁴². The Court has concluded that the detention should serve the purposes of the deportation. Since the

¹⁴⁰ PD 90/2008, Art. 13. “1. A third country national or stateless person who applies for refugee status shall not be held in detention for the sole reason that he/she entered and remains illegally in the country. A person who applies for asylum while in detention and against whom a deportation order has been issued shall remain in detention and the application shall be examined with the utmost priority. S/he shall not be deported before the conclusion of the administrative procedure.”

¹⁴¹ In practice though, especially in the Petrou Ralli Holding Facility for Aliens that GCR is visiting regularly, the asylum applications of detainees are not examined with priority. Contrary to that, the asylum seekers are often detained for three months, without even being interviewed for their asylum application. At the moment of their release, they are handed in a document ordering them to leave the country within three months. Then they have to visit the Asylum Department to take an appointment for their interview. To this malpractice, it should be added that detained asylum seekers are rarely explained the procedure they have to follow, since they are not subsidized in this procedure by an interpreter.

¹⁴² ECHR, S.D. v. Greece

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=851175&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

deportation of an asylum seeker is prohibited and is suspended, for as time his application is examined, his detention has no legal basis, and is therefore illegal¹⁴³.

Additionally the territorially competent Police Director may decide, in cooperation with the competent office of the Ministry for Health and Social Solidarity, to **restrict** applicants for asylum in an appropriate place in order to determine the circumstances of entry, the identity and origin of mass illegal entries of applicants, when this is required for reasons of public interest or public order or when this is considered necessary for the speedy and effective completion of the above mentioned procedure¹⁴⁴. The total time under restriction should, in no case, exceed sixty (60) days. In a case known to GCR, the above provision when implemented resulted in aliens being firstly detained for three months (maximum detention period till July 2009) because of the deportation order and then 60 days for the purposes of this provision. This practice seems to misinterpret and mis-implement the ratio of the legal provision, as it unjustifiably leads to an extended detention period. Asylum seekers can appeal and/or submit objections before the Administrative authorities and before the Administrative Court against the detention decision but not the detention conditions¹⁴⁵.

Although there is no special provision for legal aid and interpreter services, the P.D. 90/2008 mentions that the authorities competent to receive and examine the asylum applications should take care so as to inform the detained asylum seekers about the reasons and the duration of their detention and guarantee the right of asylum seekers to legal representation¹⁴⁶. However, since there is no other provision to specify how the aforementioned rights of the detained asylum seekers will be implemented, these provisions have unfortunately a more declaratory character. Similarly, the information leaflet about detention and deportation procedures cannot substitute the lack of interpreters or interpretation services in detention facilities, since it cannot respond to individual questions. Furthermore, this leaflet does not contain any information on asylum seekers.

Regarding the special needs of particular groups, it is mentioned that the authorities should take care so as to detain women in a separate place from men and avoid detaining pregnant women, or women who have recently given birth, and unaccompanied minors, and separating minors from their families while in detention¹⁴⁷.

3. OVERVIEW OF NATIONAL DATA FINDINGS

¹⁴³ Greek Ombudsman, "The European Court of Human Rights convicts Greece for the detention of an asylum seeker", press release http://www.synigoros.gr/pdf_01/8181_2_dtrom_katad.pdf

¹⁴⁴ P.D. 90/2008, art. 13. "2. The territorially competent Police Director and, in the cases of the General Police Directorates of Attica and Thessaloniki, the Aliens' Police Director or a senior officer appointed to this task by the General Police Director, may decide, in cooperation with the competent service of the Ministry for Health and Social Solidarity, to restrict applicants for asylum in an appropriate place when, and for as long as necessary, this is needed in order to determine the circumstances of entry, the identity and origin of mass illegal entries of applicants, when this is required for reasons of public interest or public order or when this is considered necessary for the speedy and effective completion of the above mentioned procedure. The total time under restriction shall, in no case, exceed sixty (60) days. "

¹⁴⁵ P.D. 90/ 2008, art. 13 "...3. Asylum applicants detained or restricted in an appropriate space according to the previous paragraphs shall be entitled to the rights to appeal and submit objections, as stipulated in paragraph 3 of article 76 of law 3386/2005." (see above)

¹⁴⁶ P.D. 90/2008, art. 13. "...4. In the cases that applicants for asylum are being detained or restricted, the competent authorities to receive and examine, without prejudice to the international and national legislation on detention, shall apply the following:

e. they shall see that the right of detainees or restricted persons to legal representation is fully guaranteed.

f. they shall take care that detainees are informed as to the reasons and the duration of their detention."

¹⁴⁷P.D. 90/ 2008, art. 13 "...4. In the cases that applicants for asylum are being detained or restricted, the competent authorities to receive and examine, without prejudice to the international and national legislation on detention, shall apply the following:

a. they shall take care that women are detained or restricted in a place separate from men.

b. They shall avoid detaining or restricting minors, in particular children separated from their families and unaccompanied minors.

c. they shall avoid detaining or restricting women in an advanced state of pregnancy or who have recently given birth.

For the purpose of this report we interviewed 34 asylum seekers and irregular migrants, 14 in Amygdaleza Facility for Juveniles and 20 in Petrou Ralli Holding Facility for Aliens. The detainees interviewed have spent from 1 to 211 days in detention, but it should be noted that at the moment the interviews took place the maximum detention period was three months. It should also be remarked that three of the detainees interviewed had a judicial deportation order, therefore their detention exceeded three months. Almost half of the detainees interviewed applied for asylum while in detention, the rest of them have been irregular migrants and only a few have been asylum seekers whose application was rejected. Most of them are young single men from Iraq or Afghanistan. In many cases the findings confirmed our perception about the main issues of detained persons, following our regular visits to Holding Facilities.

3.1. Case awareness and outcome of detention

Detainees usually know the reasons for their detention either because police informs them or because they collect the necessary information from other detainees while in detention. However one out of five detainees declared that they didn't know why they were detained, as they couldn't believe that they were "imprisoned just for papers". A notable case was that of an unaccompanied minor who thought that he was detained because police found a small quantity of drugs, when they entered a compatriot's house. In certain cases the detainees were not handed the information bulletin that explains the reasons for their detention and their rights in their language. All detainees who applied for asylum while in detention, with one exception, declared that they were not aware or were very poorly informed about the progress of their asylum cases. It appeared that they didn't know when they would have an interview, what the result would be, when they would get the asylum seeker's card etc. Almost all detainees asked for more information about the detention period and the immigration and asylum procedures.

Half of them declare that they know the outcome of their detention and many among them believe that they will be released and stay in Greece. There is however a significant minority that remains in the dark about the possible outcome, whether they will be deported or released and permitted to stay in Greece. Finally, most detainees are unclear about how long they will stay in detention, and they cannot understand the criteria for holding one in detention longer than others. Especially when it comes to detainees of the same nationality the differing length of the detention period is completely incomprehensible and frustrating for them. A minor from Somalia says, "I don't know why I am detained. I see people who have no documents and they are detained for five days. I don't know why I am detained for a month."

3.2. Space

According to police authorities the maximum capacity of the detention centre in Petrou Ralli is 373 persons, which breaks down to 203 men, 150 women and 20 minors. Every cell accommodates 5 men or women and 1 minor.

The majority of detainees expressed either neutral ("it is normal, it is a prison, I cannot expect more") or negative feelings ("There are 5 beds but we are 7 persons. Two of us are sleeping on the floor. It is dirty. ..." "The blankets are very dirty, there are no sheets. There are bugs on the blankets. ...") about the areas they sleep in. More negative are the feelings on the toilets and the showers mainly because of the lack of sanitation ("Toilets and showers are very dirty. The cleaning service only cleans the corridors."; "There are three toilets and two showers for 40-45 people. Toilets are hell. They are extremely dirty and they stink."). There is no other common indoors space apart from the corridors. Some people also expressed disgust for the dirtiness of the space and the presence of bugs and cockroaches. Women and minors commented on the space less negatively, although they also mentioned the unseemliness of the conditions, the toilets in particular. This can be explained by the less overcrowded conditions in women and minors facilities and by the fact that women were offered cleaning detergents more often to clean the areas themselves.

According to police authorities the maximum capacity of the Detention Facility in Amygdaleza is 40 minors. There are four sleeping quarters of 70 square meters each with air-condition equipment, a dining room and hygiene facilities (toilets and showers).

The conditions in the juveniles centre in Amygdaleza were much better and the majority of minors expressed either neutral or positive feelings for the space they sleep in ("Normal. It is ok. We have beds, mattresses, sheets, and blankets. We are 8 persons in the room, but there is place for 10. It is not very clean, but it is not a house, it is a prison."). They enjoy the fact that they have a TV in the dining room and they wished to have computers as well. Nevertheless a minority, particularly those sleeping closest to the toilets, mention the smell coming from there because of the lack of sanitation, the high temperature and the lack of fresh air due to small windows (Note: the interviews were conducted at the end of June 2010).

The majority of the interviewed detainees (34) regard the centre as overcrowded but a significant minority (44%) disagrees, and this percentage mainly corresponds to the detainees in Amygdaleza and the minors in Petrou Ralli, as their detention conditions seem objectively better.

3.3. Rules in the Detention Centre and Contact with the Staff

When asked about the rules in the detention centre, most interviewees could not mention any rules and would only describe their routine. Although there were some differences in those descriptions, the routine is mainly described as following:

"We eat three times per day. Every 2-3 hours they open the cells for almost half an hour. They usually open the cells 4-5 times per day. They let us out in the yard twice per week for 40 minutes to one hour." (Petrou Ralli); also: "They open the cells from 8.00-12.00 until the time we eat. Then we eat and they keep the door closed till 6 o'clock. They open again the cells from 18.00 until 23.00. We eat 3 times per day. I play football twice per day." (minor Albanian in Amygdaleza); or "I think we have breakfast at 9, lunch at 14.00 and dinner at 21.00. We have no watch so I don't know the time. In the meantime we stay in our rooms. At 17.00 we go in the yard and we play football for an hour. Today that you came here, they opened the yard and let us play in the morning. They open the doors 3 times per day for one or two hours. Today only, they left the door of the cell open for longer." (minor Afghan in Amygdaleza).

These differences can be probably explained by the potential lack of a stable and schedule known to them and the variance of their personal perception. Also, it was not confirmed whether the testimonies differed because of differential treatment of detainees or to differing perception of reality or to differing character. Thus, Albanian minors claimed to be satisfied that they could play football in the yard once or twice per day, while others (Pakistan, Somalia) denied having any activities and claimed that they were allowed to play in the yard a few times only. Further, some detainees in both detention premises (Arab women, Pakistani minors) felt that they faced less favourable treatment than their co-detainees (Georgian women, Albanian minors) because of ethnic/racial and religious reasons. It is furthermore repeatedly claimed in several wordings by detainees that "Police staff are not all the same" and that "There are some good police guards but also others who are not", and this seems to influence their routine.

It seems like the personality of police staff may influence the reality of detainees more than the rules, and thus a few of them deny the existence of any rules ("The first rule within the centre is that there is no rule"), and the majority of detainees cannot mention any of them. On the other hand, it should be mentioned that almost one out of four detainees describe their contact with police staff as positive and half of them (detainees) declare that police staff supports their needs and requests ("Sometimes they make jokes with us. If they find us stressed, they will say something to calm down our brain. Some are good and some are not. When I need something like shampoo, paper, they bring it. Some of them may shout and are not so helpful."), contrary to others, who are complaining that they have to ask many times before being allowed to see the doctor or go to the toilet ("If I want to go to the toilet, I may

have to wait for an hour. There are policemen, who come straight when you call them and others who let you wait.”). Most of the times their reactions reveal mixed feelings towards different police staff.

Almost half of the detainees declare that they have been insulted by police staff, because of the obscene language they use against them many times. In addition to the verbal insults, five detainees reported being physically assaulted (use of obscenities followed by shoving and punching) by the police staff. One detainee describes: “I asked a policeman to give me my medicine. He told me “Fuck you”. I said “Why?”. He said again “Fuck you”. I told him you are not strong but just because you are a policeman and I am here (in detention, you can treat me like that). He took the chair and he hit me with the chair. I put my hands in front of my face and he hit my hands.”

It is important however to mention that most of the detainees claimed that they will refer to the police staff in case they face any particular difficulties, and they expressed trust in them in this regard.

3.4. Time in the Detention Centre, Activities and Contact with the ‘outside world’

One of the problems often mentioned by detainees is the limited number of activities they can participate in. Sometimes they can play football or table tennis to relieve stress and boredom. But this activity is characterised as insufficient, as they can only play a few minutes each because of the large number of detainees and the limited time they spend outdoors. In Amygdaleza detainees declare that they have more (though not enough for many) time to play and they have also access to television, but no access to computers, Internet and books. When detainees in both centres were asked what extra activities they would want the centre to provide, they emphasized entertainment activities (television, books, music, newspapers, and games), more sports, access to computers, and Internet. They complain that they can only use the public phones to make phone calls, which actually cost a lot when they call back their families in their countries and they mention problems because of the limited time they can spend on the phone. Thus they wish they could use pre-paid international cards to call their families abroad and more time for phone calls. Telephone is the most popular means of communication but since they do not have access to their mobile phones, at certain times they cannot communicate with the external world as they cannot remember the numbers. Some of them mentioned as a problem the fact that they do not have money to buy telephone cards and their communication with the external world is rare. Finally, the majority of detainees often feel isolated since they rarely receive visitors with the exception of lawyers and medical NGO’s. Their families are in their country of origin and almost half of the detainees reported that they are supporting them financially. The lack of a family network to support them morally and financially in the host country as well as the thought that their family in their country of origin is waiting for their financial support while they are in detention are factors of further stress and vulnerability.

3.5. Medical Care and mental and physical health

Most of the detainees declare that they receive an initial medical exam upon arrival to the centre by the NGO’s medical staff working in the centre, are aware of this medical staff within the centre and they can meet with them when needed. They seem satisfied with the medical services provided, however this should be mostly attributed to the good relation they had with the medical staff, since a significant minority (47%) would like improved access to appropriate medical care because pain medication for their ailments is not enough. Others wish for a more regular contact with a psychiatrist/ psychologist and to take more medicine for their health problems; more than half detainees have expressed difficulties to sleep and wish they could take medicine to sleep. The last point is closely related to their mental health since an overwhelming majority reports that detention has had an impact on it. The deterioration of their mental health is related to stress due to the general situation of detention (duration of detention, fear for expulsion, disruption of their life plan, isolation from the outside world, loss of their rights and their normal routine - job, friends etc.). Thus most detainees describe that their mental health has seriously deteriorated while in detention, and they would rate it with 9 points on a 10-point scale before detention and with 6 points during detention. Their physical health has also been impacted by detention but to a lesser extent, and they report it before detention as 9 out of 10 and during detention as 7.5 points.

There is however a significant minority of detainees that does not believe that their physical health has been impacted during detention and there is a small minority that claims that their health has been positively impacted (drug addicts, Pakistani minors). This minority relates the improvement of their physical health to their nutrition and sleeping habits (regular food and sleep). This last opinion is also adopted by the police staff interviewed, who believe that the detainees are of a better physical condition when released because of sports activities, regular sleep and frequent meals. However most of the detainees report that they do not like the food provided by the centre (tasteless, dirty, cold, stale bread etc.), which is sometimes attributed to cultural differences (“we don’t know these foods and we don’t like them”) or to its low quality. Apart from that, almost all Muslim detainees complained that they were served pork despite the fact that they cannot eat it for religious reasons. Also that they often did not know whether the meat offered was pork or beef, since they do not receive any information or when they do, it is often contradictory.

Regarding their sleep, most of the detainees reported that they cannot sleep well because of the stress and worry they experience as a result of detention. There is however a significant number of detainees who do not report any difficulties with sleeping, although some of them mention that they take medicine to sleep.

3.6. Interaction within detention

Detainees seem to interact well with their co-detainees in the centre. Some of them regard their co-detainees as friends, when they refer in particular to their compatriots. They express trust in other people and they mainly mention that their co-detainees are people they can discuss with. In case however they face a problem, most of them claimed that they would refer it to the police staff. Some of them mentioned that they would discuss it with their co-detainees and with the staff of the NGO working in the centre, but the majority felt that it is more efficient to talk to police staff, as they are more empowered or competent to solve certain of their problems in detention. Furthermore, it must be noticed that they basically mean a problem within detention related strongly with the detention e.g. a health problem, difficulties with co-detainees etc. Although the majority of detainees expressed a positive attitude towards their co-detainees, almost half of the detainees mentioned that they have observed problems among other detainees. These problems can be put into two different categories: problems that are less serious and are mostly related to the ill-humoured condition of detention (tensions because of missing cigarettes or of phone calling time) and others related to interethnic or intercultural differences. A mocking behaviour of Georgian Christian women towards Arab Muslim women – in particular at time of praying- was reported as such. The latter kind of problems seems to become more problematic for detainees when they felt that police staff implicitly tolerated it.

3.7. Difficulties of the Life in Detention

The detainees recognize that the most difficult thing they have to face is the negative factors of detention, in other words **detention itself**. Under this we include complaints about being restricted in locked cells many hours per day, lacking freedom in general, lack of activities, limited time spent outdoors, restricted communication with the external world etc. (“We are locked up all day long”, “We cannot do anything in here and we are bored”, “I cannot talk with my family”). The poor standard of living conditions in the centres, in particular in Petrou Ralli, is reported as a major difficulty as well. To the latter they include not only the dirty areas and the unsanitary condition of the facilities (dirty toilets, showers, blankets, and mattresses etc., inappropriate food) but the fact that police staff often poorly treats them. The fact that the facilities look of a low standard reinforces the feeling of uneasiness. Lack of respect, shouting and use of obscene language by police staff and general intimidation by them, are explicitly mentioned as factors which make their detention period more stressful and difficult. Many detainees added to the above the mental stress, worry and anxiety, at least implicitly provoked by detention, as their third most major difficulty. This restless psychological condition is often related to the reasons above but also to the lack of information about their legal status and the length and outcome of their detention. Although most of the detainees are aware of the reasons of their detention, they often perceive it as a punishment, and as such they find it very strict. They often ask “I didn’t kill, I didn’t steal anyone. Why am I here?”. But the question most often repeated, is “When will I get out of here?” They also describe these questions as keeping them awake at night and frustrating them as long as they cannot find the

answers. Detainees couldn't describe a period/ moment, when detention became particularly difficult for them, but in most of the cases they repeat that the longer the detention the more unbearable these difficulties become.

3.8. Self-Perception, special needs and vulnerability

Therefore in a miserable, as they describe it, life-context the self-perception of the majority of the respondents is rather negative. They report: "I feel weak", "I feel hopeless and helpless", "I became pathetic", and "I have lost my force". Their self-perception has worsened during and because of detention "I see myself as a slave". However, most of the detainees do not describe themselves as possessing special needs and they suggest that other individuals or groups of people in detention have special needs and appear more vulnerable. Thus, many detainees reveal non-classical categories of people with special needs in detention by characterising as particularly vulnerable people of particular nationalities such as the Pakistani or the Bangladeshi (either because they stay three months in detention or because they are afraid of the police staff or the police staff shout at them frequently), those who do not speak and understand Greek or at least English (since they have less contact with the police staff, are less favourable to them and their needs are more often neglected), and those without financial resources (since they cannot buy telephone cards to call their families and friends or snacks to supplement their nutrition) and those without family links (since they do not have anyone to support them morally or financially). But certain detainees have also mentioned more classical categories of vulnerability, although to a lesser extent: as such they reported that women in a variety of contexts (a pregnant woman, a woman with a child), minors and sick people are more vulnerable. They also mention drug addicts as a particularly vulnerable group, as they are suffering from withdrawal. Finally, one out of four detainees' answers that everyone has special needs, as a way to say that everyone is vulnerable.

4. ANALYSIS OF THE DATA AND CENTRAL THEMES, CONCLUSIONS AND RECOMMENDATIONS

4.1. Power and vulnerability

At this point we will try to analyse further some of the topics which appeared more frequently during the interviews with detainees and in many cases were confirmed by the police and NGO staff interviews. Their answers regarding their top three difficulties in detention underline the main topics to be analysed. Thus, detention seemed to be very difficult since it was taking place in poor detention conditions and with poor interaction with police staff. The lack of information regarding their detention period and their legal status seems to influence their mental health, since they are continuously occupied by these thoughts.

a) Interaction with Police Staff

Police guards are almost the only persons detained asylum seekers and irregular migrants are in contact with. Thus their role and interaction is of utmost importance. Police guards are regarded as those who one can inform about one's particular vulnerability, who can acknowledge their needs and requests, enforce the daily schedule and the rules in the detention centre, relieve them from certain problems. Although they cannot decide on the release of detainees, they can greatly influence the time they spend in detention. This influence is reinforced since detainees do not have many other people to turn to, apart from co-detainees, who can be equally weak. Thus although detainees declare that they will turn to police staff if they experience a particular problem, they also express a fear of being abused by police staff; the majority of them commented that they have experienced at least verbal abuse. In cases where detainees mentioned that they have been discriminated by police staff because of their nationality or religion, those detainees expressed more vulnerability than others, either by becoming more pathetic or by perceiving themselves more negatively. Regarding the verbal or physical abuse, even when they reveal it, they are very reluctant to make an official complaint, since they are afraid of reprisal. They are afraid of police staff but they show trust in them as well since they are the only "other", the one in whose hand lies their relief. This picture becomes

more convincing, since it is widely claimed by detainees that the quality of police staff is varying; they often mention a number of “good policemen” and a number of “bad”.

On the other hand, police staff is officially charged only with the security of the detention centre, but is in practice overburdened with other duties due to lack of administrative or other staff. They have to assume several duties such as distributing hygiene materials, handing each detainee their medicine and buying things for them. In an informal context police guards sometimes complain that “We have become nurses” or “hairdressers” or “We became policemen to fight crime, but we are stuck keeping illegal immigrants”. Although the staff interviewed in both detention centres expressed sympathy for the detainees, some police guards explicitly declared during informal chats that they don’t like aliens or that they feel that aliens are trying to cheat them.

In the way detention centres operate today the dependence of detainees on police staff is obvious. Furthermore, the complaints of detainees of verbal or physical abuse, demonstrate major tension between them and police staff and an often inappropriate treatment. A breakthrough change would be to employ civil staff in the detention centres and to limit the number of police staff to those needed for external security. A more moderate change would be to employ at least some administrative and other staff according to the needs and capacity of the detention centre. These employees (psychologists, social workers, and administrative staff) would be in charge of the distribution of the hygiene materials and medicine to the detainees, the organisation of several activities within the detention centre, of their psychological support and their physical and mental well-being. In any case, the staff employed in a detention centre should be trained to work with people from other nationalities, to recognize and respect their rights and the differences in their culture and religion, so as to overcome their preconceptions and their implicit or explicit racism. Finally, the role of interpreter services (even by telephone access) could better serve many of the needs of detainees and facilitate the exercise of their rights.

b) Detention Conditions

As mentioned above, the majority of detainees complained for the poor detention conditions. The poor standard of living conditions, in particular the level of the centre’s sanitation, ranks highly among detainees concerns. Detainees who feel negatively about the standard of conditions in the centre rank this factor as one of their top difficulties. Thus 94% of those who comment negatively on the centre’s conditions also say that the poor detention conditions are their second-most difficulty in detention. The standard of conditions may also have an impact on physical health as 90% of detainees who comment negatively on the centres conditions also say that being in detention has negatively impacted their physical health.

The numbers indicate that detainees who feel negatively about the centre’s conditions also feel that life in detention is worsening for them. When examining how the standard of living conditions impacts detainees’ self-perception, the numbers indicate that those who feel negative about the conditions of the centre also feel quite negatively about themselves.

Most of the detainees interviewed declared that they were held in poor detention conditions, in dirty places, they were deprived of their interests, they had limited contact with the external world (many of them didn’t receive any visits and they couldn’t afford buying telephone cards) and very few moments of entertainment, since they rarely had the chance to participate in any activities and spend their time creatively (books, TV, music, sports). Accordingly they declared that they were locked in cells many hours per day and they were not given the chance to occupy themselves and their minds with anything else apart from their life in detention.

The importance of the detention conditions and its influence to the vulnerability of detainees also becomes apparent if we compare the replies of the detainees in Petrou Ralli with those in Amygdaleza, where only minors, a classic category of vulnerable persons, are detained. The fact that detention conditions in Amygdaleza detention facility and

interaction with police staff were of a better standard is certainly connected with minors appearing to be less vulnerable than adult men in many cases.

The above lead to the obvious conclusion that although detention as such is always unfortunate, the quality of the detention conditions influences the vulnerability of the detainees and their daily life. For that reason, there is wide room for improvements of the detention conditions of Petrou Ralli Detention Facility and many others, which are of similar or worse standard. First and foremost care must be given to face the problems created by overcrowding, so as to eliminate the phenomenon of sleeping quarters being used above capacity, and of detainees sleeping on the floor. More effort for sanitation of the common rooms (sleeping quarters, toilets and showers) should be undertaken, since the majority of detainees complained about their unseemliness and some of them mentioned the presence of scabies and cockroaches. The lack of sheets and the dirty blankets and mattresses were also mentioned as reasons for feeling uncomfortable and having difficulties in sleeping because of the itching they provoke.

Complaints about food, at least those related with their religious beliefs, should be taken into consideration. In that case, special concern should be given so as to respect for example the wish of Muslims not to eat pork, without depriving them of food. Thus, the competent authorities should try to distribute either special meals to Muslims or offer them the possibility to cook for themselves. Furthermore, the lack of food "for Muslims" is also referred by the staff as one of the main difficulties detainees have to face.

Taking into account that the right to communication with the lawyer and the family/ friends is not restricted by any law, as well as the fact that there is a strong need of detainees to communicate with the external world, telephone access should be unhindered and telephone cards should be distributed at least to those who cannot afford them. The possibility to call foreign countries with international pre-paid phone cards, which cost less than the regular phone cards, should be reviewed and finally facilitated, since many detainees complained about the fact that the telephone boxes are locked and the use of these cards impeded (as a matter of fact they have to pay four Euros for a three minutes call to Iraq instead of a half an hour call). Additionally, the policy to prohibit the use of mobile phones should be reviewed. It has been observed in other countries, where the use of mobile phones is permitted, that it did not influence the level of the security in the detention premises. Regarding the time spent in detention, more educational and recreational activities should be offered and the time spent outdoors should be significantly extended, so detainees could spend at least a few hours every day in open air. A library with books in the languages spoken by detainees would positively influence their detention time. Furthermore other ways to improve the detention time would be the possibility for TV watching, radio listening and computer access.

Finally, the practice of keeping cells locked for the majority of day-time should be reviewed since it greatly hinders the movement of detainees and reinforces the feeling of imprisonment. This opinion is also reinforced by the fact that many detainees complained that they found it difficult to go to the toilet whenever they felt necessary, since they had to call and wait for the police staff to unlock the doors and that many times during the night they had to use bottles. Taking into consideration that the majority of detainees have not committed any other crime apart from entering or staying in the country without the necessary documents, it is irrational to regard and treat them as "dangerous", for that reason only. Further, imposing on them stricter security measures than on prisoners seems disproportional and unnecessary. At this point, it should be noted again that according to the law, detention should be imposed only on those aliens under deportation, who are either dangerous for the public order or suspect to escape, in order to secure their deportation, and it is a misinterpretation and misuse of the law to impose it on everyone regardless of the above criteria. Further more, when detention is finally imposed, it shouldn't restrict the movement of the detainees within the detention centre to such an extent so as to violate other basic rights, as it seems to happen now.

Furthermore, alternatives to detention should apply in the cases of minors, asylum seekers and others regarded as vulnerable individuals or groups (e.g. because of health condition, former traumas, victims of torture or trafficking et.c) since detention is not convincingly justified in these cases according to the law and it further traumatizes the already more vulnerable ones. Last but not least, the legal amendment that extended the detention period from three to six

months creates serious concerns. Taking into consideration the poor detention conditions that characterize most of the detention premises, it is completely inappropriate to detain people in these conditions. Thus, detention should be limited to the least time necessary and not be used as a punitive measure against people, who cannot be deported.

c) Lack of Information

Following the interviews conducted with detainees, it became obvious that the majority of detainees wished to have more information about their asylum or immigration case and their situation in detention. The questions asked most often are about the time of their release or of their deportation. It should be further mentioned that the majority of those detainees do not report having access to a lawyer.

It should also be noted that according to the data findings, the detainees who wish to know more about the duration of their detention, also rank as a top difficulty in detention the negative factors associated with it, such as stress, anxiety, isolation from the outside world, loss of rights etc.

The data shows probably that the lack of information impacts the detainees' well being. We can see as evidence that 71% of the total sample simultaneously says that they do not know when they will be released, and that detention has a negative impact on their mental health. Furthermore, the majority of the total sample simultaneously says that they do not know when they will be released, and that detention has increased their anxiety, worries and uncertainty for themselves and others. Thus the lack of information becomes an additional cause for anxiety and worsens detainee's well-being.

Furthermore the interviews with the detention centre staff confirm that one of the main problems detainees have to face is the insufficient information about their status/situation, worded as "the stress for their legal status", "The fact that they don't know when they will be released or expelled" and "the language difficulties which lead to lack of communication". The same is confirmed by the NGO staff, who rank the lack of information and the violence among the top difficulties detainees have to face.

There are several measures that would help minimize lack of information. Some detainees complained that they haven't received the information bulletin and the majority of detainees couldn't describe either the rules of the detention or their rights. For that reason, it is necessary to secure that every detainee comes into possession of the information bulletin or a decision, where the reasons, the length of the detention and their rights are fully described in their language. Taking into consideration that some detainees are illiterate, the possibility of using oral interpretation services accessible at least by phone would be of utmost importance. Furthermore, the fact that some among the detainees apply for asylum during detention, but they do not receive any information about their asylum process if they don't have a lawyer, reinforces the need to access more detailed and relevant information in a language they understand. Thus, the lack of information would be better served with the presence of "cultural mediators" or specially trained translators. These professionals will be able to speak the language of detainees and trained to inform them about the asylum procedure, the reasons and the length of the detention, the possible outcome of the detention, the procedure to be followed in case of a positive or negative examination of an asylum claim or of deportation. But apart from the general information, they will be able to refer to or ask the competent authorities about the progress of individual cases and to pass this information to detainees. Finally, legal aid is also an institution greatly needed for detained persons, especially when it comes to detained asylum seekers. These detained asylum seekers are usually rather vulnerable individuals as they may have suffered persecution in their countries and they are now in custody in the host country. Furthermore, as was articulated by the interviewed detainees, the reason for their detention and the procedure to be followed may not be totally clear to them. They do not speak the language; they do not know the law or what will happen to them. In cases where a lawyer is not affordable for the detainee, the state should provide competent legal aid.

4.2. Conclusions

This research has offered the chance to look deeper into detainees' vulnerability due to and during detention. Poor detention conditions, interaction with police staff and lack of information appeared as the most important themes for them to mention, which influence their life in detention. Hopefully, some of the comments and recommendations provided here will be soon adopted in order to ameliorate detention conditions.

However, it should be noted that since detention is prescribed by law as a means only to facilitate deportation under certain conditions, it should not be used without discretion. That means that in cases of asylum seekers or when it is well-known in advance that a deportation will not be feasible, detention lacking legal basis should not be used. In these cases at least, alternatives to detention should be considered. Furthermore, alternatives to detention should be considered for every individual case and detention should be used only as a last resort and for the shortest possible and necessary time to fulfil its aim. In any case the detention of minors and other "vulnerable" people (victims of torture, traumatized people, trafficked people, individuals with health problems, etc.) should be strictly avoided and alternatives to detention should be exercised.

Additionally, a law that takes into consideration state's international obligations should dictate the practice. Thus, when it comes to detention, lawfulness should be determined by a combined and consistent reading of national, European and international law; therefore a **legal basis** is necessary for ordering detention. In this context detention is lawful, **if action is being taken with a view to deportation** or extradition. When this kind of action is missing (asylum seekers, unfeasible deportations, protection of unaccompanied minors etc) detention cannot be lawful. Furthermore, it would be unreasonable to regard one's detention as lawful when the particular detention conditions may **violate article 3** (prohibition of torture or inhuman or degrading treatment or punishment) of the European Convention of Human Rights. When detention conditions are such so as to lead to inhuman or degrading treatment, then detention cannot be considered as lawful. Detention in practice should comply with these standards.

Finally, it is noteworthy that the police circular regarding the treatment of detainees characterizes asylum seekers and aliens in general as particularly vulnerable groups of detainees among others; the reasons can be many (language ignorance, lack of family links and friends in the host country, limited access to information, lack of moral, legal and financial support, double persecution effect, defenceless to power et.c). Vulnerability requires more state concern. Contrary to that, our policy is to detain people who are seeking to save their lives from persecution or who are claiming better opportunities in life. Taking into consideration this perspective could be a useful starting point for the practice.



NATIONAL REPORT: HUNGARY

By: Hungarian Helsinki Committee

Preface and acknowledgments

The information contained in this national report is current on 1 April 2010. As a result of parliamentary elections, a new government was formed in Hungary in May 2010. This may lead to significant policy and legislative changes in the field of migration and asylum quite soon. Changes in the actual detention regime (e.g. location of detention facilities) have already been implemented to some extent in April 2010; however, at the time of writing, it is too early to make final observations on these changes.

The Hungarian Helsinki Committee would like to express its appreciation to the police officers responsible for alien policing issues at the National Police Headquarters and at county police headquarters, who assisted the research with information during our visits to the detention facilities. Similarly, we would like to thank the staff of the Békéscsaba reception centre of the Office of Immigration and Nationality for their help during our research visit.

We are particularly grateful to the migrants who agreed to take part in the interviews and to share their experience and concerns with us.

Methodology (as applied in the national context)

The Hungarian Helsinki Committee (HHC) visited all existing alien policing jails in Hungary:

- Ferihegy Budapest airport (6 August 2009)
- Nyírbátor (18-19 May 2009)
- Győr (3 August 2009)
- Kiskunhalas (17 April 2009)

The HHC also visited the closed reception centre for asylum seekers in Békéscsaba on 16 April 2009.

We conducted interviews based on the three types of common questionnaires formulated by JRS at the beginning of the project: questionnaires for detainees, for NGOs and for staff from detention centres.

All together we conducted 34 interviews with detainees from Kosovo, Algeria, Jordan, Armenia, Syria, Morocco, Serbia, Nigeria, Ivory Coast, Vietnam, Iraq, Moldova, Sudan, Ghana, Bosnia, Pakistan, China, Somalia, Afghanistan and Tanzania.

In Hungary, the Hungarian Helsinki Committee is the main NGO that has regular access to detention centres, which are maintained by the Police. Access is based on a bilateral agreement of cooperation between the HHC and the National Border Guard Headquarters (succeeded by the Police), signed in 2002, which allows the HHC to provide legal assistance to detained migrants and to monitor conditions of detention in alien policing jails. Therefore we conducted interviews with our lawyers that regularly visit alien policing jails.

In the Békéscsaba reception centre, the Menedék-Hungarian Association for Migrants is very active in providing social assistance to asylum seekers. We conducted an interview with one of their social workers who is present on a daily basis in the centre.

Finally we managed to obtain one staff interview with the head of the alien policing jail in Kiskunhalas.

1. INTRODUCTION

A mixed population of detained asylum seekers and/or illegally staying third-country nationals can be found in a total of 4 alien policing jails in Hungary. The police run the alien policing jails, where the maximum length of detention cannot exceed 6 months. The regime in the alien policing jails is very strict and provides nearly no social services or leisure or educational opportunities for detained migrants.

A closed reception centre for asylum seekers is run by the Office of Immigration and Nationality in Békéscsaba. Although this is a closed centre, the regime applicable is far less strict than in above mentioned alien policing jails. The population of the centre is exclusively asylum seekers and they can move freely within the centre, including the yard. However, since they cannot leave the centre on their own will, the centre can be considered as *de facto* detention.

2. NATIONAL LEGAL OVERVIEW

Hungarian legal regulations applicable to the detention of migrants are:

- Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (TCN Act)¹⁴⁸
- Government Decree no. 114/2007 on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals¹⁴⁹

Hungarian legal regulations in the field of asylum:

- Act LXXX of 2007 on Asylum (Asylum Act)¹⁵⁰
- Government Decree 201/2007 implementing Act LXXX of 2007 on Asylum¹⁵¹

2.1 Legal grounds for detention

The TCN Act establishes two different types of detention measures:

- i) detention prior to expulsion
- ii) alien policing detention,

Both types of detention apply to irregularly staying foreigners apprehended by the immigration authority (Office of Immigration and Nationality (OIN) or the Police). These categories correspond to foreigners in various situations: irregular immigrants not complying with an order to leave the territory of Hungary; foreigners against whom an expulsion order had been issued and foreigners against whom the competent penal court issued a sentence declaring them undesirable in Hungary.

Asylum seekers may also be detained in alien policing jails if they had been given an expulsion order before they had applied for asylum (e.g. if they do not submit an asylum application immediately upon their interception when crossing

¹⁴⁸ http://www.complex.hu/ir/gen/hjegy_doc.cgi?docid=A0700002.TV (in Hungarian)
<http://www.unhcr.org/refworld/country.LEGAL..LEGISLATION.HUN.,4979cae12.0.html> (in English)

¹⁴⁹ http://www.complex.hu/ir/gen/hjegy_doc.cgi?docid=A0700114.KOR (in Hungarian)

¹⁵⁰ http://www.complex.hu/ir/gen/hjegy_doc.cgi?docid=A0700080.TV (in Hungarian)

<http://www.unhcr.org/refworld/country...LEGISLATION.HUN.,4979cc072.0.html> (in English)

¹⁵¹ http://www.complex.hu/ir/gen/hjegy_doc.cgi?docid=A0700301.KOR (in Hungarian)

the border unlawfully). Once their asylum claim reaches the in-merit stage of the procedure, they should be released according to the law. Unfortunately this is not always the case.

The initial decision on ordering detention is taken by the alien policing authority (alien policing detention or detention for preparation of expulsion).

In the Hungarian legal framework no general rule provides for the automatic, mandatory detention of asylum-seekers. In principle, asylum-seekers are first accommodated in the closed reception centre in Békéscsaba, for the time of preliminary assessment procedure, from where they are sent to the open reception centre in Debrecen if their case is found admissible.

Since the closed reception centre in Békéscsaba is not considered as detention, there is no detention order, only a decision of the asylum agency that the asylum seeker's place of designated stay shall be the Békéscsaba reception centre.

(i) Detention prior to expulsion

Section 55(1) of the TCN Act:

"The competent immigration authority may order the detention of the third-country national prior to expulsion in order to secure the conclusion of the immigration proceedings pending, if his/her identity or the legal grounds of his/her residence is not conclusively established."

(ii) Alien policing detention

Section 54 of the TCN Act:

In order to secure the expulsion, the alien policing authority of the OIN may order the alien policing detention of the person concerned if:

- a) *he/she is hiding from the authorities or is obstructing the enforcement of the expulsion in some other way;*
- b) *he/she has refused to leave the country, or, based on other substantiated reasons, is allegedly delaying or preventing the enforcement of expulsion;*
- c) *he/she has seriously or repeatedly violated the code of conduct of the place of compulsory confinement;*
- d) *he/she has failed to report as ordered, by means of which to forestall conclusion of the pending immigration proceeding;*
- e) *he/she is released from imprisonment as sentenced for a deliberate crime.*

The substance and legitimate aim of 'alien policing detention' is to ensure the implementation of the expulsion order."

(iii) Closed reception centre for asylum seekers Békéscsaba

According to Section 48 (1) of the Asylum Act, the refugee authority shall designate a reception centre as a place of residence for the foreigner seeking recognition as a refugee or as a beneficiary of subsidiary protection, until the decision closing the preliminary assessment procedure becomes final, unless the applicant is under the effect of a measure restricting personal freedom or under the effect of punishment. In practice these asylum seekers are placed in the reception centre in Békéscsaba. According to the law, this reception centre is not considered as a detention facility, but since the asylum seekers' freedom of movement is limited insofar as they are not allowed to leave the facility, this is *de facto* detention. *"The applicant may only leave the reception centre in particularly justified cases, with the permission of the refugee authority, provided that his/her absence does not prevent the performance of the relevant procedural acts."* (Section 48(2) of the Asylum Act). However, such permission is only granted in extremely rare cases.

2.2 The minimum age for detention

According to the TCN Act, Section 56, third-country nationals under the age of 18 years may not be detained based on immigration law or prior to expulsion.

This does not apply in the case of the reception centre in Békéscsaba, where all asylum seekers, regardless of their age, are placed during the preliminary assessment procedure.

2.3 The judicial review of the detention order

Hungary established a system of a built-in judicial review guaranteeing the legality of ordering, and the lawfulness of maintaining, the alien policing measure involving deprivation of liberty. According to the TCN Act, Section 54(3) “*detention under immigration laws may be ordered for a maximum duration of seventy-two hours, and it may be extended by the court of jurisdiction by reference to the place of detention until the third-country national's departure, or for maximum thirty days.*” The prolongation of the alien policing detention measure shall be reviewed every 30 days upon the reasoned motion of the Alien Policing Authority submitted eight days prior to the expiration of the detention measure.

Regarding placement in closed reception centre in Békéscsaba, no judicial review is possible.

2.4 The right of appeal against the detention order and to challenge detention conditions

(i) Right of appeal against the detention order and provision of information

Although the foreigner is not entitled to demand the suspension of the alien policing measures involving deprivation of liberty or to submit an administrative appeal against the decision imposing detention, it is possible to file an application to the court within 72 hours requesting the review of the legality of the alien policing measure entailing deprivation of liberty (TCN Act, Section 57(2)).

In practice, however, it seems that courts often render their decisions almost automatically, based on the motion of the alien policing authority and without duly assessing all the relevant circumstances of the case or the possible applicability of the principle of *non refoulement*. Moreover, penal judges of local or county courts, who often do not have the necessary expertise to make a meaningful assessment of asylum cases and treat alien policing cases as a ‘branch’ of penal cases, are in most cases assigned to review the prolongation of alien policing detention measures. This is highly inappropriate, considering the non-penal character of alien policing cases and especially those of asylum seekers.

The legislation does not say who should inform the detainee and how, neither does it specially mention the right to appeal. In practice the detainees are informed about their rights by the police, who use a general leaflet in different languages to inform foreigners in detention, entitled “*General information sheet on the fundamental rights and responsibilities of foreigners in alien policing procedures*”. The HHC’s experience with foreigners in detention shows that the wording of these information leaflets is often too complicated and detainees are not fully aware of their rights and obligations. Once the detention is prolonged by the court, the detainees receive this decision only in Hungarian, which is often insufficient since most of the detainees do not speak Hungarian and they may be illiterate as well.

Given that no formal decision is taken about the *de facto* detention in closed reception centre in Békéscsaba, asylum seekers cannot seek judicial review.

(ii) Right to challenge detention conditions

The third-country national placed under detention in alien policing jails may lodge a complaint to the local court of jurisdiction if their rights under the TCN Act are not respected (TCN Act, Section 57(3)).

For asylum seekers in Békéscsaba, Section 35(2) of Government Decree implementing the Asylum Act is relevant. It sets out that applicants in need of assistance under no circumstances may be deprived of their right to receive housing and nourishing. This assistance is a duty of the state (Section 12(1)), thus if the reception centre fails to comply with its obligation there must be an option to lodge a complaint first to the director of the reception centre and

finally to the OIN, as it is the supervisory body of the reception centre. However, this is not regulated in the Asylum Act or in the Government Decree.

2.5 The right to information about the detention order and/or the reasons for detention

This right is not explicitly mentioned in the law, but there is an obligation of the authorities to communicate the resolution ordering detention to the detainee in a language that he/she understands (TCN Act, section 89).

The act on Administrative Procedure guarantees the right to use one's native language in every administrative procedure consequently persons subjected to an alien policing procedure are also entitled to use their language and be informed (Section 10).

2.6 The maximum duration of detention

Any alien policing measure that involves the deprivation of liberty shall be terminated immediately whenever 'it becomes obvious that the expulsion cannot be implemented' (Section 54(4), TCN Act). The deprivation of liberty cannot exceed six months (Sections 54(4)c of TCN Act).

Asylum seekers are placed in Békéscsaba reception centre during the preliminary assessment procedure, which according to the Asylum Act, Section 47, shall be completed within fifteen days. This period is unfortunately not respected in cases of asylum seekers who fall under the scope of the Dublin Regulation. Those asylum seekers are currently *de facto* detained in Békéscsaba during the entire Dublin procedure, the duration of which may amount to several weeks or months.

2.7 The provision of health care and the scope of health care benefits, and for the provision of social services

(i) Provision of health care

According to the TCN Act, Section 61(3), third-country nationals placed under detention shall have the right to emergency and basic medical care. Section 138□140 of the Government Decree implementing the TCN Act provides that foreigners detained in an alien police jail are entitled to all necessary medical care free of charge, if they are not covered by social security insurance. Section 138 lists the health care services to which they are entitled.¹⁵² Those health services have to be ordered by the doctor performing basic medical care or the specialized doctor of the out-patient services or in-patient health care institution (Section 139).

For asylum seekers, the Government Decree implementing the Asylum Act provides in Section 26(1) a long list enumerating the types of health care services that should be provided for free in case the asylum seeker does not

¹⁵² Section 138 of Government Decree implementing the TCN Act:

a. examinations and treatment included in basic medical care;

b. examination, treatment received as a part of emergency out-patient specialized treatment – including emergency dental care – as well as medications and bandages used during treatment;

c. epidemic vaccination, examinations and health care;

d. following care specified in (b)-(c), following out-patient specialized treatment or inpatient treatment received in a health care institution, until his/her recovery or stabilization of condition

da) necessary examinations and medical treatment,

db) medication not substitutable by other type of medication, not included in (f) and the therapeutic equipment needed for the administration of the medication;

e. care during pregnancy and childbirth, including proper information on healthy lifestyle and preparation for appropriate nursing care;

f. in case of urgent need other health care services shall be provided to the foreigner in accordance with separate legal regulation on health care;

g. in case of treatment specified in (b)-(e), transportation if the foreigner's transportation cannot be arranged otherwise on account of his/her medical condition.

benefit from social security insurance.¹⁵³ In addition, Section 34(1) of Government Decree adds that persons requiring special treatment are furthermore entitled free of charge to all health care services that prove necessary having regard to their (special) medical condition.

(ii) Provision of social services

Legislation does not provide any provisions of social services in alien policing jails.

For asylum seekers placed in reception centres, the Asylum Act, Section 26 provides that the conditions of reception include social care as well. Section 14(2)(c) of the Governmental Decree further provides that the asylum authority may enter into contractual obligation with a service provider to provide the applicant with social and psychological services.

2.8 Contact with outside world

Section 61(3) of the TCN Act provides that the detained foreigner shall be entitled:

„(b) to consult their legal representative or a member of the consular representation of their host country without any supervision, and to be visited by relatives under supervision ;

(c) send and receive packages and letters as specified in specific other legislation, and to receive visitors”

2.10 Legal grounds for the provision of legal aid and right to interpreter

Access to detention facilities by lawyers providing free legal assistance and representation is guaranteed on the basis of the Co-operation Agreement between the HHC and National Border Guard Headquarters.

For the court proceedings the TCN Act, Section 59, prescribes that *“the court shall appoint a representative ad litem for any third-country national or his/her family member who does not understand the Hungarian language and is unable to contract the services of a legal representative on his/her own.”*

Asylum seekers have according to the Asylum Act, Section 37(3) *“the opportunity to use legal aid at their own expense or, if in need, free of charge as set forth in the Act on Legal assistance, or to accept the free legal aid of a registered non-governmental organisation engaged in legal protection.”*

2.11 Legal grounds for the protection of persons with special needs

¹⁵³ a. examinations and treatment included in basic medical care;
b. examination, treatment received as a part of emergency out-patient specialized treatment as well as medications and bandages used during treatment;
c. treatment received as a part of emergency in-patient specialized treatment - including surgical intervention as well as medications, therapeutic equipment, bandages and meals;
d. following out-patient specialized treatment or inpatient treatment received in a health care institution, until his/her recovery or stabilization of condition
da) necessary examinations and medical treatment,
db) medication not substitutable by other type of medication and the therapeutic equipment needed for the administration of the medication;
e. medication or therapeutic equipment, including its repair, prescribed by a doctor other than medications indicated in points d) and db);
f. emergency dental treatment
g. care during pregnancy and childbirth, including abortive treatment in accordance with the provisions of the act on the protection of the life of the foetus;
i. in case of treatment specified in b), c), d), da) and g) transportation if the person's transportation cannot be arranged otherwise on account of his/her medical condition.
j. mandatory epidemic vaccination.

TCN Act prohibits the detention of minor third country nationals, but makes possible the designation of a compulsory place of residence to minors against whom an alien policing measure involving deprivation of liberty would be applicable (Section 62(1)).

The detention of women is not precluded as such, but TCN Act prescribes that women shall be detained separately from men (Section 61(2)).

As regards the detention of families, TCN Act provides that by way of a temporary measure, the authority ordering detention shall take immediate action concerning the care of the family member of the detained foreigner remaining without supervision or who is dependant on the foreigner (Section 60(3)).

No specific norms govern the health care of seriously ill or foreigners with mental disability detained in alien policing jails. Many asylum seekers suffered trauma or torture, which renders their mental health precarious. Still, victims of torture or violence are not exempted from the implementation of alien policing detention.

Asylum law contains special provisions for asylum seekers with special needs that apply also to the asylum seekers in Békéscsaba reception centre. Asylum Act defines a person requiring special treatment as a vulnerable person, in particular, a minor, unaccompanied minor, elderly or disabled person, pregnant woman, single parent raising a minor child and a person who has undergone torture, rape or any other grave form of psychological, physical or sexual violence and has special needs because of his/her individual situation (Section 2k). A person with special need is entitled free of charge to all medical services necessary with respect to his/her medical condition, also including rehabilitative, psychological, clinical psychological, psychotherapeutic treatment (Section 34(1) of Governmental Decree 301/2007).

2.12 Legal grounds for the alternatives to the detention

TCN Act, 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.”

2.13 Legal grounds for providing release from detention

In terms of TCN Act, alien policing detention shall be immediately terminated when the grounds thereof no longer exist (Section 56(2)). The alien policing detention may last until the conditions of implementing the expulsion order are put in place but no longer than six months. Detention shall be terminated when the conditions of expulsion are assured or when it becomes obvious that the expulsion cannot be implemented (Section 54(4)).

Government Decree implementing TCN Act further states in Section 124(5) that the detention in preparation for expulsion shall be terminated if the proceeding authority has established the foreigner's personal identity or that he/she has been staying lawfully in the country, or if the foreigner's expulsion cannot be ordered due to the existence of the prohibition contained in Article 51(1) of TCN Act (*non refoulement*). If it is likely that the expulsion cannot be carried out even after six months of detention □ especially if the conditions of departure cannot be secured or if, due

to his/her physical state the foreigner is in need of longer hospitalisation the detention has to be terminated (Section 126(5)).

3. OVERVIEW OF NATIONAL DATA FINDINGS

3.1 Basic information

We conducted 34 interviews with detainees. 12% were rejected asylum seeker awaiting deportation, 55% were applicants for international protection, 27% were illegally staying migrants awaiting deportation and 6% were asylum seekers under Dublin II procedure. Average age of interviewees was 29 years (maximum age: 60; minimum age: 16). Majority were men, females make up 21% of the interviewees. Their nationalities were mixed; they came from southern Asia, northern Africa, the Caucasus, the Balkans, eastern Africa, western Africa, the Middle East, Eastern Europe and Southeast Asia, with slightly more Kosovars and Nigerians than others. 58% were single, 39% married and one person reported being divorced.

3.2 Case awareness

56% of interviewees say they've been made aware of the reasons of their detention, but 44% say they haven't. For those who've been made aware, they are most likely to know from the police (27%) or the courts (27%). Two people remarked that their interpreters/translators informed them, i.e. "people not in charge". Level of being informed about their asylum cases is 3.88 on a 10-point scale. 32% of respondents say they are "totally uninformed" and only two respondents (out of 25 valid responses) say they are "totally informed". Most people ask for more information while in detention (93%), in particular for information regarding asylum/immigration procedures (38%); out of 27 valid responses, seven wanted to know the "reasons for detention." Of the people who want more information, 35% say they need it to enable them to make decisions about their future.

The head of alien policing jail in Kiskunhalas estimated that the asylum seekers are totally uninformed about their asylum case, but emphasized that it is not the duty of the detention staff to inform the persons of the reasons for their detention or about their asylum case. This is the duty of the authority that issues the detention order and of the authority responsible for asylum procedure. HHC lawyers also reported low level of awareness.

According to the Menedék social worker in Békéscsaba, the asylum seekers are relatively well informed about their asylum case and why they have to stay in this centre. HHC would like to add that this is not the case for those asylum seekers that are under Dublin procedure, since they can be detained for longer periods, without knowing what is happening regarding their Dublin case.

3.3 Space within the detention centre

42% of the interviewees feel 'neutral' about the condition of the room they sleep in, meaning that they say "its fine" or "it's alright"; however 38% also feel negative. They generally attribute their response to the atmosphere in the room (57%), in particular the ambient temperature. Also 13% attributed their response to the quality of the facilities in their room, i.e. non-functioning electrical sockets, poor toilet facilities.

60% felt 'neutral' about the rest of the centre space, although 23% feel negative. They attribute this response to the general atmosphere of the detention centre (59%), in particular that there is too little space available for detainees. 25% attribute their response to the condition of the facilities, i.e. showers, water. 70% didn't feel that the centre is over-crowded; 30% said they do feel the centre is overcrowded.

A social worker from Menedék reported that Békéscsaba centre is usually overcrowded in winter months, from December to May.

All detainees reported that they don't have a space where they can seek privacy. Head of alien policing jail in Kiskunhalas stated that they accommodate the privacy needs of the detainees by providing lockers to depose private values, possibility to order goods from supermarket and a prayer room.

3.4 Rules and routine

The detainees are generally most aware of centre rules that dictate routine (45%), such as eating, sleeping and outdoor times. But 36% did report an awareness of rules that dictate behaviour, mostly relating to being "locked up" in their room for most of the day, or not being given enough time to use the telephone. Four respondents report that they have "no information about the rules." Some feel that everyone else respects the rules of the centre, but they feel mixed about whether or not detainees can change the rules (14 say no, 10 say yes).

The head of alien policing jail in Kiskunhalas stated that they inform the newly arrived about the rules of the jail with the help of an interpreter and that rules in various languages are also put on the wall. He further claimed that the detainees can propose changes of the rules, for example modification of 'sleeping time'. Every day from 2.30 to 3.15 pm they can submit written complaints or claims.

According to the interviews with HHC lawyers, the detainees can propose changes of the rules, but those proposals are usually not taken into consideration. The rules that most affect their lives are the strict rules regarding the time spent outside of their rooms, particularly for males. The lack of liberty affects the lives of the detainees in psychological and physical sense. The lack of activities is very detrimental as well.

According to the Menedék social worker in Békéscsaba, the asylum seekers cannot propose changes to the rules. The rule that the most impacts their lives is to maintain the hygiene in the common spaces, for example at the toilets and in the kitchen. This provokes conflicts between the asylum seekers, since they have different religions and nationalities.

3.5 Detention centre staff

Detainees mostly encounter security/police staff (93% of respondents). They report their level of interaction with staff as negative (36%), or "varying" (28%); 28% report their interactions as "neutral." Only three respondents reported their interactions positively. Majority don't experience discrimination from staff, but a significant minority, nine persons (or 27%), say they do. Of those nine that do report discrimination by staff, five attribute it to "ethnicity/nationality" while four attribute it to "interpersonal reasons". 50% feel that staff doesn't support their needs; 27% say staff positively supports their needs. Most respondents attribute this answer to special needs or requests (52%), but 36% say it relates to all of their needs.

Head of alien policing jail in Kiskunhalas estimated the level of rapport between the detention staff and detainees as fair. The only difference in treatment is accorded to women that are not obliged to eat in dining rooms and to elderly people or pregnant women that are treated with special attention.

3.6 Level of safety within the detention centre

According to the interviews the level of safety is 8.03 on a 10-point scale. 56% of respondents report feeling "very safe," while only one respondent reported feeling "very unsafe." They attribute their feelings of safety to "not being afraid", i.e. a good sense of self-security. No one attributes their level of safety to the staff. Majority doesn't experience any mocking or insults from others (85%), but five respondents (or 15%) say they have been mocked or

insulted. Of those five, all blame the security/police staff for reasons ranging from racial/culture/ethnic reasons, to simply staff unfriendliness. The staff does not physically abuse them (97%), but one person does report physical abuse. This person blames a quarrel with a co-detainee. 91% despite their expressed need to receive more information about their asylum/immigration case, or the reasons for their detention, have never filed a formal complaint to the centre's authorities. Three respondents say they have, and all say the result has been unsuccessful.

According to the Menedék social worker in Békéscsaba, the security in the centre depends on the asylum seekers and their behaviour. The number of security staff also matters and since they are not many, they cannot be present everywhere all the time.

3.7 Activities within the detention centre

Some detainees don't seem sure if the centre provides activities or not: of those who responded, 58% say the centre doesn't provide activities, while 42% say the centre does. Of those who say the centre does provide activities, most participate in sports activities, but also in "entertainment" related activities, i.e. television. Out of eleven valid responses, eight say they do these activities for stress relief. Out of 14 valid responses, eight say they don't do activities because they are unaware of them. They generally have access to television, telephone and to outdoor space, but not to books, computers, the Internet or educational activities. 40% report having access to sports equipment, although it is unclear whether they provide this themselves or if the centre provides it. When asked what activities they would want, they mostly responded with *needs* instead of *activities*, i.e. better facilities. But 24% report wanting access to more entertainment-related activities; not television, in this case, but rather more access to books.

According to the head of alien policing jail in Kiskunhalas, they do not provide any activities for the detainees.

A Menedék social worker in Békéscsaba said: "We need to turn their attention to these activities and then they participate."

3.8 Medical issues

Majority of detainees reports to be aware of the existence of medical staff in the centre (91%), but the number of encounters varies: 50% say at least "once per week" or when needed, and 41% say "less than once per month." They know that they are meeting with doctors, but they seem unaware whether or not other medical staff are nurses or not (44% say they meet with nurses, 56% say they don't). 79% said they received a medical exam when they arrived to the centre, but this exam may not be very thorough. The medical staff uses a language that they understand, but a significant minority (38%) said they don't understand the language used by the medical staff.

Average physical health *before* detention is 7.38 on a 10-point scale. 38% of respondents described their physical health as "very good", and 35% reported it as "fair". Average physical health *during* detention is 6.09 on a 10-point scale, or a 1.29-point drop. Most respondents reported their physical health in detention as "fair" (53%), while 26% said it was "very good". 83% responded that their physical health has likely been negatively impacted while in detention. They likely attribute this response to the quality of the detention centre facilities, i.e. poor air quality, ambient air temperature, quality of bedding, etc.

Average mental health *before* detention is 7.37 on a 10-point scale. 37% of responses described their mental health as "very good", and 33% say it was "good". Average mental health *during* detention is 4.67 on a 10-point scale, or a 2.70-point drop. 23% of responses describe their mental health as "very poor", and 40% as "fair". However a significant minority still report their mental health as "good" (27%). Their mental health has likely been impacted while in detention, and they attribute this impact to detention in general, i.e. anxiety and uncertainty about his personal situation, worries about family, a desire to be free, reports of sadness, concerns about the poor state of facilities. A slight majority report that they want extra medical services (59%), compared to those who don't want extra medical

services (40%). Nine out of eleven who offered supporting responses said they want better access to appropriate medical care.

The head of the alien policing jail in Kiskunhalas reported that paramedical staff is always present during the office hours, but the doctor comes only upon request. In case the centre staff cannot respond to the medical needs they provide the detainees with access to external medical care. The head of the alien policing jail observed that most of the detainees get depressed if kept for a longer time, also due to the lack of information.

According to the Menedék social worker from Békéscsaba the main problem is communication and therefore some services can be out of reach. Their organization has staff that speaks more languages and they try to help asylum seekers by facilitating their communication with medical staff.

Lawyers from HHC reported that detainees in general complain that the doctors usually prescribe them sleeping pills for any sort of problems. The detainees are taken to the psychologist only when it is an emergency (e.g. attempt of suicide).

3.9 Social interaction within detention centre

Detainees generally describe their interactions with other people in the centre in “neutral” tones (58%), but 39% do describe interactions as “good”. They don’t tend to give a specific reason for the quality of the interaction, but instead describes it as “ok”, or “normal”, or “fine”. Majority doesn’t report any problems with other detainees – the few who do (six out of 34 respondents) blame existing problems on “common life in detention” and “inter-cultural tension”. 13 out of 34 respondents say they don’t trust anyone in the detention centre; seven say they do. Of those seven, four say they trust detention centre staff (mostly security/police), and three say they trust co-detainees.

The head of the alien policing jail in Kiskunhalas said that the communication between the detainees and staff is normal, but the guards are not allowed to be too friendly. Sometimes verbal insults occur among the detainees, but physical aggression is rare.

HHC lawyers report a low level of rapport between the detainees and staff, due to the language barriers.

3.10 Contact with the outside world

Majority has family in their country of origin, and the family is most likely being supported without their help. But a significant minority (41%) says their family is not being supported. 56% likely do not have any family or friends in Hungary, but a significant minority (44%) say they do. Mostly they have access to the telephone, and not to the Internet, mail and personal visits. 68% of respondents describe the telephone as the best means of communicating with the outside world, and most say they have access to it. However, many say that the centre does not afford them enough time on the telephone (only five minutes). Although they have access to the telephone, they would prefer be able to talk for longer. In general, they do not receive personal visits from anyone. A significant minority (39%) say they do receive visits from lawyers.

According to the HHC lawyers, the problem is that if the detainees don’t have money, they cannot order a telephone card. It should be also noted that the time restriction for using the phone only applies in alien policing jails and not in the reception centre in Békéscsaba.

3.11 Conditions of detention and the family

Children are not detained in alien policing jails at all. Married couples are separated and accommodated in different departments. They can speak with each other only through the bars that separate the ward for men from the ward for

women in the Kiskunhalas jail. In Nyírbátor, since the two wards are on separate floors, married couples cannot speak to each other at all, unless the guards provide a special supervised opportunity for them to meet.

In the Békéscsaba reception centre, the families are accommodated in a special protected area, which is a separate floor in one of the buildings. According to the social worker from Menedék the staff is very kind with the children. Their organization provides a person who works with children every day for 6 hours. There is space where children can play, study and do other activities. However, formal school education for children is unresolved in this reception facility.

3.12 Conditions of detention and nutrition

The majority of detainees don't tend to enjoy the food provided by the centre (58%), but a significant minority (42%) says they do enjoy the food. Of those who do not like the food, 32% attribute their response to the lack of variety offered, and 23% to the poor quality of food. 64% of respondents say their appetite has changed as a result of being in detention: when asked in which way, 12 out of 13 valid responses say, "lost appetite". When asked to describe how this has impacted them, 10 out of 11 valid responses say they "feel worse".

According to the head of alien policing jail in Kiskunhalas the problems are weekends, when only canned food is served and the detainees do not eat that kind of food. However in general the detainees become stronger, due to the regular nutrition and sport activities. According to the HHC lawyers this is not the case in Nyírbátor and Győr alien policing jails, where they observed that the detainees in general loose weight. According to the observations of HHC lawyers, in alien policing jails the detainees have no opportunity to make coffee or tea during the day and during the Ramadan no adaptation regarding the meals is made.

According to the Menedék social worker in Békéscsaba the main reason for dissatisfaction with food is that the asylum seekers are not used to that kind of food (e.g. lots of bread, little rice and vegetables) and they don't eat it.

3.13 Conditions of detention and individual

Respondents attribute their *first difficulty* in detention to simply being in detention (57% of valid responses). Specifically, respondents mention the "loss of rights" that comes with detention, i.e. no freedom, being in a prison-like situation, no liberty. A significant minority of respondents attribute their first difficulty to the state of living conditions (24%), i.e. poor facilities, poor food, not enough space to move around. Respondents attribute their *second difficulty* to the living conditions of the centre (60% of valid responses), i.e. not enough activities, not enough space to move around, poor toilet facilities, poor food. However 30% of those who responded continue to attribute difficulties to detention in general, i.e. lack of means to communicate with the outside world, no freedom, uncertainty of their case. Respondents attribute their *third difficulty* in detention once again to living conditions (58% of valid responses), with particular mention to the quality of the food provided. 29% continue to blame detention in general. However, most respondents did not offer a "third difficulty" while in detention, making the weight of these responses weak. 15 out of 18 valid responses reported that these difficulties have not changed in detention. When asked if there has been a time when life in detention became difficult, 64% said yes (36% said no). They attribute their responses either to specific events and/or circumstances or simply to "everyday" difficulties (43%).

The majority doesn't know what the outcome of detention will be (approximately 75% of responses). Moreover, they don't know when they will be released from detention (88% of responses). This lack of knowledge/awareness creates a strong sense of worry and anxiety (46%), and has left respondents with a very negative impression of their detention (46%). These responses tend to be unspecific.

67% report that they don't sleep well in detention but a significant minority says they do sleep well (33%). Those who don't sleep well tend to blame the stress of detention and the anxiety/worry that is caused as a result.

In 12 out of 17 valid responses, detainees say they do not have special needs. When asked if they know of anyone else in the centre that is vulnerable, 10 out of 19 respondents mentioned those who possess “classic” special needs, i.e. women, single mothers with children. Six out of 19 respondents mention those with “other” special needs, i.e. those that cannot speak the language of the centre’s staff, those with no money, old people, and people of particular nationalities (Albanians and Afghans).

The head of alien policing jail in Kiskunhalas reports that the detention staff is mostly not aware of the detainees’ release in advance and they do not want to inform the detainees earlier, due to the fear of aggressive reactions. According to him the three main difficulties faced by the detainees are lack of due information on asylum and voluntary return proceedings, lack of education or spare time activities and a lack of possibility to clean their own clothes. The most vulnerable persons are women and the weakest within the group or those ‘mobbed’ by the others.

According to the HHC lawyers, the main difficulties in alien policing jails are lack of activities, bad food and lack of information, deprivation of liberty itself, lack of contact with families and the length of deportation procedure. The most vulnerable are asylum seekers and among them particularly women, severely traumatised persons, mentally disabled and sick.

According to the Menedék social worker in Békéscsaba, the three main difficulties are unknown environment, different nations and different cultures and language barriers.

4. ANALYSIS OF DATA AND CENTRAL THEMES

With the analysis of collected data from the interviews, we identified three main themes that are the most problematic and would need further advocacy for a change.

4.1 Lack of information

The numbers indicate a connection between detainees’ lack of information and their reported level of mental health. For example, detainees who report that they do not know when they’ll be released from detention also report a “very poor” level of mental health. There also appears to be a connection between the need for more information and the level of sleep: detainees who say they don’t sleep well also say they need more specific information. Moreover, detainees who say they don’t know the reason for their detention also say that they can’t sleep well at night due to stress and worry.

On its face, the data reveals that the non-existence of a perspective has a negative impact on detainees. Detainees who do not know when they’ll be released – a significant portion of the total sample – tend to report higher levels of stress, anxiety and uncertainty. Detainees also report that they need more information in order to help them establish a plan for their future. The lack of a perspective may relate to the “first difficulty” that detainees report, which touches on the impact of detention, the loss of liberty and being in a prison-like environment. This is interesting because the average length of detention in the sample, 52 days, is not especially long when compared with other countries.

The numbers do not indicate much of a connection between reported levels of mental health, anxiety, stress, worry and length of time spent in detention. The length of time in detention does not come up in detainees’ responses either, suggesting that “lack of information” may be a more significant factor of vulnerability than length of time in detention. Detainees also identify those who do not understand the language used by centre staff as particularly vulnerable. If this group of detainees already have difficulty accessing information, then being unable to communicate with staff probably compounds this difficulty.

The above mentioned finding, namely that there is no much of connection between reported levels of mental health and the time spent in detention, might be also due to the fact that the prison-like conditions are very strong cause for deterioration of mental health, with quite imminent effect, regardless of time spent in detention. This will be discussed further under the point 4.3.

HHC would also like to mention that the lack of information was mainly reported in alien policing jails and by the asylum seekers under Dublin procedure in Békéscsaba reception centre. Other asylum seekers in Békéscsaba were relatively well informed about their asylum case and their prospects of release from the centre.

4.2 Interaction with detention centre staff

The security and/or police staff seems to play an important role in the daily life of detainees. Regardless of whether these interactions are positive or not, the numbers indicate that the frequent level of interaction with security/police staff impacts upon the general experience detainees have in the centre. In regards to this sample, it is clear that detainees feel negatively about their interactions with security/police staff; this despite the finding that those who do report to trust someone in the centre say they trust security/police staff.

Given that those who were interviewed do not generally receive visitors, they may end up relying on detention centre staff for the information they need. However the numbers indicate that detainees who report that they need specific information, e.g. reasons for detention, asylum/immigration procedure, also report their interactions with security/police staff as being negative. While our analysis does not indicate a strong statistical relationship here, we can infer from the numbers that security/police staff may be an unreliable source of information for detainees. Worth mentioning is also the response of the head of alien policing jail in Kiskunhalas, stating that it is not the duty of the detention staff to inform the detainees on the reasons for their detention, their release or asylum case. In other words, if detainees report their interaction with security/police staff as negative, and if their connection to the outside world is limited, then how else can they obtain the information they say they need?

The situation is a little bit better in Békéscsaba closed reception centre, where asylum seekers are in regular contact with social workers, who speak several languages and can better explain the house rules and the asylum procedure.

4.3 Conditions of detention

The conditions of detention seem to impact on detainees' reported level of well being. Although the responses are not overwhelmingly negative, there exists a significant minority that should encourage further investigation into the relationship between conditions of detention and detainees' well being. In fact, living conditions comes up as the second and third reported difficulty in detention.

The HHC would like to stress that the conditions of detention are not the same in all the detentions visited. As already mentioned in introduction, there is a big difference between alien policing jails with strict prison-like regimes and the closed reception centre in Békéscsaba, where the conditions are much better. Further on, there is a difference between alien policing jails as well. In two out of the four administrative detention facilities, the strictest possible regime is in place (in Nyírbátor and Kiskunhalas): the detainees are locked in their cells almost the whole day, while a more human friendly and flexible arrangement with more freedom of movement within the detention ward is applied in Győr and at Ferihegy Budapest airport. These differences definitely affect the findings of this project, since the conclusions were drawn from all the interviews together and not for each detention separately and that is why the whole picture is not overwhelmingly negative.

In HHC opinion the conditions of detention is one of the main reasons for the deterioration of detainees' mental and physical health at least in alien policing jails with the strictest regimes (Nyírbátor and Kiskunhalas). The prison-like

regime, with closed cells, only one hour of outdoor recreation per day, food that lacks variety, absence of social and psychological assistance and no activities definitely cause negative impact on detainees well being.

5. CONCLUSIONS AND RECOMMENDATIONS

The data from Hungary reveals that detainees' lack of a perspective, as caused by not having the information they need, is a major factor of vulnerability in all visited facilities (with exception of asylum seekers that are not under Dublin procedure in Békéscsaba closed reception centre). This lack of perspective, i.e. not knowing the details of their asylum/immigration cases, the outcome of their detention, their release date, the expected duration of detention, seems to have an impact on their reported level of mental health. The findings indicate significant feelings of anxiety, stress, worry (for themselves and for others), sadness, despair and hopelessness.

Since detainees have little connection to the outside world – low numbers of visitors, little time on the telephone – they must rely on detention centre staff, especially security/police staff, for the information. However since they report their interactions with security/police staff as negative, then it seems that they cannot rely on them for the information they need. Exception is again closed reception centre in Békéscsaba, where asylum seekers can rely on the social workers to get more information about their asylum procedure. However for those under Dublin procedure this is not sufficient, since social workers do not know how and when their Dublin procedure will terminate.

The lack of a perspective seems to have a snowball effect on other factors, such as detainees' sense of imprisonment and their reported lack of liberty, in addition to their reports of the poor living conditions. The length of detention does not seem to be a significant factor, leading us to conclude that the possession of a life perspective may temper the negative effects of long-term detention, i.e. even if one is detained for five months, if the person knows when they'll be released, then they may at least be able to pursue other activities while they wait. This is of course impossible in the alien policing jails, where almost no activities are available and due to the high security regime the detainees are locked in their cells almost the whole day.

Based on the above conclusions, the Hungarian Helsinki Committee considers that the following changes should be implemented in the rules for administrative detention of migrants in Hungary:

- Cease with the practice of detaining asylum seekers in alien policing jails
- Soften the detention regime in alien policing jails and provide some activities and books, improve access to pay-phone and provide more time for the phone calls, allow residents to stay longer in the common area and provide bigger variety of food and hot water to make coffee/tea by residents
- Ensure that a psychologist and/or a social worker is weekly present in alien policing jails, in order to assure identification and treatment of torture victims and victims of other kind of violence and to ease the psychological distress caused by the deprivation of liberty
- Ensure a particular care for female detainees and assure that illiterate detainees can communicate their needs as well
- Ensure that married couples should be able to meet on a daily basis in alien policing jails
- Disseminate easy-to-understand information on the rules applicable to the procedures and house rules
- Provide more information on reasons for detention, asylum case and possibility of release
- Discontinue with the closed centre regime in Békéscsaba, or alternatively provide for judicial review of detention, with specific consideration of vulnerable groups
- Improve linguistic skills and cultural sensibility of security staff



NATIONAL REPORT: IRELAND

By: *Jesuit Refugee Service Ireland*

1. INTRODUCTION

The findings and conclusions in this report are based on a desk review of pertinent legislation, regulations, policies and procedures as well as on structured interviews with different stakeholders involved in immigration-related detention, including detainees, representatives of non-governmental organizations, (NGOs), attorneys and personnel working in both the Dochas Centre, which is part of the Mountjoy Prison, and Cloverhill Prison, both located in Dublin.

The detainees interviewed for this particular research included female asylum seekers and women awaiting deportation in the Dochas Centre. The researcher was unable to interview detainees held in the men's prison, Cloverhill Prison, due to its visiting policy. The researcher did attempt to interview men who had been detained and subsequently released. However, they declined to do so for one of two reasons. Some indicated that they "just wanted to forget the experience." Others were afraid that their cooperation in the research project could negatively impact their asylum or immigration case.

All interviews with the detainees were carried out in a separate meeting room, out of the sight and hearing of Dochas Centre staff. During the period of time that the research was carried out for the project in Ireland, there were only a small number of non-national women detained in Dochas Centre at any given period of time for immigration-related reasons. Because of the low numbers in the facility, only nine women were interviewed for this research.

2. NATIONAL LEGAL OVERVIEW

Persons subject to administrative detention

Ireland has approved legislation and created implementing regulations governing the detention and deportation of non-nationals from its territory. Under these laws and regulations, the following categories of non-nationals are subject to detention for immigration-related reasons:

- Non-nationals refused "permission to land"¹⁵⁴
- Rejected asylum seekers¹⁵⁵
- Non-nationals with final orders of deportation¹⁵⁶
- Non-nationals awaiting trial for a criminal immigration-related offence(s).¹⁵⁷

Detention only applies to non-nationals over the age of 18. Non-national children are not detained in Ireland for immigration-related reasons.¹⁵⁸

¹⁵⁴ Immigration Act 2003, Section 5(2).

¹⁵⁵ Refugee Act 1996, Section 9(8).

¹⁵⁶ Immigration Act 1999, Section 5.

¹⁵⁷ Criminal Procedure Act 1984, Section 4. Non-nationals in this category are detained for criminal purposes rather than immigration-related reasons. If convicted, after they serve their sentence, they may be subject to deportation and, thus, detention pending such deportation under the provisions discussed below, depending on their status.

¹⁵⁸ Section 9(12)(a), Refugee Act 1996; Section 5(4)(a), Immigration Act 1999; Section 5(2)(b), Immigration Act 2003.

Places of detention and conditions

Ireland does not have detention centres for the exclusive housing of immigration detainees such as exist in the United Kingdom (UK) and other countries. Rather detainees are held in one of the following six penal institutions run by the Irish Prison Service: Castlereagh Prison; Cloverhill Prison; Cork Prison; Limerick Prison; the Midlands Prison; Mountjoy Prison; Saint Patrick's Institution, Dublin; the Training Unit, Glengariff Parade, Dublin; and, Wheatfield Prison, Dublin.¹⁵⁹ Immigration detainees can also be held at Garda Siochana stations for a limited period of time not to exceed 48 hours or for any more than two consecutive overnight stays.¹⁶⁰

The great majority of immigration-related detainees, over 90%, are held in one of two prisons in Dublin: Cloverhill Prison (male detainees) and the Dochas Centre at Mountjoy Prison (female detainees). These prisons accommodate immigration detainees as well as people suspected and/or sentenced for having committed criminal offences. Conditions for immigration detainees are generally better in the Dochas Centre than in the Cloverhill Prison. Cloverhill Prison has a capacity to accommodate 431 individuals. However, the prison is often overcrowded and residents sleep on mattresses placed on the floors of cells when sufficient beds are not available. The same occurs at Dochas Centre, Mountjoy Prison, which is generally overcrowded as well. It has a capacity to accommodate 85 but often exceeds that number.

Special needs

There are no specific prison rules governing the treatment of immigration-related detainees. The general rules governing the operations of prisons apply to all persons held within Irish prisons, including immigration detainees.¹⁶¹ There are specific provisions that address the needs of pregnant women,¹⁶² single parents with minor children,¹⁶³ persons in need of psychiatric care,¹⁶⁴ and other vulnerable persons.¹⁶⁵

Health care

All persons in the Irish prison system, including migrants and asylum seekers detained for immigration-related reasons, have the right to health care.¹⁶⁶ After arrival in the prison, each detainee is given a medical exam. During their confinement in prison, they have access to medical personnel, doctors and nurses, for any medical concerns. For serious matters, a detainee will be transferred to a hospital for treatment there.

Contact with the outside world

All persons detained in an Irish prison have the right to receive visits from family and friends under certain conditions.¹⁶⁷ They are permitted to make one phone call a day, paid for by the Irish government, not to exceed six minutes. With the permission of the director of the prison, representatives of religious denominations can visit detainees at the prisons.¹⁶⁸ Additionally, chaplains are based in the Irish prisons to provide pastoral and other relevant care to detainees. Detainees have the right to receive visits from consular authorities from their countries' embassies.¹⁶⁹

¹⁵⁹ S.I. No 56 of 2005 – Immigration Act 2003 (Removal Places of Detention) Regulations 2005. The Irish Prison service operates under the Statutory Authority of the Prisons Act 2007, the Rules for the Government of Prisons 2007 and other relevant laws and regulations.

¹⁶⁰ S.I. No. 344 of 2000 – Refugee Act, 1996 (Places and Conditions of Detention) Regulations, 2000, Section 11(1). The Garda Siochana is the Irish national police force with a presence throughout the country.

¹⁶¹ Irish Prison Service Rules 2007.

¹⁶² Irish Prison Service Rules 2007, Section 33(2).

¹⁶³ Irish Prison Service Rules 2007, Section 17(1).

¹⁶⁴ Irish Prison Service Rules 2007, Section 99(5).

¹⁶⁵ Irish Prison Service Rules 2007, Section 63(1).

¹⁶⁶ Irish Prison Service Rules 2007, Section 33.

¹⁶⁷ Irish Prison Service Rules 2007, Rule 35.

¹⁶⁸ Irish Prison Service Rules 2007, Rule 34.

¹⁶⁹ Irish Prison Service Rules 2007, Rule 39(1).

Asylum seekers have the right to receive visits from designated refugee organizations and non-governmental organizations.¹⁷⁰ Finally, detainees have the right to contact and receive visits from their legal advisors.¹⁷¹

Statistics and length of detention

During the late 1990s and into the very early years of the millennium, it was unusual for non-nationals to be detained in any significant numbers for immigration-related reasons in Ireland. However, that soon changed as laws were put into place to identify and detain individuals upon entry, after entry and prior to deportation. The highest number of detainees – 1,852 – was recorded in 2003. Ireland detained the lowest number of immigration-related detainees – 860 – in 2005.

Table 1: Detainees held in immigration-related detention¹⁷²

Year	Number of detainees
2003	1,852
2004	946
2005	860
2006	1,113
2007	1,145
TOTAL	5,916

Asylum seekers can be detained, under the authority of a District Court judge, for a potentially indefinite period of time consisting of 21 day consecutive committals until his or her application for asylum has been decided.¹⁷³ Non-nationals arriving by air or sea who are refused permission to land may be detained for a period not to exceed 8 weeks, with some exceptions, in the aggregate under the warrant of an immigration officer of a member of the Garda Soichana pending their deportation.¹⁷⁴ In practice, the majority of non-nationals are detained for up to three days before either being released or returned to their country of origin.

Table 2: Length of detention¹⁷⁵

Year	3 days	4-7 days	8-14 days	15-30 days	31-50 days	50 + days
2003	1,140	324	6	12	3	367
2004	414	195	127	75	65	70
2005	484	140	88	86	43	19
2006	439	255	167	138	55	59
2007	631	205	89	99	67	53
TOTAL	3,108	1,119	477	410	233	568

Alternatives to detention

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

¹⁷⁰ Irish Prison Service Rules 2007, Rule 39(2).

¹⁷¹ Irish Prison Service Rules 2007, Rule 38.

¹⁷² These numbers are drawn from the Irish Prison Service Annual Reports, available on the Irish Prison Service website at: <http://www.irishprisons.ie>.

¹⁷³ Refugee Act 1996, Section 10(b)(i).

¹⁷⁴ Immigration Act 2003, Section 5(2)(a).

¹⁷⁵ Irish Annual Prison Service Report 2003, p. 13 (2003); Irish Annual Prison Service Report 2004, p. 11 (2004); Irish Annual Prison Service Report 2005, p. 13 (2005); Irish Annual Prison Service Report 2006, p. 15 (2006); Irish Annual Prison Service Report 2007, p. 13 (2007). Note that the Irish Prison Service Report for 2007 provides the length of detention for 1,144 of the total 1,145 detainees.

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 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.

Detention of non-nationals refused permission to land

Non-nationals arriving in Ireland by air or sea must present themselves to an immigration officer and apply for permission to land.¹⁷⁶ Non-nationals who arrive in Ireland other than at approved ports and/or who remain in Ireland without permission to land are considered to be “unlawfully present” in the country.¹⁷⁷

Under Section 5(2) of the Immigration Act 2003, non-nationals over the age of 18 who are refused permission to land, or who an immigration officer or a member of the Garda Síochána with reasonable cause suspects have been unlawfully in Ireland for a continuous period of less than three months can be arrested. Such non-nationals can be detained under a warrant of the immigration officer or the Garda Síochána in an authorized place of detention pending removal from the country.¹⁷⁸

Length of detention

A non-national arrested and detained under Section 5(2) of the Immigration Act 2003 can only be detained until such time as he or she is removed from the country. However, this period of detention cannot exceed eight weeks in the aggregate.¹⁷⁹ The following exceptions, however, act to toll the accrual of the 8-week time period: 1) the time period during which the person is remanded in custody pending a criminal trial or is serving a criminal sentence; 2) the period of time spent by the person on board a ship, railway, train, road vehicle or aircraft; and, 3) the period of time during which the person has instituted court proceedings challenging the validity of his or her proposed deportation.¹⁸⁰ It is important to note that two of the grounds under which a non-national may be detained under Section 5(2) of the Immigration Act 2003 constitute criminal offences. These are: failure to present oneself to an immigration officer and apply for permission to land; and landing at an unapproved port.¹⁸¹ A person convicted of either offence can be imprisoned for a term not to exceed 12 months. Thus, any period of administrative detention is tolled during the period of imprisonment.

Information on reasons for detention and rights

Non-nationals who are refused permission to land are given a written notice advising them on why they have been refused. This information is provided in English and if a person does not understand the reasons, the immigration officer will try to identify an interpreter to translate. However, no other written information is given to non-nationals refused permission to land regarding either their detention under Section 5(2) or of their rights.

Appeal of decision

A decision by an immigration officer or by a police officer to detain a non-national under Section 5(2) of the Immigration Act 2003 can seek review from the relevant supervisor. Additionally, the detainee may seek review of

¹⁷⁶ Section 4(2), Immigration Act 2004.

¹⁷⁷ Sections 5(1), 5(2), 6(1), Immigration Act 2004.

¹⁷⁸ Section 5(2), Immigration Act 2003.

¹⁷⁹ Section 5(3)(a), Immigration Act 2003.

¹⁸⁰ Immigration Act 2003, Section 5(3)(b).

¹⁸¹ Sections 4(9), 6(4), Immigration Act 2004.

the legality of the detention by filing a habeas corpus action with the High Court. Finally, where a non-national detained pursuant to Section 5(2) challenges the validity of his or her removal in court proceedings, the court entertaining the challenge can determine whether the person should continue to be detained.¹⁸² A challenge to conditions of detention can be made under the European Convention of Human Rights within the courts.

Interpreters

There is no right to interpretation or the services of an interpreter for persons who are refused permission to land unless they are seeking asylum. In practice, where a non-national does not speak English, the immigration officer will try to identify an interpreter to explain in the person's language the reasons why he or she has been refused permission to land and why he or she is being detained.

Legal aid

Unlike asylum seekers, migrants who are detained under Section 5(2) of the Immigration Act do not have the right to free legal assistance. Nor is there any mention of the general right to access to a solicitor in the Immigration Act 2003 for persons detained under Section 5(2). In practice, access to a solicitor will be facilitated if a detainee affirmatively requests such.

Detention of asylum seekers

The Refugee Act 1996 provides the legal basis for detaining asylum seekers in Ireland. Under Section 9(8) of the Act, an asylum seeker over the age of 18 may be detained. An asylum seeker may be detained where an immigration officer or a member of the Garda Síochána with reasonable cause suspects that:

- He/she poses a threat to national security or public order;
- He/she has committed a serious non-political crime outside Ireland;
- He/she has not made reasonable efforts to establish his/her identity;
- He/she intends to avoid removal in the event of his/her application for asylum being transferred to a convention country pursuant to the Dublin Convention;
- He/she intends to leave Ireland and enter another country without lawful authority; or,
- He/she without reasonable cause has destroyed his/her identity or travel documents or is in possession of forged identity documents.

Length of detention

Asylum seekers who are detained under Section 9(8) of the Act must be brought as soon as practicable before a District Court judge who, if satisfied that one or more of the grounds listed above apply, may commit the asylum seeker to an authorized place of detention for a period not to exceed 21 days from the time of the initial detention.¹⁸³ This 21-day period can be extended by a District Court judge for additional periods of 21 days at a time if the judge believes that one of the grounds continue to apply.¹⁸⁴ In reality, most asylum seekers are released within a short period of time to accommodation in hostels that are run by the Reception and Integration Agency.

Information on reasons for detention and rights

Under Section 8 of the Refugee Act 1996, all asylum seekers are to be informed of their rights to consult a lawyer and the Office of the United Nations High Commissioner for Refugees (UNHCR). Where an asylum seekers is detained

¹⁸² Section 5(4), Immigration Act 2004.

¹⁸³ Section 10(b)(i), Refugee Act 1996.

¹⁸⁴ Section 9(14)(a), Refugee Act 1996.

under Section 9(8) or (13) of the Refugee Act 1996, an immigration officer or a member of the Garda Síochána must inform an asylum seeker as soon as possible of a number of their rights.¹⁸⁵ This information is provided in a written notice.

Appeal of decision

As noted above, asylum seekers who are detained under Sections 9(8) or (13) of the Refugee Act 1996 must be brought before a District Court judge as soon as practicable after being detained. The judge may order continued detention or release of the asylum seeker. The question on whether grounds for detention continue to exist must be re-examined by the District Court judge every 21 days. In addition to this form of review, a detained asylum-seeker can challenge the legality of the detention in habeas proceedings under Article 40(4) of the Constitution in the High Court.

Interpreters

Asylum seekers do have the right to an interpreter during court proceedings and when consulting a solicitor as established under Section 10(f) of the Refugee Act 1996.

Legal aid

Asylum seekers have the right to legal aid as set forth in Section 10(1)(c), (f) of the Refugee Act 1996. Under regulations, they also have access to a solicitor if they are detained in a Garda station.¹⁸⁶ Asylum seekers can hire private solicitors to assist them in their claims for asylum or, if they qualify, can obtain free services from the Refugee Legal Services, an office of the Legal Aid Board of Ireland.

Legal authority to detain those pending deportation

Section 5(1) of the Immigration Act 1999 authorizes the detention of persons with final deportation orders. An immigration officer or a member of the Garda Síochána may detain a non-national with a final order of deportation if he or she suspects with reasonable cause that the non-national:

- Has failed to comply with any provision of the order;
- Intends to leave the country and enter another without lawful authority;
- Has destroyed his or her identity documents or is in possession of forged identity documents; or,
- Intends to avoid removal from the country.

In such cases, an immigration officer or a member of the Garda Síochána may arrest the person and detain him/her without warrant.

Length of detention

Detention of a non-national under this provision cannot exceed a period of eight weeks in the aggregate. However, the following events will toll that period of time from running: 1) the time spent on remand awaiting a criminal trial or sentence; and, 2) the time period during which court proceedings are brought to challenge the validity of the deportation order, including any appeal.

¹⁸⁵ Section 10, Refugee Act 1996. These rights include: right to be informed of legal basis for detention; right to be brought as soon as practicable before a court to determine detention or release pending a decision on the asylum claim; right to consult a solicitor; right to have the UNHCR or other person notified of the fact and place his/her detention; right to leave the country at any time during detention provided that a judge approves the removal; and, right to assistance of an interpreter when consulting a solicitor and during court appearances.

¹⁸⁶ Regulations 2000, S.I. No. 344 of 2000, Sections 16(5)(a), (b) and 16(6).

Information on reasons for detention and rights

Non-nationals who are detained pending their deportation are informed in writing that the government proposes to deport them. Detainees awaiting deportation do have certain rights, including the right to challenge the validity of their deportation and/or detention and the right to access an attorney. However, no other written information is provided to detainees pending their deportation relating to either their detention or their rights while detained.

Appeal of decision

A non-national detained under Section 5 of the Immigration Act 1999 can challenge the validity of his or her deportation in court.¹⁸⁷ If a challenge is filed, he or she can also challenge his/her continued detention.¹⁸⁸ A challenge to the legality of his/her detention can be made in habeas corpus proceedings before the High Court pursuant to Article 40(4) of the Constitution.

Interpreters

The notice of deportation that is provided to a non-national must be in a language that he or she understands.¹⁸⁹ However, there does not appear to be any other provision in the law relating to access to interpreters for non-nationals who are detained pending deportation.

Legal aid

There are no explicit provisions in the Immigration Act 1999 for detainees to access a solicitor pending their deportation. Nor do any laws provide for free legal aid for such detainees. However, in a decision issued in 2000, the High Court held that there is a constitutional presumption that upon arrest, a person detained under the Immigration Act 1999 has the right to obtain legal advice.¹⁹⁰ In practice, where a detainee requests access to a solicitor, he or she will be permitted such contact.

3. OVERVIEW OF NATIONAL DATA FINDINGS

3.1. Basic information

Generally, the women interviewed were young, with most under the age of 30. The average age was 31 years. Seven were Nigerian, one Brazilian and one young woman was from Zimbabwe. Most were single and only three were married. None of the spouses of the married women were in Ireland with them. Five of the nine women had children. The children of three of the women were being cared for by family in their countries of origin. The children of two of the women were living with them in Ireland prior to their mothers' arrest and detention. While their mothers were in detention, the children were under the jurisdiction of the child services agency in Ireland. They were permitted visits to their mothers in prison.

The average amount of time that the women were detained was 12.33 days, with the minimum being 2 days and the maximum being 43 days. Four of the women were rejected asylum seekers. Three of the women were seeking asylum. Two of the women were pending deportation after having been in an irregular status in Ireland.

¹⁸⁷ In the matter of Article 26 of the Constitution and sections 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999, [2000] 2 I.R. 360.

¹⁸⁸ Section 5(5), Immigration Act 1999.

¹⁸⁹ Sections 3(3) and 3(b)(ii), Immigration Act 1999.

¹⁹⁰ D.P. v. Governor of the Training Unit, Mountjoy Prison, [2001] 1.I.R. 492.

3.2. Case awareness

“I have applied for asylum but no one explained to me how it works. I have not met or spoken to a lawyer. I filled in the application by myself and the governor sent it in. It is difficult to get information.”

This is emblematic of the experiences of all those interviewed for the project. Although all of the women had been informed of the reasons for their detention, most felt that they did not have sufficient information to understand their rights as migrants or asylum seekers in Ireland.

For example, the three asylum seekers were unsure of how the process worked. None of them had spoken to a solicitor at the time that the researcher interviewed them and they had little knowledge of what the process involved. No one sat with them to explain their rights in any detail, including what asylum meant. When they indicated that they wanted to apply for asylum, they were given an application to complete – a 22-page document – and told that they would be notified of their interview date. They were not sure how, if or when they could speak with a solicitor. One of the women who said she was afraid to go back home told the interviewer that she did not know what asylum meant.

The migrant women had similar complaints, mostly focusing on the deportation process itself. For example, one of the women, a possible trafficking victim, wanted to understand why she was in prison.

“I have a long story. I was an orphan back home and lived under a bridge. A man told me he would help me come here and make money. After I got here, he told me I had to be a prostitute and pay him 40,000 euros. I told him I wouldn't and he threatened to kill me or send me back to Nigeria. I want to know what will happen to me. I want to understand.”

All of the women were especially anxious about the fact that they had no right to be informed of the date and time of their deportation. They were also concerned that they had no resources to fall back on once they arrived in their country, including something as basic as bus fare to travel to their homes. They felt it would be helpful to have access to information and assistance for their return, in the form of counselling on what to expect and financial support for basic costs after arrival. Although the women were aware of why they were being detained and deported, they felt that they had not received sufficient information during their time in Ireland regarding possible avenues to pursue legal residency.

Non-governmental organisation personnel confirmed this lack of awareness. According to the NGOs, the police will explain why they are being detained when they are arrested – something confirmed by the detainees themselves. Beyond that, however, few if any really understand their rights or what will happen to them. Although detained asylum seekers are visited by Refugee Legal Services solicitors, certain NGO staff believe that they need to visit the detainees more consistently and frequently for two reasons: 1) to explain their rights and advise them on the status of their cases; and, 2) to work with them to avoid longer periods of stay in the prison.

3.3. Centre accommodation and rules

With the exception of one detainee, the women described their sleeping space in the facility in somewhat negative terms, mostly complaining of roommates who smoked and cleanliness issues. They were generally satisfied with the rest of the space throughout the centre but noted that they had no real place to be alone should they so desire. Although the facility is generally overcrowded, the women themselves felt no sense of such.

The prison authorities have developed an A4 sheet outlining information on how the prison operates including mealtimes, availability of classes and services, access to telephone calls and visiting times. It does not appear that these brief guidelines are translated into other languages. All of the women reported that they had received no

information – either written or oral – regarding the rules of the centre upon arrival. Instead, they watched what others did and followed them.

The prison chaplain is an important ongoing source of support and assistance whenever issues arise for immigration detainees in respect of their accommodation or the operation of the prison rules.

3.4. Staff, safety and interaction with other inmates

Detainees have most contact with the guards on a daily basis with varying reactions towards them. One detainee reported that, “Some are better than others.” The women all reported that they could visit the doctor and/or nurse whenever they felt the need. The governor of the centre makes daily rounds and is accessible to all the women detained in the centre, either during her rounds or upon request for an individual meeting. Additionally, there is a full-time chaplain in the centre. Many of the women reported contact with her and spoke positively of her presence and assistance.

None of the women reported any physical assaults or incidents while detained. Almost all of them said that they had little interaction with other inmates. A few did report that some inmates had made derogatory racist remarks. None complained of any mistreatment by staff. Although all reported feeling generally safe, one woman did state, “I’m in the midst of criminals and I feel nervous.”

3.5. Activities in the centre

The centre offers a range of activities to all inmates, including access to sports equipment, computers, television, educational opportunities, religious space and outdoor space. Most of the women participated in the activity, stating that it was a way to pass the time and reduce their anxiety and stress about being detained.

3.6. Medical issues

As noted above, all detainees undergo a brief medical examination upon entry and are permitted to meet with medical staff as often as needed. There are nurses and doctors on staff. None of the women reported difficulty in communicating with them. Most indicated that they were generally satisfied with their care with some complaints. For example, one woman noted that she needed a special diet. Another said that she would like help with panic attacks. At the time of the interview, however, they had not spoken to the medical staff or other centre personnel to make the requests.

Regarding their medical condition, almost all of the women reported that both their physical and mental health had deteriorated as a result of their detention. They attributed the negative impact on their mental health to obsessive worry and anxiety about what would happen to them, a fear of the unknown and, some, stating that detention made them feel bad about themselves, as if they were unworthy.

3.7. Contact with the outside world

The centre permits daily visits from family and friends. It also facilitates access by inmates to their solicitors. As previously noted, the families of most of did not travel with the women to Ireland. Rather they remained at home and were cared for by other family members. Two of the women had their children living with them in Ireland and the children did come to the centre to visit their mothers. Although UNHCR has access to the centre, none of the women or the staff reported having ever met with them. Women stay in contact with family and friends by phone and are permitted free calls to anywhere in the world for six minutes a day.

3.8. Nutrition and sleep

Although all the women said that there was sufficient food, most reported not liking the food, saying they would like to have their own traditional food. Less than half lost their appetite while in detention. Almost all of the women reported significant difficulties sleeping because of uncertainty regarding their futures, fear of being sent back to their country of origin and fear for how their families will cope if they are sent back.

3.9. Difficulties in detention

The women were specifically asked to name three difficulties experienced by them in prison apart from the complaints noted above. All of the women stated that the most difficult thing they experienced was a lack of freedom and the accompanying loss of rights. Most could not state a third difficulty, but those that did said that it was the anxiety they suffered as a result of being detained. None of the women had ever been detained in a prison in their lives and seemed shocked to find themselves in an Irish prison.

Most of the women did not know what would be the outcome of their detention and none knew when they would be released or returned to their home countries. As mentioned previously, this was the cause of significant stress for all women. Many reported a negative self-perception as a result of the experience. NGO staff confirmed this and noted that detention has a devastating impact on the women. It significantly impacts their moral and they are shocked to be in a criminal prison setting.

3.10. Special needs and vulnerability

Few of the women reported any special needs. Only two indicated that they needed specific medical care (for sickle cell anaemia) or psychological care (for depression and panic attacks). The woman with sickle cell anaemia was provided adequate medication. However, the woman who suffered depression did not receive any psychological care. Two of the women with children in Ireland expressed a need to see their children more often. None reported any special vulnerabilities experienced by other detainees but this may be due to the fact that immigration-related detainees are only held for short periods in detention.

The most significant vulnerability or perhaps, better said, what made the women feel most vulnerable was the lack of information about their cases and about the law. As a result, they felt afraid, nervous and depressed.

4. ANALYSIS OF THE DATA AND CENTRAL THEMES, CONCLUSIONS AND RECOMMENDATIONS

Generally, the conditions of detention in the Dochas Centre are satisfactory and do not violate any international human rights standards which govern the detention of immigration detainees. Procedural safeguards relating to the detention of asylum seekers are satisfactory. A District Judge must order the detention of asylum seekers, and ongoing detention is reviewed every 21 days. In practice, most asylum seekers are released within a short period of time. Detention of non-asylum seekers is limited to eight weeks with some exceptions and challenges to such detention can be taken in habeas proceedings. Most non-asylum seekers are either released or deported prior to the eight-week deadline.

The primary issue of concern identified during the research was the lack of information experienced by all of the women interviewed, relating to: 1) the operating rules of the prison; 2) asylum procedures and access to legal representation; 3) the final outcome of their detention; and 4) the deportation process. This lack of information contributed in great part to the sense of vulnerability, anxiety and isolation felt by the women.

4.1. Operating rules

The failure of the centre to provide information on its operating rules to all detainees in a language they understand was somewhat tempered by the access that the women had to the guards, to the governor and to the chaplain. However, the women still felt unsure and somewhat adrift in trying to figure out how things worked. As one woman stated, "You just watch the others and follow what they do."

Recommendation: Prison staff should ensure that each detainee upon arrival is informed of the rules of the centre in a language that they understand.

4.2. Asylum procedures and access to legal representation

As per its obligations under international refugee law and its own national legislation, the Irish government has an obligation to identify persons in need of international protection and provide them access to counsel to assist them in preparing and presenting their claim for protection. Despite laws and regulations requiring that asylum seekers be informed of their rights, detainees expressed confusion regarding the asylum process itself and were unaware of their right to have a solicitor work with them to prepare the application.

As noted above, the application – a 22-page document – is given to a detainee if she indicates a desire to apply for asylum. It appears that the governor or staff does ask detainees shortly after arrival if they want to apply for asylum. However, there is no protocol in place which does the following: 1) provides written and/or oral information on asylum procedures to a detainee upon her arrival in the centre; 2) provides clear information on her right to a solicitor to assist her in preparing the application and her interview with the asylum authorities; and, 3) provides information on what will happen to her if and when she is released.

Under Irish law, an asylum seeker who does not have the financial resources to pay for a solicitor is entitled to one from the Refugee Legal Services (RLS) free of charge. RLS attorneys provide advice and representation to asylum seekers who are detained under Section 9(8) of the 1996 Refugee Act. Visits and assistance by RLS attorneys to detained asylum seekers in the period of the research seemed inconsistent. The researcher was unable to determine if the RLS itself has any system in place to regularly visit the detention centre, not just on a case-by-case basis, and provide information and assistance to the detained women. Based on the interviews with the women, with prison staff and with NGOs, there does not appear to be any such system.

The failure on the part of the authorities to provide information on procedures in a language they understand and create a system in the facility whereby solicitors meet with each detainee seeking asylum runs the risk of failing to identify and support legitimate asylum seekers. All of the asylum seekers with which the researcher spoke seemed to have a basis for seeking protection. However, none understood exactly what she was required to do to establish the claim. Thus, there is a potential for denial of legitimate claims and the return of persons who are in need of protection.

Since in addition to the experience of the researcher a number of stakeholders raised concerns about the effectiveness of the RLS in providing legal assistance to immigration detainees, consideration should be given to an independent evaluation of the operation of the scheme for this category of beneficiary.

Recommendation: The Office of the Refugee Applications Commissioner (ORAC), the office responsible for adjudicating asylum claims in Ireland, should meet with the prison authorities and with RLS attorneys to develop a protocol for asylum seekers in detention. This protocol should include instructions on the type of information given to all detainees upon arrival in the facility. Any information must be provided in a language and manner that the detainees can understand. RLS attorneys should visit the centre on at least a weekly

basis, not just case-by-case, to speak with detainees who have any questions about the asylum system and to assist them in the preparation of their claims.

4.3. The final outcome of detention and the deportation process

As noted, all of the detainees expressed frustration over the fact that they did not know if and/or when they would be released. Those awaiting deportation were especially anxious because they did not know the date or time when they would be returned home and thus could not make any short or long-term plans. The authorities stated that they could not advise the women of the precise time of their deportation for security purposes but they understood the women's anxiety.

Recommendation: The authorities should make sure to provide detailed information on how long a non-national can be detained for immigration-related reasons. The more information the women have about their situation, the better they will be able to manage their emotions during detention and plan for their futures. The authorities should also work closely with those detainees awaiting deportation to give them an approximate idea – consistent with security concerns – of when they will be deported. They should make sure to facilitate contact between the detainee and family and friends at home who can receive them upon arrival.

4.4. Alternatives to detention

Given the small numbers of persons who are detained for immigration-related reasons combined with the downturn in the number of persons seeking asylum, the government should seriously consider instituting alternatives to detention. Not all asylum seekers are detained at time of entry. Since all asylum seekers are eventually housed in government-run hostels that impose no restrictions on freedom of movement, it seems more practical and effective – with the exception of persons who may pose security concerns – to transfer asylum seekers identified at ports of entry to the hostels instead of detaining them in prison. Additionally, permitting a greater number of persons awaiting deportation to remain in the community until the actual date of deportation would save the government time and money and would permit the non-national greater freedom to plan for his or her future.

Recommendation: Unless persons seeking entry to Ireland pose a security concern, the government should consider alternatives to detention, such as regular reporting or the posting of a bond, for non-nationals refused permission to land and, especially, for all asylum seekers. Given that GNIB already permits some persons awaiting deportation to remain free pending their removal subject to adherence to specified conditions, the creation of a pilot program to formalize this practice should be put in place. Relevant NGOs can and should work with governmental authorities in the creation and implementation of such a plan. Any such plan could include options for non-nationals to pursue assistance from the International Organization for Migration for voluntary returns.

In closing, Ireland is clearly not a country of bad practices as relates to immigration-related detention. Some of Ireland's practices – such as the prohibition against the detention of children for immigration reasons – should be copied by other countries. However, the government can and should improve on its treatment of non-nationals and asylum seekers in detention as suggested in the recommendations above. The first step in doing so could and should be the creation of alternatives to detention, something with the international community as well as the UNHCR has been and continues to promote, particularly for asylum seekers.



NATIONAL REPORT: LITHUANIA

By: *Caritas Lithuania*

1. INTRODUCTION

The DEVAS project in Lithuania was implemented by Caritas of Archdiocese Vilnius from February to October 2009, at the Foreigner's Registration Centre in Pabrade, Lithuania. Pabrade is small city in northeastern Lithuania, 50 km from the Lithuanian capital city Vilnius, next to the Eastern State Border of Republic of Lithuania and EU to Belarus. For several years, Caritas Vilnius has had good relationship to the administration of Pabrade's Foreigner's Registration Centre due to a positive experience of long-term co-operation on refugee matters. The administration of the foreigners' centre, specifically the head officer and chief of the centre, agreed to implement the DEVAS project in Pabrade. During the time of the project, ten interviews with detainees were conducted: nine of them with male detainees and one interview with a female detainee. These detainees came predominately from the member countries of the former Soviet Union, so their life stories were closely related to the so-called transformation period within the societies of the former Soviet Republics since 1990.

The Foreigners' Registration Centre is the only detention centre in Lithuania. It consists of two separate premises: one for asylum seekers and their families (without restriction of mobility and with the possibility of free movement in Pabrade and the capital city Vilnius) and the other one for illegally staying third country migrants (with movement restrictions: the detainees are not allowed to leave the territory of the premises). As interviewers, we were not able to obtain free access to the premises for illegally staying third-country migrants. The interviews were instead conducted inside administration buildings, and thus as interviewers we had no possibilities to get insights into the living conditions within the detention centre and make up our minds about them.

Also involved in the implementation of the DEVAS project were two social work students from the Mykolas Roemeris University in Vilnius. They helped by conducting and transliterating detainee interviews. In addition, an official from the investigation unit in Pabrades Foreigner's Registration Centre was charged with assisting the DEVAS project team during the whole project period. The official in charge made proposals about how to manage the whole project implementation process, arranged the lists of detainees that we interviewed according to the project criteria (there was no way for us to choose the detainees by ourselves as a project team) and encouraged detainees to take part in the project. He also made sure that the detention centre guards brought the detainees to the administration building where the interviews were conducted.

The project staff from Caritas Vilnius were able to conduct all the detainees' interviews without being disturbed or interrupted by a third party except the two or three times when the officials came in order to take the detainees to official business such as a visit to their lawyer or a phone call from their embassy. Three out of ten interviews were conducted in Lithuanian, one in English and six in Russian. Further, one NGO that works with migrants was interviewed (Caritas Vilnius) and five staff members from the Pabrades Refugee Centre answered the staff questionnaire, which had previously been translated into Lithuanian and Russian. The staff preferred to complete the staff questionnaire in written form and anonymously. Almost no female migrants were detained in the detention centre of Pabrade. At the time of the project implementation, there were only two women in the premises for detainees. An interview was conducted with one female detainee from Belarus, but by that point the project timeline could not accept another interview into the DEVAS central database. The second female detainee, who was from the Congo, refused to participate in the project.

As the staff of the DEVAS project in Lithuania, we are grateful to all the detainees at the detention centre in Pabrade, Lithuania, who participated at the interviews and shared their life stories.

2. NATIONAL LEGAL OVERVIEW

The main laws regulating detention of illegally staying third country nationals and asylum seekers in Lithuania are the following: the Law on the Legal status of Aliens (2004; as amended on 29 November 2006), the Order of Interior Ministry of Republic of Lithuania “On Conditions and Description of Procedures of Temporary Accommodation of Aliens at the Foreigners Registration Centre” (2007), the Law on Administrative Proceedings (1999, as amended on 11 Nov 2006) and the Law on Pre-Trial Detention (1996).

2.1. Legal grounds for detention

Before Lithuania joined the EU as well as after the EU accession, the Law on the Legal Status of Aliens of 2004 and new amendments of Law on the Legal Status of Aliens in 2006 make *no distinction between the grounds for detention of illegally staying third country nationals and asylum seekers*. Accommodation of asylum seekers in the Foreigners’ Registration Centre in Pabrade without restriction of movement became the most frequently used measure for asylum seekers since joining EU of Lithuania. *There are no any legal grounds in Lithuania to keep an asylum seeker in detention while she or he is awaiting the outcome of the asylum procedure*. The fact is that asylum seekers are usually housed in the Foreigners’ Detention Centre in Pabrade (South East Lithuania), until they could be moved to the Refugee Reception Centre in Rukla (Central Lithuania), but not detained. Art. 70 of the Law on the Legal Status of Aliens declares the exemption from liability for illegal entry and stay in republic of Lithuania for those aliens who have provided they present without delay to competent institutions of Republic of Lithuania and rendered an explanation on their illegal entry into or stay in the Republic of Lithuania.

Articles 112 and 113 of the Law on the Legal Status of Aliens define the legal grounds for detention. These could be unauthorized admission into national territory, illegal entry or stay, using (or suspicion) of false documents, in case of decision on removal of the alien from the Republic of Lithuania. To these grounds of the detention in the case of breaches of Lithuania’s immigration law is further related detention of aliens on public health grounds, in order to stop the spread of dangerous communicable diseases, as well as on security grounds, when the aliens’ stay in the republic of Lithuania constitutes the threat to public security and public policy.

2.2. Legal grounds for the minimum age of detention

In terms of Article 114, Paragraph 3 of the Law on the Legal Status of Aliens, an alien below the age of 18 years may be detained only in an extreme case when the alien’s best interests are the main consideration.

2.3. Legal grounds for the detention order

Article 114 of the Law on the Legal Status of Aliens authorizes detention by administrative authority, i.e. the police or any other law enforcement institution officer, for a maximum of 48 hours. Detention beyond 48 hours must be authorised by a court order. In terms of article of the Law on the Legal Status of Aliens, where grounds for the continued detention of a alien exist, the police or any other law enforcement institution officer shall apply to the local district court, within 48 hours from the moment of detention of the foreigner, to request authorization to detain her/him for a period of over 48 hours or to grant a measure alternative to the detention. The court’s decision to detain an alien must state the grounds for detention, the time period of detention with the exact calendar date indicated and the place of detention.

It must be pointed out that the application of these legal norms is extremely rare in the practice. The asylum seekers are mostly detained because of violating the criminal law.

Considering an automatic judicial review of the decision of detention must be said, that there is no such an automatism in Lithuania.

2.4. Legal grounds for the right of appeal against the detention order, or to challenge detention

The court's decision may be appealed according to the procedure set forth in paragraph 1 of Article 117 of the Law on the Legal Status of Aliens. The alien has the right to appeal the regional court's decision to detain her/him or to extend the detention period or to apply measures alternative to detention. The appeal must be filed before the Supreme Administrative Court of Lithuania, according to the procedure established by the Law on Administrative Proceedings. The appeal may be submitted through the Foreigner's Registration Centre in Pabrade, which shall transfer the appeal to the Supreme Administrative Court of Lithuania.

2.5. Legal grounds for the right of information about the detention order, and/or the reasons for detention

According to the Article 116 §3 and §4 of the Law on the Legal Status of Aliens, the court's decision to detain an alien as well as impose against him a measure alternative to detention must be announced to the alien in language which she or he understands, indicating the reasons for her/his detention as well as measures alternative to detention. The Article 9 of the Law of Administrative Proceedings stipulates that the alien has right to make use of an interpreter's service free of charge. The stay budget pays for the services of interpreter. Further the Article 116 of the Law on the Legal Status of Aliens imposes that the court's decision to detain the alien must state the grounds for detention, the time period of detention with the exact calendar date indicated and the place of detention. The alien should be informed about the reasons for detention as well as measures alternative to the detention by the solicitor or officer by the court; the information should be provided in oral or written form. At last the alien should be provided with the copy of the document containing the court's decision to detain or to apply the measures alternative to the detention.

Article 87§1and §5 of the Law on Administrative Proceedings stipulates that the court's decision should consist of opening, descriptive, motivational and resolution parts. The resolution part should include, among other things, the term of appeal and appeal order. Article 85 §3 of the said Law requires that the descriptive and resolution parts of the court's decision are written and announced in public the day after the hearing.

2.6. Legal grounds for the duration of detention

Lithuanian law does not lay down a legal maximum duration of detention or alternative to detention, but there are two articles that are relevant.

In terms of Article 116, Paragraph 4 of the Law on the Legal Status of Aliens, the district court ordering detention beyond the initial 48-hour period determines its duration; this must be stated in the detention order, with the exact calendar date indicated and the place of detention. Article 119 of the said law provides that a detained alien shall be immediately released, upon the disappearance of the grounds for his/her detention, according on the effective court's decision, or once his/her period expires.

The legislator doesn't regulate the detention's period the Foreigners Registration Centre in Pabrade. According the courts, the aliens are accommodated from 1 to 6 months at the Centre. The uniform judicial practice still doesn't exist.

2.7. Legal grounds for the provision of health care and the scope of health care benefits, and for the provision of social services

The Article 71 §1.6 of the Law on the Legal Status of Aliens lays down the rights and duties of an asylum applicant in the Republic of Lithuania while his asylum application is being examined. According to this the asylum applicants have the right to receive free immediate medical aid and social services free of charge at the Foreigners Registration Centre in Pabrade (South East Lithuania) or Refugee Reception Centre in Rukla (Central Lithuania). The provision of health care is also regulated by the Order of Interior Ministry of Republic of Lithuania "On Conditions and Description of Procedures of Temporary Accommodation of Aliens at the Foreigners Registration Centre". The Article 17, subsection 4 of the said Order states that primary health care and emergency aid, shall be guaranteed to the persons accommodated at the Centre as well as social services have to be provided. The right of the immediate medical aid, the health care in the detention centre and special medical treatment in other medical institutions in the case of lack of the needed medical care in the detention centre is as well provided by the Article 19, subsections 1, 3, 4 of the Law of Pre-Trial Detention.

2.8. Legal grounds for contacts with the outside world

The legal grounds for contact with the outside world are found in the Order of Interior Ministry of Republic of Lithuania "On Conditions of Temporary Accommodation of Foreigners at the Foreigners Registration Centre" on October 4, 2007 No 1V-340. The Order of 2007 have replaced the former Order on Conditions of Temporary Accommodation of Foreigners at the Foreigners registration Centre, approved by the Decree of the government of the republic of Lithuania on January 29 2001 No. 103 which in Article 17 regulated the legal grounds for contact with outside world. The Article 17 of the above mentioned Order of 2007 stipulates in the subsections that persons accommodated at the Centre shall have a right to:

- 17.1. Use the services provided an the centre;
- 17.3. Receive the legal assistance guaranteed by the state;
- 17.5. Receive and send an unlimited number of letters;
- 17.6. Receive an unlimited number of parcels and wrappers;
- 17.7. Buy food products, clothes and other necessities for life;
- 17.8. Receive and send money or make bank transfer;
- 17.10. Use the paid telephone in the residential territory;
- 17.14. Meet with the persons visiting him/her in the territory of the Centre upon the permission of the head of the centre;
- 17.15. Lodge complaints against the decision of the chief of the centre affecting disciplinary sanctions and address it to the State Border Guard service.

The Article 18 of the above mentioned Order as well as defines further rights of asylum seekers and detained asylum seekers as right to get reimbursement for costs by using means of public transport when it is related to the procedure of asylum application except detained asylum seekers (18.1.), right to receive monthly monetary allowances (18.2.), right to address the High Commissioner for refugees Board Representative and to meet them (18.5.).

The Article 71 §1 of the Law on the Legal Status of Aliens lays down the rights and duties of an asylum applicant in the Republic of Lithuania while her/his asylum application is being examined. The Article 110 of the said Law guarantees the support for the integration of aliens who have been granted asylum in the Republic of Lithuania.

2.9. Legal grounds for the provision of legal aid

The Article 71 §1 subsection 3 of the Law on the Legal Status of Aliens provides the grounds for the provision of legal aid. The provision of legal aid is guaranteed as well as by the Order of Interior Ministry of Republic of Lithuania "On

Conditions of Temporary Accommodation of Foreigners at the Foreigners Registration Centre” (2007), Article 17 subsection 3 (right to legal assistance guaranteed by the state) and subsection 9 (right to hire a lawyer at their own expense of aliens). The situation how it often looks in the practice is that illegal migrants receive free legal assistance only during the trial and pre-trial hearing at the court. Being detained in the detention centre, they have to pay services of the lawyer by themselves.

2.10. Legal grounds for the protection of persons with special needs

The Article 71 §2 of the Law on the Legal Status of Aliens stipulates that aliens under the age of 18 may be detained only in an extreme case. The provision relating to the protection of particularly vulnerable people is that contained in the Order of Interior Ministry of Republic of Lithuania “On Conditions of Temporary Accommodation of Foreigners at the Foreigners Registration Centre” (2007), Article 17 subsection 16 according to which the minor aliens are allowed to attend the general education schools and to take part in the events organized by national and international NGO outside the territory of the centre in the Republic of Lithuania. The Article 19 of the said Order stipulates that psychological services shall be provided to the persons who experienced torture or rape, minors, single women and elderly.

2.11. Legal grounds for alternatives to detention

The Article 115 §2, subsections 1 to 4 of the Law on the Legal Status of Aliens lays down the measures alternative to detention: requirements to appear at the appropriate territorial police agency and to inform the appropriate territorial police agency about her/his whereabouts; entrusting the guardianship of an unaccompanied minor alien to a relevant social agency and entrusting the care of the alien, pending the resolution of the issue of his detention.

2.12. Legal grounds for providing release from detention

The provisions regulating release are those found in the Article 119 of the Law on the Legal Status of Aliens, which states that upon disappearance of the grounds for the alien’s detention, stated in the court’s decision, the alien shall be immediately released. The same applies when the alien’s detention period, established by law or by the court, expires.

3. OVERVIEW OF THE NATIONAL DATA FINDINGS

3.1 Basic Information

According to the DEVAS interviews, the average detainee in the detention centre in Lithuania was male, single, and around 30 years old. Almost all of the detainees that were interviewed came from the former Soviet republics of Soviet Union like Belarus, Uzbekistan, Kazakhstan, Azerbaijan, and the Russian Federation. One detainee came from Iraq. The average length of the detention of detainees interviewed in Pabrade was 9.6 months. The longest period of detention among the detainees interviewed was more than 3 years.

3.2 Case Awareness

Almost all of the ten detainees that were interviewed by the DEVAS project team were illegally staying third country nationals whose life situation was directly related to the breakdown of the former the Soviet Union and the transformation of the former Soviet societies during the period since 1990. Six of the detainees were not in possession of passports or ID cards, having only expired passports of Soviet Union citizens. Typically the detainees were either living in territories or regions next to the state borders (Lithuanian-Belarus, Lithuanian-Russian

Federation), to which they had moved during the period of transformation, or oscillating between Lithuania and neighbouring countries, without applying officially for new citizenship instead of their expired citizenship of the former Soviet Union. Such cases came, for example, from Belarus and the Russian Federation (region of Kaliningrad). Another group of detainees were illegally staying third country nationals seeking asylum in Lithuania who had been denied asylum and were awaiting their deportation home. Such cases came, for example, from Iraq, Uzbekistan and Kazakhstan. Two of the interviewed young detainees had committed juvenile crime and had been sentenced. They had been brought to Pabrade in order to clear their identity and nationality.

All of the interviewed detainees affirmed that they had been “more or less” informed about the reasons for their detention. In four cases courts had explained the reasons for administrative detention to them and in two other cases they had been informed by police and other administrative authorities. In each case the sentence was announced in their mother tongue (mostly Russian or Lithuanian) or with help of interpreters. According to the detainees, the level of information provided was a problem. Only one detainee thought that the level of information was sufficient, whereas six detainees considered it as insufficient (“totally uninformed”). The difficulties were connected first of all to the lack of sufficient or any information about the complicated procedure of asylum. In most cases the detainees had an official document in written form from the administrative authorities about the decision of administrative detention without being informed about the possibilities of applying for asylum. Five out of seven detainees said that “more information about detention and asylum or immigration procedure is needed” especially about the duration of detention, application procedure for getting personal documents and the general conditions entering asylum or administrative detention. Most of all, information about the necessary documents for getting a new ID card was needed.

In addition, information about the time of release was important. Two interviewed detainees, those who had committed juvenile crime and experienced juvenile prison, were arguing that “within the young offenders’ institution we knew the exact day of our release whereas while being administratively detained in the Pabrades detention centre we absolutely do not”. The term of administrative detention can be prolonged every third month and because of that the exact duration of detention cannot be established. The detainees experience permanent distress because of this uncertain duration of detention and the resultant loss of control over their own lives.

A further issue that was mentioned in relation to case awareness was a lack of understanding of why they had been detained in the first place: “why have I been put into prison without being committed of any crime”.

3.3 Space within the detention centre

As already mentioned, the Foreigners' Registration Centre in Pabrade consists of two premises: one of them is the open premise for asylum seekers and their families in which they have full freedom of movement during the asylum procedure, and the other is a closed one where illegally staying third country nationals are accommodated. There are strict restrictions of movement: the illegally staying third country nationals are not allowed to leave the territory, which is fenced off from the remaining area of the Foreigners' Registration Centre, without being accompanied by the guards. At the time of the DEVAS research, around 50 detainees were accommodated in the detention centre. The detainees seemed to be grouped taking into account such criteria as nationality, language and culture as well as religion and also differences between national groups, for example Chechens and Russians or Armenians and Azerbaijanis. According to the statements of members of staff and detainees, there were no more than 50 persons on one floor. Almost all the detainees were men. The few women present at the time were accommodated in a separate place altogether. At the time of the DEVAS interviews illegally staying third country nationals from the republics of former Soviet Union, all of whom speak and understand Russian, were accommodated on the first floor. The second floor was designed for illegally staying third country nationals from other countries like Afghanistan, Pakistan, Iraq, and African countries. There were usually five detainees accommodated in one sleeping room, which has a size of 15 - 20 square metres. If the centre is not crowded and there are rooms available, there is the possibility for the remaining detainees to choose to sleep by themselves. Such a “free choice” is not usually exploited because it can

be seen by the other detainees as a wish to separate and can lead to alienation from the rest of the group. There is no separate room for retreat and no possibility to be alone, but the detainees did not see the centre as overcrowded.

All ten interviewed detainees were negative about the centre space because of the facilities, which needed renovation. They mentioned first of all the bad or insufficient condition of roof, walls, windows, central heating system (the detainees from southern republics of the former Soviet Union found the temperature in the rooms especially cold), means for cooking and washing which were out of order, shower cabins, and partly damaged power sockets. According to the interview statements of the detainees, the regular answer from the staff to their concerns about the poor state of the building in which they were staying was "there is no money because of the economic crisis in Lithuania". The wishes of the detainees to fix damaged electric equipment, such as washing machines or electric ovens, were not respected by the officials. Some of the detainees mentioned sanitation as a problem and did not agree with the requirement or the regulation that they keep the sleeping room clean by themselves. Outside, next to the detention centre, there is a small yard where the detainees could be for a while during the day, where there was also a place for playing football or basketball. During the night the centre is locked up.

3.4 Rules and routine

There are house rules in the detention centre in Pabrade, and they exist in written form. Detainees reported that they are informed about the house rules following their arrival. The information about the house rules is provided in oral or written form in only two languages (Lithuanian and Russian, not English) and afterwards should be signed by every detainee. The house rules concern daily life in the detention centre, for example rules about the living space, nutrition, activities and so on. Besides the main rules, there are possibilities for the detainees to make small choices by themselves, for example by deciding when to get up, about taking meals in the canteen or cooking it by themselves, about washing clothes by themselves or letting them be cleaned by the housekeeping staff. Previously, there were possibilities to set up some rules proposed by the detainees but nobody reported using such opportunities. According to the detainees, there are many "informal rules" within the detention centre, "which is similar to the situation in jail". There are groups that dominate, depending on the number of detainees from one country or cultural region. There is a main rule within the centre, which is the strict prohibition of the use of mobile phones. Nevertheless everybody uses them illegally, despite the regular control visits by the special military task force. Detainees identified a mobile phone is the most effective means of communication and they can be acquired easily with a small amount of money and a little help from family members, friends or asylum seekers that have access to the local community.

3.5 Detention centre staff

The regular staff within the detention centre are officers from the investigation unit who are responsible for each case, security guards, social service staff (librarian) and the chief of the detention centre. They were considered by the detainees as "competent". The staff uses a language that the detainees could understand well (Lithuanian, Russian and Basic English). Detainees reported that the staff responded quickly to requests that were presented to them. More than half of the detainees interviewed considered the daily interaction between them and the staff as positive. There were no cases of discrimination by the staff reported. In the case of special requests the detainees could apply in oral or written form. One of the detainees reported a "little experiment" he had done in order to check the effectiveness of the processing of the detainees' requests by the detention centre staff. The detainee sent a letter with a written request to the Ministry of Interior, with the help of asylum seekers he knew well. At the same time, he let the investigation official of the centre process the request. Both of the requests were processed.

Nevertheless, all of the interviewed detainees expressed a wish to be treated by the centre staff "with more respect". The detainees complained that some staff members regard them "not as persons but only as statistical figures and numbers". The centre staff, especially the security guards and officials from the investigation unit ("inspectors"), are the only persons who deal with detainees' daily needs, since many of the detainees have very little contact with the outside world, and some have no family members, relatives or friends in the host country who visit them while they

are in detention.

3.6 Level of safety within the detention centre

The detainees considered that the detention centre in Pabrade was "very safe". Some detainees mentioned security guards as the reason for this. However, some of the interviewed detainees expressed concerns about the "technical security" (danger of accidentally getting an electric shock from the partly damaged wiring system and the broken power outlets in the detention centre). The detainees also mentioned a small risk of being mocked or physically assaulted by other detainees because of pent-up aggression and other negative emotions as a result of the long period detention or because of national disputes, for example between Russians and Chechens, Armenians and people from Azerbaijan etc.

3.7 Activities within the detention centre

In the detention centre there are basic activities available in order to keep the detainees active. Generally the detainees regarded daily activities as "important", as a "main means to combat the monotony, isolation, the pent-up frustrations and aggressions of being 'locked up' and permanently in detention". As another 60-year-old detainee from Russia said, "otherwise it would be that passivity, this permanent nothing-to-do, killing us". The detention centre provides sports and entertainment in the form of TV and books in the library. All detainees have access to books (in Lithuanian, Russian and some in English), a telephone that uses cards (which is not functioning well the whole time), television, sports hall, religious space (a room, where is possible to meet with the priest from time to time, which is used only by Russian orthodox detainees), and to outdoor space (but without facilities like a park benches, only small basketball/football ground). There is no access to computers (no use of the Internet), educational opportunities (the detainees have expressed a strong wish to learn languages during the time they are in detention, including the language of the host country Lithuania) or to religious services.

In particular, the interviewed detainees mentioned that the equipment is mostly out of date. For example, in the library there are no newspapers, no language books for foreign languages (including Lithuanian) and no dictionaries. All ten detainees with whom the interviews were made wish to have the possibility to use the Internet or to have access to a PC. A chill-out room is desperately needed because most of the time the detainees are among others. Further, a group room is needed, where the detainees could gather for sessions or discussions. Despite the card phone the detention centre is provided with, the interviewed detainees reported difficulties in using it freely either because the card phone is out of order most of the time or because they have no possibility to buy phone cards especially if they do not have relatives, family members or friends in Lithuania. There is no other way to make phone calls except for the illegal use of mobile phones, for which the detainees can be punished.

3.8 Medical Issues

There is medical staff in the centre: two doctors, two nurses and one psychologist. The detainees can see them at least once per week or as necessary. All the detained persons have had a medical exam (measure of the blood pressure, several blood tests etc.) Upon arrival to the centre, detainees reported that they understood the language (Lithuanian or Russian, also basic English) of the medical staff. The health care unit within the detention centre provides only primary health care. In emergency cases like acute appendicitis, strong tooth pain, psychosis etc., detainees can be brought to a specialist in the city hospital in Pabrade. The detainees missed being regularly examined and treated by such a specialists like an ENT doctor or an ophthalmologist, especially those among the elderly detainees who needed glasses or hearing aids.

In general, though primary health care was provided in the detention centre in Pabrade, the interviewed detainees felt that they were offered only a superficial level of medical care, in which they were always provided with the same treatment of pills - aspirin or pain reliever –no matter whether they were complaining of pain in their bones, joints,

stomach or simply of headaches. In most cases the detainees felt that they lacked attention and emotional devotion on the part of medical staff. Some of the detainees felt dismissed by the medical staff, or did not feel that they were taken seriously. One detainee reported that a nurse had refused to give him stress relievers without even an explanation. However, when asked to rate the medical care overall, three detainees were positive about their medical treatment, two were neutral and one thought it was bad. Five detainees reported that better medical services were needed, in terms of better access to appropriate treatment or better quality.

All the interviewed detainees felt that being in detention had negatively impacted their physical health. There was a direct relation between the level of the negative impact on health and the duration of the detention. When asked why they thought that their health had deteriorated, most of the detainees said that the reasons were stress, the bad state of the detention centre buildings and the poor living conditions. Illegally staying third country nationals from the southern republics of the former Soviet Union like Azerbaijan or Uzbekistan reported difficulties in coping with the very low temperatures inside the buildings during the cold Lithuanian winter period. Low temperatures caused a lot of medical troubles like flu, cold, cough etc. Some of the detainees suffered allergies or stomach troubles that they had never experienced before and according to their statements the reason for this could have been the insufficient sanitary conditions within the detention centre and the lack of vitamins in the food. Most of the detainees saw a link between their poor state of physical health in detention and their deteriorating mental health. The frequency of being ill increased in detention and the period for recovery from medical troubles became longer.

Being detained also had a very negative impact on the perceived *mental health* among all the detainees interviewed during the DEVAS project. Through being detained, their mental health had dropped on average from “very good” (eight out of ten points) to “less good” (six out of ten points). The reasons given for this were the impact of being detained in a closed place, the impact of worries, and the impact of medical or health problems. The most negative impact happened in situations where the affected person had a physical or mental handicap or was vulnerable in some other way. Among the detainees interviewed for DEVAS was a middle-aged-man of German origin with his old mother, who suffered from schizophrenia. They had fled to Lithuania from a region of the Russian Federation next to the border of Kazakhstan and Siberia, because they had been discriminated against on account of their nationality. They had been detained in Pabrade for more than three years, and there was still no clear outcome for their future because the Russian Federation refused to provide them visas that would allow them to return home. The Lithuanian DEVAS project staff witnessed the deep hopelessness of this man during the interview, which was expressed in his motionless and static posture, in his quiet and lifeless voice, and in his dull and vacuous face. The situation had become unbearable for him because of his mother, who could not cope with the fact that they had been forced to flee to Lithuania or the fact of being in detention without any long-term perspective for the future. This permanent uncertainty meant that during the three-year period of detention she had become chronically mentally ill.

3.9 Social interaction within the detention centre

Six of the detainees interviewed considered the interaction between detainees as good. One detainee mentioned neutral interaction and one mentioned a bad atmosphere in the detention centre. When there were problems, it was because of inter-cultural tensions (for reasons of culture, religion and nationality) and tensions due to common life in detention. Some of the detainees used preventative tactics in order not to be involved in disputes or interpersonal conflicts. They were consciously keeping their distance, and trying not to respond to the aggression. The detainees generally tried to solve the problems by themselves without informing or involving the staff of the detention centre, "otherwise you can be considered as sneak or spy by the other detainees", as one of the detainees remarked.

Four detainees said that they had a person to trust in the centre (detention centre staff or other detainees). All detainees said had a family in their home country, and in most cases they do not rely on them for support. Five detainees reported having friends and family in Lithuania.

3.10 Contact with the outside world

The most important ways mentioned to keep in touch with the outside world were the card phone or mobile phones, as well as mail and personal visits. In the detention centre the detainees have a limited access to these ways of keeping in touch. The use of the mobile phones is prohibited while in detention, but nevertheless the detainees use them illegally at their own risk. All detainees said that the fixed line telephone that they have access to in centre is insufficient because most of the time it is out of order. In addition, money is needed in order to buy a phone card, and every time the detainee wants to use the card phone, he has to apply for it in written form and address it to the responsible official or to the chief of the centre in Pabrade. Therefore despite the strict prohibition of the use of mobile phones in the centre most of the detainees possess mobile phones, and in most cases the officials turn a blind eye to this. On two occasions during the implementation of the project, a member of the DEVAS project team was called by the detainees who were indignant because the special military task force from Vilnius had been called for an intervention within the centre. The reason for such an intervention was to find out and to punish the possessors of mobile phones among the detainees, on the grounds that they had broken the internal house rules. On one occasion, a detainee from Azerbaijan, who held university degree in journalism from Turkey and Iran, called the interview team (from his own mobile phone). He was extremely agitated, and told the team about "razzia" within the detention centre. During the "razzia" there were accidents like broken arms or ribs of detainees, which happened when detainees fought against the special military task forces. The detainee was calling to say that the physician had not been called in order to examine and treat the detainees' injuries.

Three detainees reported receiving visits from family and friends, and one of the interviewed detainees has received religious visits. Generally the situation of the detainees was easier for those who had family members, relatives or friends in Lithuania, as they could provide them with means of communication with the outside world such as envelopes, stamps, pencils and sheets of paper for letters. Without these contacts the detainees are incapable of keeping in touch with those on the outside.

3.11 Conditions of detention and the family

The DEVAS team in Lithuania did not interview any detainees who were detained with their families.

3.12 Conditions of detention and nutrition

In general, the food that the detainees were offered in the canteen of the detention centre was not popular because it was simple, poor quality and always the same: pasta, porridge, a little meat, and no vegetables or fruit. Four of the interviewed detainees said they liked the canteen food, while three of the other interviewees did not like it and would prefer to cook by themselves. Further, the illegally staying third country nationals from other cultural backgrounds than Europe missed food from their own cultural background. Three detainees reported a change of appetite in detention. They report a loss of appetite because of the conditions mentioned before, which made them feel worse. Five detainees said they did not sleep well because of the stress of being detained with others in small rooms and because of their worries.

3.13 Conditions of detention and the individual

The detainees were asked to rank their difficulties in detention. As "difficulty one" they considered detention itself and further the poor living conditions in the detention centre, since the main premises of the detention centre is in need of a complete renovation. Also ranked as "difficulty one" are continuous worries about the situation of being in detention and sorrows about the situation of family members and relatives. One detainee saw the violation of human rights while in detention as having the biggest impact on his life and another detainee mentioned the loss of the control over his own life.

As “difficulty two,” detainees worried about the living situation of family members and relatives as well as about the strong restrictions of freedom and free movement within the detention centre. Again, detainees felt that the loss of control over their lives and the poor living conditions had a negative impact.

As “difficulty three” the detainees mentioned the emotional impact of being detained. One of the detainees in Pabrade expressed it as followed: “We are human beings not just figures in statistics. But in the detention centre we are just known by our personal numbers.” In addition, some detainees mentioned that illegally staying third country nationals who had not committed any crime were accommodated together with those who have committed a crime and have been sentenced to jail. The non-criminals among the detainees said that this caused them a lot of stress.

Analysis of the data suggests a strong link between the duration of detention and the negative impact of detention on physical and mental health. Physical and especially medical troubles increased with the duration of detention. Detainees observed a special emotional dynamic in the experience of coping with detention: first of all the person in detention has “high hopes” concerning the duration of detention, the terms of release and the general outcome of the whole procedure. These persons are highly motivated, make plans, keep attending different activities etc. Attempts to escape from the detention centre could be regarded as part of the typical behaviour in this first stage of detention. Three of the ten interviewed detainees in the detention centre in Pabrade had committed two or three successful attempts to flee. However, each time they were apprehended and again detained. Then follows a second stage: after this repeated detention the detainees lose their strength and motivation to cope, especially in the case of long-term detention, and instead of being active they fall into hopelessness and sort of stupor.

Only one detainee from the ten who were interviewed by the Lithuanian DEVAS project team knew exactly what the outcome of their detention would be, and only two detainees knew their departure date from detention centre. Not knowing this lead to worries and difficulties in planning their future. In particular, as mentioned above, those young detainees who have committed juvenile crime prior to detention could compare the situation in jail, when prisoners know their exact day of release. Having a fixed date of release from detention would ease the state of uncertainty among detainees.

How did the interviewed detainees define the “vulnerability” from their own perspective? For the detainees, “vulnerable persons” were regarded first of all as persons with a physical or mental handicap or with so called “classic special needs”. For instance, the detainees described as “vulnerable” “the old man with amputated leg” or “the elderly woman who is badly mental ill and suffers one psychotic episode after other”. The general opinion of all the interviewees in Pabrade was that “families with small children are vulnerable in detention” (but the families are not accommodated in the detention centre, but instead the centre for asylum seekers in Pabrade which includes separate apartments for couples and families with young children). Further, a “pregnant women or young mother after delivery, who can’t get a special nutrition or clothes for her baby, could be considered as vulnerable”. The other cases of vulnerability, noticed by detainees under the conditions of detention in Pabrade, were: “A 73-year-old-man, who is very sick and crying every night; a Polish man, who is seriously ill as well; a Vietnamese man who does not understand the language; and a man from Chechnya who is not allowed to see his family in Lithuania.”

4. ANALYSIS OF THE DATA AND CENTRAL THEMES

In Lithuania, administrative detention is applied to illegal staying third country nationals and not to asylum seekers. This distinction between illegally staying third country nationals and asylum seekers determines their living conditions, which means they have different accommodation. In Pabrade the asylum seekers are accommodated in a new freshly renovated building. Asylum seekers have freedom of movement and access to the outside world. Meanwhile, illegally staying third country nationals live in an old building that is surrounded by a wire-mesh fence. They have no freedom of movement, and they can leave the premises only accompanied by the guards. It is important to note that

for a first period of 24 hours within Foreigners' Registration Centre in Pabrade, illegally staying third country nationals and asylum seekers are detained in the same building in order to find out their legal status. Afterwards they are led to two different premises, and illegally staying third country nationals and asylum seekers communicate only by sending each other letters through the fence. This form of communication is mostly used by illegally staying third country nationals in order to ask the help of asylum seekers in providing them with cigarettes, mobile phones, paper and pens.

This situation disadvantages illegally staying third country nationals in comparison to asylum seekers in one special respect. Between 2002 and 2007 Caritas Vilnius and the Red Cross in Lithuania provided social services and counselling to both illegally staying third country nationals and asylum seekers in the Foreigners' Registration Centre in Pabrade. Through this service, everyone was offered consultations with voluntary social assistants and lawyers. However, one and a half years ago Caritas Vilnius established a Community Centre in Pabrade town, 2km from the Foreigner's registration centre, and this Centre provides social services and counselling only to asylum seekers that have freedom of movement. The illegally staying third country nationals were subsequently cut off from any social assistance provided by two NGOs.

Specific recurring themes regarding administrative detention can be observed from the DEVAS interviews. One such theme is *the lack of information about administrative detention, especially about the duration of detention*. The distinction between illegally staying third country nationals and asylum seekers determines not only the differences in accommodation, movement of freedom and access to counselling by NGOs, but also in the level of information provided about the duration of their detention and asylum procedure. The illegally staying third country nationals complain about the lack of accurate information. The minimum duration of administrative detention in the Detention Centre is three months but the average duration of all interviewed detainees was more than nine months. The case of the detainee from Kazakhstan detained with his mentally ill mother for more than three years without having any indication of the outcome of their detention was a particularly bad example the DEVAS team came across. Uncertainty concerning the duration of the detention is one of the most stressful factors the detainees experience while being detained. Those interviewed detainees who had not committed any crime prior administrative detention felt criminalized because of the restriction of their freedom of movement, and because of indefinite term of release from detention. Further, because of being detained with "criminals", they felt as if they were being treated as such. In all interviews the detainees underlined the link between the indefinite duration of their detention and their physical, mental health and well-being. Interestingly, in two interviews the detainees stressed that there was a positive side to the prolonged duration of detention. They were homeless prior to detention and needed more time for an alternative form of accommodation being prepared and to recover from serious illnesses (for instance, leg amputation).

Another important topic mentioned by detainees was *the level of isolation from the outside world in the Pabrade Detention Centre and its negative impact on their physical/mental health and coping capacities*. As explained above, after NGOs Caritas Vilnius and the Red Cross moved their counselling and social assistance services from the Foreigners' Registration Centre to the new premises in the town of Pabrade, illegally staying third country nationals, especially those without family members, relatives or friends in Lithuania were deprived of NGO services and legal help. According the opinion of the DEVAS team, this group is especially vulnerable because they have no contacts with outside world for very long period of time, except the guards, staff and co-detainees. Without the help of family members, relatives or friends, the detainees do not have access to important means of communication such as mobile phones, phone cards, envelopes, stamps, pens, paper, etc. and they lose the ability to control their own personal life and to influence their environment. The most effective and frequently used means of communication in the detention centre in Pabrade were mobile phones, which are prohibited. Nevertheless the illegally staying third country nationals used them because the card phones in centre were often out of order. All of the interviewed detainees reported about the violence towards them by the special military task force who paid regular control visits because of their illegal possession of forbidden mobile phones. Overall, this isolation and alienation heavily affected their emotional and mental state and even during interviews the detainees burst into tears or expressed anger, rage or indifference. Sometimes the interviewing staff during the two hour DEVAS interview were the only human beings

with whom the detainees could share their worries, concerns, problems and joys. Giving them a possibility to meet persons and specialists from the outside world, like social assistants, psychologists, priests and a lawyer, could alleviate this isolation.

The third important topic mentioned by detainees is *the general impact of administrative detention, - especially, the restriction of freedom and movement, and accommodation in isolated location for indefinite period of time, – on physical and mental condition of the detainees*. This impact has several levels and aspects, such as living conditions, nutrition, and activities within the centre. This impact depends on other important factors such as the existence of a disability, age, gender, nationality, contacts with outside world and so on. The detainees reported a strong relation between their conditions of accommodation and nutrition within the detention centre on the one hand, and between their physical and mental state on the other. All interviewed detainees criticized the living conditions in Pabrade: they mentioned that the building should be renovated, the windows are broken (it is windy and cold inside) and roof should be repaired (it rains through), the wallpaper is very old. The detainees reported similar problems about poor nutrition (not tasty, not enough, small portions, lack of choice, no respect to cultural and religion differences) and lack of activities (for many detainees provided activities seem to be only “pro forma”: TV in bad condition, no sports equipment, old books in languages they do not understand, the table of tennis without bats and balls). The rules on communication mean the Internet is not available for them at all. The detainees reported positively on the possibilities to make food or wash clothes by themselves but they expressed regret that very often the equipment is out of order. One detainee reported that he was not provided with suitable clothing. He had been detained in summer and in winter time he was still wearing flip flops as no one had provided him with winter footwear. Many detainees also reported a sense of time being wasted. They expressed a wish to learn foreign languages and frustration that there were no manuals in the library and no lessons organized. They also expressed a wish to repair an old gas oven on which to cook, but none of the staff would give them permission to do so.

5. CONCLUSIONS AND RECOMMENDATIONS

The DEVAS research conducted in February – October 2009 in the Foreigners’ Detention Centre in Pabrade shows that while on the surface the detention of illegally staying third country nationals seems to be a procedure that respects human rights, there are a number of problems with the situation. This detailed survey confirmed that from the perspective of the detainees the long duration of detention without a fixed term of release, the isolation of being in detention, and the bad living conditions have a very negative impact on the physical and mental condition of these illegally staying third country migrants.

In order to smooth the impact of detention, one short term recommendation could be the following: the detainees have to be provided with *access to free counselling and social assistance from NGOs* like Caritas and the Red Cross. The experience of social advocacy gained by Caritas Vilnius during five years (2002 – 2005) has shown that complementary assistance and regular contacts with NGOs help detainees to cope with their desolate situation. Because these services have moved to the new community centre in the town of Pabrade, they are now only available for asylum seekers. Therefore those illegally staying third country nationals in the closed detention centre have been left without assistance from NGOs. This target group seems to be “abandoned” not only in terms of social funding and advocacy but also in human terms: isolated from the outside world, detained for a long period of time, without knowing the clear outcome of the detention, suffering from the consequences of isolation, loneliness and in permanent distress.

In order to assist the illegally staying third country nationals *the local community and institutions like schools and the parish of the local Catholic Church in Pabrade could be more involved*. Regular visits by volunteers to the detention centre to talk to the detainees would help provide moral support for those locked up. The local community could help by collecting products, finding and offering second hand shoes and clothes as well as equipment like washing

machines or gas ovens. As detainees mentioned in their interviews, the possibility of having even a few small choices in their daily lives in detention - like washing their clothes and underwear by themselves or cooking food instead of consuming prepared food or fixing broken house equipment - could make them more happy and independent.

It would be reasonable to *legalize the use of mobile phones within the detention centre* because they are the most used and effective means of communication with family members, relatives, friends and independent social or legal assistants. The fact is that the detainees in detention centre in Pabrade are using the mobile phones illegally in spite of a high risk of being found out and punished by special military task force that pays regular visits to the detention centre and uses violence to discourage such activities. *Free Internet access should be planned* in the future because many detainees mentioned as a most effective mean to keep in touch and be up-to-date with outside world.

As for "long term recommendations", *the duration of the detention of illegal staying migrants in the detention centre in Pabrade should be defined with more exactness*. In cases where this is not possible and the limit of three months has been exceeded, either the possibilities for alternative forms of accommodation should be provided or the outcome of their legal procedure has to be speeded up. It is conceivable that co-operation between the detention centre and NGOs could help to provide measures alternative to detention and could give quite good results. NGOs based on Christian values are well experienced in working with marginalized groups of society and working with them while respecting their dignity.



NATIONAL REPORT: LATVIA

By: *Caritas Latvia*

1. INTRODUCTION

This report was carried out based on an approach and a methodology developed by DEVAS. To complete the project the only illegal immigrant and asylum seeker detention centre in Latvia, the Detention centre of Olaine (located 30 km from the capital Riga), was visited. On the basis of several questionnaires and guidelines, Caritas Latvia arranged for a number of interviews - with 8 detainees and 1 member of the staff. All the detainees were young males each from a different country (Cameroon, Turkey, Syria, Sierra – Leone, Eritrea, Somalia, Ghana, and Iraq). Altogether a total of 9 interviews were conducted and evaluated. It was not possible to implement one part of the methodology – interviews with Non-Governmental Organizations – since no NGO is working with the centre or visiting the detainees.

Caritas Latvia owes special gratitude to Head of the State Border Guard General Normunds Garbars, the Head of the Internment Camp for Illegal Immigrants “Olaine” captain Raimonds Paļčevskis, as well as all the detainees who helped Caritas Latvia to complete this report. And also a special thanks to all the project partners whose exchange of experience in carrying out this project was an important help in finishing this report.

2. NATIONAL LEGAL OVERVIEW

The National Laws that deal with detention of illegal immigrants (third-country nationals) and asylum seekers are the Immigration Law Act of 31 October 2002 (Immigration Law) and the Asylum Law Act of 15 June 2009 (Asylum Law). However, many of the laws contained in the Immigration Law concern asylum seekers, so in this text only if the laws for asylum seekers differ from those for illegal immigrants will they be explicitly mentioned or quoted. Otherwise, it is to be noted that the Immigration Law applies to both of these two types of foreigners. They are defined as follows:

- **Asylum seeker** – a third country national or a stateless person who, in accordance with the procedures specified in this Law, has submitted an application regarding granting of refugee or alternative status in the Republic of Latvia until the time when the final decision regarding his or her application has come into effect and become non-disputable;
- **Third country national or a stateless person** – a person who is not a citizen of the Republic of Latvia, another European Union Member State, a state of the European Economic Area or the Swiss Confederation, as well as a stateless person who has been granted this status by one of these countries. (Asylum Law. Section 1, 7) and 10).

2.1. Legal grounds for detention

The legal grounds for detention are found in the Immigration Law Section 51. It states that a third-country national can be detained by the Border Guard or the State Police (1) if he/she has illegally crossed the border of the Republic of Latvia or has otherwise violated the rules and regulations for third-country nationals entering the Republic of Latvia; (2) if appropriate state organizations have grounds for suspicion that the third-country national poses a threat to security of the state or to public order and security. Section 52 of the same Act states that the Border Guard or State Police officer has to write a detention protocol at the time of detention. The protocol must contain the information on

the time and place of detention, name and rank of the officer, information about the detainee, and the motives of the detention. Section 57 states that Border Guard or State Police officer has to find out the detainee's identity, take his fingerprints, carry out a search of his property, if necessary arrange for him medical examination, and has to include all that in the protocol.

The legal grounds for detention of an asylum seeker are found in the Asylum Law Act of 15 June 2009 Section 9 which states that the Border Guard has the right to detain an asylum seeker for a period up to seven days and nights if: (1) the identity of the asylum seeker has not been established; or (2) there is reason to believe that the asylum seeker is attempting to use the asylum procedure in bad faith; or (3) competent State authorities have a reason to believe that the asylum seeker poses a threat to national security or public order and safety.

2.2. Legal grounds for the minimum age for detention

The minimum age of detention is 14 years, as stated in the Immigration Law Section 51: (1) An official of the State Border Guard has the right to detain a third-country national, except a minor third-country national who has not reached the age of 14 years.

2.3. Legal grounds for the detention order

The legal grounds for the detention order for an asylum seeker (Asylum Law. Section 9, (2)) and a third-country national are described in the Section 54 of the Immigration Law, which states that to detain the third-country national for longer than 10 days the Border Guard officer needs to obtain the detention order from a regional judge, who can issue an order to detain the third-country national for a maximum period of 2 months. The Border Guard officer can ask for detention extension in the same court. Factors that have to be taken into account when assessing the need for the extension of detention include: the third-country national is hiding his identity or refuses to cooperate with the Border Guard authorities; the third-country national does not possess the required financial means to support his/her stay in the Republic of Latvia; competent state organizations have grounds to believe that the third-country national is a member of a criminal or anti-governmental organization, or that he or she poses threat to security of the state or to public order and security; the third-country national has committed a crime against humanity, crime against peace, a war crime or has participated in genocide, which has been recorded in court.

2.4. Legal grounds for judicial review of the detention order

The detention order is not reviewed automatically, but only on an appeal of the detainee.

2.5. Legal grounds for the right of appeal against the detention order, or to challenge detention

The Border Guard officer has the legal right to detain the third-country national described in Section 51 for the time period of up to 10 days. The detainee has the right to appeal the detention decision in the court. The legal grounds for right of appeal of the Court decision are found in the Section 55 of the Immigration Law point 6, which states that the third-country national or his representative has the right of appeal within 48 hours of receiving the Court decision. The appeal is addressed by the Regional Court immediately, and the Court decision is final and is no longer subject to appeal. If an asylum seeker has received a negative decision regarding his or her legal status, he or she can appeal the decision in the district administrative court, as specified in the Asylum Law, Section 30, Point 1. Within 10 days of coming into effect of the decision the application of appeal has to be submitted to the Office, who will, if necessary, ensure its translation, and submit it to the court. The Court decision is final and may not be appealed (Asylum Law, Section 31, point 4), unless the conditions which were the basis for taking of the decision have changed in his or her favour (Asylum Law, Section 32, point 1).

2.6. Legal grounds for the right of information about the detention order and/or the reasons for detention

The Immigration Law Section 56 states that the detainee in defence of his or her legitimate interests has the right to appeal the detention to a district (city) court, contact the consular institution of his or her country and receive legal assistance. A third-country national shall be acquainted with these rights at the moment of detention.

2.7. Legal grounds for duration of detention

The legal grounds for a legal maximum duration of detention are described in the Section 54 of the Immigration Law, which states that to detain the third-country national for longer than 10 days the Border Guard officer needs to obtain a detention order from a regional judge. If in the period of time prescribed by the Court decision it has not been possible to expel the third-country national, the judge, based on the Border Guard's request, can issue an order to extend the detention of the third-country national for a maximum period of 2 months. But the total detention time cannot exceed 20 months. The Asylum Law Section 9 specifies that the total time period of detention for an asylum seeker shall not exceed the time period of the asylum procedure. Section 13 of this law states that (2) the application will be examined within three months of submission; however, the State Secretary of the Ministry of the Interior or his or her authorised person may, due to substantiated reasons, extend the time period for examination of the application up to twelve months.

2.8. Legal grounds for the provision of health care and the scope of health care benefits, and for provision of social services

Section 59¹, point 2 of the Immigration Law states that when the third-country national is placed in the residence centre he/she undergoes a medical examination and necessary sanitary measures. If the detained third-country national has health problems, then according to the orders of the examining medical personnel he/she is placed in a specially designed room. Section 59² states that in the accommodation centre the detainee has the right to receive emergency medical assistance, as well as guaranteed health care services. The detainee also has the right to receive health care services and medicines that have been prescribed by medical personnel.

2.9. Legal grounds for contact with the outside world

Section 59 of the Immigration Law states that the detained foreigner is put in specially equipped facilities or a residence centre, separate from persons arrested or detained in a criminal procedural order. This centre is a structure unit of the State Border Guard. Section 59² describes that after being put in the residence centre the detained foreigner is introduced in a language he/she understands (if necessary, with assistance of an interpreter) to his rights and obligations, as well as to the centre's internal rules and regulations. It further states that the detainee has the right (1) to contact his/her country's consulate, (2) inform his/her family members, relatives or other people of his/her place of residence, (3) receive legal help for detainee's own funds, (4) meet with family members or relatives, as well as with representatives of international and non-governmental human rights organizations, (5) file complaints and petitions, (12) to receive consignments and parcels. And Section 4 of the Asylum Law states that (1) Upon the request of the United Nations High Commissioner for Refugees, the institutions involved in the asylum procedure shall ensure (1) the opportunity of meeting with an asylum seeker, even if he or she has been detained.

2.10. Legal grounds for the provision of legal aid

The Immigration Law Section 56 states that (1) the detainee in defence of his or her legitimate interests has the right to appeal the detention to a district (city) court, contact the consular institution of his or her country and receive legal assistance. A third-country national is acquainted with these rights at the moment of detention. In Section 59² it is specified that (1) after accommodation in an accommodation centre, the detained third-country national shall be acquainted in a language understandable to him or her (if necessary, utilizing the services of an interpreter) with his

or her rights and duties, which include the right to (3) to receive legal assistance, with his or her own means. An asylum seeker, however, has the right to request a person for the receipt of legal aid using his or her own funds, but if the asylum seeker does not have sufficient funds, he or she has the right to legal aid ensured by the State (Asylum Law, Section 10, point 3).

2.11. Legal grounds for protection of persons with special needs

Section 59¹ point 3 of the Immigration Law states that an unaccompanied detained minor third-country national who is at the age of 14 to 18 years up to the end of the time period of detention shall be accommodated in the relevant State Police structural unit. If up to the end of the time period of detention his or her identity and citizenship or country of residence has not been established, the State Police shall ensure the accommodation of the minor third-country national in a child care institution (Section 59⁵ point 2).

Section 59¹ point 3 of the Immigration Law states that detained foreigner upon placement in the residence centre is handled observing all general human rights principles and internal security, as well as personal characteristics and psychological make-up. It also states that male and female detainees should be separated. If the detained foreigner is underage, he or she is placed together with detained parent or legal guardian. Also detained families, if they wish so, are placed together. And if the detained foreigner has a child that has not been detained, that child can be placed in the residence centre by the request of the detained foreigner together with his/her parent. The child of the detained foreigner has the same rights and obligations in the residence centre as the detained foreigner. It also states that a detained third-country national who has a health disorder shall be accommodated in accordance with the instructions of medical personnel in premises specially equipped for such purposes.

2.12. Legal grounds for alternatives to detention

According to Section 7 of the Asylum Law the asylum seeker must hand over his or her personal identity and travel documents to the State Border Guard until the final decision is taken regarding his status. And (3) the personal document of an asylum seeker gives the right to stay at an accommodation centre for asylum seekers, where necessary living conditions are provided, and he or she may be transferred from one accommodation centre to another (Section 8). Section 8 (2) specifies that an asylum seeker shall not be accommodated at an accommodation centre for asylum seekers while he or she has another legal basis to reside in the Republic of Latvia. When changing the place of residence, the asylum seeker shall inform the Office regarding the address of the new place of residence.

2.13. Legal grounds for providing release from detention

According to Section 59⁴ of the Immigration Law detained third-country national can be released from the residence centre (1) if the detention term has ended, (2) in order to implement a return decision, or (3) in accordance with the State Border Guard officer's decision about the release of the detained third-country national.

3. OVERVIEW OF NATIONAL DATA FINDINGS

3.1. Basic information

All eight detainees that were interviewed are male and all, except one, are single. They are aged between 18 and 32 years. They come from Africa or the Middle East, and typically go into detention right after arrival. All of them are asylum seekers and their detention can last very long, usually over a year, and in 3 cases around 20 months (which is the maximum duration of detention).

3.2. Case awareness

The detainees feel usually rather well informed both for the reasons of their detention and the current situation of their case. They were most often detained by the border guard or by the police. Four detainees, however, feel the need for more information, all of them for legal questions related to the procedure: the possibilities of obtaining legal aid, and information on the conditions for filing an appeal.

3.3. Space within the detention centre

The feelings about the rooms are mixed: four are positive or neutral about it and four negative. It mostly relates to the question of privacy, which is hard to find because there is almost no place in the centre where the detainee could go to be alone, and also because most of them share their room with one or two other detainees. As one detainee said “Conditions of life are deplorable here, not good enough, not at all! There are two or three persons in one room. It’s almost impossible to be alone”, but another said “The room is good; it is a normal size room. But sanitary conditions are unacceptable, for example the mattress is very old”. The reactions about the centre are however clearly negative – “Conditions of life are very poor here. It looks more like a prison, not like a detention centre. It was not so in Sweden for example.” Strangely, while people point to the insufficient size of the centre and to the fact that there is no privacy, only two of them thought that it was overcrowded, at least for the moment, because the number of detainees is small.

3.4. Rules and routine

What the typical detainee thinks of the rules is not quite clear. Most of the detainees say that the rules are not respected, and their opinions are divided on whether or not it is possible to ask for a change in the rules of the centre. A staff member said however that the rules of the centre are elaborated and given by the Cabinet, but that some minor points, like schedule for meals or recreation, could be changed if the detainees asked for it. Four of them also said that most rules are more a matter of formality and as one of them put it “Not all the rules are respected in the centre; some of them are more theoretical and are not connected with the reality of life here”. Others indicated that they are too restricting and compared it to a prison – “I understand that rules are necessary but they are limiting freedom, it is not a prison there! Sometimes the rules make me nervous”.

3.5. Detention centre staff

The relations with the staff are mostly formal and rather distant. It is related to coldness towards him and not mistreatment, but the general feeling is that the staff is only doing what is in the framework of their daily job and no more – “They are only doing their work; there is not much personalized attitude”. Some feel that some of the staff is friendlier and that it is possible to get some support from them. Only one detainee said that he was treated differently from the other detainees, mostly because of his complaints regarding the living conditions in the centre – “Most of the guards dislike me because I speak about all the inconveniences in the centre and I complain to official institutions and NGOs by writing letters”.

3.6. Level of safety within the detention centre

The detainees feel safe inside the centre. There has however been a case when a detainee was mocked by a staff member, or by another detainee and even assaulted physically, but it only happened once – “Few times I was offended by a detainee. And once when we were in the same room this aggressive detainee pushed me because ‘I came too close’”. Interestingly, these occasions led to a discussion with the staff, but it didn’t result in any real changes.

3.7. Activities within the detention centre

All detainees are well aware that there are activities offered in the centre, but will not automatically participate in those. The activities are sport-oriented (ping-pong, or basketball in the yard) and not much else is offered (access to education, religious place, television, books is unclear). One detainee mentioned among the most difficult things for him during the detention “no possibility for self-education – no books, no Internet, etc.; and no tools for painting which is my hobby”. If he does not participate in the sports activities, it is because of feeling too weak or depressed – “Surely, it would be good for me to participate in some sports activities, for example, but I have no inner motivation to do that”, while others say that sports activities help to relieve stress and are good for their health in general. The main concern however, is availability of means of communication. The average detainee would like a free access to phone and especially to the Internet.

3.8. Medical issues

The detainees are aware of the presence of a medical service and can access it frequently (on average he sees a nurse once a week). They have access to nurses but not to doctors or psychologists, unless a serious health problem arises. A staff member said however that there is a psychologist available in the centre. Most of them report difficulties in communicating with the medical staff. They try to fix it with the help of staff or other detainees, but without much success – “I try to get translation with the help of other detainees, or use some kind of sign language”. Typically, their physical health has heavily degraded during detention, and all of them felt that detention has had a negative impact. Some link these problems to the stress and depression associated with detention, as well as the quality of the food – “[Detention] has a destructive impact on my health, especially because of the bad quality of the food and a lack of physical activities”. There is also as strong a degradation in his mental health. The uncertainty about the future is a major reason – “Days don’t differ from one another; the same people all the time, common feeling of depression, facilities are small. No contact with relatives. Life is not joyful here. The most difficult thing is the uncertainty about the future”. The detainees feel strongly negative about the quality of the medical services because they feel they don’t receive appropriate treatments, and complain that only the strict minimum is provided. However, almost none of them require specific further medical services.

3.9. Social interaction within the detention centre

The typical detainee reports good relations with his co-detainees and if he has witnessed problems between other detainees, it was only a small conflict mostly because of differences in characters (only one case). A staff member explained that there are two separate units or blocks for males in the centre, and that sometimes detainees who could have problems with one another (usually due to religious or cultural reasons) are put in different blocks. But he said that such cases have been very rare. The detainees also get along well with the staff, but the relationship is mostly formal – “My relationship with the staff is good in general; peaceful cohabitation, but no friendships or close contacts”.

3.10. Contact with the outside world

Most of the detainees have family in their home country, but their family members do not count on their support (only one reports this situation). They are informed that they can receive visitors, but because they have just arrived they do not know anyone in Latvia and thus receives no “friendly” visits (only one reported weekly visits from his wife, and several admitted that “Caritas Latvia” was the first visitor they have had). They don’t receive any visits from lawyers or religious persons. The telephone is the preferred means of communication (but it is not available all the time), but they would like to have access to the Internet – “Internet communication would be the best way for me to contact my family; it would significantly improve my life here”.

3.11. Conditions of detention and the family

None of the detainees have children (inside or outside the centre), or a spouse detained with him.

3.12. Conditions of detention and nutrition

The food served in the centre does not suit the average detainee, and all of the interviewed detainees complained about it. The two main problems with it are the small quantity and the limited variety available – “They are not giving enough food here. It is possible to buy extra food, but I don’t have any money”. One detainee complains that the food worsens his stomach problems. The reactions are very strong when asked about food.

3.13. Conditions of detention and the individual

The average detainee cannot sleep, sometimes because of the noise, but mostly due to stress and worry – “Difficult to fall asleep because I have a lot of disturbing thoughts running through my mind. Stress is the main cause of insomnia”. The difficulties reported are varied. Most often however, living conditions are mentioned, mostly related to the size of the centre, as well as lack of physical activities and the quantity and quality of food. Then come communication problems. None of the interviewed detainees knew what the outcome of their detention would be, but they are optimistic about it (only neutral, optimistic answers). Also the average detainee does not know when he will be released, which leads to stress and uncertainty and often depression. When asked to present himself, he does so rather positively. However, three persons report that the detention had a negative impact on their self-perception. Finally, he does not think he has special needs (only one thought he did). He perceives that a person with special needs would be a woman and a person without friends and family.

4. ANALYSIS OF THE DATA AND CENTRAL THEMES

The sample being quite small, it is difficult to draw definitive conclusions about vulnerability factors. Negative answers also often have varied roots. The overall picture from Latvia is one of people being detained for a long time without anything to do, little contact with a far away family and little knowledge of their future, leading to a slow degradation of both mental and physical health, but without obvious mistreatment.

4.1. Living conditions in the centre

One of the main problems the detainees identified was the state of the living conditions in the centre. There are lots of complaints about the physical size of the centre and the rooms. One detainee said that his mattress was old and needed replacement; at least three of them noted that the centre wasn’t well sound-isolated – it lets through noise which keeps them up at night. This is understandable given the condition of the centre – a two-storey brick building built around 1980, and even though it has undergone some renovation work six years ago to accommodate illegal immigrants, it still isn’t in a very good shape. The living conditions in it are rather simple, acceptable, but not much more than that.

Another important issue is privacy – there is practically no place for a detainee to go to be alone. They live usually two or four per room (depending on the total number of detainees), the common rooms are few and there is almost always somebody there. The fenced court outside the building is rather small and does not offer much possibility for reclusion. And the close proximity with the guards creates the feeling of “being watched” – hence the comparison by many detainees between this centre with a prison. During the interview a staff member repeatedly stated that they are detainees and not prisoners, but their attitude – which is strictly professional of just doing their job, providing what is prescribed by the law and nothing more – is not helping either. This might actually be the main problem of

detainees in Latvia – the detention conditions make them feel being treated like criminals, which has very adverse effects on their morale.

Finally there is the question of food. All 8 detainees had strong negative reactions about it. The complaints are both for quality/variety and quantity that they receive. One detainee even named all the ingredients and their quantities for all the meals that he gets for one week, to stress how inadequate that was. A staff member said however that they give what the law prescribes and that they have no additional funds in the budget for food. The detainees are allowed to buy additional food for their own money, but having just arrived in the country not knowing anyone here they usually do not have any money.

4.2. Activities within the detention centre

Another important aspect is the range of activities available for the detainees. All 8 said they knew that some sports activities were available (like ping-pong and basketball), but only half of them said they would participate in those. The main reasons for non-participation are depression and lack of motivation. This creates a sort of a vicious circle, especially when the detentions last very long, because some of those who did do sports said that it made them feel better both physically and mentally. The main pastime remains watching TV, but there are complaints about that too because only local channels are available and nothing in English. Others would like some more books in English and some music. The limited number of activities makes their life rather monotonous, which for prolonged detentions adds to their weakening mental condition.

4.3. Duration of detention and mental health

A contributing factor to the mental health problems expressed and manifested by the detainees (such as stress and depression) is certainly the duration of the detention. The legal maximum duration of the detention is 20 months, and it isn't rare that this period is reached. The average time in detention of the interviewed detainees was around 10 months, and one could observe the differences between those that had been there longer than a year and those that had just arrived. Detainees that had been in the centre for a long period of time were noticeably more depressed, unmotivated, they complained about general health issues. But the one who had just arrived a week ago was rather "agile, lively", even refused the second-hand clothing that was being offered for the centre. Thus, the long periods of stay in the centre amplify the negative effects acquired during the detention.

4.4. Communications issues and contact with the outside world

The fact that detainees are more or less isolated from the outside world makes the availability of means of communication a priority for them. Six out of eight had family members in their home country and wanted to be regularly in contact with them. And they need to contact also their lawyers and/or legal advisors as well as some non-governmental organizations (though in the last few years none, except Caritas Latvia, had come to see the detainees). The primary means of communication they use is a mobile phone that is available for them every day upon a request from the guards, but they have to pay for the communication themselves. Six out of eight detainees said that they would like to have access to the Internet and that it would significantly improve their lives, for three main reasons – because it would let them communicate more and easier with their families; because it would let them obtain the necessary information regarding laws and legal procedures; and because it would be a tool of information in general and of self-education.

Not knowing the outcome of the case and the lack of information regarding the possibilities of legal assistance (expressed by half of the detainees) combined with the frustration due to limited means of communication and, hence, inaccessibility of needed information, put the detainee in a state of stress and uncertainty that degrades further their mental health.

5. CONCLUSIONS AND RECOMMENDATIONS

Even though the detainees do not consider themselves as vulnerable people (all except one) the reality of their lives seems to indicate otherwise. To sum up one can apply the DEVAS model of vulnerability to the detainees in Olaine, on all three levels. On the personal level one will notice that most detainees that pass through this centre are young and single, recently arrived in the country with little or no financial resources, not speaking the local language, with vague awareness and understanding of legal policies regarding immigration and asylum procedures; their only help sometimes being their faith. On the social level the factors that “add to the vulnerability” are that their families are far away and it is often difficult to reach them with the means of communication available (or at least that this communication is limited), they receive practically no visitors, the relations with the staff are formal, almost impersonal. The only positive factor is the rare cases of friendship among the detainees, which is usually limited to people of same nationality/culture or religion. The environmental level of factors probably plays the most important role, since there is the centre with its geography/architecture and all the limitations that come with that, the legislation that determines the length of detention, rules of the centre, quality of medical services, and food (variety and quantity).

To give concrete realistic suggestions to improve the situation is not an easy task because of the many limiting factors on several levels (national/legislative, local), but with some effort several improvements can still be made. As we have seen the main problem of detainees in Latvia comes from the uncertainty of the outcome of their case and lack of information on possibilities of legal aid, which cause stress and depression. Mental (and physical) health is further worsened by the strict (“prison like”) living conditions, insufficient quantity of food, difficulties of communication with the outside world leading to a sense of isolation, lack of activities offered in the centre, long duration of the detention. Unfortunately the main issues are hardly changeable because they either require serious adjustments in the legislation or the way the judicial system works (case outcome, duration), or because they would require significant financial investments (living conditions, type of building). So in order to give realistic recommendations we will focus on the remaining factors.

The question of food is obviously serious because it was mentioned by all of the detainees and even the staff admitted that this situation persisted only because of the limits in the budget. An assessment should be made of how well-grounded these complaints are and of the food rations’ non-conformity to European standards (if such exist), and then submit this to relevant national authorities demanding necessary adjustments.

Another recommendation that would if not solve then at least significantly improve the every-day life of the detainees on several levels is providing access to the Internet. Apart from the initial installation costs it is also a rather cheap solution (the monthly expenses are probably less than what the detainees currently spend on the phone). Internet would let them gather information that could help them with their legal situation (including looking for and communicating with lawyers, researching the laws, which are available in English). It would also facilitate communication with their families and provide access to information in general, which could lessen significantly the feeling of isolation and being “cut off from the world”. Finally, it would offer tools of self-education, literature, and entertainment in their native language thus making their every-day life more enjoyable.



NATIONAL REPORT: MALTA

By: *Jesuit Refugee Service Malta*

Acknowledgments

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1. INTRODUCTION

This report is based on the results of research conducted by JRS Malta as part of the DEVAS project. The first part of the report outlines national law, policy and practice relating to detention of asylum seekers and irregularly staying third-country nationals in Malta. The second part of the report examines the detainees' perspective of the social conditions of their detention. The third part outlines the procedures in place for the identification and assessment of vulnerability, within the context of administrative detention in Malta. Finally, it presents conclusions and recommendations from the results of the study.

In Malta, persons detained in terms of the Immigration Act¹⁹¹ are held in facilities specifically designated for this purpose all of which are situated inside army or police barracks. During the period when the research for this project was conducted¹⁹², there were eight such facilities in use: four at Safi Barracks, two at Lyster Barracks and two at Ta' Kandja. The centres are administered by a specially established civilian force known as the Detention Service (DS), which is run by army officers and whose members are recruited mostly from retired members of the security forces.

At the time the research was conducted the centres were filled to capacity following the arrival of a record number of migrants, by boat from Libya, during 2008 and the early months of 2009¹⁹³. All such arrivals are immediately detained in terms of the Immigration Act. National law does not place a time limit on detention. Detention lasts until an asylum application is determined, in the case of those granted some form of protection. Since June 2005, asylum seekers whose application is still pending after the lapse of 12 months are released to await the outcome of their asylum application in the community. Those whose asylum application is finally rejected before the lapse of 12 months and those who do not apply for asylum are detained for 18 months¹⁹⁴. The only exceptions are those who are found to be vulnerable, after an individual assessment of their situation, as in terms of government policy¹⁹⁵ vulnerable immigrants are not detained. Within this context, the assessment of vulnerability assumes particular significance.

¹⁹¹ This Act, and the subsidiary legislation enacted there under, regulates immigration into Malta. The Act provides for the mandatory detention of all immigrants issued with a removal order or refused admission into Malta.

¹⁹² Between February and September 2009.

¹⁹³ From 2002, Malta experienced a sharp increase in the number of undocumented migrants arriving by boat in an irregular manner, usually leaving from Libya. In 2002 alone 21 boats carrying 1686 immigrants arrived in Malta in this manner, compared to just 57 in 1 boat the previous year. In the years that followed, with the exception of 2003, the number of arrivals did not decrease significantly: in 2003 some 502 immigrants arrived in 12 boats; in 2004, 1388 immigrants arrived in 53 boats; in 2005, 1822 immigrants arrived in 46 boats and in 2006, 1780 immigrants arrived in 57 boats¹⁹³. The year 2008 witnessed a massive increase of arrivals of migrants of 2775 in total¹⁹³.

¹⁹⁴ This time limit was established by a government policy document published in January 2005 entitled '*Irregular Immigrants, Refugees and Integration*', Ministry for Justice and Home Affairs & Ministry for Family and Social Solidarity, available at http://www.mjha.gov.mt/downloads/documents/immigration_english.pdf.

¹⁹⁵ *Ibid.* pg.13.

The situation on the ground in the centres today is totally different from that in which the research was conducted as, after Italy and Libya reached an agreement regarding the return of boats intercepted by the Italian navy in international waters and set up joint patrols off the Libyan coast, arrivals dropped to 1475 in 2009¹⁹⁶ and until April 2010 there were no arrivals. As a consequence of the drop in arrivals, detention centres were far less crowded in the last few months of 2009 and by the first quarter of 2010 only two detention facilities within Safi Barracks were being used to house detainees, as the number of detainees had dropped to approximately 250. However, both the law and policy regarding detention of illegally staying third country nationals and the rules regulating the treatment of vulnerable persons in detention and their release on grounds of vulnerability remain unchanged.

Methodology (as applied in the national context)

Interviews were carried out with 89 migrants detained in seven administrative detention centres between February and September 2009: Hermes Block and Tent Compound at Lyster Barracks; Warehouses 1 and 2, C Block and B Block at Safi Barracks and the new detention facility at Ta' Kandja. The sample included asylum seekers administratively detained while their asylum application was being processed and persons whose asylum applications were denied by the competent authorities and are at law liable to be returned to their country of origin or country of transit. An interview was also carried out with a member of staff of a local NGO actively engaged in working in detention centres. JRS Malta also completed a legal questionnaire, detailing the legal provisions regulating detention and the treatment of vulnerable asylum seekers.

All of the immigration detention centres in use at the time when the research was conducted housed both asylum seekers and illegally staying third country nationals awaiting removal. Moreover, persons at risk of vulnerability could be found in all of the centres in use at the time.

Out of the seven centres in which interviews were carried out, four housed only single men. In the initial weeks of the project women and family units were housed in Hermes Block at Lyster Barracks. After this facility was closed for refurbishment in April/May 2009, single women were detained separately from men at the new facility in Ta' Kandja. Couples were detained at B Block in Safi Barracks¹⁹⁷.

Data was collected from men, women and unaccompanied minors who at the time of their interview were still being detained pending age assessment. Of the 89 people interviewed, 71 were male and 18 were female. The breakdown is as follows: 38 Somalis, 8 Eritrean, 5 Ethiopians, and 38 West Africans out of which 22 were Nigerians. The number of detainees that were interviewed per centre reflected the composition of the detainee population, both in terms of age and gender as well as in terms of nationality/ethnicity. Additionally, selected respondents included a number of persons who appeared to be in a particularly vulnerable situation and others who would not normally be considered to fall within the categories of persons normally considered as vulnerable, some of whom were referred and released in terms of the procedure described in Section 3. In choosing the people to be interviewed, the recommendations of JRS staff members who were in regular contact with the detainees were taken into account.

As a number of respondents could not speak English, interviewers used interpreters to facilitate communication and to fill the questionnaires. The interviewees' consent for the use of a particular interpreter was always requested at the beginning of the interview; where the interpreters were chosen from among the detainee population, they were always chosen with the consent of the interviewees. The data collected was recorded on the questionnaires themselves and in other instances on a digital voice recorder.

¹⁹⁶ "1475 migrant arrivals, 319 repatriations, by end September", *Times of Malta*, 22 October 2009.

¹⁹⁷ Since mid-2009, men and women are no longer housed in the same accommodation centres unless they are a family grouping.

2. NATIONAL LEGAL OVERVIEW

Summary of national legislation

Immigration into Malta is regulated by the Immigration Act of 1970, Chapter 217 of the Laws of Malta, and the subsidiary legislation enacted there under. The treatment of asylum seekers is regulated by the Refugees Act 2000, Chapter 420 of the Laws of Malta, and related subsidiary legislation, in particular the Reception of Asylum Seekers (Minimum Standards) Regulations (S.L. 420.06 of 22 November 2005).

2.1. Legal grounds for ordering detention

In terms of the Immigration Act, detention is the automatic consequence of a refusal to grant admission into national territory¹⁹⁸ or the issuing of a removal order in respect of a particular individual¹⁹⁹.

Removal orders are issued by the Principal Immigration Officer, an administrative authority, against persons considered liable to removal as “prohibited immigrants”. This includes those who enter or are present in Malta without the required authorisation from the immigration authorities and those who become “prohibited immigrants” for one of the reasons listed.

Unlike immigrants detained by virtue of a removal order, immigrants refused access to national territory, “shall be deemed to be in legal custody and not to have landed”²⁰⁰.

Article 16 of the Immigration Act provides that any person who is in Malta without the required leave from the immigration authorities or who is “reasonably suspected of having so acted”, may be taken into custody without warranty by any police officer and while he is in custody shall be deemed to be in legal custody.

2.1. Legal grounds for right of appeal against the detention order/for right to challenge detention

Maltese law does not provide for the issuing of a detention order; detention is the automatic consequence of a removal order or of a decision to refuse admission into national territory.

Maltese law contains no provision for automatic judicial review of detention. Article 25A (5) of the Immigration Act provides for the possibility of an appeal from a decision to issue a removal order. Any such appeal must be presented to the Immigration Appeals Board, within three working days from the date of issue of the removal order. If the removal order is revoked, the immigrant concerned is automatically released from custody.

The Board has the authority to grant the immigrant concerned provisional release from detention, even on a verbal request, during the course of any proceedings before it under such terms and conditions as it deems fit.

In addition, in terms of article 25A(9) of the same Act, the Board has jurisdiction to hear and determine applications, made by persons held in custody by virtue of a deportation or removal order, to be released from custody pending the final determination of their asylum application or their deportation/removal from Malta, as the case may be. In such cases, release will only be granted where, the Board is of the opinion that, the continued detention of the applicant is unreasonable as regards duration, in the light of the circumstances of the case, or where there is no reasonable prospect of deportation within a reasonable time.

¹⁹⁸ *Immigration Act* 1970 (Malta), Article 10(3).

¹⁹⁹ *Ibid.* Article 14(2).

²⁰⁰ *Ibid.* Article 10(3).

The Board may refuse to grant release where the individuals concerned have refused to cooperate with legitimate attempts to remove them from national territory. The law further restricts the scope of this remedy, by prohibiting release in certain cases. Persons are released by virtue of this remedy must report at least once a week to the Immigration authorities. Moreover, in certain circumstances, they may be taken into custody again, pending their removal from Malta.

In practice, it would seem that the Board considers government policy on detention to be reasonable in the vast majority of cases and only grants release in exceptional circumstances. There is no fixed time limit within which the Board has to decide applications so procedures have lasted up to 3 and a half months and, in some cases the applicant was released in terms of government policy, before a decision was taken on his request for release.

Article 409A of the Criminal Code²⁰¹ also provides any detainee with the possibility of applying to the Magistrate's Court to challenge the lawfulness of his detention. If the court chooses to release the applicant, the Attorney General may apply for the person's re-arrest if he is of the opinion that the continued arrest was founded on any provision of this code or of any other law. The law imposes very strict timelines for the determination of such applications, which are usually rigorously observed by the courts.

This remedy was used on at least three occasions by immigrants (two asylum seekers and one rejected asylum seeker) to challenge their detention, but all three applications were rejected. On each of these occasions²⁰² the Court held that as there is a national law (the Immigration Act) authorising detention, which imposes no limit on the amount of time a person may spend in detention, such detention is lawful. According to the Court, the scope of this remedy does not include an examination of whether there are other circumstances which make the detention unlawful, e.g. if the detention violates the individual's fundamental human rights.

Irregularly staying third country nationals may also challenge the lawfulness of their detention in terms of article 34 of the Constitution of Malta and article 5 of the European Convention on Human Rights, which is now part of Maltese law and can be invoked before the local courts. In one such case²⁰³, the First Hall of the Civil Court justified detention on the basis of national security concerns as the Court highlighted the need to "avoid a flood of 'irregular' people running around in Malta". Detention was held to be necessary for the stability of the country. Other cases are pending before the First Hall of the Civil Court (Constitutional Jurisdiction)²⁰⁴. Legal proceedings of this nature generally take months, if not years, to be finally determined.

2.2. Legal grounds for instructions on right of appeal/instruction on right to challenge detention

Maltese law does not make specific provision for instructions on the right to appeal from a removal order or to challenge detention.

2.3. Legal grounds for legal maximum duration

Asylum seekers may be detained for a maximum of one year. This time limit is not specifically stated in the law. Regulation 10(2) of the Reception Regulations states that asylum seekers shall be granted access to the labour market if a decision at first instance has not been taken within one year of the presentation of an application for asylum and that this access shall not be withdrawn during the appeal stage of the RSD procedures²⁰⁵. As it is impossible to work while in detention, these provisions have been interpreted to mean that all asylum seekers will be released from detention if their application is still pending after one year.

²⁰¹ *Chapter 9 of the Laws of Malta, 1854 (Malta).*

²⁰² *Napoleon Mebrahtu vs. Commissioner of Police*, Magistrates Court, 26 June, 2003; *Karim Barboush vs. Commissioner of Police*, Criminal Court, November 5, 2003; *Kinfe Asmelash Gebrezgabiher vs. Commissioner of Police*, Magistrates Court, June 27, 2006.

²⁰³ *Essa Maneh et. vs. Commissioner of Police*, Civil Court, First Hall, 16 December, 2009.

²⁰⁴ *Tafarre Besabe Berhe v Commissioner of Police et*, Civil Court, First Hall (Constitutional Jurisdiction).

²⁰⁵ *Reception of Asylum Seekers (Minimum Standards) Regulations*, 2005 (Malta) Regulation 10 (3).

There is no legal time limit on the detention of rejected asylum seekers and illegally staying third country nationals who do not apply for asylum. In terms of a government policy document²⁰⁶, published in January 2005, no immigrant may be detained for longer than eighteen months.

2.4. Legal grounds for health care in detention

In terms of article 13(2) of the Refugees Act²⁰⁷ asylum seekers are entitled to receive state medical care and services. The law does not specify the scope of the healthcare to be provided and whether asylum seekers have the right to access health care under the same conditions as nationals in the public system or if they are covered under a specific scheme. However, in practice this provision is generally understood as providing access free of charge to most of the medical services that nationals receive. Regulation 11 of the Reception Regulations provides that, where applicants are working regularly or have sufficient means, they may be required to cover or contribute to the cost of material reception conditions. Moreover, in “exceptional circumstances” the law provides the possibility to modify these reception conditions in case “asylum seekers are in detention or confined to a border post” provided that “these different conditions cover basic needs”²⁰⁸.

The law makes no provision for undocumented migrants’ access to health care. There is only a non-legally binding “policy document” establishing that all foreigners in detention are “entitled to free state medical care and services”²⁰⁹. As with the provisions specifically applying to asylum seekers, this policy is informally interpreted as access free of charge to the standard health care coverage in Malta (preventive, investigative, curative, and rehabilitative services). This applies to all undocumented migrants and asylum seekers in detention in Malta.

2.5. Legal grounds for the protection of person with special needs, or particularly vulnerable people

Regulation 14(1) of the Reception Regulations provides that, in the implementation of the provisions relating to material reception conditions and health care, account shall be taken of the specific situation of vulnerable persons which shall include minors, unaccompanied minors and pregnant women, found to have special needs after an individual evaluation of their situation. Regulation 11(2) also states that material reception conditions for asylum seekers shall be such as to ensure an adequate standard of living for persons who have special needs.

Moreover, in terms of government policy on immigration, people who are vulnerable by virtue of their age or physical conditions shall not be detained²¹⁰.

2.6. Legal grounds for accompanied and unaccompanied minors

In terms of the Refugees Act, an “unaccompanied minor” is a person below the age of eighteen who arrives in Malta unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered Malta²¹¹.

The regulations mentioned in section 1.1.7 above, regarding material conditions of reception for vulnerable asylum seekers, apply to both accompanied and unaccompanied minors. In addition the Reception Regulations stipulate that where the provisions on reception conditions are applied to minors, the best interests of the child shall constitute a primary consideration²¹².

²⁰⁶ Op. Cit. *Ministry for Justice and Home Affairs & Ministry for Family and Social Solidarity*, pg. 11.

²⁰⁷ *Refugees Act 2001*, (Malta)

²⁰⁸ *Reception of Asylum Seekers (Minimum Standards) Regulations 2005* (Malta) Article 12(6)

²⁰⁹ Op. Cit. *Ministry for Justice and Home Affairs and Ministry for the Family and Social Solidarity*, pg. 12.

²¹⁰ Ibid. Pg. 13.

²¹¹ *Refugees Act 2001* (Malta), Article 2.

²¹² *Reception of Asylum Seekers (Minimum Standards) Regulations 2005* (Malta) Regulation 14

Apart from this, rather vague provision, the law only contains provisions regarding the education and placement of minors. Regarding education, the law provides that minor asylum seekers or minor children of asylum seekers shall have access to education on equal grounds as Maltese nationals for so long as an expulsion measure against them or their parents is not enforced. Such access shall not be postponed for more than three months, extended to one year for specific education, from the date of application for asylum²¹³. Regarding placement, the Reception Regulations provide that accompanied minors shall be lodged with their parents or the adults responsible for them by law or by custom²¹⁴. In practice, however, in assessing the family link, responsibility by custom may not be acknowledged by the authorities resulting in the splitting of an alleged family. Finally, the Reception Regulations stipulate that an unaccompanied minor aged sixteen years or over may be placed in accommodation centres for adult asylum seekers²¹⁵.

In terms of government policy on immigration, people who are vulnerable by virtue of their age shall not be detained. The law makes no provision regarding the procedures in place to implement this policy, which are regulated solely by what can be described as administrative practice.

2.7. Legal grounds for providing release

Procedures for release are implemented by the immigration authorities. All such procedures are regulated by policy and practice rather than by law.

2.8. Legal grounds for any other rights

National law does not contain provisions regarding the rights of illegally staying third country nationals held in detention.

Article 13(2) of the Refugees Act provides that asylum seekers have the right to access state education and training. Moreover Regulation 12(1) of the Procedural Standards Regulations²¹⁶ provides the right to be protected from forced removal pending the final outcome of an asylum application. Article 10 of the Reception Regulations provides for access to the labour market after 12 months from the date of an application for protection.

3. OVERVIEW OF THE NATIONAL DATA FINDINGS

3.1. Case awareness

From the results of the study, it transpires that information provided to detainees regarding their situation in detention is scarce.

The majority of the detainee population are not aware of **the reason for their detention** (58%). Those who were informed were given such information by the police during their arrest (30%) or by people who were not in charge, such as other detainees (24%). Only a very small proportion of people considered themselves to have been properly informed (13.5%).

Almost 80% expressed their need to get more **information on procedures** and/or **on the duration of detention**. This frustration was expressed very often through anger during the interviews. For the detainees, clarity and precision

²¹³ Ibid. Regulation 9.

²¹⁴ Ibid. Regulation 12(3)

²¹⁵ Ibid. Regulation 15

²¹⁶ *Procedural Standards in Examining Applications for Refugee Status Regulations*, 2008 (Malta)

particularly regarding the length of detention are important, both as a general right to know (38.6%) as well as in preparation for the future (33.3%).

This lack of information induces stress among detainees, many of whom feel that an injustice is being done, but are powerless to do anything about it. Furthermore, detention follows a very long and difficult journey which in itself renders detainees in an even more vulnerable situation. For example, a detainee explained: “70 out of 78 people on the boat died on the journey, and the newspaper said that the government said that the remaining eight should be released immediately, but six of us are still in detention. Why are we in detention? How long will I stay?”

3.2. Space within the detention centre

It results from the interviews conducted that the overcrowding in the detention centre together with poor sanitation is a huge problem for 75% of the detainees. More than 75% were negative about their room and almost 73% complained about the centre space. A third of the detainee population complained about hygiene, in particular those accommodated in the Safi detention centre. “It is not clean; toilets are dirty, even the basket for food is not clean.” 83% highlighted the lack of privacy, stating that there is no space to ever be alone in detention. A number of detainees feel that there is a direct link between living conditions and ill-health. “At time, we were 370 in a single warehouse. People are sick and they infect others. You are afraid to get sick.”

3.3. Rules

Almost half of the detainees interviewed said that there are no rules in detention. One detainee stated that: “Here it's a jungle. There are no rules.” A quarter of those who acknowledged the existence of rules feel that they are arbitrary and inadequate. Although they tried to advocate for a change, these rules have proven to be inflexible in practice.

3.4. Staff

It results from the study that there is a lack of contact with the Detention Service staff who are the main interlocutors to the detainees. It should be stated however that, at times when the centres are filled to capacity, the staff to resident ratio is very low, as staff are hugely outnumbered by detainees; this makes communication between staff and detainees extremely difficult.

Interaction with staff yet this varies greatly according to the individual member of staff. A majority believe that staff generally fails to support their general needs. “They talked to us through the window. They are mostly polite but generally indifferent.” “They don't even give us the food properly, they throw it towards us.” 20% report as having positive support from them. “If we need something or we have a problem, we can speak to speak to them. I generally get on well with them”. As a rule, however, rather than discrimination or ill-treatment, the problem in staff-detainee interaction seems to be linked to the lack of facilities or the lack of power of the staff to change the situation.

3.5. Safety

Regarding safety, 28% reported as being physically assaulted while in detention, of which 68% by other detainees, and 32% by the staff. “It happens when I asked for my Sim card, since I had all my contacts in it. They took me to the staff room but they couldnt switch on my mobile as the battery was dead. I told them I can get a similar battery from friends. I tried to explain that the numbers are really important for me but they refused. After I insisted, they punched me on both the leg and my face.” 18% of these reported that they filed a complaint in case of physical assault, but none reported to have resulted in any change. Even though, a number of detainees have reported physical abuse, there was higher incidence of verbal abuse by staff: 40% reported that they had been mocked, of which 58% claimed to have been mocked by staff. “Whenever I try to speak to them, they tell me that I am a black animal and to go away from them. They also keep telling us that we are illegal immigrants and Malta is going to deport us back to our

countries of origin.” “Sometimes when the soldiers are drunk, they insult your colour, nationality, tell you to go back to Africa” As for mocking between detainees, 42% report such problems. It resulted that disputes due to different culture, language or religious were relatively low (12,25%). Often disputes among detainees are due to conflicts over limited resources and poor living conditions. “It happens when I argue with someone about cleaning, flushing toilets, changing TV station, and so on.”

3.6. Activities

Almost 80% of those interviewed reported that there were no activities provided in the centre. It is pertinent to note, however, that most of the persons interviewed were not interested in any activities but were focused primarily on their freedom (40%) and then a number mentioned the wish for education (25%). A vast majority of detainees had access to television and telephone. However half of the detainees reported to have access to outdoor space while nobody had access to internet or computer.

3.7. Medical care in detention

Only two thirds of the detainee population reported medical presence in detention. Half of the persons interviewed said that they had access to medical staff once a week while a quarter of them reported to have access to medical staff less than once a month. These results varied according to the different centres. In Lyster Barracks, almost half of the persons interviewed were unaware of the presence of medical staff in detention.

3.8. Physical Health

62% declared that their physical health was affected by the fact of being in detention; almost 69% stated that their health was very good when they arrived but only 25% rated it good at the time of the interviews. The reasons mentioned for the negative changes are mainly facilities (69%) and then, psychological issues (18%) or medical facilities (11%). “It has a bad impact on me. Since I am here I have chest pain, headache and body pain. It is because of the noise and no activities.”

3.9. Mental health

Almost 80% reported that their mental health has been affected by being in detention. According to the detainees interviewed, this deterioration is due to several factors, which are, in order including: the fact of being locked up, being separated from the world, worries, mental health problems, living conditions, being separated from their loved ones and past traumas. 65% said that their needs, in particular access to appropriate treatment, are not being met. “my wife in Somalia has delivered baby and she is sick, I couldn’t do anything about my family, being in detention. I cannot stop thinking about them and this is deteriorating my mental health.”

3.10. Social interaction in the centre

Over half of the population interviewed felt that their personal interaction with other detainees was positive. At the same time, this did not exclude 56,3% from saying that problems between others detainees had arisen. A majority felt that tension was mainly due to cultural differences (53.4%) and common life in detention (17%). 10% mentioned communication problems related to the release date, particularly the fact that some people are released on time and some others are not.

3.11. Contact with the outside world

A majority of those interviewed stated that they have families in their country of origin and identified the fact that they are unable to support them while in detention as an added source of stress. Almost 40% said that they kept in touch with their family by telephone but almost 80% stated that they do not have regular access to it.

In fact the access to the telephone is very limited; in some centres there is only one landline for all the residents, and only very limited credit is provided to each detainee. Moreover, detainees might not have their contact numbers with them as most of their belongings are confiscated upon arrival.

Regarding outside visits, NGOs come first (71%), followed by lawyers (49%), religious persons (42%), UNHCR (15%), and family members (4%). It should be noted that most centres do not allow visits from family members or friends. The limitation of contact with the outside world is mainly due to a lack of the necessary infrastructure (no internet, lack of adequate telephone and calling cards).

3.12. Nutrition and sleep

74% said that they do not like the food served in detention, and almost 50% feel it is of bad quality. 70% declared they had lost their appetite in detention. Often complaints are related to the food being served cold or not cooked.

75% said that they do not sleep well at night, mainly because of stress. The living conditions are often mentioned (38%) as another cause for not sleeping well (overcrowding, lack of hygiene, noise, etc.). A significant percentage of the population interviewed (13.4%) mentioned external reasons, such as worries about others: "He's preoccupied with thoughts of the death of his brother or sister. He stays awake crying to God because he is suffering. He dreams of his brother."

3.13. Difficulties

When asked to classify the most significant difficulties experienced in detention, most mentioned in first the impact of being detained (52%): the fact of being behind bars, locked up, with their life plan disrupted. The main difficulty quoted in second position are the living conditions like the lack of services, problems with food, lack of clothes. The third difficulty mainly reported were again the living conditions, particularly food (42% of the third option).

3.14. Outcome of detention

Only 3% reported that they knew the outcome of their detention and only 14% said they knew the exact date when they would be released. For the interviewees, this was a great source of worry and mental health problems.

4. ANALYSIS OF THE DATA AND CENTRAL THEMES

Determining vulnerability' within the context of administrative detention in Malta

In terms of the government policy which was published in January 2005: "Irregular migrants who, by virtue of their age and/or physical condition, are considered to be vulnerable are exempt from detention and are accommodated in alternative centres"²¹⁷.

In order to give effect to this policy, over time procedures were established with a view to determining whether or not detainees qualify for release on grounds of vulnerability, "by virtue of their age and/or physical condition". These

²¹⁷ Op. Cit. *Ministry for Justice and Home Affairs & Ministry for Family and Social Solidarity*, Pg. 11.

procedures, which will be described in the following sections, essentially target the following categories of 'vulnerable' persons: unaccompanied minors, families with minor children, pregnant women, elderly persons, persons with disability, persons with serious or chronic health problems and people with mental health problems.

In spite of the clear policy statement that vulnerable persons are exempt from detention, in practice, all, even those who clearly fall within one of the above-mentioned categories, are detained on arrival and only released once their vulnerability is assessed, the competent authorities have concluded that they are indeed vulnerable, the necessary clearances²¹⁸ are obtained and accommodation is found in the community. As these procedures take time to complete, vulnerable immigrants may spend months in detention.

4.1. Determining factors of vulnerability

AWAS, the government agency charged with determining whether or not a particular individual is in fact vulnerable, currently operates two separate procedures:

- The age assessment procedure, which is applied in cases involving persons claiming to be unaccompanied minors;
- The vulnerable adult's assessment procedure, used to determine vulnerability on other grounds, including old age, disability, and physical or mental health problems.

From the information available it would seem that in the case of pregnant women and families with children a simplified assessment procedure is implemented.

Both procedures are implemented exclusively by AWAS staff and there are no written rules regulating the manner in which procedures are conducted or the criteria upon which assessment is based. In fact, national law makes only fleeting and indirect reference to vulnerability assessment, simply stating that the vulnerable persons are those "found to have special needs after an individual evaluation of their situation"²¹⁹.

This, in addition to the fact that the procedures followed have changed over time, makes it very difficult to determine exactly how such assessments are conducted. However, from our observations it would appear that the following procedure is followed:

- Age assessment

Individuals claiming to be minors, who are not accompanied by an adult responsible for them, whether by law or by custom, are referred to AWAS for age assessment; referrals are usually made by the immigration police, where the person concerned declares that he is a minor upon arrival, or by the Refugee Commission, where an applicant for asylum declares minor age in his Preliminary Questionnaire (PQ) form.

In cases where the individual concerned makes conflicting statements regarding his/her date of birth, e.g. in cases where the age declared on arrival and that declared in the PQ are different, a preliminary interview is conducted by one member of AWAS staff. It would seem that some claims to minority age are rejected solely on the basis of this interview.

Those who pass this preliminary stage, as well as those who did not need to go through it, are interviewed by a panel of three members of AWAS staff known as the Age Assessment Team (AAT), who may take a decision on the individual's claim or, in case of doubt refer the individual for Further Age Verification (FAV).

²¹⁸ These include: health clearance in all cases, authorization of release by the Principal Immigration Officer in cases involving vulnerable adults excluding pregnant women and families with children where authorization is automatic.

²¹⁹ *Reception of Asylum Seekers (Minimum Standards) Regulations*, 2008 (Malta) Regulation 14.

From the information available it seems that the FAV consists of an X-ray of the bones of the wrist. Before an FAV is carried out, an interim care order is issued and the Minister for Social Policy who then becomes formally responsible for the individual concerned, who is presumed to be a minor (though only for the purposes of this procedure), authorises the medical test.

Where a person is found to be a minor, an application is made for the issue of a care order by the Minister for Social Policy in respect of the minor; once the said order is issued, the person concerned is released from detention.

Where a person is deemed to be an adult s/he is given a letter communicating the decision.

- Vulnerability assessment (for adults)

Adults who appear to be vulnerable in terms of government policy are referred to AWAS for assessment; in such cases referrals are made by the police on arrival, in cases where the individual concerned is clearly vulnerable, by the Detention Service, medical staff and by NGOs working in detention. AWAS has created a Referral Form, to be used when referring such cases for assessment.

Individuals referred are first assessed by a social worker who conducts an interview and writes a report recommending release or otherwise.

The said report is passed to the Vulnerable Adults Assessment Team (VAAT), a panel made up of 3 members of AWAS staff, which takes a final decision regarding whether or not the individual concerned should be recommended for release or whether some other action, e.g. follow-up in detention, is more appropriate.

In case of a positive recommendation the case is referred to the Principal Immigration Officer (PIO) who takes a final decision on whether or not to authorise release; in our experience such release is usually granted by the authorities concerned.

Given the relatively fixed parameters within which vulnerability assessment, which is practically exclusively linked to release from detention, takes place, the determining factor for a positive finding of vulnerability is the existence of a link to one of the recognised categories of 'vulnerable persons', i.e. minor age;²²⁰; pregnancy; serious, acute or chronic illness; disability; and serious mental health problems.

The results of the research would seem to indicate that detention, i.e. both the fact of being detained for an unknown length of time, as well as the conditions in which migrants are detained, cause significant stress and lead to a deterioration in detainees' physical and mental health. Although this finding implies that prolonged detention increases detainees' vulnerability to some extent, it should be noted that, in most cases this would not necessarily imply a positive finding of vulnerability and consequent release from detention. It is only in cases where the individual's mental and/or psychological health has deteriorated to a significant extent that it may give rise to a positive finding of vulnerability.

4.2. Identifying vulnerable groups in administrative detention

Vulnerable detainees are usually identified by the Immigration Police on arrival in Malta, Detention Service personnel, fellow detainees or NGO personnel. They are then referred to the Agency for Welfare of Asylum Seekers (AWAS) for

²²⁰ Persons are usually considered elderly once they have reached the age of 60.

assessment. In cases where AWAS believes that the detainee concerned is vulnerable, they would issue a recommendation for release from detention, as outlined above.

It should be stated however that following identification and referral, the individuals concerned are held in detention pending the outcome of the vulnerability assessment procedure. During this time they continue to be held in the same facilities as other detainees and are not provided with any special care or support.

5. CONCLUSIONS AND RECOMMENDATIONS

The results of this research strongly indicate that many of those interviewed believe that a number of factors directly related to or resulting from their detention in Malta are at the root of a marked deterioration in their physical and mental health/well-being. Detainees interviewed complained of increased stress, frustration, loss of appetite, problems sleeping and feelings of powerlessness. The identified the following as causes: the fact that they are deprived of their liberty, the lack of information about their situation, their inability to do anything about their situation, the poor conditions in which they are detained, and the lack of possibilities to engage in gainful activities, all of which are often exacerbated by past traumas experienced in their country of origin or on the journey to Malta.

Although there is no clear definition of what constitutes vulnerability, these results would seem to indicate that detention significantly increases vulnerability, even in persons who would not *prima facie* appear to belong to one of the categories normally considered to be at risk of vulnerability.

The system that currently operates in Malta, while recognising the particular vulnerability and special needs of certain individuals and allowing for the provision of alternative reception arrangements for them, fails to take this broader, though possibly less acute level of vulnerability into account. We believe that it is extremely positive that the needs of particularly vulnerable individuals are addressed by the government agency responsible for the welfare of asylum seekers and migrants. However, the results of this research would seem to indicate that any measures taken to address or mitigate those factors that create or increase the risk of vulnerability would not only improve detainees' quality of life but would possibly also reduce the incidence of acute vulnerability, to the extent that this is precipitated or aggravated by detention.

We are therefore making the following recommendations for action on the basis of the outcomes of this research:

1. Alternatives to detention for the reception of asylum seekers

Given the negative impact of detention on detainees' physical and mental health, JRS Malta strongly recommends that

- **Alternatives to detention are put in place and that detention is only used as a last resort, where all other measures have proved ineffective.**

2. Length of detention

Many of those interviewed identified the uncertainty regarding the exact duration of their detention as a factor that causes significant stress and frustration. The detainees' request for more clarity about the date of their release from detention and their complaints about the negative impact of the uncertainty on their mental health/psychological wellbeing are more than understandable. In addition, it must be stated that this lack of certainty is difficult to reconcile with human rights standards requiring guarantees of protection from arbitrariness

The duration of detention is currently determined not only by government policy on release, but also by the duration and outcome of the refugee status determination (RSD) procedure, which is governed by complex rules and is largely outside the control of the detainees.

While we believe that tackling this problem effectively would necessitate a complete overhaul of the way in which the system works, the current information gap can be reduced by systematically and regularly providing detainees with clear information about the status of their asylum application, as well as information about how changes in the status of their asylum application will affect the date of their release.

JRS Malta therefore recommends that

- **A process is initiated with a view to evaluating the current law, policy and practice on detention, with a view to bringing it in line with human rights standards requiring the laws regulating detention to be sufficiently certain to guarantee protection from arbitrariness.**
- **A procedure is put in place in order to ensure that detainees are systematically and regularly provided with clear and accurate information regarding the status of their asylum application, , as well as information about how changes in the status of their asylum application will affect the date of their release.**

3. Improved living conditions:

Detainees interviewed for this study consistently identified the conditions in which they are detained as a cause of significant anxiety and stress.

Although it is clear that in recent years the number of arrivals placed a huge strain on available resources, it is equally clear that the fact that local authorities have chosen to opt for a particular type of facility, usually capable of hosting large numbers of detainees in very basic conditions, has to some extent contributed towards the problems highlighted by the interviewees.

One major difficulty identified is the lack of communication between detainees and detention centre staff. It is clear that with large centres hosting up to 350 detainees communication between staff and detainees is made very difficult not to say impossible.

This difficulty could be addressed by opting for adequately staffed centres hosting smaller number of detainees in humane conditions, which allow for adequate personal space and the possibility of enjoying privacy and security. This which would also serve to minimise other difficulties relating to lack of adequate resources for the number of detainees held in a particular centre, overcrowding, lack of privacy, and security/safety and some sanitation concerns.

JRS Malta therefore recommends that

- **Where detention is resorted to, detainees are held in centres where conditions are in line with internationally recognised standards, furnished with sufficient resources for the number of detainees held therein, with adequate provision for privacy, security and safety and a daily regime of activities.**
- **Centres are adequately staffed in order to ensure that staff is less stressed, and better able to engage in meaningful communication with detainees and respond to their needs promptly and efficiently.**

4. Persons with special needs

Given the fact that detention of itself appears to be a factor that significantly increases the risk of vulnerability, it is important that the needs of detainee population are monitored and that particularly vulnerable persons with special needs are promptly identified.

Moreover, it is imperative that once particularly vulnerable persons are identified, their needs for medical, psychological and other forms of care or support are catered for even while they are in detention.

JRS Malta therefore recommends that

- **Mechanisms are put in place to monitor the detainee population and to systematically identify particularly vulnerable persons with special needs.**
- **Once identified, particularly vulnerable persons are provided with the care, support and treatment they require, even while they are in detention.**
- **The detainee population is provided with proper access to medical care and psychological support, in order to prevent the further deterioration of their physical and mental wellbeing.**



NATIONAL REPORT: THE NETHERLANDS

By: *Dutch Council for Refugees*

1. INTRODUCTION

The Dutch Council for Refugees has participated in the DEVAS Project from January 2009 – December 2009. The DEVAS Project aims to identify which factors contribute to the vulnerability of detained asylum seekers and irregular migrants. To provide an EU-wide perspective on this issue, the project has taken place in 23 European countries. The Dutch Council for Refugees has interviewed asylum seekers who were or had been detained. We also interviewed asylum seekers whose asylum claim was rejected and who were awaiting their expulsion. We therefore interviewed migrants with the legal status of asylum seeker and of illegal migrant.

The initial objective was to interview 25 detainees, 3 detention centre staff members and 3 NGO staff members. However, during the project we encountered difficulties in receiving permission from the authorities to access the detention centres. Therefore, as an alternative, we interviewed 8 recently released detainees. On 2 July 2009 we finally received permission from the authorities and commenced the interviews with actual detainees. Mid- August we completed our interviews. By that time we had spoken with:

Location	Number of detainees	Formerly detained (FD)/ detained (D)	Number of interviewed staff members of the Detention Centre
Asylum seekers centre (ASC) Alkmaar	2	FD	x ²²¹
ASC Katwijk	2	FD	x
ASC Leiden	1	FD	x
ASC Crailo	3	FD	x
Border Detention Centre Schiphol	3	D	1
Youth Detention Centre Maasberg – Overloon	2	D	1
Deportation Centre Zestienhoven	6	D	1
Detention Centre Zaandam	2	D	1
Total	21		4

²²¹ Since asylum seeker centres are not detention centres, we did not interview staff members.

We also interviewed members of the following NGO's/individuals active in the detention facilities:

- The Dutch Council for Refugees (Border Detention Centre/Application Centre Schiphol)
- Social worker (Border Detention Centre/Application Centre Schiphol)
- SAMAH; organisation for young asylum seekers (Youth Detention Centre)
- Asylum Lawyer (Detention centres in general)

This national report provides an overview of the results of the interviews particular to the situation in the Netherlands. In this report, first a legal overview with respect to detention of asylum seekers and other irregular migrants will be given. In Chapter III an overview of the national data based on the interviews will be provided. Chapter IV analyses the data and discusses five central themes that can be derived from the data. Finally in Chapter V conclusions will be drawn and recommendations will be provided.

2. NATIONAL LEGAL OVERVIEW

2.1 Legal Grounds for Detention

There are two main legal grounds for detaining migrants in The Netherlands. Both grounds are applicable to asylum seekers as well as to other irregular migrants. Although no distinction in application is made, the migrants are detained at different wings in the detention centres.

The first legal ground is laid down in art. 3 jo art. 6 par. 1 and 2 Aliens Act 2000.

Art. 3 section 1 Aliens Act 2000

In other cases than in the Schengen Border Code listed cases, access to the Netherlands shall be denied to the alien who:

- a. does not possess a valid document to cross a border, or does possess a document to cross a border but lacks the necessary visa*
- b. Is a danger to the public order or national security*
- c. Does not possess sufficient means to cover the expenses of a stay in the Netherlands as well as those of his trip to a place outside the Netherlands where his access is guaranteed.*
- d. Does not fulfil the requirements set by a general policy measure.*

Art. 6 section 1 & 2 Aliens Act 2000

- 1. The alien to whom access is denied can be obliged to stay in a by the government official carrying out border control appointed space or location.*
- 2. A space of location, as meant in the first section, can be secured to prevent unauthorised leave.*

Migrants are mostly detained because they do not fulfil the requirements as set out in art. 3 section 1 sub a and c Aliens Act 2000.

Migrants, who, after arriving to The Netherlands, claim asylum, are detained on the grounds of art. 3 AA 2000 as well. They are kept in detention throughout their asylum procedure. In practice no individual decision is being made nor are other, alternative measures considered. Detention is therefore not applied as *ultimum remedium*. This subject will be discussed further in § 2.12.

On the basis of art. 6 AA 2000 asylum seekers can also be kept in prolonged detention. If the Immigration and Naturalisation Service (INS) cannot render a decision within 48 working hours, detention can be prolonged lawfully up till 6 weeks. The average period of this so-called 'Closed Reception Centre Procedure' is 90 days.²²²

The second legal ground for detaining migrants is laid down in art. 59 AA.

Art. 59 section 1 Aliens Act

1. If necessary in the interests of public policy (ordre public) or national security, Our Minister may, with a view to expulsion, order the remand in custody of an alien who:

(a) is not lawfully resident;

(b) is lawfully resident on the grounds of article 8 (f) and (g).

2. If the papers necessary for the return of the alien are available or will shortly become available, it is deemed to be in the interests of public policy (ordre public) that the alien be remanded in custody, unless the alien had been lawfully resident on the grounds of article 8 (a) to (e) and (l)

3. An alien shall not be remanded in custody or the remand shall be ended as soon as the alien has indicated that he wishes to leave the Netherlands and also has the opportunity to do so.

4. Remand in custody pursuant to subsection 1 (b) or subsection 2 shall in any event last for no longer than four weeks. In case before the decision on the request article 39 was applied the custody shall in any event not last for longer than six weeks.

This article is only applied to migrants who are found (illegally) on the territory, including asylum seekers whose application for asylum is denied and who are no longer allowed to remain on the territory. This article is therefore not applied to migrants at the borders.

2.2 Legal grounds for the minimum age for detention

By law there is no minimum age for detention. However in policy guidelines some guarantees are laid down. According to WBV 2008/20 the following rules are applicable to the detention of minors:

- Minors younger than 16 who reside with their parents in The Netherlands, will not be detained separately from their parents;
- If possible, alternative measures will be applied to families with under aged children, or, if there are two parents, one parent can be detained;
- Unaccompanied minors between 12 –16 can only be detained if the actual detention can take place within 4 days in a Youth Detention Centre;
- Unaccompanied minors under the age of 12 will not be detained.

No other rules on the minimum age for detention are provided in The Netherlands.

2.3 Legal grounds for the detention order

As explained above, there are two grounds for detention in The Netherlands: migrant detention at the border (art. 6 AA) and migrant detention on the actual territory (art. 59 AA).

²²² F. Vogelaar, *Gesloten OC Procedure voor Asielzoekers*, Onderzoek in opdracht van UNHCR, conclusies van VluchtelingenWerk Nederland: September 2007.

Border detention

The legal grounds for refusing entry to the Dutch territory at the border are laid down in art. 3 section 1 sub a-d AA (see above). Subsequently on the basis of art. 6 section 1 and 2 AA, the migrant can be detained. In practice this leads to an initial detention of all asylum seekers at the border. This detention lasts throughout the asylum procedure and sometimes even prolonged detention is ordered. This last form of border detention can lead up to a 3 month period of detention.

Territorial detention

On the basis of art. 59 AA, migrants who are found on the territory can be detained on the grounds mentioned above. Detention on the basis of this article always has to be in the interest of public policy or national security and with a view to expulsion. If the prospect of expulsion no longer exists, the migrant has to be released from detention.

In general all asylum seekers will be detained after a negative decision on their request for asylum if an actual prospect of expulsion exists. If asylum seekers, after the negative decision on their asylum application, are detained for more than six months while expulsion is not apparent, the interest of the migrant of being released is often considered of higher importance than the interest of the authorities to continue the detention. In such cases a judge usually orders release from detention.

2.4 Legal grounds for judicial review of the detention order

Whether it concerns border detention or territorial detention, by law there is an automatic review by a judge of the decision to detain. In art. 94 AA, it is laid down that the authorities have to notify the district court within 28 days after the detention of an migrant is ordered, unless the migrant has already lodged an application for judicial review himself. When the district court receives the notification it considers this as if the migrant lodged an application for judicial review.

In the application of this article no difference is being made between asylum seekers, or other irregular migrants.

2.5 Legal grounds for the right of appeal against the detention order, or to challenge detention

In The Netherlands it is possible to appeal against the detention order on the grounds of art. 93 AA. This article states that the detention order should be considered a decision to which one can appeal. The migrants are informed of this right by their lawyer, or by the government official who issued their detention order.

Besides the right to appeal against the detention order, one also has the right to file a complaint against the detention conditions. Although there is no possibility to file a separate appeal against the detention conditions, this can be integrated in the general appeal against the detention order on the basis of art. 93 AA.

In order to file a separate complaint, one has to look at the Custodial Institutions Act and the Border Regime Facilities Code. Complaints, which are based on these acts/codes, will be reviewed by a special Commission, not by a Court.

In the application of these articles no difference is being made between asylum seekers or other irregular migrants.

2.6 Legal grounds for the right of information about the detention order and/or the reasons for detention

Detainees have the right to be informed about the reason for their detention; this is laid down in the Aliens Decree. Usually this information is provided by the government official who issues their detention order, or by a lawyer. In all cases, the detention order has to be given in writing. More practical rules on how the information should be provided, is laid down in policy guideline Aliens Circular A6/2.5.

2.7 Legal grounds for the duration of detention

In general migrant detention is limited to a sequential period of 6 months. This period can only be exceeded in specific circumstances: if the migrant does not want to reveal his identity and prevents the authorities from doing so (VC A6/5.3.5)

However, under the influence of the European Return Directive, the length of detention might change. The Dutch authorities intend to accept the proposed extension of the possibility to detain up to a period of 18 months.

If detention is ordered ex art. 6 AA for families with under aged children, the maximum duration of the detention is two weeks. If the detention is ordered on the basis of art. 59 AA, the maximum duration is four weeks (VC A6/5.3.5 & A6/2.7), unless there are special circumstances. (medical conditions, danger to public health) In those cases the detention can either be limited or extended.

2.8 Legal grounds for the provision of health care and the scope of health care benefits, and for the provision of social services

Border detention

Health care is provided to detainees during the asylum procedure. This is based on art. 8 sub d of the Border Regime Facilities Code. This provision states that the President of the facility has to provide for necessary medical care. If asylum seekers experience any medical difficulties, they have the right to see a doctor.

Concerning social services, the codes only provide for spiritual support.

Territorial detention

For migrants detained on the territory, the Custodial Institutions Act (CIA) applies. This act states in § 42 that the President is responsible for the provision of adequate medical care in the facility. Moreover, the detainee has a right to choose his own doctor. The article also provides for a complaint procedure (sub 5).

The Custodial Institutions Act states that the detainee has the right to social care and support. The President is also required to provide for professionals who are able to give such care and support.

2.9 Legal grounds for contact with the outside world

Border detention

Migrants who are detained at the border have similar rights as migrants detained on the territory. A major difference is that for migrants detained at the borders there are no minimum rules as to the duration of phone calls and length of a visit. Moreover, no organisation or institution has unrestricted access to these detainees; every detainee, either asylum seeker or irregular migrant, is subjected to the same rules. The detention regime at the border is in theory more restrictive than the regime in regular detention facilities.

Territorial detention

For those migrants who are detained on the territory, the CIA provides rules for contact with the outside world. In general, the detainee has the right to receive visitors at least one hour per week. Those visits are subject to specific times and places. It is noteworthy that the Council for the Administration of Criminal Justice and Protection of Juveniles and the Supervising Commission have unrestricted access to the detainee. Family members, lawyers and social workers are subjected to the general rules. Detainees also have the right to make phone calls at least once a week for a minimum duration of 10 minutes. The costs for these phone calls are at the detainee's own expense.

2.10 Legal grounds for the provision of legal aid

Migrants are provided with legal aid in detention that is paid for by the State. Besides the difference between border and territorial detention, there is also a difference between migrants who already claimed asylum upon their arrival; i.e. before detention, and those who applied for asylum at a later moment during their detention.

Border detention

Migrants who claim asylum upon their arrival at the border and who are subsequently detained, will be assigned a lawyer/legal aid worker specialised in asylum law. Migrants who do not claim for asylum immediately, will be assigned a penal lawyer whose knowledge of asylum often is limited; this frequently causes difficulties. Moreover, NGO's such as the Dutch Council for Refugees have no access to detainees, other than asylum seekers.

Territorial detention

Ex asylum seekers who are detained after a negative decision on their asylum application, also have a right to legal aid. In general, the lawyer who was assigned to their case during the asylum procedure continues his assistance during detention. Nevertheless, asylum seekers always have the right to seek another lawyer if they are not satisfied with their assigned lawyer.

In all cases – for border and for territorial detention – legal aid is provided for by the authorities; the detainee does not have to pay for the services.

2.11 Legal grounds for the protection of persons with special needs

In The Netherlands there are regulations for persons with special needs in detention. However, several reports and researches show that in practice these rules are not always applied. Particularly the rules laid down in the Receptions Directive and Procedures Directive are not always applied correctly.

In theory the following rules for persons with special needs exist:

- Minors younger than 16 who remain with their parents in The Netherlands, will not be detained separately from their parents;
- If possible, alternative measures will be applied to families with under aged children, or, if there are two parents, one parent can be detained;
- Unaccompanied minors between 12 –16 can only be detained if the actual detention can take place within 4 days in a Youth Detention Centre;
- Unaccompanied minors under the age of 12 will not be detained.

The abovementioned rules are applicable to border detention as well as to territorial detention.

2.12 Legal grounds for alternatives to detention

As indicated earlier in § 2.1, 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.

2.13 Legal grounds for providing release from detention

Under certain circumstances there is a possibility to release (ex) asylum seekers from detention.²²³

Migrants are released from detention when:

- They are expelled to another country (automatic);
- There is no longer a prospect of expulsion (Court order);
- The INS has displayed insufficient effort in trying to expel the migrant (Court order);
- There are special circumstances on the side of the migrant which compel the authorities to release the migrant from detention (Court order);
- Alternative ways for reception are provided;
- They are granted a status.

3. OVERVIEW OF NATIONAL DATA FINDINGS

3.1 Basic information

Most of the detainees that we interviewed were male, single and young. They came from very different parts of the world and had an average age of 27. The interviewed detainees were detained shortly after their arrival. This is typical to the Dutch situation where asylum seekers arriving at the international border are detained throughout their asylum procedure. This has also been described in § 2.1. Besides this form of detention, there are also other moments on which an migrant can be detained (after a negative decision on the asylum application, prolonged border detention).

The average duration of the detention of the interviewed detainees was 60 days. If we look at each detainee separately, most detainees were not detained that long. Two detainees who were detained for eight months influence this number. One of them was a Somali who was unable to return to his country of origin: "I am here because I signed

²²³ Aliens Circulaire A6/5.2.6 and jurisprudence

a paper that I want to go back to Somalia. They tried to return me in December 2008. I had a transfer in Dubai to Djibouti but the flight was cancelled. So I had to return and I was detained here. They say I cannot go to Mogadishu now. They say it is too dangerous.”

The legal status of the interviewed detainees differs. Of the 21 interviewees:

- 10 are irregularly staying migrants;
- 09 are asylum seekers;
- 01 has an unknown status;
- 01 has been granted a refugee status.

All irregular migrants we have spoken with were ex asylum seekers. Their application for asylum had been rejected and they were awaiting expulsion. Between the negative decision on their asylum request and their actual expulsion, the ex asylum seekers are 'labelled' irregularly staying migrants.

3.2 Case awareness

Two-third of the detainees felt that they were sufficiently informed on the reasons for their detention. A similar majority was satisfied with the quality of the information that they received. This view was however not supported by a volunteer of the Dutch Council for Refugees at the Detention Centre at Schiphol Airport: “(...) the procedure might be quite fast and for many detainees the reasons for their detention are not clear at all. We inform them therefore about the reasons for their detention. When they enter the detention centre they are either badly or somewhat informed, but they are well informed about their situation after meeting the Dutch Council for Refugees.”

3.3 Space within the detention centre

Detainees do not have a particular opinion on the space within the detention centre. Mainly the fact that they are locked in their cells at specific hours during the day worries them (see also § 3.4). A small majority is positive about the rooms in which they stay: “The room is small but it is all right. There is a bunk bed, a TV and a fridge.”

The only complaints detainees have about their room, concerns the climate within the room (too cold) and the impossibility to communicate with their roommate. The space of the centre itself is perceived quite neutral. Detainees do not consider the centre to be overcrowded and they usually are able to find privacy in their room.

From the interview with a detention centre staff member at the airport, two noteworthy aspects arose. Primarily, there is no separate male/female wing; both sexes are kept in the same area. Apparently the interviewed detainees do not consider this to be problematic. Secondly, detainees can request to be placed voluntarily in an isolation cell. This is allowed for a maximum period of 24 hours. Detainees sometimes request this if they need some time alone.

3.4 Rules and routine

Almost all detainees mentioned in the interview that at specific times during the day, they are locked up in their cells and are prohibited from going out: “They lock us up during lunch- and dinnertime. Why are they doing that? We can't go anywhere.”

Only at the deportation centre at Rotterdam, this seems to be different: “There are no real rules as far as I know. Of course we can't leave the centre and from 20.45 to 8.00 we are locked in.”

This rule seems to affect the mental health of the detainees deeply. Detainees experience being locked in a cell more negatively than being locked in a detention centre.

Concerning the rules in the detention centre; almost all detainees think that everyone will respect the rules in the facility. When it comes to opportunities to change the rules, they do not think that this is possible. However, according to theory and practice, this is possible. A detention centre staff member states the following: "Reasonable proposals are always discussed with the management. It is up to the management to give their consent or to reject something. Minor changes in food, can always be done; e.g. many Africans do not like spaghetti, so they will receive something different."

3.5 Detention Centre Staff

From the relationship with the detention centre staff emerges a positive image. Most interaction takes place with the security staff and occasionally with medical staff. The relationship is mostly perceived positive/neutral: "Staff is ok. They are guards: usually either two men and one woman, or two women and one man. The guards change three times a day. I don't have problems with them. Some are extremely friendly others are less friendly. I am quite content with them."

Most importantly is that detainees do not feel discriminated in the centre. Another noteworthy aspect is that the detainees do not perceive the interaction with detention staff to be problematic due to language problems. It seems that they are able to express themselves satisfactorily on the daily issues. If detainees want to discuss their (asylum) case, they can contact their lawyer or an INS official. For those conversations an interpreter is available.

3.6 Level of safety within the detention centre

Most detainees feel safe within the detention centre. One of the interviewees was once mocked by other detainees. It did not become clear throughout the interview what happened exactly to him; he only stated that the mocking occurred during queuing for food. The other detainee participated in a hunger strike. Together with other detainees he sat down and refused to go back to his room. Security police forces came to stabilize the situation. The interviewed detainee states that he was hit by the security forces on his ribs, knees and neck. The whole group was handcuffed and returned to their cells by the security police forces. The Dutch Council for Refugees does not have information that complaints were raised against the security police force.

It is interesting to note that some of the detainees who are detained on the international airport are afraid that a plane might crash on the detention centre. This fear probably stems from a recent crash of a Turkish airplane near the airport: "I am sure you heard something about the fire in 2005? In the beginning I was nervous about that. But I am more nervous now about the Turkish Airlines crash. When I hear a plane I am thinking it might happen here."

In general the noises of the airport are considered frightening. Some detainees say it constantly reminds them of the fact that they can be put on a plane and sent back to their country of origin at any time.

3.7 Activities within the detention centre

The awareness of organised activities in the centre is high; almost 90 %. However, this does not mean that detainees will also participate in those activities. The reasons for not participating are varied; stress and health problems seem to be the most important reasons. There are a great variety of activities available, but no access to education. Most detainees consider this to be acceptable and are not looking for more activities.

The guards also seem to be sensitive about the participation of detainees: "If people are not active this will be seen by staff. They will talk to the detainees or ask the medical staff."

3.8 Medical issues

All detainees are aware of the presence of a medical service. Almost all detainees have access to the service at least once per month. The medical service provides for nurses and doctors, however not for psychologists. Interpreters are available in order to facilitate communication with the medical staff.

The effect of the detention on physical health is clearly negative. The average grading by the detainee of their physical health dropped from 7.2 at the beginning of detention to 5.71 after four weeks. According to the detainees, this is caused by the detention itself. The same applies to mental health: the negative effect of detention is perceived here even stronger. The grading of mental health dropped from 7 at the start of detention to 3.5 after four weeks. Explanations for this reduction are factors such as stress, thinking too much and worries about the uncertain future.

3.9 Social interaction within the detention centre

Most of the detainees have good relations with their co-detainees. Occasionally there are quarrels between the detainees; this is usually about personal things. Not all detainees can confide in someone at the centre. However, if they do have such a person, it does not matter whether it is a staff member or a co-detainee. As explained earlier the difficulty with co-detainees lies mainly in the communication. Most detainees would like to be able to communicate with their cellmate, but they are unable to do so, due to language problems.

3.10 Contact with the outside world

The detainees we have interviewed state that they do not have family members in their country of origin who depend on their support. Likewise, most detainees do not have friends or family in The Netherlands; they therefore rarely receive visits. The most favourite means of communication for them is the telephone. However, access to it is rather limited. Detainees are not allowed to possess a mobile phone. In most centres phone cards are distributed, but the credit on it (usually € 6 – € 10 per week) is only sufficient for one international phone call. Access to Internet is not available due to security issues. One detention staff member stated that sometimes detainees can send an e-mail or a fax, but this possibility/ is reserved for exceptional circumstances.

According to a detention centre staff member, visits are mostly made by family members. He also states that not all the detention centres abide strictly by the visiting hours schedule. Most of the centres are outside the urban areas and therefore hard to reach by public transport. The staff seems to be rather flexible when it comes to visiting hours.

3.11 Conditions of detention and the family

Since most of the interviewees did not have family members present in the Netherlands, no valid conclusions can be drawn from those answers.

3.12 Conditions of detention and nutrition

When it comes to food, most detainees are not satisfied about the quality or quantity. Although it seems to be possible to make some requests for specific meals (see quote § 3.7), detainees are possibly not aware of it. From the interviews it does not become clear to what extent the quality and quantity of food can be related to a decrease/increase of the detainees' health. More research into this specific aspect would be required.

3.13 Conditions of detention and the individual

Almost 80 % of the interviewed detainees report sleeping problems that they relate to stress. On the basis of the interviews we can also extract two major difficulties that are experienced by the detainees. Primarily, it is the shock of

being detained and the subsequent loss of rights that affects them deeply: “I was shocked when they brought me here. I was shocked they detained me”

As second difficulty, the living conditions and cohabitation issues are mentioned: “Lack of fresh air and the stinking toilet in the cell”

On a whole, the experience of being detained is very difficult for the majority of the detainees. They do not know what will happen after their detention. The fact that they do not know when they will be released worries them.

During the interviews detainees presented themselves negatively, but they do not consider themselves to have special needs. When asked which persons might have special needs, the interviewees gave the following answers:

- People not knowing the language
- People who are detained for a long period
- People under a Dublin claim

Especially the last category is in an awkward situation since their asylum application is not taken into consideration in The Netherlands. They can only wait until they are returned to their first Dublin country. In that country their asylum claim will be processed.

Some detention centre staff members indicate that they perceive women as vulnerable persons. Also persons who are ‘really confused’ are considered to be vulnerable by them. According to the interviewed NGO staff members, minors, victims of human trafficking and persons suffering from PTSS should be considered vulnerable and should be excluded from detention.

4. ANALYSIS OF THE DATA AND CENTRAL THEMES

In this chapter a more in depth insight will be given on three central themes that emerged from the interviews and the analysis. The first theme involves ‘information’ which was perceived very positive by the detainees. Two themes that need improvement, as shown by the negative experiences of detainees – concern ‘communication’ and ‘daily routine’.

4.1. Information

Throughout the interviews the image emerges that detainees are well informed on their case, the reasons for detention and the rules that are applicable in the detention centre. The extent to which detainees are informed on these aspects, affects their well being, and therefore their vulnerability, directly. From the interviews held in other EU-countries, it becomes apparent that if detainees are not sufficiently informed on their case, it causes mental as well as physical health problems.

Generally in the Netherlands, the INS official provides the migrant with basic information on his case and the reason for detention. If this information is insufficient, a volunteer of the Dutch Council for Refugees or the detainee’s lawyer will give more detailed information once the migrant arrives at the detention centre.

The Dutch Council for Refugees does not have the possibility to speak with migrants who are not (ex) asylum seekers. The Council does not have access to this group because the authorities expect that this will increase the number of asylum applications from migrants in detention. Since the basic information provided by the INS is sometimes perceived as insufficient by detainees to be fully informed on their situation, this leads to a potential lacuna for the migrants that the Dutch Council for Refugees and other NGO’s don’t access to.

Taking into account the conclusions drawn in other EU-countries on the correlation between the level of information and level of physical and mental health, it is of the utmost importance that all detainees, asylum seekers as well as other irregular migrants, are fully informed on their case and have sufficient opportunities to request for more information if they deem this necessary.

On the basis of this research the conclusion that (ex) asylum seekers have sufficient opportunities to be fully informed on their case and situation can be rightfully drawn. Unfortunately, this does not apply to the situation of other irregular migrants, since the possibilities to inform them are limited.

4.2. Communication

With respect to this theme a distinction should be made between communication with detention staff members and communication with others.

Almost all detainees are positive about the communication with the staff members of the detention centre. Also from the interviews with the staff members themselves, a rather positive image emerges. Guards approach the detainees with respect and an open attitude. In return, detainees state that the guards are only doing their jobs; they do not hold the guards responsible for their detention.

The first difficulty arises in communication with co-detainees. Usually detainees do not speak the same language and therefore encounter problems when speaking to other detainees. From the interviews the image arises that most problems are encountered in communication with cellmates. Especially if detainees want to confide in them on serious subjects, the language problem constitutes a barrier. The fact that the detainees cannot easily interact with cellmates should be a point of concern, since this prevents them from sharing their problems, worries and uncertainties. Not being able to talk about these things increases the level of stress, which directly impacts mental health. As we saw in the previous chapter, a decreasing (mental) health increases the level of vulnerability.

A second difficulty involves communication with the outside world. This seems to be problematic due to two factors. First of all, detainees do not have access to Internet or e-mail facilities. This limits the possibility to contact their family and/or search for documents that support their asylum case, severely. It is unclear for what reasons Internet is not made available to the detainees. A second factor that limits detainees' means of communication with the outside world is the prohibition on the use of a (mobile) phone. Detainees are not allowed to possess or use a mobile phone inside the detention centre. Most likely this is part of the security rules. However the rationale for this rule has not become clear during the research. As compensation for not allowing mobile phones in the centre, detainees are handed out weekly a telephone card with the amount of approximately €10 (this differs per detention centre). Detainees state however that this amount is hardly sufficient to make one international phone call.

The consequences of not being able to freely contact friends and family have a negative impact on detainees' (mental) health. Therewith it is also a factor that increases their vulnerability. Earlier in Chapter 3 it has been pointed out that detainees as well as NGO representatives are of the opinion that people with mental health problems have special needs and are therefore considered vulnerable.

4.3. Daily routine

Concerning this theme, two different types of difficulties are encountered during detention. This firstly concerns the quality and quantity of the food, which is perceived as unsatisfactory by the detainees. A detention centre staff member stated that such issues can be discussed and if approved by the management, other food can be served. Apparently detainees are not aware of this possibility. The idea that rules cannot be changed confirms the findings of § 3.4.

A second major difficulty however, involves the 'lock-in hours', which appear to be applied in all detention centres, except for detention centre Zestienhoven at the Rotterdam Airport. 'Lock-in hours' mean that during a certain period of the day, all detainees are locked in their cells. For example a detainee at the detention centre at Schiphol airport stated the following: "You are locked in from 11.45 – 13.00, from 16.45 – 17.45 and from 20.45 – 8.00."

It has not become clear during the research why the detainees are locked in. Most likely capacity issues lay at the root of this.

This situation affects detainees severely. Most detainees have not done anything wrong. The majority of the detainees we have interviewed only asked for protection because they feel that their life is at risk. The fact that they are detained is a shock that they have to overcome. The feeling that they are not wanted in the Netherlands and put away in a distant detention centre outside urban areas has a severe negative effect on their mental health and self-perception. If, on top of that situation, the migrants are also locked in their cells which gives them even more a feeling of being a criminal, it increases their vulnerability to an unacceptable level.

5. CONCLUSIONS AND RECOMMENDATIONS

During this research the Dutch Council for Refugees has spoken with many persons on the subject of detention and to what extent migrants in detention consider themselves to be vulnerable. Groups of people who are considered vulnerable in detention by the interviewees in the Netherlands are:

- People not knowing the language
- People who are detained for a long period
- People under a Dublin claim
- Women
- Minors
- Persons suffering from PTSS
- Victims of human trafficking

Most migrants in detention do not consider themselves to be vulnerable. However from the answers to other questions during the interview, it can be derived that detention has a negative impact on them. The rating of their mental and physical health dropped during detention and their answers display a poor level of self-perception.

On two specific themes the Dutch Council for Refugees would like to recommend changes. Since we have only spoken with (ex) asylum seekers, the conclusions and recommendations as set out below, only aim at that specific group.²²⁴

Communication

Detainees encounter difficulties in communication with their cellmates, who often do not speak the same language. As a consequence of the 'lock-in hours' cellmates are obliged to spend quite some time together. Moreover, there are not many possibilities to share difficulties with cellmates; the environment in the detention is not stimulating. However, during one interview a guard mentioned the initiative of starting discussion groups for detainees. In these voluntary groups detainees can share their worries and problems with other detainees.

²²⁴ Except for recommendation 10; this aims specifically at irregular migrants other than (ex) asylum seekers.

This research has shown that being able to communicate and discuss problems with other persons will decrease the level of vulnerability of detainees. If detainees are able to express themselves sufficiently and receive feedback on their problems and worries, this enforces their self-perception. A positive self-perception influences the level of vulnerability directly in a positive way. We therefore propose the following recommendations:

- ⇒ Detainees with the same nationalities or who speak the same language, should be placed in one cell
- ⇒ Create more opportunities to confide in a person, e.g. through discussion groups.

Detainees do not have access to Internet nor to e-mail facilities. Moreover, they are not allowed to have a mobile phone inside the detention centre. The credit on the telephone cards, which are distributed weekly, is only sufficient for one international phone call. These rules seriously impede the detainees' possibilities to contact their family members. It has a negative impact on their mental health.

As we saw in the previous chapter, the rationale of this rule is unclear. If we look at other countries, the Dutch system is even harder to understand. If we take Sweden, for example, detainees are allowed to use the Internet freely in the detention centre. They are also allowed to use a mobile phone inside the centre, at the detainees' own expense. Difficulties concerning security do not seem to arise in those detention centres. Another suggestion would be to facilitate the use of Internet but only for e-mail, i.e. access to other websites can be blocked. In this manner detainees can stay in touch with family without using the Internet for improper purposes. We would therefore recommend the following:

- ⇒ Detainees should have access to internet and e-mail facilities
- ⇒ Detainees should be allowed to use a mobile phone inside the detention centre
- ⇒ Credit on the telephone cards should enable detainees to make at least two international phone calls per week.

Daily routine

Detainees are not satisfied with the quality and quantity of the food in the detention centres. The guards indicate that food preferences can be made known to them, so they can discuss the request with the management of the centre. Apparently detainees are not aware of this possibility, or do not make use of it. Although it cannot be concluded from this research that the quality and quantity of food directly affects the detainees' health negatively, it certainly does have a negative impact. Especially for the detainees who have to remain a longer period in detention, they notice that they lose their appetite and rate their physical health rather low. We would like to suggest the following:

- ⇒ The food in the detention centre should be more varied and of a larger quantity
- ⇒ Detainees should be made aware by the detention centre staff of the possibility to request changes in the food which is served.

The detainees' mental health is seriously weakened by the fact that during certain hours of the day, they are locked in their cells. This makes the detainees feel like criminals whilst they have not committed a crime. By locking detainees for more than 12 hours per day in their cells, the self-perception and mental health of the detainees is impacted negatively in a very severe way. This heightens therefore their level of vulnerability. It might not be necessary to lock detainees in during daytime, if a more efficient schedule for the security guards can be developed.

If we look at the situation in other countries, we see that many have semi-open facilities for (ex) asylum seekers. Slovenia, Sweden, Lithuania and Czech Republic, for example, have a separate facility for that group. These facilities are only secured at the entrance: detainees are allowed to move freely within the centre but cannot leave the premises. Denmark applies a similar policy towards (ex) asylum seekers; they also developed a separate facility for

this group.²²⁵ Around the detention centre a large secured fence is placed. In front of the fence a row of trees prevents the detainees from having a permanent view on it. The detainees are allowed to move in and outside the detention centre, but cannot leave the premises.

Detaining people who have not committed a crime is not acceptable. However, if there are no other solutions, then detention should be carried out in the most prudent manner. Currently this is not the case in the Netherlands: (ex) asylum seekers are detained and locked in their cells as criminals. This lowers their self-perception and increases their vulnerability. We therefore recommend the following:

- ⇒ Create semi-open facilities for (ex) asylum seekers who are detained before, during or after their asylum procedure;
- ⇒ Detainees should never be locked in their cells voluntarily during day-time; a more efficient schedule for the security will make this possible.

²²⁵ Denmark did not participate in this project. The statements made in this report about the situation in Denmark are based on the author's own experiences.



NATIONAL REPORT: POLAND

By: *Caritas Poland*

1. INTRODUCTION

This national report is the result of research having been done in 2009 in Poland. It is based on an approach and a methodology that was developed by the DEVAS project partners. On the basis of several questionnaires and guidelines, Caritas Poland arranged for 31 interviews with detainees – many of which included interviews with whole families.

Caritas Poland owes special gratitude to Komendant Główny, Straży Granicznej, all of the persons we met during our visits to the detention centres, as well as all of the detainees who helped us to accomplish this report.

Methodology (as applied in the national context)

The aim of the 'DEVAS project' (Detention of Vulnerable Asylum Seekers) was to study the conditions for vulnerable asylum seekers in detention in Poland as well as for irregularly staying third-country nationals in detention.

Caritas Poland participated in the DEVAS project as a partner to JRS-Europe, the lead coordinator, and the 23 collaborating NGOs. Katarzyna Sekuła, Migration officer, at Caritas Poland, was designated as the national project supervisor. She conducted all visits and interviews in the detention centres.

The research was done on the basis of three social questionnaires that were used to interview three distinct groups:

1. Asylum seekers and/or irregularly staying third-country nationals in detention;
2. Non-governmental organisations that work in the detention centres that were researched;
3. The staff of the detention centres that were researched.

A legal questionnaire was used to research the existing laws related to detention in Poland. Caritas Poland conducted the interviews in four detention centres located in Przemyśl, Krosno Odrzańskie, Grójec and Biała Podlaska.

The majority of interviews were conducted with the presence of an interpreter from Caritas Poland. There were two visits to detention centres in Biała Podlaska and in Grojec, and one to Krosno Odrzańskie and Przemyśl. All premises visited are Guarded Centres for Foreigners and apart from Grojec, which is situated near Warsaw, are located close to the borders. The detention centres researched within DEVAS are all administrative detention premises that are designed for asylum seekers as well as irregularly staying third country nationals. The border guard manages all centres.

During the implementation of the research, a sudden influx of Georgians came to Poland to apply for asylum. This is why they constitute such a large portion of the sample.

In many cases whole families were interviewed. In the case of children who were detained, Caritas Poland asked for assistance and advice from psychologists working in Caritas Centres of Support for Migrants and Refugees to

analyse the children's situation and behaviour in detention, in order to a more nuanced perspective of their time in detention.

2. NATIONAL LEGAL OVERVIEW

2.1. Legal grounds for ordering detention

The legal grounds for ordering detention are included in Article 101 of the Act of 13 June 2003 which says that the Border Guard or Police can detain foreigners for a period of time not longer than 48 hours. The authority that has detained an alien should take the alien's fingerprints without delay. If required by the circumstances, they should also make a request to the court for placing an alien into the guarded centre, or for the arrest for the purpose of expulsion.

Article 41 of the Act of 13 June 2003 on granting protection to aliens allows for an alien to be placed in the guarded centre or to be detained in a facility for the purpose of expulsion. The arrest for the purpose of expulsion shall be applied if the circumstances determined by the Border Guard indicate that it is necessary for reasons of state security and defence, as well as for public security and policy.

2.2. Legal grounds for the right to appeal a detention order

In accordance with article 106 of the The Act of 13 June 2003, detainees have the right to appeal the detention order within seven days from the day of receipt of the Court decision. The court shall treat the appeal immediately. Article 44.3 expresses the following:

“An alien may appeal against the decision of the President of the Office on refusal to accept a request for release from the guarded centre or from the arrest for the purpose of expulsion within the time limit of three days from the date the decision has been delivered. The appeal shall be submitted to the district court competent with respect to the seat of the President of the Office, through the head of the guarded centre or through an officer responsible for functioning of the arrest for the purpose of expulsion.

The head of the guarded centre or the officer responsible for implementing the arrest for the purpose of expulsion shall - within the time limit of two days - send the appeal to the court, which shall examine it immediately.

The provisions of the Code of Criminal Procedure concerning procedure for complaint against the ruling on preventive measures, shall apply *mutatis mutandis* to the procedure for appeal against the decision referred to in sec. 3; the President of the Office shall exercise the function of the public prosecutor.”

2.3. Legal grounds for maximum detention

Article 106 of the The Act of 13 June 2003 on aliens stipulates that detention cannot be longer than 90 days. However, it can be prolonged for specified period of time in case it is necessary to have more time to execute the decision on expulsion due to obstruction of the foreigner. The period of detention in the guarded centre, or arrest for the purpose of expulsion, cannot exceed one year. However, what is not defined in The Act is the number of times the same person can be detained. In practice this causes the following situation:

An irregularly staying third country national was detained for a period of one year after which he was released because he could be neither detained any longer nor deported because of a lack of documents. In this case still his legal status did not change which means that after that time he was still illegally staying in Polish territory and is once again eligible for detention.

2.4. Legal grounds for contact with the outside world

Article 117 of the The Act of 13 June 2003 on aliens states that a foreigner that is detained in the guarded centre or in a facility for the purpose of expulsion has the right to contact with the following: Polish authorities, diplomatic representatives and NGOs. Paragraph 14 states that a foreigner can meet face-to-face with close persons in rooms specially designed for that purpose.

Art. 43.1 states that an alien placed in the guarded centre or in a facility for the purpose of expulsion shall be informed in a language he or she understands about the organisations that statutorily deal with refugees' affairs, and that s/he shall be allowed to correspond or make telephone contact with these organisations. Paragraph 2 of the same article states that an alien referred to in section 1 may, particularly for the purpose of being granted legal assistance, to personally contact, within the guarded centre or in the facility for the purpose of expulsion, the representative of the UNHCR or the organizations that statutorily deal with refugees' affairs. Paragraph 3 states that exceptions to this rule may only be justified by the necessity of ensuring public security and policy or observing organisational rules in the centres concerned.

2.5. Legal grounds for health care provision

Article 113.1 of the The Act of 13 June 2003 on aliens states that upon being accommodated in the detention centre or guarded foreigner's centre, the foreigner shall be immediately submitted to a medical check-up, and if necessary will undergo sanitary operations.

Article 117.4 of the The Act of 13 June 2003 on aliens states that a foreigner has the right to access medical aid or can be put in medical centre if his/her health condition so demands.

2.6. Legal grounds for the protection of persons with special needs, or particularly vulnerable people

Article 103 of the The Act of 13 June 2003 on aliens refers to the situations in which detention could affect the health condition of a foreigner and therefore does not allow his/her placement in a detention centre.

Article 115 says that female and male foreigners should be separated. It also states that a foreigner accompanied by a minor should be accommodated in the same room as the minor if possible. In addition, if an unaccompanied minor is accommodated in a guarded detention centre, s/he is to be put in a separate part of the detention centre so as to avoid contact with adults. Those foreigners who declare they are with relatives may be accommodated, as per a written request they must make, in the same room. Article 121 states that a woman up to the seventh month of pregnancy can be accommodated in the facility for detention for the purpose of expulsion. After that time pregnant women are to be transferred to the guarded detention centre.

The Act on Protection to Aliens includes procedures with participation of aliens whose psychophysical state allows presuming that they have been victims of violence or of aliens with disabilities.

Art. 54.1 of the said Act states that in case of an asylum seeker whose psychological state leads to the presumption that s/he has been a victim of violence, or in the case of aliens with disabilities, procedures for the determination of refugee status shall be effected:

- In conditions assuring a freedom of speech, in a particularly tactful manner, adjusted to the alien's psychophysical state;
- In the place of his/her residence;
- On a date adjusted according to his/her mental and physical state, taking into consideration the dates of medical treatments undergone by such an alien;

- With participation of a psychologist and - if necessary - of an interpreter of the sex indicated by an alien or by a doctor.

If it is justified by the mental or physical state of an alien placed in the centre, he/she shall be provided with transportation in order to: 1) give testimonies and statements in the proceedings for granting the refugee status; 2) undergo the medical treatment.

An alien referred to in section 1 of said Act shall not be placed in the guarded centre or in the facility for the purpose of expulsion.

Art. 55 states that activities undertaken during the procedure for granting the refugee status in relation to an alien referred to in art. 54.1, or activities connected with granting the assistance in the centre, may be carried out by a person of the sex indicated by the alien and who has received vocational training working with victims of crimes or violence and persons with disabilities.

2.7. Legal grounds for providing release

Article 44 of the Act on Protection to Aliens states that an alien may be released from the guarded centre or from the facility for the purpose of expulsion in cases referred to in art. 107 1 of the Act of 13 June 2003 on aliens; or on the basis of the decision of the President of the Office rendered *ex officio* or upon request of an alien, if the evidence of the case indicates that the probability that an alien meets the conditions for being recognized as the refugee as specified in the Geneva Convention and the New York Protocol; or the condition for obtaining the permit for tolerated stay on the basis of art. 97.1.1. This decision shall refer also to minor children and spouses accompanying an alien.

3. OVERVIEW OF NATIONAL DATA FINDINGS

3.1. Basic information

The average age of the detainees that were interviewed is 34; of those, 53.6% are male and 46.4% female. The overwhelming majority of the detainees are Georgian. The average time spent in detention is 2.07 months, or, 66.32 days. As a rule, families are accommodated separately in special units. Males are separated from females, and minors are separated from adults.

As the research was being conducted Poland faced a sudden influx of persons from Georgia who applied for asylum, which is why they figure prominently within the sample. However, there were also persons from Vietnam, Chechnya, Armenia, Nigeria, India, Pakistan, Tunisia, Morocco, Ukraine, Rwanda and Iran.

Among the sample the biggest group were applicants for international protection (over 60%); and in second place irregularly staying third country nationals and asylum seekers detained for the purpose of "Dublin procedures".

3.2. Case awareness

All of the detainees reported that they had been informed about their situation through official procedures, or upon arrival in the detention centre. The reasons for detention were known by all as well. Asylum applicants reported to be fairly informed about the asylum procedure. The most important issue for them was to know the duration of their detention. "Being here would be easier if I know how long I need to be here", said a Georgian detained in Przemyśl.

The vast majority of the detainees reported that ruminating on the details of their cases takes up of their thoughts. As said by one detainee, “Thinking what happens next with little knowledge is unbearable.”

Detainees expressed an urgent need in almost all cases to be aware of possible scenarios for their future. The detention centre staff is constantly asked by detainees to look into their cases. The awareness of the legal steps and its consequences was very low in majority of the cases. “Please tell us what happens to us – we want to know.”

As opposed to people from the Caucasus, persons from African countries had no knowledge on legal issues and procedures, and also no understanding of their situation. “ I just want to get out”, and “I came here [to Poland] to visit my friend” were among the types of replies from African detainees.

In detention centres, the border staff do not deal with the legal issues, and there are no legal departments that analyse the cases of the detainees. Therefore, the staff working in the centres and having regular contact with detainees do not have knowledge of their situation and cannot answer detainees’ questions. In some cases the detainees regard this as a “lack of willingness or good will”; in fact it is more due to the limitations within the border guards’ job descriptions.

3.3. Space within the detention centre, rules and routine

The majority of detainees had positive feelings about their bedrooms. None of them reported that the centre was overcrowded. They also expressed a good understanding of the rules and routine in the centre. The family units are more spacious, and in many cases the educational staff takes care of children and baby-sits them. “The room is fine, light”, said one detainee. Another remarked, “We have a nice room, it is fine”. These types of replies were most often expressed. The majority of detainees relate rules and routine to schedules for meals, activities and free time.

In case of the detention centres in Przemyśl and Biała Podlaska, which were planned from the beginning as detention premises, meaning that the sections and spaces are designed accordingly for this purpose. Therefore, the conditions there are far better than in the detention centre in Krosno Odrzańskie, which was adapted for detention from existing facilities. But even this centre was recently renovated and looks much better than in 2007. Detention centres in Przemyśl and Biała Podlaska have units for male, female and families and also recreational spaces – all of which makes a big difference for the lives of detainees.

3.4. Detention centre staff

Detainees maintain frequent contact with border guards, medical and educational staff. Almost all of detainees assess their typical interactions with staff as positive or neutral saying, for example, that “they are doing their work or they are fine – it is their job”. None of the detainees interviewed reported experiencing discrimination from staff.

Over half of the detainees reported that the staff supported their needs if possible. Educational staff were very much appreciated in most of the interviews with families: “They are good, take care of children”, said one family.

The staff provides for the proper implementation of rules and regulations, and they focus mainly on these activities. The educational staff consists of civil workers who have flexible tasks and focus a lot on children and language activities.

The manner in which the staff treats detainees depends on the location. In the case of Przemyśl, the interactions are more humane and formal. It is the so-called ‘human factor’ that in many cases defines the attitude of staff towards detainees. Detention centre staff focuses on ensuring at least minimal conditions in detention as foreseen by law, such as medical care, social activities, food, space, separate rooms for families and children, etc.

In the centres the staff is composed of civil workers and border guards. This mixture makes for a good atmosphere. Caritas Poland also noted that there is a rising awareness among staff of the need to take part in intercultural trainings and to be aware of cultural differences and its consequences for their daily work. Increasing interest in cooperation and exchanging practices with NGOs is also noticeable. Ocalenie Foundation runs a programme of intercultural trainings for border guards and police. Psychologists, lawyers, social workers and intercultural advisors (of Chechen origin) working for Caritas Centres of Support for Migrants and Refugees have access to detention centres on daily basis and provide complex care for the detainees. Their work in detention is very much appreciated by the border guards, as described by one, "It is easier for us to work as we know that specialists and professionals are here". Another said, "We would not be able to provide such complex support for detainees if not for Caritas' help".

3.5. Level of safety within the detention centre

Most detainees feel quite safe in the detention centre. They have not reported any cases of security infringement. They tend to attribute their safety to the conditions in the safety, or to safety from the 'outside world'. Others mentioned feeling safe because of the presence of co-nationals (mostly for the Georgians). No one reported experiencing verbal or physical abuse.

The detainees did not express any vulnerability to danger from staff or co-detainees. Some said that existence of clear rules and routines, as well as the provision of basic needs, makes for a stable environment in the detention centre.

3.6. Activities within the detention centre

Most detainees said that they participate in activities in the detention centre. Of these, almost everyone described taking part in "educational" activities such as language classes. Many do it for their own satisfaction, but others for boredom or stress relief. Detainees reported access to books, television, telephone, educational opportunities and outdoor space; but not to Internet and computer access. Hardly any detainees describe activities that they would want the centre to provide. The educational staff observe high attendance rates in classes.

Detainees admitted that the language classes are very useful, especially since the groups are small and comfortable. They like the classes and they learn a lot, as noted by one detainee, "It is good learning Polish here at classes and to practice with the staff. I have a lot of fun and stop from thinking about my case". Staff in Biała Podlaska admitted that detainees at the classes are highly motivated and active; they learn after classes and practice with border guards and staff. Families whose children attend classes remarked that the children enjoy them as well.

3.7. Medical issues

Almost all detainees reported meeting with doctors and nurses; and over 90% reported meeting them at least once per week. No one reported meeting with psychological staff. Almost everyone reports having had a medical exam upon arrival to the centre. Over half reported to understand the language of the medical staff. But a significant minority, or 45%, admitted to have problems with understanding and wished for a presence of interpreters. At the basic level most detainees felt that the quality of medical care is good. In more complex cases, and the in case of children, detainees remarked that the medical care is not enough.

The issue that remains a problem is the lack of a regulation obliging medical staff to be fluent in the foreign languages, or in at least one of the dominant languages used in the detention centres. Also the cultural differences seem to be neglected, such in the cases of Muslim women not feeling comfortable going to male medical staff. The medical aid that is provided is at a basic level; more complex cases are directed to the local hospitals. Detention centres that hold children should provide for a paediatrician.

3.8. Physical and mental health

The duration of detention in the majority of the interviews was short, meaning that no substantial observations of physical health deterioration were made. Almost half of the detainees admitted that detention negatively impacts their mental health. People describe this impact in unspecific terms – mostly in relation to the psychological stress they feel.

During the visits it was observed that detention, irrespective of the conditions, does affect children. The psychologists looked into the cases and confirmed that their development and mental health is highly affected by detention. They become hyperactive, and experience appetite and sleeping problems. The situation is even worse for children who lived in Poland before being put into detention as they miss their friends, schools, and relatives.

3.9. Social interaction within the detention centre

Detainees hardly reported any problems in their interaction with co-detainees. They also observed few problems existing between detainees. Some relate their good interactions to the presence of co-nationals and people who share a common language.

Over 78% admitted that they feel comfortable with approaching border guards for support, or, someone just to speak with. The atmosphere in majority of the detention centres subject to this research was good and the relations between staff and detainees can be described as friendly with the exception of the center in Przemyśl. A majority of the detainees comprehend the role of border guards and understand that it is their job. They also appreciated that they do what they can.

3.10. Contact with the outside world

Most detainees reported having family in their country of origin. A majority admitted that their family is being supported without them. Over 55% said they did not have family/friends in the host country. For the vast majority the telephone is the most crucial means of contacting family/friends. Public telephones are available in all centres for incoming and outgoing calls. No one reports access to the Internet, and no one describes using postal mail. The few who described receiving personal visitors mentioned that they more often see lawyers than family or friends.

The location and disperse of detention centres around Poland makes it difficult for UNHCR, NGOs and others to access detainees them regularly. Caritas staff frequently access without any obstacles the detention centres in Krosno Odrzańskie and Biała Podlaska, and also Białystok (but not included in the DEVAS research) where also Caritas Centres of Support for Migrants and Refugees are located. Therefore, the detainees have access to psychological, legal and social aid. Ocalenie Foundation mentors intervene each and every time intercultural interventions (such as for hunger strikes, etc.) are needed, irrespective of the distance.

3.11. Conditions of detention and nutrition

The greater percentage of detainees did not report having any problems with the food provided in the detention centre. About one-third felt more negatively, often saying that they missed the food from their own country, or complaining about the lack of variety. Negative impacts resulting from appetite and food are very few.

Children reported dissatisfaction with the food, saying that it could be more varied. A majority of Georgians reported that children should be provided with more fruit.

3.12. Conditions of detention and the individual

A majority of the detainees reported to sleep well in the detention centre. Almost none complained about the conditions. Most people attributed their top difficulties in detention to unspecific circumstances (e.g. the 'shock' of detention) and to the disruption of their life plans (e.g. uncertainty of their asylum applications, and upcoming plans). This aspect of detention appeared in most of the cases – lack of updates on the case, lack of information on their current situation and overwhelming sensation of waiting. Over half reported that thinking about their future is very difficult and tiresome; in these cases detainees constantly analyse their situation and possible scenarios for their future. These difficulties of detention do not change for most. However, such difficulties may be greater for people who are in prolonged detention.

The vast majority of detainees do not know what the outcome of their detention will be. Many are afraid of deportation. No one knows when he or she will be released from detention. These people report feeling psychological stress as a result.

In the case of children, as confirmed by psychologists working for Caritas Centres of Support for Migrants and Refugees, detention has very negative impact on their lives and development. Living in constrained spaces and with no access to formal education is very negative for children. Their psychological condition deteriorates over time. Parents face difficulties explaining to their children the reasons for detention and have no answers for their questions relating to the duration. The following observation was made, however, that mothers detained with their children are much stronger and cope with detention better as they have a strong feeling that they need to protect children. "I need to be strong to protect my children", says one mother. According to another mother, "We will manage, it is important to show to children that everything is fine".

4. ANALYSIS OF THE DATA AND CENTRAL THEMES

Detainees that took part in the DEVAS project expressed their opinions on a number of topics related to their detention. From the number of interviews conducted the following perspectives can be outlined.

The living conditions, rules and routines, the level of safety and the availability of activities remain of little significance to detainees. They do not complain about the living conditions and activities as they play little role in their stay in the centre.

What is more important, and what brings about more emotions, are detainees' level of case awareness, their ability to plan for the future and the level of nutrition afforded to them in the centre. Detainees reported these factors irrespective of age, sex and duration of detention.

All detainees felt that their situation was akin to imprisonment. They were unaware as to why they were subject to detention and court procedures despite having committed no crime.

The most frequently reported factors identified within the research relating to the impact of detention on detainees are as follows:

- Sleeping problems
- Lack of appetite
- Feelings of uncertainty
- Feelings of unfairness
- Tearfulness (especially in children)
- Hyperactivity (especially in children)

- Negative thoughts

Information and communication

Each and every detainee complained about limited access to information on his or her current legal situation. They feel trapped and suspended, being unable to know what to expect. Almost all of them treated the DEVAS research visits as an opportunity to talk over their cases and possible solutions and future scenarios. Therefore, it appears that there is a gap that needs to be filled in the detention system so that people would feel more comfortable and become more familiar about the outcome of their detention. This solution would bring about significant changes to the lives of detainees.

The other problem that was reported relates to the communication barrier. In a number of cases detainees themselves act as translators and interpreters to others. The lack of proper communication can be, in the long term, quite frustrating and lead to stressful situations among detainees. In these situations it would be ideal for the staff to possess a greater language capacity, in order to enable better communication with detainees.

Intercultural interactions

What also appeared during the course of the interviews was that detainees' traditions and customs received little attention from staff. There is a strong need to take this issue more into account and to give it more attention. In this context, it seems that food should be adapted at least to some extent to the detainees' customs and traditions relating to their home country. The detention centre staff might also benefit from intercultural training so as to become more familiar with the varying customs and traditions of detainees. At the moment the civil workers and border guards already participate in these types of trainings. This is a good practice that should be expanded.

Children

During the course of interviews it occurred that children are most affected by detention – psychologically and developmentally. In detention, as especially noticed by psychologists working with Caritas Poland at the time of the interviews, some children became aggressive and hyperactive. Children cannot adequately comprehend the environment of detention and their legal situations. Although the education provided helps to stem some of the negative effects, in all it is not enough. Children should simply not be in a situation of administrative detention.

Emerging vulnerabilities in detention

Detainees' level of vulnerability, in the context of administrative detention and on the basis of observations and visits to detention facilities, seems to be most influenced by

- Access to information about their legal situations
- Their inability to plan ahead for their future

The approach used at present shows that the staff at detention centres apply the legal procedures step by step in order to meet the requirements posed by law. Yet the day-to-day needs of detainees are sometimes neglected by what may be too strict of an interpretation of the law, i.e. not being flexible enough to meet the full range of detainees' needs. The law allows staff little room to provide flexible services to detainees, such as explaining their legal situation.

When asked about vulnerability, almost every staff member defined it in a traditional way as defined by the law. They did not perceive the concept of vulnerability in a more flexible or broad manner. There is more awareness on "visible" vulnerability such as pregnancy, disability, the elderly, etc., than on "invisible" vulnerabilities such as

psychological stress, depression, etc. There is a strong need to raise more awareness on how detainees can become vulnerable in detention.

As stated by the NGO Dorota Parzymies²²⁶, vulnerability is an individual issue that cannot be treated by a fixed and limited definition. It is not enough to ensure proper social conditions in detention centres and enough space for the detainees. According to them, what is a problem is the fact that detainees live in uncertainty and suspension for quite a period of time.

The personality and character of individual detainees cannot be ignored in assessments of vulnerability. Persons that are more sensitive, delicate, shy, and closed appear to be more vulnerable and psychologically susceptible to being harmed and cannot manage detention easily.

Cultural difference can be treated as a vulnerability in detention. The lack of intercultural knowledge and training by staff can result in increasing detainees' susceptibility to the harmful environment of detention. It seems that one's cultural background is of more importance than the traditionally defined categories of vulnerable groups.

The detainment of families with children should be avoided as in every case this group was perceived by Caritas Poland as being vulnerable. The mothers' instinct becomes very strong but children do not cope with detention well. It could be further observed that persons receiving support from family members living in the country of detention seem to cope with detention better than those that have no family tight here and no support from outside.

Detainees live in 'black hole' with the suspense of not knowing what to expect next. Caritas Poland is sure that the improved provision of legal information would enable the detainees to avoid many of the negative effects of detention, such as sleeping problems, loss of appetite and feelings of uncertainty. The lack of concrete information on their legal situation and fear from being deported paralyzes detainees. It determines their activity or passivity in detention. It seems that the period of detention is not as important as the knowledge on what to do next, i.e. what their court decision means in practice.

As a result solutions need to be implemented that minimize vulnerability that is related to uncertainty that is fostered by a lack of information. The creation of legal units within the detention centres that can have access to detainee information is one possible solution.

5. CONCLUSIONS AND RECOMMENDATIONS

5.1. Conclusions

Since the last monitoring of detention centres in 2007 that was done as a part of the "Ten New Member States Project"²²⁷, a lot of positive changes can be observed. Yet a lot remains to be done. The renovation of detention facilities, the setting up educational units, the participation of detention staff in a number of trainings and increased cooperation with NGOs should all be seen as positive changes. However these activities do not address the most crucial factors for detainees as reported by them to the DEVAS researchers.

²²⁶ Withing DEVAS project Caritas Polska conducted and interviewed Dorota Parzymies, President of Ocalenie Foundation. (<http://www.ocalenie.org.pl/>), that launched its activities in 2000. Since then they have operated and focus on the support of refugees and asylum seekers in Poland, capacity building of institutions, mediations, workshops, monitoring of the current situation of asylum applicants and refugees in Poland. It is worth mentioning in here that it is the first NGO in Poland who employed persons of Chechen origin as mentors. Malika Abdoulvakhobova is the vice president of the Foundation. Mentors of Ocalenie Foundation carry out intercultural workshops for Boarder Guards and Police. Their support with mediation is of extreme importance and effectiveness in centers – both detention and reception around Poland.

²²⁷ See http://www.detention-in-europe.org/index.php?option=com_content&view=article&id=75&Itemid=88

The perspective of detainees should be taken into account more closely. Bringing about changes that are crucial for them are needed. Such changes should impact their awareness of their legal situation, and how they can plan for their future after detention. Detainees cannot live in constant stress caused by the lack of knowledge on what will happen to them, and how detention will impact their ability to integrate into the host country.

Therefore, we believe that a possible solution would be to create a unit within the detention that has access to each detainee's case file. This unit would then be able to provide the detainees the most updated and relevant information as regards their legal situation. It would solve the majority of the problems that exist in detention centres and without any doubt would diminish the stress that detainees experience.

Currently in Poland there are a lot of possibilities to finance the needs of foreigners. Caritas Poland understands that in many cases the Border Guard is not eligible for funding. Yet it is possible to collaborate with NGOs that would enable cooperation for long-term solutions. The scope of activities run by NGOs in Poland is very wide, starting from intercultural trainings and language course and ending with interpersonal mediation.

5.2. Recommendations

Caritas Poland would like to recommend the following solutions to be implemented in detention centres:

To the administration within the detention centres:

- **Ensure detainee access to information on their current legal situation, including the duration of detention, and possible scenarios for their lives after detention.**
Upon detention all of the detainees are informed about their situation through official procedures. However what is most important for detainees is to know the duration of their detention and the possible scenarios for their future and their life plans.
- **Provide language courses for detention staff to improve staff-detainee communication.**
Currently, there are no qualification criteria that demand foreign language knowledge for detention staff. This should be obligatory at least among medical staff so that an appropriate level of communication is ensured, and to allow detainees to better voice their medical needs.
- **Increase intercultural awareness and skills among detention centre staff.**
The awareness of intercultural issues is quite low among the staff. Intercultural knowledge is in many cases essential to provide for the proper care of the detainees and to understand their requests or customs. Detainees come from different cultures and may seem different in many aspects – traditions, food, and customs. Staff should have appropriate knowledge of detainees' cultures in order to better understand their situations.

To policy makers:

- **Improve the monitoring of detention and provide for information exchange among detention centres.**
At the moment there is no system of monitoring detention centres in a complex and regular manner. Such a system of monitoring should take into account the perspectives of both staff and detainees. At the same time information exchange and exchange of good practices in detention centres should be strengthened. Good practices should be exchanged between detention centres so standards can be raised in a common effort.

- **Cease the detention of children.**

Children are most affected by detention, not only psychologically but developmentally as well. Children do not attend schools when detained and their behaviour changes in detention in an aggressive and hyperactive. Detention may impose traumas that can continue to negatively affect them later in life.



NATIONAL REPORT: PORTUGAL

By: *Jesuit Refugee Service Portugal*

1. INTRODUCTION

The DEVAS Project in Portugal was carried out by the Jesuit Refugee Service (JRS) Portugal. In Portugal there is only one detention centre, *Unidade Habitacional de Santo António* (UHSA) located in Oporto to which JRS Portugal has full access in the extent that the JRS representative works full time with detainees inside the centre.

UHSA is a temporary installation centre, managed by Border and Alien Service, for irregular migrants having received a removal order from the Portuguese territory. In a Memorandum of understanding signed on February 13th 2006, with the Ministry of Interior, International Organization for Migration and the Jesuit Refugee Service, a Commission of Monitoring and Evaluation was made responsible for monitoring the functioning of the Centre and ensure that the principles written in the signed Protocol and the internal regulations are fulfilled.

Although being a partner with other organizations, JRS' work at UHSA is autonomous from other institutions/organizations/services; the role of JRS is to provide holistic support to all detainees during their stay at UHSA, and to identify vulnerable cases among those arriving at the Centre and provide special protection for these persons. JRS also maintains a social team composed of a Clinical Psychologist who accompanies vulnerable migrants, providing psychosocial support during their period of stay of in the UHSA. The support given is mostly oriented in themes such as the reduction of anxiety and stress, adaptation to the installation in UHSA, preparing the return to the countries of origin (contact with families and/or local organizations when it's necessary and oriented to the specific needs of the migrant) and the preparation of life plans. Other members of the team include: a chaplain, and a group of visitors and volunteers (including cultural mediators who will provide support to the immigrants) who regularly visit UHSA as well as whenever specifically requested to do so. We can also count on the collaboration of other institutions like schools and universities (in areas like Group Dynamics and Psychology) that develop activities with the migrants in the UHSA.

The centre has the capacity to host 30 adults (15 women and 15 men) and 6 children. In each floor there is a "family room", with a bathroom, 2 beds and a cradle.

For the DEVAS Project, in Portugal, 31 detainees were interviewed. They are mostly irregularly staying migrants; only four had asylum-related situations (one asylum seeker, one rejected asylum seeker and two asylum seekers in the "Dublin II" system). This is related to the fact that in Portugal the detention of asylum seekers is not foreseen. Despite this they appear in detention because people can make their asylum claims after being detained for irregularly staying or there can be situations under the Dublin Regulation.

The detainee interviews were conducted by the JRS staff member working fulltime in the centre. Because the proximity with the detainees is very high, working full time with them every day, it was decided to designate another person so that a 'outsider', *per se*, would interview detainees. This person was a Psychology student doing her practical fieldwork in the centre under the technical supervision of JRS; all of the work was directly accompanied and supervised by JRS.

All the interviews were made in the JRS Social Office or in the centre's Medical Office, because both of these spaces are private and reserved and it was possible to assure the confidentiality of the interviews. All of the detainees made their verbal consent for the interviews but preferred not to sign the Informed Consent document.

In what concerns the NGO questionnaire only the *Doctors of the World* were interviewed because JRS is the only other NGO working in the centre and has one staff member working there fulltime so it was not possible to conduct an interview. The Staff questionnaire was answered by a member of the Portuguese Immigration Service working fulltime in UHSA. These questionnaires were not completed under the direct supervision of the researcher; but this was done so after consulting the project coordinator, JRS-Europe. The Legal Questionnaire was completed by a jurist working for JRS Portugal.

JRS Portugal would like to thank everyone that took the time to participate in this project, especially the detainees that so willingly answered the interviews with the objective to try to make a difference – even though not directly to themselves, but for others in the future – and to collaborate with JRS.

We would like to thank also Dr.^a Sofia Mexia Alves, who helped with the interviews and Dr. Rui Amaral Mendes and all the team from Doctors of the World (not only for their participation in the study but for all the help and support in all situations) and finally the cooperation of the Aliens and Borders Service, in particular of the coordinator inspector Ms. Helena Cabral.

2. NATIONAL LEGAL OVERVIEW

In this section we will list the relevant regulations/legal acts that concerns asylum and immigration, with particular focus on how administrative detention is regulated.

- Act n.º 27/2088, 30th June establishes the conditions and procedures for granting asylum or subsidiary protection and the status of asylum, refugee and subsidiary protection to applicants, by transposing into the national legal framework Directives numbers 2004/83 EC, of the Council, of 29th April, and 2005/85 EC, of the Council of 1st December (Asylum Act).
- Act n.º 23/2007, 4th July approves the legal framework of entry, permanence, exit and removal of foreigners into and out of the national territory (Immigration Act).
- Implementing Decree n.º 84/2007, 5th November, regulates the Immigration Act.
- Decree-Law n.º 85/2000, 12th May that makes equivalent the spaces created in the airports (under the Council of Ministers Resolution n.º 76/97 of April 17), to the centres for temporary installation, for the purposes of paragraph 4 of the article 22 of the Decree-law n.º 244/98 of 8th August, with the wording of the Act n.º 97/99 of 26th July, while not approved the legislation referred to in the article 6, Act n.º 34/94 of 14th September.
- Council of Ministers Resolution n.º 76/97, 14th May that establishes the guidelines for situation of passengers waiting to be sent back (given the situation of illegal immigration) and applicants of political asylum, on the provision of legal support, social support and security in the national territory.
- Act nr. 34/94 of 14th September, which defines the regime for accommodating aliens or stateless persons in temporary installation centres.

- Act n.º 115/2009, of 12th October that approves the Code of Penalties Execution and Measures of Freedom Privation. This law will come into force on the 12th April 2010 (art. 10.º)
(Decree-law n.º 265/79, 1st August: revoked by art. 8 n.º 1 paragraph a) of Act n.º 115/2009, of 12th October.)

2.1. Legal grounds for ordering detention

In Portugal, according to the Act n.º 27/2008, 30th June, asylum seekers cannot be detained. They are free to move and stay wherever they want in the country. They are offered the possibility to stay in the reception centre of the Portuguese Refugee Council (CPR) but if they choose not to do so, they must find accommodation for themselves. Asylum seekers must also present to the authorities whenever asked to and inform them of their whereabouts.

The only detention-like situation that is provided for in national asylum legislation is a special procedure for asylum claims presented at borders by migrants who do not meet the necessary legal requirements for entry in Portuguese territory (Act n.º 27/2008, June 30th, article 26º). In such cases, asylum seekers must remain in the “international area of the airport or seaport” while awaiting a decision on the admissibility of their claim, which is taken by the National Director of the Aliens and Borders Service or, in case of review by the Administrative Court. During their stay at border points, asylum seekers are detained (they cannot enter the Portuguese territory) until:

- A positive decision on the admissibility of their claim is taken, which allows them to enter national territory; or
 - Deadlines for the referred decision are not respected, which allows them to enter national territory; or
 - When a final negative decision on the admissibility of their claim is taken the asylum seeker has to return to the point where his journey began.

Article 12º, paragraph 1 of the Asylum Act says that *“the application for asylum to prevent knowledge for any administrative procedure or process by criminal illegal entry into national territory brought against the applicant and family members who accompany”* and the article 146º, paragraphs 5 and 6 of the Immigration Law says that are not organized deportation proceedings against the alien who, having entered illegally on national territory, submits an application for asylum to any police authority within 48 hours after its entry and that he/she will wait the decision of their application in freedom. But the person who asks for asylum after these 48 hours and who already is on detention will not wait for the decision in freedom – in the first phase of the admissibility of the claim will wait in detention like in the cases of the border points.

Act n.º 34/94, September 14th, defines the regime for accommodating migrants or stateless persons in temporary accommodation centres. Within it, article 2º, makes reference to asylum seekers, but to the extent that allows their installation in such centres for humanitarian reasons, qualified by law as a “social support measure” (when the migrant does not have means to provide for himself). In such cases, the installation (not detention) is determined by the National Director of the Border and Aliens Services and after a written demand by the migrant and consultation with the Regional Centre of Social Security about the existence of a situation of economic and social need (art. 2.º of Act n.º 34/94, 14th September).

Conversely, irregular migrants can be detained in Portugal (Act n.º 23/2007, July 4th, Section II, Removal ordered by administrative authority, articles 145º and 146º). The installation in those cases is made by “security reasons” and it is legally qualified as a “detention measure” (art 3.º and 4 of Act n.º 34/94, September 14th).

In practice, irregular migrants are not immediately detained. Usually, the immigration authorities (SEF) give them a 10 day or a 20 day period to leave the country voluntarily. If they do not obey they risk being detained by the police and brought before a criminal court within a maximum period of 48 hours, so the judge (judge of primary criminal jurisdiction, or judge of the district – Act n.º 23/2007, July 4th, article 146º, n.º 1) can validate or not the detention and

decide whether to apply coercive measures. The decision to detain should be judicially reviewed at the end of each period of eight days (Act n.º 34/94, 14th September, article 3, n.º 2).

The two kinds of installation centres (for humanitarian reasons and security reasons) could be in the same building (art. 5.º of Act n.º 34/94, September 14th), but in this case there must be a separation of access and their respective areas (that is the case of the transit zone which is equivalent to the CIT at the international airport of Lisbon).

In the Portuguese territory alternatives to detention can be:

- Periodic presentations at the Aliens and Borders Services: Act n.º 23/2007, July 4th, Chapter VIII;
- Removal from national territory, Section I – General arrangements, article n.º 142, n.º 1 a);
- The obligation to stay at home using electronic surveillance means according to law: Act n.º 23/2007, July 4th, Chapter VIII – Removal from national territory, Section I – General arrangements, article n.º 142, n.º 1 b);
- Term of identity and residence: Code of Criminal Procedure, Act n.º 78/87, 17th February, article 196º;
- Caution/Guarantee: Code of Criminal Procedure, Act n.º 78/87, 17th February, article 197º;
- Obligation to submit periodically: Code of Criminal Procedure, Act n.º 78/87, 17th February, article 198º;
- Suspension of the exercise of profession, function, activity and rights: Code of Criminal Procedure, Act n.º 78/87, 17th February, article 199º;
- Prohibition and enforced conduct: Code of Criminal Procedure, Act n.º 78/87, 17th February, article 200º;
- Obligation to stay at home: Code of Criminal Procedure, Act n.º 78/87, 17th February, article 201º;

The competent authorities to detain irregular migrants are the agents of criminal law: Aliens and Borders Service (SEF); the National Republican Guard (GNR); the Public Security Police (PSP); The Judicial Police (PJ) and the Maritime Police – Act n.º 23/2007, July 4th, article 146º, n.º 7.

The irregular migrant and the asylum seeker have the right to an interpreter during the hearing that determines if the detention will take place or not (Act. n.º 27/2008, 30th June, article 49º). This interpreter is paid for by the state (Act. n.º 27/2008, 30th June, article 49º, n.º 3).

2.2. Legal grounds for the right to appeal a detention order

The right to appeal a detention order is laid down in Act n.º 23/2007, 4th July, article 146º, n.º 1 in the extent that it is said that after the irregular migrant is detained he/she has to be brought before a criminal court within a maximum period of 48 hours, so the judge (judge of primary criminal jurisdiction or judge of the district – Act n.º 23/2007, July 4th, article 146º, n.º 1) can validate or not the detention and decide whether to apply coercion measures. The decision to detain should be judicially reviewed at the end of each period of eight days (Act n.º 34/94, 14th September, article 3, n.º 2)

The detainee is informed about his/her detention and right to appeal. In the case of asylum seekers this is foreseen in the Act n.º 27/2008, 30th June, articles 24º and 49º, N.º s 1 and 2, and for irregular migrants is foreseen in art. 7.º of Act 34/94, 14th September and articles 7.º paragraphs j), l), m), n), 117.º and 124 n.º 2 of Act 115/2009, 12th October. In what concerns irregular migrants, case law also states that the migrant in an irregular situation, arrested by the police and submitted to the judge, needs to be heard by the judge in order to be clearly informed about the causes of detention and the granting of means of defence (Judgment of RL of 25-03-2004 – Case N.º 8454/2003 – 9).

The detainee can also appeal against the detention conditions (art. 7.º of Act 34/94, 14th September and articles 116.º and 124 n.º 2 both of Act 115/2009, 12th October).

2.3. Legal grounds for instructions on the right to appeal a detention order

The case law states that a migrant in an irregular situation, arrested by the police and submitted to the judge (art. 146.^o of Immigration Act), needs to be heard by the judge, in order to be clearly informed about the causes of detention and the granting of means of defence (Judgment of RL of 25-03-2004 – Case N. ^o 8454/2003 – 9). The irregular migrant, with the help of a counsellor, may present his or her defence to the court to try and get the arrest invalidated. The detention decision should be judicially reviewed at the end of each period of eight days (Act n.^o 34/94, 14th September, article 3, n. ^o 2).

2.4. Legal grounds for maximum duration

As it was said before, asylum seekers cannot be detained in Portugal. The only detention-like situation occurs when the asylum claim is presented at border and the asylum seeker does not meet the necessary legal requirements for entry in Portuguese Territory. In these cases, the Asylum Act foresees an accelerated special procedure. The National Director of the Border and Aliens Service makes the admissibility decision within 5 (five) working days. An appeal can be lodged against that decision before the Administrative Court within 72 working hours. A final decision must be reached within 72 working hours – the asylum procedures at the border points has shorter deadlines than the in-country procedure in order to minimize the negative impact of a detention-like situation (Act. n. ^o 27/2008, 30th June, articles 24^o and 25^o). But such a short deadline has a risk: the time may not be enough for an appropriate inspection of the asylum claim.

In what concerns irregular migrants, the maximum period for detention in a closed centre is 60 days (Act. n. ^o 23/2007, 4th July, article 146^o, n. ^o 3). After that period the migrant must be released and he or she is free to go into the community (some of them have a place to go, others do not). If the migrants do not have a shelter and ask for help, JRS staff in UHSA provides social and psychological support. The majority of these cases are undocumented migrants with an expulsion procedure running. Portuguese authorities cannot send them back to the country of origin because of the lack of documents proving their identity and nationality. On the day that the migrant is released the migration authorities' notifies him/her of the final negative decision related to the expulsion procedure, and gives them a 10-day or 20-day period to leave the country voluntarily. If they do not obey, they risk being detained once more (the maximum period is 60 days) – article 161^o of the Immigration Act (Disobedience to the removal decision).

Alternatively, if the expulsion procedure it is not concluded yet (which is rare) the measure of detention is changed into an alternative measure, which is usually the "Term of identity and residence" (periodical presentations to the authorities).

Migrants can also be detained once more in case of violation of the measure of entry interdiction (article 187^o of Immigration Act).

Therefore, the same person could be detained in UHSA more than once. On occasion this does occur.

2.5. Legal grounds for contact with the outside world

The access to the asylum seeker is foreseen in the Asylum Act, in relation to the access to the open centres in which they can be placed, by lawyers, family members, UNHCR and the Portuguese Refugee Council (The Act n. ^o 27/2008, 30th June, articles 49.^o and 59.^o).

In the transit zones asylum seekers are allowed to contact lawyers, UNHCR, the Portuguese Refugee Council (the operational partner of the UNHCR in Portugal), direct family members (spouses, sons and daughters, parents, brothers and sisters) and diplomatic or consular entities. They can also use the telephone, but only for short periods of time, unless they pay for the phone call.

While in detention in the UHSA, the detainee can have all the visits that he/she wishes to receive (after a verification of their legal situation). They can also use the telephone and other means to communicate. (Art. 7 of Act n.º 34/94, 14th September and articles 7.º paragraph e, art. 58.º to 73.º and art.124 n.º 2 of Act 115/2009, 12th October).

2.6. Legal grounds for health care provision

The Act n.º 27/2008, 30th June, in its articles 49º a) iv), 52º n.º 1 and 2, 56º n.º 2 and 61º n.º 1 and 3, states that asylum seekers have the right to health care.

While in detention irregular migrants also have the right to health care. They have access to the National Health Service in the same way that Portuguese citizens do (art. 7.º of Act 34/94, 14th September and articles 7.º paragraph a), i), art. 32.º to 37.º and 124 n.º 2 of Act 115/2009, 12th October).

2.7. Legal grounds for the protection of persons with special needs, or particularly vulnerable people

The Portuguese law, in its Asylum Act, foresees the protection for the unaccompanied minors (Act. n.º 27/2008, 30th June, article 26º, n.º 2, and articles Nºs 77º and 78º), for the victims of torture and violence (Act. n.º 27/2008, 30th June, articles Nºs 77º and 78º, n.º 3 and article 80º), for traumatised persons (Act. n.º 27/2008, 30th June, articles Nºs 77º and 78º, n.º 3 and article 80º) and for families (Act. n.º 27/2008, 30th June, articles Nºs 51º n.º 2 and 59º, n.º 1 a) and b)).

2.8. Legal grounds for accompanied and unaccompanied minors

The Portuguese law, in its Asylum Act, foresees the protection for the unaccompanied minors: Act. n.º 27/2008, 30th June, article 26º, n.º 2, and articles Nºs 77º and 78º. This Act, in its article 79º, n.º 4 states that unaccompanied minors under 18 years old cannot be detained and are transferred to special centres. Minors aged over 16 years old, however, are considered legally responsible and are, therefore, treated as adults.

2.9. Legal grounds for any other rights

The Act n.º 27/2008, 30th June, in its articles 56º, 57º, 58º and 59º, states that asylum seekers that do not have necessary material conditions such as health, shelter, and access to basic funds, have the right to social support in these areas.

Concerning legal aid for asylum seekers, this is foreseen in the Act n.º 27/2008, 30th June, articles 25º n.º 2, 49º n.º 1 d) and n.º 4, 59º n.º 4 and 63º. The Act n.º 34/2004, 29th July, in its article 7º n.º 1 and 2, extends this right to all the migrants, regular and irregular, and stateless persons that show that they are in a situation of economic need (irregular migrants are provided this service in the same way as Portuguese citizens).

Only asylum seekers in the Portuguese territory (and in open centres) can obtain financial support.

3. OVERVIEW OF THE NATIONAL DATA FINDINGS

The age average of the detainee sample is 31 years old; 58% were male and 42% were female, all single and mostly from South America or the Balkans region (only a minority came from Central Africa). Almost everyone was irregularly staying awaiting deportation (only four cases were related to asylum claims).

3.1. Case awareness

Everyone claimed that they knew the reason for their detention; more than half were informed by the police or in court, while others learned during their arrest for detention, or during immigration procedures. Nevertheless, the majority of the detainees say that they need more information on the legal situation concerning their asylum or immigration case. Many feel it is their right to know; others need it to prepare for the immediate future, and yet others need it because they it is necessary to better adjust to the situation – “There should be more information about our legal situation (once a week); explain better the procedures”.

3.2. Space

About the centre itself, the opinions are somewhat divided. Almost half of the detainees refer to the room in a neutral way but say, for example, that the mattress is too hard, the room is not comfortable, the air is not that good or even that should be more than one person per room. Mostly they refer to the room as “ok” or “fine”. The rest of the interviewees describe the room positively. They have individual bedrooms but some people make remarks about the size of the bed. The conditions of the centre are good, in general; and this opinion is shared by the NGO in the centre: “There is a small bed - rather small if the detainee’s stature is somehow higher than the average - and a desk. Heating is available and each detainee has his/her own room, which enables him or her to maintain their privacy. There are some rooms, intended for detainees with children, who have two beds and a cradle and a private bathroom”.

When we look at the opinions about the rest of the space the results are more or less the same. Many either feel positive or neutral about the centre space. They do not feel that the centre is overcrowded and they often use the room as a personal and private space. We find the same opinion in the NGO and Staff Questionnaires. In this last one it’s said that the space in the centre is enough for the people who are there “because we can’t exceed the maximum capacity”.

3.3. Rules and routine

Detainees are aware of the rules and feel that they are mostly respect by everyone. But they do not feel that they have the possibility to change them if they wanted to. The detainees are, in general, content with the rules with the exception that they would like to be able to use their mobile phone when they want to (they have a limited period of the day in which they can have access to it – during the week it is from 14h to 16h; on weekends it’s available for an more extended period, also during the morning): “There are schedules to eat, time to go to sleep, we can’t have watches and so, only having your cell at a certain time”; “There are rules to go to bed and wake up, eat and to use your cell. It’s necessary to have rules or else it would be a mess. The rules are adequate.”; “We have to go to sleep at 22h, we only have our mobile phones for 2 hours a day (except on weekends), we can’t go to the outside space (sports field) when we want to.”

3.4. Staff

Detainees say they are most frequently in contact with the security staff; and the majority feels very positively about their interaction with them. Almost all of the detainees say that they never felt any kind of discrimination from the security staff. In fact, 86% of the people say that the staff supports most or even all of their needs. All of the detainees feel that they have someone in the centre that they can trust, whether it’s the security staff, co-detainees or even JRS staff. Many remark that the interaction between detainees is good, but a significant minority also describe problems that exist between detainees, such as arguments over use of the facilities. Most agree that these tensions are merely due to the common living situation that detainees find themselves in.

3.5. Safety

Many detainees describe themselves as feeling very safe in the detention centre. No one reports feeling less than “moderately safe”. They attribute this level of safety to the quality of living conditions and to the security staff: “Because I know that I won’t have any problems with anybody and that the security guards also wouldn’t allow it to happen.”

They do not tend to report any incidents of abuse in the centre. Most do not report having experienced incidents of verbal ridicule or mocking; and the few persons who did report such incidents attribute it to arguments with other detainees as a result of cultural, ethnic or racial reasons. Only one detainee described an incident of physical assault, blaming it on a quarrel with another detainee.

JRS-Portugal regularly collaborates with a group of cultural mediators that come to UHSA whenever necessary, or upon detainees’ request. This group of mediators helps detainees to peacefully resolve problems in the detention centre. As a result, only two detainees described having made formal complaints about the quality of their rooms; both cases were positively resolved.

3.6. Activities

Detainees are aware that activities are provided for in the centre, and most actively participate with fellow co-detainees and even with staff. Many watch movies or television programmes, read, and engage in other entertainment-type activities and also sports. Detainees participate mostly to make use of their time, as well as to relieve boredom and release stress. They have access to books, telephones, television and outdoor space but no access to computers and Internet, educational opportunities, sports equipment and a religious space. In JRS-Portugal’s experience, it is not uncommon for detainees to request for a gym to be placed in the centre so they can engage in sports activities whenever inclement weather prevents them from going outside. Most detainees would like to see an increase in the number of activities provided in the centre.

3.7. Medical

The Doctors of the World (*Médecins du Monde*) provide medical support to detainees on a weekly basis. JRS-Portugal also enlists the support of additional volunteers, and especially doctors and nurses who have participated in JRS-Portugal’s qualification recognition programmes. The detention centre offers to transport detainees with mental health needs to psychiatric services, and also to the local area hospital for additional medical needs. Detainees that are transported to external medical care providers are typically accompanied by the Immigration Service and by a JRS-Portugal representative.

A large majority of detainees are aware of the presence of medical staff in the centre; all meet with medical staff at least once a week, and everyone reports that they received a medical exam when they first arrived to the centre. They feel that the communication with the medical staff is effective, and done in a way that is understandable. Some detainees express a need for additional medical services such as HIV testing, more doctors on call and consultations with dentists and eye care specialists.

The good quality of the medical services in the centre is confirmed a representative from Doctors of the World: “Overall, I would say that the medical services are fully equipped to address most of the medical conditions usually diagnosed in the detainees. Emergency equipment is also available. Dental care is not provided due to the lack of specific equipment. Nonetheless, whenever necessary, the detainee will be referred to a hospital for specific treatment”.

Physical health

A majority of detainees agree that detention has had an impact on their physical health. But half say that this impact has been positive. In fact, detainees report that their physical health has improved in detention. According to the experience of JRS-Portugal, this perception of physical health is likely to be related to prior conditions of alcohol and drug abuse that many persons experienced prior to their detention. In the UHSA they are required to participate in drug rehabilitation programmes; as a consequence their physical health improves, sometimes in a very dramatic fashion. The availability of mental health treatment is an important factor in detainees' perception of the medical care. According to Doctors of the World, "They get medical treatment and are also accompanied by a psychologist".

Mental health

Detainees do not feel as optimistic about their mental health as they do for their physical health. When asked, most describe their mental health as being "fair" in detention. Almost everyone in the sample admits that detention has negatively impacted their mental health, mostly in the level of psychological stress they experience. In this respect detainees frequently reported feeling anxious, tired, and depressed, as well as feeling worried about what will happen to their life after detention. Mental health complaints are often presented alongside physical health complaints, according to Doctors of the World: "Headaches/migraines are usually associated with anxiety and insomnia". The deprivation of freedom that comes with detention is often reported by detainees to be a primary source of stress and anxiety.

3.8. Communication with the 'outside world'

Detainees have the right to receive visits on a daily basis from families, friends, lawyers, consulate representatives, religious persons and human rights organisations. In practice, however, detainees remark that they do not tend to regularly receive visitors. A number of detainees say that their family and friends are located in their country of origin, meaning that they have little such networks available to them in Portugal. But just over one-third admits to receiving visits from lawyers.

Detainees stay in contact family and friends mostly by telephone, since they have no access to the Internet and they tend not to use the postal system. Public telephones are available in the centre, and detainees who cannot purchase telephone cards can usually use JRS-Portugal's telephone. Most detainees disagree with the centre's strict policy on the restriction of mobile telephones. Detainees typically report to not understand the restrictions to their private property: "The schedule of the food is ok but I don't agree with the schedule for having your cell, it doesn't make sense". Despite the availability of public telephones, which require the use of telephone cards, a large number of detainees would be more content if they could use their personal mobile telephones.

3.9. Conditions of detention and nutrition

Detainees' opinions about the food in the centre are almost equally divided between those who like and dislike it. Just over one-third of detainees who do not like the food attribute their disapproval to the lack of variety: "Fish, potatoes, rice, soup; Fish, potatoes, rice, soup; Fish, potatoes, rice, soup ... Not enough variety!" Others say that the stress of detention has somehow decreased their motivation to eat regularly. Despite this, detainees do report to eat well, with 61% saying that they have even gained appetite. JRS-Portugal's experiences with detainees reveal that this may have a lot to do with detainees' lives prior to detention, in which many dealt with alcohol and drug abuse, and even homelessness.

3.10. Conditions of detention and the individual

Almost half of the detainees that were interviewed say that they do not sleep well at night. Many of these detainees blame stress and worry as primary causes for their insomnia.

The mere imposition of detention itself, and the psychological stress that comes as a result, is a difficulty that detainees frequently experience. The loss of rights is another frequently reported problem for detainees: “being locked up”, “the lack of freedom”, “being closed in here”. To a slightly lesser extent detainees refer to other factors that make life in detention harder: not knowing anyone, the slow passing of time. Some described the first days of their detention as being the hardest. The quality of the living conditions in the centre, such as the inability to sleep, the quality of the food, the lack of activities and the strict rules are additional difficulties frequently reported by detainees.

Despite these expressed difficulties, 81% feel that their situation improves as time passes, especially when they compare it to the first difficult days of detention. According to their response on the questionnaire, detention centre staff states that this perception of improvement may be due to the services available in the centre: “They receive medical and psychological support”.

Over half of detainees admit that they do not know what the outcome of their detention will be; but most do not feel particularly negative about this. Many detainees also know exactly when they will leave detention (either because they had arranged a flight from Portugal, or because they know about the 60 day detention limit). Over half of detainees who do not know when they will be released describe experiencing psychological stress and anxiety, mostly because they are unsure of what will happen to them and how they will be able to carry on with their life post-detention.

The detention centre staff states that detainees are given assistance toward the preparation for an eventual return to their country of origin, if it turns out that they must return.

Most detainees hold positive perceptions of themselves. Just over one-third says that detention has actually improved their self-perception. As described in other chapters within this report, this may be related to the social problems that some detainees experienced prior to their detention. Yet exactly one-third do say that they think worse of themselves as a result of being detained. It is not uncommon to hear detainees describing feelings of shame at having to return to their country as a “deported person”, returning “empty-handed” without achieving their dream of a better life and sometimes returning even in a worse situation than they were in when they left their home country: “Being arrested and going back as a deported ... I feel very bad and I'm going to be seen badly going back like this. It's a shame”. Three tenths of detainees say that their self-perception has been left unaffected by detention.

A majority of detainees do not report possessing special needs. The minority who do describe needs that are not usually officially recognised as being “special needs”, for example, not having correct immigration documents. According to detainees who express this need, not having the right immigration documents places them in a situation of vulnerability due to their lack of official rights: “Not having documents makes you have no rights... without documents I can't do anything. If I had documents I could work and all, it would be better”).

Detainees feel differently about other people in the centre: in this case, everyone is able to identify vulnerabilities in other detainees. Here detainees typically describe needs that are related to detainees' mental health, e.g. detainees who are “sad”; in other cases, detainees attribute the country of origin as a factor of vulnerability. Some go so far as to say that the people who work in the centre are vulnerable: “Everyone that works here, because we stay here but we all leave and you always stay here...”; “Nobody in particular. Sometimes the people who work here, you and not u”; “In here I don't think there are any... maybe you (laughs a lot). You needed more help and you don't have it”. Just

over one quarter of detainees say that everyone in the detention centre, rather than people with particular factors, possesses special needs.

4. ANALYSIS OF THE DATA AND CENTRAL THEMES

The data reveals that many detainees describe their situations in relatively positive terms. However, the data reveals an interesting pattern: negative responses are low within the first month of detention, but after one month they increase significantly, and in the second month they decrease again. This trend may be related to the 60 days maximum period of detention, meaning that detainees may feel positive as they approach the end of their time in the centre, but negative during the mid-point of detention: “The beginning is difficult but when you are here for a long time it gets even harder. When you are here for a month, time passes slower”. For example:

- Sleeping patterns: the numbers indicate that 13 percent who say they don't sleep well are in their first weeks of detention. That number increases to 60 percent for people who have been detained for one month, and goes back down to 27 percent for people who have been detained for two months. Additionally, nine percent of the persons who report insomnia as a consequence of stress and worry are within their first weeks of detention, 73 percent are in detention for one month, and only 18 percent are in detention for two months.
- Knowledge of departure date: Eleven percent of those within their first weeks of detention report not knowing when they will be released from detention; this number increases to 79 percent for those who have been detained for one month, and goes back down to eleven percent for those who are in their second month of detention. When detainees were asked how not knowing their departure date affects them, more people reported negative factors after one month in detention – anxiety, uncertainty, worry about family, disruption of their life plan – than those who have only been detained for a few weeks at the time of the interviews and those who have been detained for two months.
- Top difficulties: 14 percent of those who are detained for less than one month attribute their top difficulty in detention to the 'loss of rights'; this number increases 79 percent for those detained for one month, and back down to seven percent for those detained for two months. Similarly, more detainees complain about the standard of living conditions after one month of detention than those who have been detained for less than one month or more than two months.
- Physical and mental health: Detainees increasingly articulate their level of physical and mental health, either positively or negatively, when they are in detention for one month, than when they are detained for less than one month or for two months.

All this suggests that newly detained people in Portugal tend to react positively to the situation of detention. This can be related to the fact that a significant number of the detainees interviewed engaged in problematic behaviours prior to detention such as drug usage, prostitution and petty crime. Because of this, they may initially perceive detention as being positive due to the relatively good standard of living conditions, the social support they receive from centre staff and the psychological support and medical treatment that is available to them. However, the data shows that these initial positive reactions become more negative when people are detained for one month. These negative reactions tend to diminish again when people are closer to the end of the 60 days period (the maximum duration of detention in Portugal). This would suggest that detainees might be more susceptible to the negative factors of detention after the novelty of the situation wears off, but well before their release date.

From this we can conclude that the period in which detainees in Portugal are most vulnerable is at the mid-point of their term in detention, e.g. between four and six weeks. This is when they expressed the most negative factors of

detention: anxiety, nervousness, stress, uncertainty, poor living conditions and disruption of their life plan. We can see the same effect for their level of physical health, but in this case the descriptions are more positive. This may be due to the good standard of physical health care, or even due to the fact that detainees are unable to engage in the problematic behaviours they did prior to detention.

The data also shows that the staff in the detention centre appears to play a critical role: the positive level of interaction appears to benefit detainees. For example, the numbers indicate that detainees who positively rank their level of safety in the centre also positively rank their interaction with the staff. Similarly, detainees who feel safe say that the staff supports their full range of their needs. These findings are not fully conclusive: detainees who feel positively about the staff also report experiencing the negative factors of detention.

Thus we can infer that firstly, the staff are at least not contributing to the negative experiences of detainees, and secondly, that no matter what the level of staff treatment is, detainees may continue to experience the negative effects of detention. The data is not fully clear on this point. But the type of answers and JRS-Portugal's own observations in the UHSA indicates that detainees generally have a favourable attitude towards staff, especially the security staff; some detainees even labelled the centre staff as being 'vulnerable'. From this we could conclude that while the quality of treatment from staff may impact positively the experience of detention, it might not prevent the overall negative experience that is associated to it. On this point, the detention centre staff is in agreement: "I think they feel that it [detention] is a situation of waiting and uncertainty".

5. CONCLUSIONS AND RECOMMENDATIONS

Conclusions

The data shows that, in general, the conditions of detention in Portugal are good. In fact, they may even be better than conditions of detention found in other EU Member States.

Detainees generally feel safe in the centre, and attribute their safety to their positive interactions with security guards. The medical services are sufficient enough to address many of the needs expressed by detainees. Psychological support is provided, both by JRS-Portugal but also by external providers. Detainees' rooms are able to provide a large measure of privacy, and the conditions of the centre are quite hygienic.

Despite these positive factors, migrants continue to have negative experiences as a result of their detention. Strikingly, detainees in Portugal seem to be particularly vulnerable during the mid-point of their detention: after the novelty of the situation has worn off, but well before they are to be released. Here we witness the mental health consequences of detention in the form of anxiety, psychological stress and self-uncertainty. Even the best conditions of detention cannot take away from the fact that detainee rights to movement and to manage their lives are severely curtailed: "Everyone, all the people who are in this situation are affected, no matter in what way". Doctors of the World, the only other NGO to actively operate within the centre describes detainees as being regularly anxious.

The lack of information is an oft-repeated concern made by detainees. Here we observe that the possession of information is an important factor for the way detainees experience their time in the detention centre: the inability to plan for the future, or to even adjust to the present situation of detention, does have an impact on detainees' level of stress and anxiety.

As is the usual situation in detention, detainees often express not having the ability to exercise personal choice, insofar as it can impact the daily regime within the detention centre. It is on this point where detainees, Doctors of the World and the detention centre staff disagree: detainees feel that they cannot exercise any degree of influence on the

rules and routine of the centre; Doctors of the World admits that detainees can influence changes so long as such changes do not jeopardise the safety of co-detainees and staff, and so long as the changes do not exceed budgetary restrictions; the detention centre staff clearly states that detainees merely need to speak with the coordinator of the centre if any type of change is requested.

Recommendations

Even in good conditions, the DEVAS research indicates that detention can still be a very negative experience for detainees. *Therefore JRS-Portugal recommends that detention should only be used as a last resort, when all other alternatives to detention have been exhausted.* This should especially be true in cases where there are pre-existing conditions that might make migrants more vulnerable: for example, physical or mental health conditions (including alcohol and drug abuse), minors that are unaccompanied, and families.

If detention is unavoidable, then *detainees should regularly undergo holistic evaluations that would determine the necessity of detention.* These evaluations should be held periodically in a manner that can determine if detention is still necessary and proportional to the migrant's specific situation.

This is especially important for migrants who apply for asylum request while they are already in detention for the purpose of removal (as described in this report's legal chapter, Portugal does not detain asylum seekers). The continuation of detention for asylum seekers in these cases could amount to a "double persecution", in the sense that it negatively impacts people who may already possess histories of trauma related to their flight. Furthermore, the asylum seeker should not stay in detention during his or her asylum procedure, because there should not be any presumption that the asylum seeker will be eventually removed, especially while the procedure is ongoing.

Since language is such a critical factor in detention, *interpreters and translations should be made accessible to detainees at their request.* The inability to communicate in an understandable language can increase detainees' sense of isolation, and can lead to mistrust and conflict between detainees, and even between detainees and staff.

Detainees should also have access to effective legal aid and/or representation, from the beginning of their case, whether it is an asylum claim or an immigration case. This assistance should be provided in a language that detainees understand.

Means of communication to the 'outside world' should be improved by the provision of Internet connections and facilitated access to detainee's personal mobile telephones. The DEVAS research shows that an inability to remain connected to persons and networks in the 'outside world' can have a very detrimental effect on detainees' mental health and on their sense of isolation.

The detention centre should provide for more activities to engage detainees' physical and mental capacities. Idleness can lead to an increase in psychological stress for detainees. This is why it is important to provide activities so that detainees can benefit from the time that they spend in the detention centre. In this way, if detention has to be implemented, then it should be done in a manner that brings the least amount of harm to the individual.

The DEVAS research shows that it is very important for the situation of detainees to be monitored by independent bodies and organisations. *This is why JRS-Portugal recommends that migrants detained in transit zones at the airports (known as 'CITs') should have access to social and humanitarian support provided by NGOs.* In this way the UHSA experience (the Memorandum of Understanding between the Ministry of Interior, the International Organization for Migration, and JRS-Portugal) demonstrates that the presence of NGOs in places of detention is very important for monitoring detainees' level of vulnerability, to help detainees to remain informed about their situation and to ensure

that the harmful effects of detention are kept to a minimum degree as possible. Moreover, evaluations show this model to be a good practice at both the national and European level.²²⁸

²²⁸ See: European Parliament Report on Detention and Open Centres 2007 (http://www.libertysecurity.org/IMG/pdf_eu-ep-detention-centres-report.pdf); Global Detention Project (<http://www.globaldetentionproject.org/countries/europe/portugal/introduction.html>); SEF's Activities Plan 2009 <http://www.sef.pt/documentos/56/PA2009.pdf>; UHSA website: <http://www.imigrante.pt/site-quinta-santonio/videos/2.htm>



NATIONAL REPORT: ROMANIA

By: *Jesuit Refugee Service Romania*

1. INTRODUCTION

The Jesuit Refugee Service Romania (JRS-Romania) is an independent, humanitarian NGO whose mission is to accompany, serve and defend the rights of refugees, forced migrants and asylum seekers, advocating on their behalf from their first arrival in Romania until they are satisfactorily settled. This mission embraces all persons who are driven from their homes by conflict, humanitarian disaster or violation of human rights and whose needs are most urgent and unattended by others or simply forgotten – generally referred to as “destitute persons”. JRS-Romania is also focused on persons kept in detention centres, mostly rejected asylum seekers.

JRS-Romania provides supplementary support to government and other NGOs in migrant detention centres (public custody centres)²²⁹, covering legal counselling, social assistance and emergency aid. Close cooperation is maintained with UNHCR, the Romanian Immigration Office and IOM while lawyers and judges are supported through JRS Documentation Centre on Country of Return Information. An important part of JRS-Romania’s work continues to be lobbying the Government for improvement of legislative policies, including protection of tolerated persons, detainees, refugees and asylum seekers.

As part of its advocacy work, JRS-Romania monitors detention conditions and practices through different projects and research studies. One of these projects is DEVAS – “Detention of Vulnerable Asylum Seekers” – a European project implemented in 23 EU Member States partly funded by the EU Commission and lead by JRS-Europe.

JRS-Romania targeted detained irregularly staying third-country nationals and particularly the asylum seekers that are found in detention centres in exceptional cases. The research was based on empirical findings coming from vulnerable groups in detention, conditions in these centres and how people cope with them.

The objective was to identify how detainees become vulnerable (factors and circumstances that could lead to vulnerability) in order to advocate for the improvement conditions in these centres, and more importantly, to advocate for stronger protections and alternatives to detention for vulnerable persons.

As regards to the research instruments, two social questionnaires were used to interview two distinct groups:

1. Detained asylum seekers and/or irregularly staying third-country nationals who are in detention
2. NGOs that work in the detention centres of concern

A legal questionnaire was used to research the existing laws related to detention. Topics addressed in these interviews included: duration of detention, health care, psychological support, legal counselling, visits from the “outside world”, etc.

²²⁹ Romanian aliens’ legislation provides for “public custody” notion instead of the notion of detention, which is widely used across European and is also used in this report. For details see chapter 2.1.

JRS-Romania conducted 24 interviews in the Arad and Otopeni detention centres in the period between March and July 2009.²³⁰ Before all interviews took place, prior written voluntary and informed consent of the interviewees was obtained. A JRS legal counsellor was interviewed as well.

JRS-Romania would like to express gratitude to the Romanian Immigration Office for its support provided in carrying out the interviews, access in the facilities and the overall activities under the DEVAS project.

2. NATIONAL LEGAL OVERVIEW

2.1 Legal grounds for detention²³¹

The legal grounds for detention are foreseen by the following laws: The Emergency Ordinance of the Romanian Government no. 194, Republished, issued 12 December 2002, on the Regime of Aliens in Romania; and the Law no. 122 concerning the Asylum in Romania, issued 4 May 2006.

In Romania, asylum seekers are not detained for the sole reason that they have applied for asylum. Romanian authorities will not apply criminal sanctions for illegal entry or residence to asylum-seekers who enter or reside on Romania's territory without authorization. However asylum seekers can be detained under certain conditions. Asylum seekers are detained only if they have an expulsion order,²³² are declared 'undesirable' or if they asked for asylum at the state border checkpoints.

The migrant who requests protection in Romania (at the state border checkpoints) will remain in the transit area of the state border checkpoint until the decision to approve entry to Romania or the decision to reject the asylum application has been received and is irrevocable. The migrant should not remain in the transit area for longer than 20 days. The asylum seeker can be accommodated in special centres for reception and accommodation located near the border crossing points. These centres have the legal status of transit zones and have been established by order of the Ministry of Administration and Interior.

The asylum seeker cannot be expelled, extradited or forcibly returned from the border or from Romanian territory, except for the cases mentioned in Article 44 of Law no. 535/2004 regarding the Prevention and Fight Against Terrorism (art. 6 (1) of the Asylum Law). The asylum seeker can be taken in detention according to the provisions stipulated by the Law for Foreigners. (art. 75 (1) and (2) of the Methodological Norms for the application of the Asylum Law).

For justified reasons of public interest, national security, order, health and public morals, protection of the rights and freedom of other people – even if the migrant has the material means necessary for subsistence – the Romanian Immigration Office can establish a place of residency and can arrange transportation with a companion to that place for the entire duration of the asylum procedure, at the request of the qualified authorities.

Taking the migrant into public custody is a measure of temporarily restraining the freedom of movement on the Romanian state territory, and is ordered by a magistrate towards a migrant who could not be removed under escort

²³⁰ These are the only two detention centres for irregular migrants on the Romanian territory. No interviews were carried out in the transit zones. Due to the caseload, most of the interviewed migrants were in Otopeni Centre; however, the report does not make a distinction between the two centres.

²³¹ The report does not cover prison facilities for migrants convicted in Romania and serving their sentences; however, in practice, this category of migrants are mostly at risk of becoming irregular on the territory and thus to be further taken into public custody after their release from the prison.

²³² In Romanian legislation the term "expulsion" is used for the penal/criminal sanction imposed following a deed committed by an individual. The aliens' legislation is using the notion of "removal" from the territory for the administrative measure of "expulsion".

within the term provided by law. It is also used towards a migrant declared as undesirable or against whom the court ordered the penal sanction of expulsion.

In the case of migrants who crossed the state border illegally and of migrants whose stay is illegal and whose identity could not be established, an order shall be issued for return under escort as well as an order to take the person into public custody. When there are serious indications that the removal under escort cannot be carried out within 24 hours, the migrant shall be taken into public custody.

The return order is an administrative order of the Romanian Immigration Office or its territorial units, used when migrants do not voluntarily leave Romanian territory upon expiry of the validity term of the return order (migrants whose entry was illegal, whose stay on the Romanian territory became illegal, whose visa or stay right was annulled or revoked, whose permanent stay right expired and against former asylum seekers²³³ who are compelled to leave the Romanian territory). Removal under escort may also be carried out in the case of migrants with physical or mental disabilities or of those who are a threat to public health.

The penal sanction of expulsion may be ordered against the migrant who committed a crime on the Romanian territory, under the conditions provided by the Criminal Code and the Criminal Procedure code. The migrant's stay right shall end *de jure* on the date when the expulsion measure was ordered. The court may decide that, until the expulsion, the migrant should be taken into public custody, but the duration of such a measure should not exceed 2 years. If the expulsion measure cannot be enforced within 24 hours, the migrant shall be taken into public custody.

The declaration of undesirability is a measure ordered against a migrant who performed, performs or there is strong evidence that he/she intends to perform activities that may endanger national security or public order. The right to stay of the migrant shall cease as of the issuance date of the decision whereby he/she was declared as undesirable. The specialized staff of the Romanian Immigration Office shall enforce the decision whereby the migrant was declared as undesirable by escorting the migrant to the border or to the country or origin.

2.2 Legal grounds for the minimum age for detention

The Romanian legislation does not foresee a minimum age for detention both in the Emergency Ordinance no. 194 on the Regime of Aliens in Romania and in the Law no. 122 concerning the Asylum in Romania.

Asylum applications submitted by unaccompanied minors are not the object of a border procedure. Unaccompanied minor asylum seekers are given access to the territory and ordinary procedures. An unaccompanied minor is defined as a migrant or stateless minor who has arrived in Romania unaccompanied by either parents or a legal representative or who is not in the care of another person, according to law, as well as a minor who is left unaccompanied after entering Romanian territory. In the application of Asylum Law, all decisions regarding minors are made in conformity with the best interest of children. Unaccompanied minors are granted the same protection offered under the conditions of the law to minor Romanians who are in difficult situations.

The removal shall be forbidden if the migrant is a minor and the parents have a right to stay in Romania. In cases where the parents of the minor do not have their residence on the Romanian territory, he/she shall be returned to the residence country of his/her parents or to the country where other family members have been identified, with their approval. In cases where the parents or other family members cannot be identified, or if the minor is not accepted by the state of origin, he/she shall be granted the temporary stay right on the Romanian territory. With a view to finding adequate solutions, the Romanian Immigration Office shall cooperate with national and international specialized organisations in the field of minors' protection.

²³³ Those with repeated asylum-requests, who are considered as requesting the "access" to a new asylum procedure; however, until the approval of the access they are irregular migrants according to the law.

2.3 Legal grounds for the detention order

Taking into public custody is a measure of temporarily restraining the freedom of movement on the Romanian state territory, ordered by a magistrate against the migrant who could not be removed under escort²³⁴ within the term provided by law, as well as against a migrant declared as undesirable or against whom the court has ordered a measure of expulsion.

When there are serious indications that a removal under escort cannot be carried out within 24 hours, the migrant shall be taken into public custody (for example if the migrant does not possess a valid border crossing document, financial means and other formalities that are required). In the case of migrants who could not be removed under escort within the period provided by law, the taking into public custody shall be ordered by the prosecutor appointed for such purpose from within the Prosecutor's Office attached to the Bucharest Court of Appeal, for a period of 30 days, upon the request of the Romanian Immigration Office or its territorial units.

The renewal of the public custody period of migrants who could not be removed from the Romanian territory within 30 days shall be ordered by the court of appeal to whose territorial jurisdiction the accommodation place is subject, at the motivated request of the Romanian Immigration Office. The court shall issue a decision before expiry of the validity of the measure of taking into public custody that had been previously issued, and the court decision shall be irrevocable.

In the case of migrants against whom the measure of expulsion was taken, the court can order that the migrant shall be taken into public custody up to the moment when the police authorities expel the person in accordance with the provisions of the Criminal Procedure Code, but the public custody period should not exceed 2 years. The court may decide that, until the expulsion, the migrant should be taken into public custody, but the duration of such measure shall not exceed 2 years. If the expulsion measure cannot be enforced within 24 hours, the migrant shall be taken into public custody. If the court that issued the criminal decision did not order the taking into public custody, the Romanian Immigration Office may make a request to the Bucharest Court of Appeal to issue the decision for the taking into public custody of the migrant who is to be expelled. The court shall settle the application within 3 days of its receipt. The court decision shall be final and irrevocable.

The taking into public custody of migrants declared as undesirable shall be ordered by the court that issued the measure declaring the migrant to be undesirable. The decision is ordered by the Bucharest Court of Appeal, upon the notification of the prosecutor from the Bucharest Court of Appeal especially appointed for such purpose. The prosecutor shall notify the court, upon the proposal of institutions with powers in public order and in the national security field that hold data and serious indications.

2.4 Legal grounds for the right of appeal against the detention order, or to challenge detention²³⁵

Migrants, against whom the measure of return was taken, may submit a complaint, within 5 days, to the Bucharest Court of Appeal who shall be bound to solve it within 3 days from the date of receipt.

2.5 Legal grounds for the right of information about the detention order and/or the reasons for detention

Migrants accommodated in centres have the right to be informed immediately after their arrival to such places, in the language they speak or in a language they understand, regarding the main reasons that led to this measure, the rights and obligations they have during their stay in these centres. The reason of their being taken into public custody

²³⁴ Also, the Law provides for the public custody measure to be applied in case of migrants who crossed the border illegally and irregularly undocumented migrants.

²³⁵ In case of migrants declared undesirable or under penal sanction of expulsion, the complementary measure of detention (taking into public custody) shall be decided in the same trial, with the possibility of further appeal.

as well as the rights and obligations of the migrants accommodated in the centres shall be communicated in writing by the persons appointed to run such centres.

2.6 Legal grounds for the duration of detention

The migrant who is requesting a form of protection in Romania will remain in the transit area of the state border checkpoint until the reception of the decision to approve entry in Romania or, depending on the case, until the decision to reject the asylum application remains irrevocable, but no longer than 20 days from the time of entry into the transit area.

The maximum period of taking into public custody of the migrants against whom the measure of the return has been ordered is 6 months.

In the case of migrants to whom the measure of expulsion was taken, the court can order that the migrant shall be taken into public custody up until the moment when the police authorities expel the person in accordance with the provisions of the Criminal Procedure Code, but that the public custody period should not exceed 2 years.

Public custody of migrants declared as undesirable shall cease on the enforcement date of the court decision. The decision that the migrant was declared as undesirable shall be enforced by escorting the migrant to the border or to the country or origin, by the specialised staff of the Romanian Immigration Office. The period for which a migrant may be declared as undesirable is 5 to 15 years, subject to the possibility of extending such period with a new period between such limit if it is established that the reasons which led to such a measure did not cease; however the detention has an indefinite period.

2.7 Legal grounds for the provision of health care and the scope of health care benefits, and for the provision of social services

Migrants accommodated in centres shall benefit from the rights by law and from the rights provided under the international treaties in the field, to which Romania is a party. The migrants accommodated in centres shall have the right to legal, medical and social assistance and to the respect of their opinions and specific nature in religious, philosophical, and cultural fields. Migrants taken into public custody shall be entitled to receive medical assistance, free medication and medical materials. Medical services provided under paragraph 1 shall be offered, as the case may be, through the medical service of the accommodation centres or medical units of the Ministry of Administration and Interior and the Ministry of Public Health. Reimbursement of expenses shall be provided by the Ministry of Administration and Interior, through the budget allocated to the Romanian Immigration Office.

2.8 Legal grounds for contact with the outside world

During their stay in centres, migrants shall be offered the possibility of communicating with diplomatic and consular representatives of the state of origin, and counselling assistance/support.

2.9 Legal grounds for the provision of legal aid

Migrants accommodated in centres shall have the right to legal, medical and social assistance and to the respect of their opinions and specific nature in religious, philosophical, and cultural fields.

2.10 Legal grounds for the protection of persons with special needs

Minors who are living in accommodation centres have free access to the mandatory educational system. The centres are established, organized, sanitarly authorized, arranged and equipped so as to offer appropriate conditions of

accommodation, food, medical assistance and personal hygiene. The centres are organised and operate based on a regulation approved by the Minister of Administration and Interior.

2.11 Legal grounds for alternatives to detention

Tolerance for remaining on the Romanian territory, hereinafter referred to as tolerance, is the permission to stay on the territory of the country, granted by the Romanian Immigration Office to migrants who do not have the right to stay on the Romanian territory and, who, for objective reasons, do not leave the Romanian territory. Objective reasons are those circumstances independent of the migrant's will, unpredictable and insurmountable, which prevent the migrant from leaving the Romanian territory.

Tolerance may be granted to migrants in the following cases:

a) When migrants are in the situations presented below, and fail to fulfil the conditions provided by law for granting a stay permit. Migrants shall not be allowed to leave the country under the following circumstances:

- 1) They are charged or indicted in a criminal case and the prosecutor decides to enforce the measure consisting in the interdiction of leaving the town or the country;
- 2) They were sentenced by final court decision and they have to carry out a prison sentence.

b) When migrants are taken into public custody, have a return measure ordered against them, but could not be removed within 6 months;

c) When migrants taken into public custody, against whom the court ordered expulsion, could not be expelled within 2 years from the date when they were taken into public custody;

d) When migrants whose temporary presence on the Romanian territory is required by important public interests. In this case, tolerance shall be granted upon the request of the state competent bodies;

e) When there are serious reasons to consider that the migrants are victims of human trafficking - in this case, tolerance shall be granted upon the request of the prosecutor or the court;

f) When the Romanian Immigration Office deems that such migrants cannot temporarily leave Romania for other objective reasons.

The removal shall be forbidden in the following cases:

- a) The migrant is minor and the parents have a right to stay in Romania;
- b) The migrant is the parent of a minor who has Romanian citizenship if the minor is the migrant's dependent or the migrant is bound to pay alimony, an obligation that he/she regularly fulfils;
- c) The migrant is married to a Romanian citizen and the marriage is not one of convenience;
- d) The migrant is over 80 years old;
- e) There is justified fear that his life is endangered or that he will be subject to torture, inhumane or degrading treatment in the state where the migrant is to be sent;
- f) Return is interdicted by international documents to which Romania is a party.

Persons provided under the above paragraph may be granted, or as the case may be, renewed the stay right in Romania by the Romanian Immigration Office.

Migrants on the Romanian territory may request the support of the Romanian Immigration Office and of international or non-governmental organisations with duties in the field of assisted humanitarian voluntary repatriation in case they have no financial means.

A migrant may not be expelled to a state where there are justified fears that his/her life is endangered or that he will be subject to torture, inhumane or degrading treatment.

2.12 Legal grounds for providing release from detention

The release from the centre may occur in the following ways:

- A decision taken by the competent Court of Appeal following the recourse submitted in due time (5 days starting with the moment of being taken in public custody);
- If the Romanian Immigration Office is not requesting the renewal of the public custody period;
- If the Court of appeal is not approving the renewal requested by Romanian Immigration Office (e.g. the court admits the appeal submitted by the migrant);
- At the end of the maximum period of detention foreseen for each category of detainee (irregular/undesirable/expulsion).

3. OVERVIEW OF NATIONAL DATA FINDINGS

3.1 Basic information

With the exception of one woman (Bolivian, aged 25), all the detainees interviewed during the research were males, coming from Asia (Pakistan, Afghanistan, and India etc.), Africa and the Middle East. The average age was around 29, while the youngest detainee interviewed was a 19 year-old boy from Pakistan and the oldest - two Iraqi males - were 47 years old. Another issue of interest was the detainees' civil status – 90% were single persons.

The average length that participants in DEVAS had been detained was three months. However, at the time of conducting the interviews, some of the detainees had been in detention for just several weeks; while others had been there for 20 months. Some had had experience of previous detention centres: either in Romania (Otopeni or/and Arad migrant detention centres), or in Western European countries. The latter were mainly former asylum-seekers that had been returned under Dublin II Regulations. Several detainees had been convicted in Romania for criminal offences and had served their sentence in domestic prisons.

All the detainees interviewed were irregular migrants (with illegal staying status) awaiting deportation. However, almost half of them had submitted new asylum applications while in detention asking for access to a new refugee status determination procedure. Four of these detainees had been in Romania since 1991 while the majority had arrived within the last three years.

3.2 Case awareness

Two thirds of the detainees declared that they received information on the grounds of detention from police authorities either during the official procedures (expulsion following a penal sanction etc.) or during their arrest/detention. A few stated that they had been informed about their situation by other persons (e.g. NGO staff or lawyers). They also mentioned that in some cases the immigration officer communicated the information orally.

Even so, several detainees stated they did not clearly understand the grounds for their detention and/or the asylum/immigration procedures: "Why was my asylum procedure rejected, I was informed only briefly by authorities." Moreover, detainees underlined the importance of having access to information regarding their future, with a view to a possible voluntary relocation/return to their country of origin. They were also interested in information that may affect access to protection or toleration in Romania.

Lack of proper information may affect their legal status, their personal feelings about detention and its consequences, as well as having an effect on their mental health.

3.3 Space within the detention centre

As regards sleeping rooms and general space, more than half of detainees interviewed declared that they felt positive about their dormitory. These detainees said even that though the space is not very comfortable, all the necessities were provided and the space was cleaned regularly. The main discomfort was related to the size of the rooms. Allegedly they were too small to be shared with three other detainees; also, the atmosphere was considered as “not positive” due to the fact that the rooms were closed almost all the time and there was restricted access to existing facilities (TV etc.). Comparisons were made with the facilities offered by other centres from abroad, possibly even with asylum centres and not only detention facilities.

Most of the detainees did not consider the centre to be overcrowded. However, almost half of them reported that they could not find a private zone within the centre where they could be on their own, while the rest stated that their own room was the place where they could “felt alone with their thoughts”. Some detainees found it easy to be alone in different parts of the centre: dormitory, gym, library, club or the hall for visitors.

3.4 Rules and routine

When asked about the rules of the centre, most of detainees listed the regular rules that had become a routine for them. Within the centre there are strict rules including a programme for time of meals, time for walking outside etc. Some of the reactions to these rules were described by the detainees, for example: “I have to stay in the room; I can't get out when I want”; “from 8:30-9:00 our room door is opened and we have to go to breakfast, then we are locked in again. At 12:00 we have to go for lunch and then come back to the room where we are locked in again and so on”; “during the day, they keep us all only in the rooms. Only from 18:00 20:00 or 21:00 hours we are in the hall for the TV”; “the rules are simple: a program for meals and the time we are to wake up and to go to bed”.

The detainees considered that the rules were widely respected in practice, but others considered that some of the detainees were more privileged.

With the exception of one detainee, all of them stated that the rules could not be changed. Even if the majority of them admitted that in theory they could propose changes, in practice they stated that these suggestions would not be accepted. Several of them stated that they had submitted proposals for changes but they were not approved or were delayed.

Among the rules considered by the detainees as being as most important were: 1) use of a telephone in order to stay in contact with the family; 2) permission for open air activities so as not to be confined to their rooms for many hours at a time; 3) equal treatment towards all detainees in detention; and 4) proper supervision in the centre.

3.5 Detention centre staff

Most of the detainees stated that the personnel with whom they are most frequently in contact with were the security staff while others mentioned the medical personnel or the director of the centre. Almost two thirds of them described the interaction with the staff as being positive or normal. They reported a friendly relationship if the rules and procedures were followed by both staff and detainees. However, a quarter of those interviewed considered that interaction with the staff was not positive. According to these detainees, problems that arose were related to communication between detainees and the security staff, especially if the detainees did not speak Romanian. They considered that staff support varied depending on the behaviour of the officers/detainees and in their specific cases they considered the staff unhelpful.

Most of detainees did not feel they were discriminated against and said that they felt supported by the staff. They felt that the staff of the centre provided them with support mainly by being sympathetic to their situation and by helping them with small shopping or other personal things. However, almost a quarter said that they did not feel supported by the staff, and around the same number mentioned that staff discriminated between detainees. In their opinion, the occurrence of a different treatment is due to personal reasons. The example mostly given when referring to different treatment applied towards detainees is: "because some detainees can have the door open all day long." Regarding the reasons different treatment applied to detainees, the newcomers believed that the ones who were staying for longer periods had more privileges and vice-versa. Another group that were identified as being favoured were those who had been in Romania for longer and thus spoke the same language as the guards: "they treat me better because I speak the Romanian language. Officers paid much more respect."

3.6 Level of safety within the detention centre

Almost all the detainees responded positively when asked about the level of safety in the detention centre, citing the clear rules regarding security and the presence of the security staff. Only on a few small incidents among detainees resulted in their stating that the level of safety is not that good.

None of the detainees reported having been physically assaulted, and two-thirds of those responding to the questionnaire also that they had not been mocked or humiliated while in detention. Where this had happened, it came from other detainees due to differences in both cultural background and life experience: "I have been insulted by other detainees because of cultural differences and education."

However, other detainees had a different interpretation of the word: "safety". Their concept was distinct from physical security, and was more related to personal problems, such as sickness (e.g. digestive problems), and concerns about their future etc.: "physically I feel safe, but mentally nobody takes care of us, our case, our depression, stress"; "it's physically safe, but we are afraid about the future."

Very few detainees questioned had submitted a formal complaint. Some of the detainees explained they wanted any incidents resolved in an easy way, without formal complaint because they did not want the police to become their enemy.

3.7 Activities within the detention centre

Most detainees reported that there were no activities provided within the detention centre. Of those who stated that some activity was available, they mentioned sport, chess and cleaning activities.

Participation in these activities was motivated by different reasons. For some, the activities were seen as a good use of time, and an opportunity to take personal responsibility for one's own health, etc. On the other hand, some detainees stated that they were not interested in taking part in any activities: "I don't want anything from here; I just want to be free." Detainees said they had access in the centre to library books, a telephone, television, and sports equipment. However, according to the majority, detainees did not have access to computers, Internet, education, religious space, or outdoor space.

When asked what could have the most positive impact on their life if it were to be provided in the centre their answers were: entertainment (sports, a better equipped gym, TVs and TV cable with several channels for news, a place for relaxing); access to internet/computer; and educational opportunities (books in their own language, computer classes, Romanian language classes). Almost all of them wanted to spend more time outside their rooms or, if possible, outside the centre.

3.8 Medical issues

All detainees reported that there were medical staff in the centre (physicians, nurses and one psychologist) and most detainees said that medical personnel visited them at least once a week. However, with the exception of one detainee, they mentioned that access to specialised psychological care was fairly restricted.

Only a third of the detainees stated they had had a medical check-up on their arrival at the detention centre, although according to the regulations, this should have been done in all cases. If this check up did take place, detainees reported that it was very general or a few days delayed (possibly due to a week-end or other holiday).

Most of the detainees stated they understood the “medical language” and that is because with medical staff they could use Romanian and/or English. For detainees who have a problem with language, the solution seemed to be to use an interpreter, perhaps from the group of detainees.

Prior to detention, most of detainees stated that they did not have health problems, but during their detention almost 2/3 of detainees reported that their physical health was negatively affected. The causes that lead to impaired physical health condition, in their opinion, were related to psychological issues but also as a result of general conditions within the centre: “because of the pressure, we don't know when we will be released or returned”; “after nine months of detention, I feel even sicker, due to the closed space.”; “because of detention: no activities, we have to stand still.”

When asked about their mental health, 80% of those questioned said that being in detention had affected their mental health negatively. The following problems were considered as affecting their mental health: the impact of being in detention (a small percentage considered loss of rights as having a serious impact, while most of them focussed on the fact of being behind bars); the impact of living conditions (mainly general living conditions, while few specified cohabitation issues); the stress caused by worries; and the impact of medical problems (mainly mental, but also some physical problems).

The quality of medical services inside the detention centre was perceived as good by almost half of the detainees who remarked they had access to appropriate services. On the other hand, a third of them considered the quality of medical services to be ‘poor’, with a lack of adequate treatment. The issue of transportation to the hospital was mentioned both as positive and negative: “I was taken to the hospital immediately when I had problems” compared with “I was not taken to the hospital due to the lack of a car... that was the reason invoked by the police.”

When asked about medical services needed, but not provided, in the centre, the majority did not require anything specific. However, the problems mentioned “to be developed” were access to appropriate medical care (to medication, vitamins, and other treatments) as well as improved communication with the existing medical staff.

3.9 Social interaction within the detention centre

Generally the interaction between detainees was reported as good, and only a few of those questioned mentioned a “bad atmosphere”. The majority did not report problems between detainees. Those who experienced problems considered they were due to intercultural tensions and tensions between the newcomers and those who were already there: “Many detainees take advantage of other detainees. They get money from them telling them that they know a good lawyer that could get them released.” The majority of detainees declared they have a person they can trust in the centre. Usually this is a fellow detainee, but sometimes Jesuit Refugee Service staff or detention centre staff members are mentioned.

3.10 Contact with the outside world

Most of the detainees have a family connection in their home countries, while over half have friends and family in Romania. When asked what was the most way important for them to keep in touch with the outside world (family, friends), the majority said telephone, and specifically their mobile phones. However, this required them having money for calls. Other ways of communication mentioned were letters and also personal visits: “By phone with friends; I don’t answer to family because I don’t want them worried.” A few stated that the Internet would be an effective means for communication. However, it is not available in the centre. Detainees received visits mostly from NGOs (JRS), lawyers, friends and UNHCR. Very few received visits from families or religious people.

3.11 Conditions of detention and nutrition

90% of the detainees stated they did not like the food that they received in detention, complaining mostly about poor quality but also about the quantity. They complained that they are not allowed to receive cooked food in their packages. More than two-thirds reported a loss of appetite while in detention. All of those whose appetite was affected stated that loss of appetite made them feel worse.

3.12 Conditions of detention and the individual

More than half of detainees stated they sleep well. Sleeping difficulties could result from stress or external reasons (e.g. mosquitoes). According to detainees the top four most difficult things for them during the detention were:

- The impact of detention itself, “being locked 24 hours a day” and also being separated from family: “the visit of my family was very difficult, my child was crying and I did not know how to react.”
- The impact of living conditions in the centre, particularly the food and lack of opportunities to get in the fresh air;
- The impact of worries on mental health and on their ability to sleep, including the fear of being returned, and the uncertainty of what will happen next;
- The impact of medical problems.

For most of detainees these difficulties have not changed over the time they have been in the centre and life in detention become even more difficult – “Freedom is freedom, in detention there is too much depression”.

Only two of the detainees interviewed said that they were aware of the outcome of their detention, while only around half said they were aware of their departure date or release. Uncertainty in this regard led to stress and affects their plans for life. Detainees interviewed were worried about themselves and their future: “I feel I am in doubt, I don’t know when and where.”

Most of detainees concluded that detention had a negative influence on the way they see themselves – “I feel like a 5 year old child whom they tell what to do - but I am the head of a family”. However, a small number of detainees mentioned the “positive aspects” of detention, including hope and confidence in solving their situation.

When detainees were asked if they consider themselves as persons with special needs, different from other persons, only a quarter considered their particular situation as requiring “special” needs, distinctive requirements, which were usually to do with specific medical requirements. When asked who was vulnerable, groups such as those who had been in detention for longer than a few months, pregnant woman and certain nationalities were mentioned. The most common answer was that ‘everybody’ in detention is vulnerable.

4. ANALYSIS OF THE DATA AND CENTRAL THEMES

A. Need for information

As for any detained individuals, migrants kept in public custody (whether or not they are asylum seekers) need to be informed about their legal status, procedures, rights and obligations from the moment they are confined to a detention centre.

The Law governing migrants explicitly provides for the right to be officially informed in writing on the main grounds for detention and their rights and obligations while in custody either in their own language or in a language that they understand. In practice, detainees are requested to sign the acknowledgement documents (available only in English and Romanian). The concept of “provision of information” was somehow vague to detainees, an important percentage (30%) said that they were not informed at all about their situation. This should be connected with the finding that a large proportion of the detainees were not aware neither of the outcome of their detention (whether they would return to their country of origin or be able to stay in Romania), nor their departure date (and sometimes destination).

Therefore, the main piece of information missing here would seem to be related to the outcome of the individual's situation: detention plays a transitional role in concluding staying/exit in/from Romania for irregular migrants – with three options:

- a) Forced/voluntary return (to the country of origin or to other country);
- b) Release from detention and permission to remain temporarily as a ‘tolerated’ person or;
- c) Regularisation of stay on the Romanian territory.

Other crucial information that detainees were missing related to the fact that in practice there is a lack of fixed and transparent time limits that one can be held in police custody. While there are legal remedies available (such as the possibility to appeal against the decision of being taken into public custody and its prolongation), observance of legal deadlines for submitting various procedural papers requires specialised assistance and due acknowledgement. Few detainees stated they were aware of this information and of their departure date from the centre.

The need for detailed information was underlined in the findings. In most of the cases this relates to dual procedures: challenging detention and the possibility of applying for a new asylum procedure (e.g. positive decisions issued in the asylum procedure may lead to the release from the centre). Data gathering and court rules are complex and sometimes demanding even for specialised jurists, and almost all the asylum-seekers considered they were not properly informed on legal procedures. Language barriers should also to be considered in looking at the complete picture.

Sources of information are also to be examined in order to ensure proper communication. The source of information may affect proper communication. While the communication was not the goal of our analysis, the manner of perception by detainees is relevant. Legally speaking, the authorities are responsible for informing detainees on the reasons for their detention, their rights and obligations, their legal status and procedures to follow. This information needs to be communicated in all cases. However, several detainees stated that they received “the information” on the grounds of detention from non-officials: NGOs, lawyers etc. – most probably they referred to explanations and details provided complementary to the authorized ones. Even if informed by all possible sources, several detainees stated that in their opinion the reasons for their detention were not that clearly explained to them.

The degree of perception of relevant information depends also on previous experiences, links with the host country, personal and cultural background of each detainee. Among these, previous experiences in detention play an important role: whether in migrants’ detention centres or prisons in Romania or abroad, including former asylum-

seekers returned under Dublin II Regulation. Comparisons were made with the present detention regime and the opinions were mixed. Informal groups of unreliable dispatchers of information emerged and sometimes “legends” occurred in the centres: for example, those having remunerated lawyers are easily released; the voice of community is stronger than any outsider etc. Thus, from our experiences, the message can be altered; *bona-fide* migrants/asylum-seekers, mainly those newly arrived in the centre, are sometimes given incorrect information and even put at risk of losing procedural remedies.

B. Impact of detention on mental health

From our findings we can see that overall detention conditions seem to have an important impact on the mental health of detainees and their negative self-perception. For most of them, these difficulties have not changed over time and life in the detention centre has become harder. It should be noted that, based on medical grounds, an irregular migrant may be released from the detention centre when it is impossible to ensure adequate treatment etc.

The presence of medical staff in the centre was commonly recognised, with visits paid at least once a week. Although medical care is provided, detainees reported a deterioration of their physical health. Before detention, they consider they had no physical health problems, but they felt that they were seriously affected afterwards. Detention itself and living conditions in detention had an impact on mental health, especially the uncertainty detainees are facing. Uncertainty about the outcome is characteristic for the situation in detention. Uncertainty makes the time in detention difficult and makes people worried. The considerable stress reported by detainees was due to both to psychological/personal reasons and the detention conditions/facilities in general. Deterioration had been intensified proportionally to the length of detention.

Most detainees have a negative self-perception and the time spent in detention has a negative influence on the way they see themselves. Although the average time in detention by the time of the interview was three months, the negative effects were considered common to all. They were affected also by sleeping distress, linked among others to the fear of return to the home country. One detainee considered lack of spiritual alleviation as a reason of feeling helpless. Another reason affecting the common mood was related to nutrition and decline and/or change in appetite. Most of detainees stated they did not like the food provided, complaining mostly about poor quality but also about the quantity. All of those whose appetite was affected stated they lost appetite, making them to feel worse.

Although the majority of detainees did not consider overcrowding an issue, the need for a private zone within the centre where they could be on their own was emphasised, even though some considered their own rooms as sufficiently private in this regard.

Overall, a mixture of the detention conditions and the fact of being in detention meant that detainees became physically and mentally depleted while in detention, and thus this is a cause of vulnerability.

C. Differential group approaches; relevance of Romanian ties

In general, the group of detainees was homogeneous, interacting in the same manner with one another. Interaction with staff (mainly security) is good in general; most detainees did not perceive themselves as being discriminated against by detention staff or by other detainees. It seems to depend very much on the one hand on the official on duty, and on the other if the detainees are abiding to the established rules.

With the exception of one detainee, all of them considered that the internal rules could not be modified. Even if the majority of them admitted that in theory they could propose changes for the rules, in practice they stated that these would not be admitted. The concern for the outcomes of the complaints submitted to the personnel in charge could prevent detainees from reporting incidents; those very few who submitted a formal complaint said that the problem was addressed by the police, but still somehow continued.

According to their statements, the problems that may arise are related to communication between detainees and the security staff, which was especially obvious if the detainees did not speak Romanian. Personal relationships and communication play an important role: some detainees admitted that they felt more supported than other detainees. Another group considered neutral position vis-à-vis differences in treatment from staff. The newcomers believed that detainees who had been in detention for longer periods had more privileges and vice-versa.

The same issue of communication with the staff occurred with regards to communicating information about rights and obligations on detention or on understanding medical instructions. Languages used are Romanian and English (with prevalence of the first one), while interpreters are seldom used, usually only in official procedures (interviews with asylum-seekers etc.). Use of Romanian is justified mainly by the fact that many (but by no means all) of the migrants have already been in Romania for some time (some of them for almost 20 years), and have links in the host country. The solution proposed by detainees for a better communication is the communication through an interpreter, perhaps from their own group; however, this may create an additional advantage for those knowing Romanian. Thus, detainees that know the Romanian language seem to fare better than those who do not.

In addition, those having ties in Romania - family members, friends and partners – had more contacts with the outside world. Most detainees had relations in their home country, and separation from their families had a negative consequence for detainees. Since no money or financial resources are provided, some of detainees cannot use the public telephone to communicate with or support in any way their families. Therefore, those without connections in the host country, financial resources and/or who do not know Romanian (or English) may be considered as being vulnerable.

D. Lack of activities

As it has been mentioned, the average length of detention was three months and the negative effects on people's well being were already visible. There were very few activities available (sport games/exercises, TV, reading or cleaning) and only a minority took part. Regarding the rules, they were strictly observed, including a programme for meals and walking, becoming a routine for detainees. Non-observance of the rules provided in the internal regulations may lead exceptionally to suppression (disciplinary measures) of certain rights, including interdiction to engage in sport or other cultural activities. Also, permission to enjoy certain entertainment, mainly TV, may be conditioned by certain obligations (cleaning of the common area etc.). The possibility of having different activities depending on personal behaviour of the detainee is perceived in various ways, with positive and negative impacts; however, it may lead to tensions.

Exercise in open air is available on a terrace of 90m² three hours a day (there is a different timetable depending on the grounds of detention: irregular migrants/expellees/undesirables). Most detainees have practically nothing to do while inside their rooms (radio or TV). Thus, a lack of activities leads to boredom and even to stress among detainees. The authorities stated that the lack of activities in the open air is due to insufficient staff to ensure security.

Lack of activities together with closed rooms had an impact on the group relationships – security issues, small incidents among detainees, rare incidents of detainees being mocked, tensions based on intercultural background or between groups of new-comers and former detainees. However, the level of safety was considered high due to clear rules for security and the presence of the security staff.

5. CONCLUSIONS AND RECOMMENDATIONS

Data gathered through the project reveals information comparable with the findings of JRS-Romania during the counselling sessions provided both in the centre and outside for those who had experienced detention. The group of

migrants could see that their situation did not represent a pressing issue for Romanian society, and that the provisions of the Aliens' Law has not so far been considered a matter of priority by the authorities. Most of the rules were included following the accession of Romania to the European Union and considering the practice of certain EU states (Austria, Germany, Netherlands etc.).

The data of the report was based on the statements made by detainees and JRS-Romania staff, thus missing the authorities' point of view. The findings drawn from discussions led to the conclusion that the vulnerability of both the situation *per se* and particular persons in custody are to be further considered:

- a) Limits of the situation point to alternatives to detention, the possibility of revision of the detention's length and the need for information;
- b) Vulnerabilities related to individuals are related to deficiency in communication, involvement in various activities and the address of physiological/psychological needs.

1. **Alternatives to detention** – The DEVAS study strongly suggests that detention is to the detriment of a detainee's well being. Therefore, "public custody" should be an exceptional measure applied to migrants who cannot be removed from the country under escort in a very short period of time (within 24 hours), covering together with undesirables and expellees, migrants who did not leave voluntarily the Romanian territory in 15 days for illegal staying or with illegal entry; it includes also migrants with physical or mental disabilities and those who are a threat to public health. The measure consists of restriction of freedom of movement thus sanctioning illegal condition of migrants in Romania, with the aim of removal from the territory. However, the tolerated status has a similar aim - obligation to leave Romanian territory and removal without any prior notice.

Practitioners have already questioned the relevance of taking people into public custody instead of their being tolerated for a limited time. In practice, toleration is applied subsequent to public custody – in the case of impossibility of removal in the period provided by law. The period of time available to illegal migrants in order to leave the territory is very short and it does not leave the room for alternatives. Sometimes, links with the host country are significant and migrants should be allowed to proceed to departure in dignity. Non-compliance with these short deadlines is sanctioned with public custody, even in cases where return is objectively impracticable, i.e. to Somalia.

Therefore, toleration should be seen as an alternative to public custody measures – which are a sanction that should be applied only after the exhaustion of all reasonable possibilities to leave the territory voluntarily with the self-respect that should be granted to all human beings. Toleration should be compared with the negative effects of detention, which are underlined in the DEVAS findings. This principle should be advocated for further inclusion in the amendments of Aliens' Law.

2. **Length of detention/release date** – The DEVAS study has found that a widespread lack of knowledge about the date of release from detention is a crucial contributing factor in detention's detrimental effect on detainees. In addition, the time spent in detention seemed to increase the problems experienced by detainees. The law provides for a single reconsideration of renewal of public custody within 30 days in a court of law. Being a request of extension of the measure accorded in an administrative procedure, it is hard to reasonably challenge it, without having new evidence. Moreover, although the Immigration Office makes the request for renewal, which has the burden to prove additional time needed for removal and concrete steps taken in this regard, very often the appeal procedure is formal. Besides, migrants are accountable for non-cooperation with diplomatic missions etc. in speeding up the removal procedure.

Regular assessment of individual situation during detention and prospects for enforcing the removal measure should be considered and included in further revised legislation. Proportionality of the measure and

its negative impact may be presented in front of the court of law through the opinions expressed by independent experts.

3. **Need for information** – The DEVAS study in Romania has established that information plays a crucial role for persons kept in a closed centre who have undergone various legal procedures and who are in an unfamiliar country/society. The notion of “information” is very broad, covering official information (grounds of detention, procedural steps), supportive information (NGOs, lawyers) and in-side information (shared among the detainees); it covers more or less everything that may be connected with the detainee’s situation. Coming from various sources, information is filtered and assessed by each individual and sometimes interpreted in an incorrect way. The complexity of legal procedures, the foreign situation and compliance with deadlines should be taken into account in understanding why the findings of DEVAS reveal a desperate need for information.

Narrow official grounds provided by the authorities combined with lack of understanding of procedures put detainees in an uncertain situation. Explanations provided during the counselling sessions by their defendants are extremely useful, but they should be supported by inside information of the group of detainees, therefore keeping the power in the hands of the actors involved.

The “best interest” of migrants should be considered. In the case of asylum-seekers, the specific law prevails over the general regime of migrants, while their particular vulnerability is recognised by the law. However, the legal complexity of the domestic procedure and consideration of their insecure status may affect the effectiveness of exhausting all legal remedies in the proper manner. It should be mentioned that free legal aid is not available in the administrative procedures as yet. Another issue of concern is related to respect of confidentiality – asylum-seekers applying for access to a new procedure are considered as migrants and sometimes presented to their diplomatic missions in order that the removal procedure can be carried out.

A particular need for information relates to the possibility of removal: either return to the country of origin or to a different country. The court decisions approving the removal orders do not specify the target country and, regularly, the assessment of conditions for return (risk of torture etc.) are made in consideration of the country of origin. However, there were cases in practice where migrants were sent to other countries. This kind of information is not available until the moment of return, which keeps detainees in a state of anxiousness. Proposals to amend the legislation in ruling on the country of return should be further considered.

4. **Improved communication** - Language is a critical factor for persons in detention and one of the most important findings from DEVAS is that there is a lack of interpreters for detainees. Written communication of official documents (e.g. decisions, notification) are available only in Romanian while the rules of the centre were translated only into English. An inability to comprehend what detention centre staff communicates may mean that vital information is lost for the detainee. Those who do not understand them or who are illiterate are in a very vulnerable situation from this point of view. Even in cases where the reading of documents is possible, additional efforts to explain particular wording are required. Language incomprehension also increases detainees’ sense of isolation and mistrust.

Translation of relevant documents into useful languages should be considered, together with use of interpreters in for official documents; however, the overall responsibility of providing explanations remains to the NGO counsellors or lawyers. Thus it is important that detention centres provide for better language facilities that can meet the full range of detainees’ needs and avoid discrimination between those understanding Romanian and those who do not.

Development activities and increment of those available – Considering the average length of detention and the small number of recreational opportunities reported in the DEVAS study, further progress should be made. Additional tensions are created since the possibilities to take exercise in open air are limited and sometimes suspended for different reasons. Proportionality and general support of detainees' well being should be considered as an alternative to their being confined to their sleeping rooms for long hours (where TVs and radio are not always available). The perception of time is different in detention centres and individuals should be offered adequate possibilities of coping with stress and anxiety through activities.

5. **Medical care** - Considering the reported deterioration of psychological well being during detention, specialised psychological care should be considered. A special requirement is to ensure proper communication between detainees and medical staff through interpreters, if this is necessary and possible.



NATIONAL REPORT: SLOVAKIA

By: *Caritas Slovakia*

1. INTRODUCTION

This national report is the result of inquiries and research that took place in Slovakia between February and July 2009. It is part of the DEVAS Project, implemented by JRS–Europe and its project partners, which aimed to research and identify the detention conditions and practices of 23 Member States towards vulnerable asylum seekers.

Caritas is a Catholic relief, development and social service organisation working to build a better world, especially for the poor and oppressed. Its activities are focused, *inter alia*, on poverty and social inequality, migration and asylum.

On the basis of several questionnaires and guidelines, Caritas Slovakia arranged for a number of interviews in two detention centres. Firstly, Caritas made several visits to the detention centre in Sečovce, which is located about 40 km from Košice, close to the Ukrainian border. There we completed 27 interviews with detainees, and one interview with a detention centre staff member. Secondly, Caritas visited the detention centre in Medvedov on eight occasions, which is located 70 km from Bratislava, close to the Hungarian border. There we conducted interviews with 36 detainees, as well one interview with a detention centre staff member.

Caritas also conducted interviews with two NGOs: the Slovak Humanitarian Board and the Human Rights League. The Human Rights League's mandate in the detention centre is to monitor the conditions in detention, with special attention paid to legality of detention and providing legal assistance to detained aliens.

Others contacted during the project implementation were IOM, the Goodwill Society, the Head of Bureau of the Border and Aliens Police, the Police Presidium, the Secretary General of Caritas Slovakia, the Deputy Head of Sečovce detention centre, the Detention Camp Director of the Medvedov detention centre, Migration Office in Slovakia.

Caritas came across some difficulties in obtaining the data, which are detailed below in the report. In short, it was difficult for the researcher to have enough time and privacy to conduct the interviews thoroughly, due to restrictions imposed by the detention centres. In addition, the detainees felt intimidated by the official nature of the study and preferred to tell their own stories. Finally, the lack of linguistic interpretation meant that it was hard to obtain rich and full answers from some detainees.

2. NATIONAL LEGAL OVERVIEW

The main law dealing with the detention of illegally staying third country nationals and asylum seekers in Slovakia is the 48/2002 Coll. Act of 13 December 2001 On Stay of Aliens and on Amendments and Modifications to some other Acts, which came into force on 15 December 2005.

2.1. Legal grounds for detention

Section 62 §1 of the Act on Stay of Aliens provides that a police officer may detain an alien for the purpose of executing an expulsion order or facilitating his/her removal in case of illegal entry or stay in national territory.

2.2. Legal grounds for the minimum age for detention

The law does not refer to a minimum age for detention.

2.3. Legal grounds for the detention order

Paragraph 4 of the said article provides that upon taking a person into custody, the police department shall immediately issue a detention order and place the alien in a facility. Where it is not possible to immediately determine the identity of the individual concerned, the police department shall attach any available evidence/information that will prevent mistaking this person for another person, to the decision on his/her arrest.

2.4. Legal grounds for judicial review of the detention order

Section 62 § 6 says that an arrested alien may file a remedy against the decision on the arrest with a court within 15 days from the delivery of the decision on the arrest.

2.5. Legal grounds for the right to appeal against the detention order, or to challenge detention

Paragraph 6 goes on to state that an arrested alien may file an appeal in court against the decision on the arrest, within 15 days from the delivery of the decision on the arrest. Filing of the appeal shall not have a suspensive effect.

2.6. Legal grounds for the right of information about the detention order and/or the reasons for detention

Section 63 provides that a police department informs detainees, immediately after their arrest, about the reasons for the arrest and on the possibility to examine the lawfulness of the decision on the arrest in a language that he or she understands.

2.7. Legal grounds for the duration of detention

Article 62 §3 provides that the illegally staying third country national may be deprived of his or her liberty only for as long as is necessary and, in any case, for not longer than 180 days.

2.8. Legal grounds for the provision of health care and the scope of health care benefits, and for the provision of social services

Article 68 §1 provides that detainees shall be obliged to undergo a medical examination as determined by a physician, including the necessary diagnostic and laboratory examination, vaccination and preventive measures determined by an authority for protection health. The law also lays down that, in cases where a detainee requires healthcare that cannot be provided within the detention centre, the authorities concerned shall ensure that such care is obtained in a medical establishment outside the facility. In cases where detainees deliberately damage their health they shall be obliged to reimburse the costs of the treatment and the costs occurred for supervision and transportation to the outside medical establishment.

2.9. Legal grounds for contact with the outside world

Articles 71 to 73 of the said Act provide the legal basis for detainees' contact with the outside world. Article 71 §1 provides that detainees may send written notices at their own expense. Article 72 regulates the detainees' access to visitors, providing that detainees shall be entitled to receive a visit from up to two persons, once every three weeks, for duration of 30 minutes. The facility's director may grant an exception in justified cases.

The law does not place any limits on visits from persons providing legal protection. Article 73 provides that detainees may receive a parcel of up to five kilograms containing items for personal use, once every two weeks. This limitation does not apply clothes parcels. Police shall check all items received at the centre. There is no limit on the receipt of financial gifts.

2.10. Legal grounds for the provision of legal aid

Article 72 - The law does not place any limits on visits from persons providing legal protection.

2.11. Legal grounds for the protection of persons with special needs

Article 67, which regulates placement of detainees, stipulates that when accommodating a detainee the authorities shall take into account the individual's age, health condition, family relations and religious, ethnical or national characteristics. Upon placement, the authorities managing the detention centre must ensure that the detainee is informed about where he/she has been placed, his/her rights and obligations related to the arrest and the internal policy of the facility in a language he/ she understands. The law stipulates that minors shall be placed separately from adults to whom they are not related.

Regarding family unity, the law provides that families may be placed together. Where the police authorities decide to detain family members separately, they must take into consideration whether the consequences of such separation are proportionate to the aim to be achieved.

2.12. Legal grounds for alternatives to detention

Unaccompanied minors are to be housed in a special residential centre, and a guardian must be appointed for them.

2.13. Legal grounds providing release from detention

Article 63(f) provides that a detainee should be released without delay, where the reasons for his/her arrest cease to exist, if a court orders release, or if the maximum time limit of 180 days has elapsed.

3. OVERVIEW OF THE NATIONAL DATA FINDINGS

3.1 Basic information

The majority of the detainees in Slovakia that were a part of the DEVAS sample were single males. The average age was 31, and they were from a range of countries, with the majority being from Vietnam or Pakistan. Other nationalities interviewed were Indians, Georgians and Ukrainians. Approximately one-third of the detainees were married.

The average length of detention was between one and two months. Around one quarter had been detained shortly after arrival in Slovakia, with the remaining people having spent a longer time in Slovakia. Some of the detainees had been in the country for many years. This was reflected in the fact that almost a third of the detainees conducted their interviews in Slovak.

3.2 Case awareness

The majority of detainees interviewed were applicants for international protection, with some of these having applied for asylum while in the detention centre. Around a third of detainees interviewed were illegally staying third country nationals who were awaiting deportation. The detainees reported being rather well informed, immediately after detention and in a language that he or she understood. Only one quarter said that they needed more information, and these people wanted to know what the result would be on their case, and when they would be released. One person wanted “a leaflet about my rights”. Most of the people who needed more information wanted it so they could plan their future.

3.3 Space within the detention centre

The detainees interviewed seemed to feel “ok” about their sleeping rooms, and only a few people expressed negative sentiments about the room. Similar answers were found when the detainees were asked about the general space in the centre. One person said: “It’s OK except for the bars”, showing perhaps that even if you have an adequate facility, the fact that it is a prison still causes distress. Most detainees did not report feeling overcrowded in the centres, but some said they would like to have a chance to be alone from time to time and to have more privacy.

3.4 Rules and routine

The detainees respected the routine, which they described as “breakfast – lunch – supper – walk”. Nevertheless they all reported that they would like to have many more outdoor activities.

3.5 Detention centre staff

Detainees reported being in contact with security staff (although one co-detainee said: “I am in daily contact with the ‘bars’”). The detainees reported that their interaction with the staff was good: “It’s ok” “they interact well with me”. Occasionally, problems with language barriers were mentioned, which caused a feeling of exclusion. Almost all the detainees reported that they felt that the staff supported their needs. Unfortunately, because of the short answers it was not possible get a thorough insight into why staff detainee relations were rather good.

3.6 Level of safety within the detention centre

Almost all the detainees reported feeling safe in the centre, and when asked why they felt safe, they replied that they felt well looked after and that it was safer than outside.

Only two people reported being mocked by others, one by a detainee and one by a policeman who was not very polite. Three people said they had been physically assaulted, and all by detainees during a quarrel. Three people had filed a complaint, and one had filed a successful complaint (this involved moving a detainee to another unit).

3.7 Activities within the detention centre

Almost all detainees reported that there were activities offered by the detention centre, and that they took part in them. Nearly all of them mentioned sport, particularly football or walks. When asked why they participated, the most common answer was because they enjoyed the activities. Almost all said they had access to books, telephone, TV, education, sports, spiritual/religious space and outdoor activities. They do not report having access to computers or the Internet.

When asked what activities the centre could reasonably provide that would improve their lives in detention, one-third of detainees simply said 'freedom', and that without this activities were irrelevant: "without freedom there is no positive impact." The other frequent requests were for computers and for more access to sports.

3.8 Medical issues

All the people interviewed said there were medical staff in the centres, and reported the presence of a doctor and nurse. Most reported having contact with medical staff once a week. Nearly all of the detainees said that they had had a medical exam upon arrival at the detention centre. However, almost half said that they did not have medical care in a language they understood, and they thought it could be solved by interpretation by co-detainees. This is a significant amount, signifying an underlying language problem that perhaps explains the problem of the short answers to the DEVAS interviews. Detainees reported that they were positive about the medical facilities provided, others were neutral, and some felt negative. Only 12% report having unmet medical needs.

One-fourth of detainees said that their physical health was negatively affected by being in detention, while the others said that they had not been affected. Of those who were affected negatively, half blamed the facilities (for example, diet), and others did not give a reason.

Half of the interviewees said that their mental health had been affected negatively by being in detention. Detainees reported that their mental health had dropped while in detention: 75% rated their mental health as 'very good' on arrival in detention, whereas only 45% rated their mental health as 'very good' at the time of the interview.

When asked for an explanation for this drop in mental health, some mentioned worries, others blamed health problems (including mental), some were worried about being separated from people on the outside, and some said that simply being locked up had caused their mental health to drop. No one mentioned living conditions.

NGO staff observed that the lack of duties and activities for the detainees seemed to lead to the decline in detainees' self-esteem and to depression.

3.9 Social interaction within the detention centre

The majority of detainees reported getting on positively with others. Only one in ten said that there were problems between detainees. Almost all of those questioned said that they had someone to trust in the detention centre, and interestingly they mention the staff of the centre, for example 'the advisor, policemen' rather than co-detainees. NGOs and staff noted that persons who could interact with co-detainees from their country of origin seemed to benefit from this and appeared less depressed.

3.10 Contact with the outside world

Most of those questioned had family in their country of origin, while around a half reported having friends and family in the host country.

The overwhelming majority reported that they stayed in contact with their friends and family by phone. Only a very small number said that they stayed in contact through visitors (this might be partly to do with the fact that they have been detained for a relatively short time). No one was able to stay in touch with family members through the Internet.

When asked for the best method of contact, the overwhelming majority said that it was telephone. However, only 61% said that they had sufficient access. This discrepancy is because many people answered 'mobile phone', which was not covered in the DEVAS questionnaire, and was not available to them at the centre.

Only around one in ten detainees had had family member to visit them, while one quarter had had a friend to visit. Almost all detainees had had a visit from the lawyer, and many reported having been visited by and NGO like Caritas or Good Will.

3.11 Conditions of detention and the family

Around one in five detainees had children outside the centre. Two women reported having children living with them in the centre. These two people said that their children had access to kindergarten and to recreational space. One raised concerns about the need for special baby food.

3.12 Conditions of detention and nutrition

Most of the detainees reported that the food in detention suited them: "I like the food very much, but I would like to have rice much more often." However, some detainees said that their appetite had gotten worse in detention. Most of the detainees said that they slept well, while one quarter reported having sleeping difficulties. These seemed to be related to the worries that people had in detention: "My problems, homesickness..." and "lack of freedom, problems" were echoed by a number of detainees.

3.13. Conditions of detention and the individual

When asked about top difficulties in detention, the first difficulty mentioned was the fact of being behind bars: 'being locked up' 'we are not free'. The second most frequent difficulty mentioned was missing people on the outside world: 'I miss my husband and family' "I am so far from my pregnant wife ...". A small minority (one in ten) mentioned living conditions as one of the main problems in detention: "I miss the food from my own country"; "I need a pen, I have to write"; "more outdoor activities"; "more cigarettes".

Almost all detainees felt that the beginning of detention had been the most difficult: "the first three months, it is better now, time is moving on". This may be because detainees know there is a fixed time limit of detention of six months, and therefore after a few months they know they are getting closer to the date that they must be released.

Approximately 80% of detainees reported that they did not know what the outcome of their detention would be, and less than one in ten reported knowing the exact date they would leave the centre. This was unsettling for the detainees: "It would be better to know"; "Nervous"; "It makes me very unhappy. I am not patient; I want to go home as soon as possible... Because of my mother... she is so sick."

Most detainees reported positive or neutral self-perceptions: "I see myself as a free person." "I see myself as a good man". Of the 20% who described themselves negatively, many concentrated on feeling like a criminal or prisoner: "I see myself... as a monkey in a zoo."

One in five detainees felt that they have special needs. Around half of these needs related to medical problems or being detained with children, while others related to separation from family, especially separation from children, needing religious guidance or extra activities. Many detainees point to "sick people" or "elderly people" as being vulnerable in detention. The remaining detainees were more apt to say that everyone in detention is in a very special situation with special needs: "Everybody here is vulnerable."

4. ANALYSIS OF THE DATA AND CENTRAL THEMES

The analysis of the DEVAS data from Slovakia posed some challenges. Although there were a relatively large number of interviews conducted, the answers were rather short and often did not reveal much about the point of view of the detainee. This could have been due to the fact that the interviewer, when conducting the interviews, was almost always watched over by detention centre staff or by a camera, which may have made detainees reluctant to open up. In addition, we found that many people were scared of 'paper', and would prefer to tell their stories rather than answer the questions. The time allocated to interviews was also very short, because of the strict regime of the centres. Another factor was that there was a lack of interpreters in the centres, meaning that it was hard to obtain rich answers, especially for those from China. Further, it was felt that some detainees did not like talking about their problems, as answering truthfully to some of the more personal questions might be seen by some detainees as admitting weakness.

Nevertheless, there are several important themes that arise from the data. Detainees generally reported positively about the facilities such as space, food, and activities. They also reported positively about staff relations and relationships between detainees. One possible reason for this is that the facilities have improved greatly after some investment by the EU, and that some of the detainees could remember the conditions in the previous detention facilities. Unfortunately, it is hard to tell whether positive opinions of the staff (or indeed other positive opinions of the living conditions) were influenced by the presence of staff during the interviews, and the fact that detainees were afraid of the 'paper' in the survey.

However, even if we take at face value the generally positive living conditions, detainees still report distress at being in a closed facility. For example, detainees reported that although activities were a good way to pass the time, they did not ameliorate the fact of being in detention. Similarly, when asked about the most difficult things about being in detention, simply being locked up was often mentioned as the most important thing. Being locked up was also seen a contributing factor to the perceived deterioration of mental health while in detention, marked by the fact that the number of those who rated their mental health as 'very good' dropped considerably during detention.

Other explanations to this drop in perceived mental health related to isolation from their friends and family. In fact, lack of communication with the outside world was also one of the top difficulties mentioned. The fact that mobile phones cannot be used led to isolation for some. Only 1/4 had received visitors from family or friends (although almost a half had family in the host country), which perhaps added to their sense of isolation. The one in five who reported having children outside the centre felt that this was a particular problem, and reported missing their families as one of their top difficulties.

Another cause for isolation within the detention centres seems to be language. This was made obvious by the difficulty Caritas had in finding interpreters for the DEVAS interviews. This can also be gleaned from the data collected: almost half of the detainees said that they don't have medical care in a language that they understand, and some mention that language barriers cause problem with staff members.

Detainees reported having relatively in depth knowledge about why they had been detained, and were also aware that there was a legal limit of six months on their detention. Perhaps this is a reason why some detainees in Slovakia seem to report managing detention with little effect to their mental health. However, lack of knowledge about specific departure date and the outcome of their detention (deportation or release) seemed to be a widespread problem, and one that was causing great distress.

5. CONCLUSIONS AND RECOMMENDATIONS

The data collected in Slovakia through the DEVAS study also sheds some light on who can be considered 'vulnerable' in detention. On the one hand, there are some factors that lead detainees with particular characteristics to be more vulnerable. As well as the classic vulnerable categories (such as women, those who are sick, elderly people) the data seems to bring out another group: those who are linguistically isolated. For those who face language barriers in the centre among staff and detainees, their situation is worsened by the fact that there seem to be few interpreters at the centre. Caritas even had problems communicating with these people for the purposes of DEVAS, and it can be assumed that this significantly affects their experience of detention and also their understanding of their legal situation.

Another group that can be identified are those detainees who have families, and in particular those who have children outside the centre, often far away in their country of origin. Again, this situation is made worse by the fact that the use of mobile phones – which were considered the best means of communication - was not permitted. Those with young children in the centre form another vulnerable group, but did not report specific problems in this survey.

Other causes of vulnerability that can be identified apply more generally. One factor that makes everybody in detention vulnerable is that simply being locked up seemed to cause significant stress to many detainees. Added to this, the uncertainty of exact release date and outcome of detention affected detainees' well being. In these cases, all detainees are equally vulnerable to these negative effects.

As regards recommendations, it can therefore be said that the use of detention as a restriction on the freedom of applicants for international protection on the grounds of their illegal entry is a mechanism that has a general negative impact. In spite of the very decent conditions within the detention facilities and the respectful and friendly manner of staff, it is clear that detention deprives the human being of liberty and is therefore intrinsically undesirable. Therefore, there is a strong need to look for alternatives to detention and ongoing improvements in the existing conditions.

In particular, in light of the DEVAS research and the observations of Caritas Slovakia, Caritas would like to make the following recommendations to the national authorities:

- To grant NGOs more access to detainees, in order to provide activities and accompaniment so as to diminish the negative experiences of detainees;
- To ensure the ongoing improvement of staff language skills, and to ensure that detention centres offer a reliable form of translation and interpretation. Detainees themselves might even benefit from language courses, which might diminish their level of social isolation, improve their ability to communicate with others and make beneficial use of the time that they must spend in detention;
- To provide for more outdoor activities so detainees do not stay closed within the interior of the centre for too long. Since many detainees view their detention as imprisonment, it would be beneficial to them if they had opportunities to be outdoors;
- To improve communication channels between detention centre staff and the government decision makers. Detention centre staff are very aware of what detainees experience and the impacts they live with in detention. As a result they are well placed to promote laws and conditions that improve protections for detainees;
- To accelerate asylum and return procedures, and the examination of the legality of the detention. Doing so would ensure that detention is implemented for the shortest period possible, and causes the least harm to the individual detainee;

- To transfer asylum seekers to open reception and residential facilities. This could be a part of a more comprehensive set of alternatives to detention that could positively impact the situations of vulnerable groups and those with special needs, such as: elderly people, those who are isolated (linguistically or otherwise) in the detention centre, mothers with children, and mentally ill and sick people;
- To enable access to personal mobile phones. Detainees often keep important data on their mobile phones, such as the telephone numbers of family and friends, or even NGOs and lawyers. Ensuring access to this potential rich source of support could dramatically reduce detainees' sense of isolation, and improve their ability to stay connected with loved ones and helpful persons.



NATIONAL REPORT: SLOVENIA

By: *Jesuit Refugee Service Slovenia*

1. INTRODUCTION

The DEVAS study was conducted in the only Centre for Foreigners in Postojna, Slovenia, between February and June 2009. Among the 26 detainees who were interviewed, eight were asylum seekers and the rest irregularly staying third country nationals. To better understand the reality of detention and to include the point of view of staff, JRS Slovenia also interviewed two social workers: one working in the detention centre, the other from the open reception centre in Ljubljana who comes regularly to visit the asylum seekers living in the detention centre. Another social worker was interviewed from the only NGO that visits the detention centre on a regular basis.

Any study has its limitations. In this case, most of the interviews were conducted with men. This was because there were few women in the detention centre. Having more interviews with females might have enriched the quality of the data that was collected. Another limitation was the lack of an interpretation/translation capacity. Although this did not pose a major problem, on occasion it was hard to catch the nuances of detainees' answers. Generally, the detainees were willing to dedicate their time to talk about their experiences in the detention centre. Only one person refused to take part in an interview. Some were more willing to talk openly than others. It depended not only on the type of person, but also on the time they had spent in the centre. In most cases, the longer the person had been in the centre, the more willingness they had to talk.

JRS Slovenia would like to acknowledge the Ministry of the Interior for giving us permission to conduct interviews in the detention centre²³⁶ in Postojna. Secondly, we would like to express our gratitude to all of those who responded to the questionnaires and generously gave their time so that we could better understand their reality in detention. In a special way our gratitude goes to all the detainees who revealed their lives and their vulnerabilities. We hope that the words, feelings, thoughts, and desires that they have communicated will help us toward better understating their view.

Finally, we would like to thank the Jesuit Refugee Service-Europe in Brussels for their constant help and assistance throughout the implementation of the DEVAS study.

2. NATIONAL LEGAL OVERVIEW²³⁷

2.1. Legal grounds for detention

The legal grounds for the detention of persons seeking international protection are found in Article 51 of the International Protection Act (IPA), which states that the movement of an international protection seeker (hereafter known as asylum seeker) can be temporarily limited on the grounds of: (1) establishing the identity of the applicant; (2) suspicion of misleading or abusing the asylum procedure; (3) preventing the threat to other persons' life or property; (4) preventing the spread of contagious diseases.

²³⁶ The official name is 'Centre for Foreigners' (*Centre za tujce*). There is only one such centre in Slovenia and it is run by the police. To know more about this detention centre, one can read the Jesuit Refugee Service (JRS) Regional Report "Civil society report on administrative detention of asylum seekers and illegally staying third country national in the 10 new member states of the European Union", Valetta, October 2007, 120-131.

²³⁷ JRS Slovenia wishes to thank Jerneja Cifer for writing this chapter.

Article 59 of the IPA (Dublin procedure) states that a competent authority may – until their transfer to the relevant state – accommodate the asylum seeker according to Article 51 in the Centre for Foreigners. Asylum seekers can be detained for three months in the detention centre. Their stay can be prolonged for one month.

The legal grounds for the detention of illegally staying third country nationals (also known as ‘aliens’) are based on Article 56 of Aliens Act. Regarding the detention of illegally staying third country nationals paragraph 1 of Article 56 of the Aliens Act provides that when a foreigner does not leave the state within the stipulated time limit or cannot be removed for any other reason, the police will order the accommodation of the foreigner in the detention centre or outside the centre until his or her removal from the state. The provisions of this Article apply to circumstances when the identity of a foreigner is not established. An alien can be detained in the detention centre for six months and their stay can be prolonged for another six months.

Neither the International Protection Act nor the Aliens Act provides a minimum age for detention.

2.2. Legal grounds for judicial review of the detention order

Paragraph 4 of Article 51 of IPA gives the asylum seeker the right to appeal against the detention order to the Administrative Court within three days from the receipt of the detention order.

Illegally staying third country nationals can appeal to the Minister of Interior and to the Administrative Court. Article 58 of the Aliens Act states that the police are the authority to order the accommodation of an alien in the detention centre, or under strict police surveillance. An alien can appeal to the Minister of Interior within eight days from the receipt of the written copy of the order on accommodation. The appeal does not prevent the execution of the order. The Minister decides on the appeal in eight days. Appeal to the Administrative Court is possible against the Minister's decision.

2.3. Legal grounds for the right of appeal against the detention order or to challenge detention

An alien can appeal to the Minister of Interior within eight days from the receipt of the written copy of an order on accommodation. The Ministry of the Interior then decides whether the detention order remains valid.

2.4. Legal grounds for the right of information about the detention order and/or the reasons for detention

The asylum seeker has the right to be informed about their detention and the reasons for his/her detention. The person must be informed orally and in writing. The Ministry of the Interior issues the detention order. The written copy of the order is issued within 48 hours of the oral issuing of the detention order as it is stated in paragraph 3 of Article 51 of the IPA.

Illegally staying third country nationals have the right to be informed about the reasons for the detention. The person is informed in writing as stated in the Article 58 of the Aliens Act.

2.5. Legal grounds for the duration of detention

The legal grounds for the duration of detention of an asylum are stated in paragraph 3 of Article 51 of the IPA. The detention may stay in effect as long as the grounds for it remain, but no longer than three months. If the grounds for detention still remain valid after the three month period, it can be extended for one month more.

Illegally staying third country nationals cannot be detained for more than six months. Paragraph 4 of Article 58 of the Aliens Act stipulates that, if due to objective reasons, removal is not possible within six months, detention can be prolonged for a further six months if it is expected that removal will be implemented during this extension.

2.6. Legal grounds for the provision of health care and the scope of health care benefits, and for the provision of social services

Detained asylum seekers have the right to health care as is prescribed in Article 84 of the IPA. But the scope of health care is restricted to care for emergencies, for women and for essential treatment of a disease. A person with special needs has the right to additional health care services, if approved by a special commission.

Illegally staying third country nationals also have the right to health care. The Health Insurance Act (Article 7) states that the state budget provides emergency health care for people of unknown residence and for aliens from countries that do not have bilateral relations with Slovenia.

Article 87 of the IPA lays down provisions for financial, cultural and psychosocial assistance, child day-care for children and educational activities. For illegally staying third country nationals, psychosocial assistance is provided in cases when it is established by a medical examination that one's physical health or psychological condition requires such assistance. The Aliens Act does not prescribe any obligatory psychological assistance for persons with special needs.

2.7. Legal grounds for contact with the outside world

On the basis of an agreement between NGOs and the police, NGOs are authorised to contact the detained asylum seeker or alien. Lawyers and representatives of UNHCR can also have contact with detainees. In the Centre for Foreigners there are visiting hours when relatives and others can visit the asylum seeker or alien. The house rules of the Centre for Foreigners determine the time and the length the detainees can be visited. The visits occur in special rooms intended for this purpose.

2.8. Legal grounds for the provision of legal aid

Detained asylum seekers have the right to free legal aid in procedures (Article 78 of IPA) before the Administrative and Supreme Court. The Aliens Act does not provide for free legal aid for aliens. Article 13 of IPA requires that the Minister of the Interior appoint refugee counsellors to provide legal support and aid to asylum seekers who appear before the Administrative or Supreme Court.

2.9. Legal grounds for the protection of persons with special needs

Article 15 of the IPA states that special care is provided for vulnerable people with special needs, especially for accompanied and unaccompanied minors, disabled and elderly people, pregnant women, single parents with children, victims of torture and other forms of physical, psychological and sexual abuse.

Article 56 of the Aliens Act states that aliens who cannot be accommodated in the detention centre due to special reasons or needs can be accommodated in other social-protection institutions with the agreement of the Centre for Foreigners. Paragraph 1 of Article 60 of the Aliens Act states that an alien minor who entered Slovenia illegally and who was not accompanied by his/her parents or legal representatives should be accommodated in a special unit within the detention centre. In these cases the police must inform the Centre for Social work, who appoints a legal guardian for the minor.

2.10. Legal grounds for providing release from detention

Paragraph 1 of Article 61 of the Aliens Act provides that the accommodation of an alien in the detention centre will be terminated when the reasons for such accommodation no longer exist or when the purpose of such accommodation

is achieved. Paragraph 3 of the same Article provides that accommodation in the centre may be brought to an end on the request of the alien, if the police establish that the conditions for alternative measures are provided.

3. OVERVIEW OF NATIONAL DATA FINDINGS

3.1. Basic Information

The overwhelming majority of the detainees interviewed are male and over half are single. Less than one in five are married, while slightly more than that are divorced. The average age is approximately 30.

The average length of time that people had been detained was about three months, although some had been there for more than six months. One person had been there for more than a year²³⁸. The adults were situated in one unit of the centre, while the minors were in a separate unit with families.

Around half of those interviewed come from countries that were part of the former Yugoslavia. A number of others come from Asia, with a few from Central America and Africa.²³⁹

3.2 Case Awareness

Most of the detainees reported that they had been informed about their situation through official procedures, or upon arrival to the centre. On average detainees reported being only somewhat informed about their case. The majority of detainees said that they needed more information about the duration of detention; some reported needing more information about the reasons for the detention, and others on international protection procedures.

The detention staff stated that while people were informed about their legal status, this was sometimes not enough because they did not understand the law and its meaning. Oftentimes NGO representatives fill this gap in knowledge, as was confirmed by the interview with the social worker from the Jesuit Refugee Service (JRS).

Asylum seekers tend to be better informed, because they receive assistance from the staff member coming from the Asylum home in Ljubljana, who comes to the detention centre twice per week.

When asked why they needed information, many detainees explained frustration at being behind bars, a desire to get on with their future, whether it be to return home, to go to another country or remain in Slovenia. A number of detainees said that detention would be easier to bear if they had more information: "We feel better if we know the time to get out ... for my mental and physical well-being."

3.3 Space within the detention centre, rules and routine

The structure of the detention and the space within it has a very important impact on detainees' lives. The majority of detainees reported feeling positively about their bedroom and were content that the centre is not over crowded, and that they have somewhere to be alone. However, most detainees reacted negatively when asked about the centre space in general. Their negative feelings seem to be more connected to their deprivation of liberty, rather than the facilities *per se*. One detainee declared: "It is like in a prison and I am not free to move". Others mention how this

²³⁸ The person was in the centre for 13 months. This is exceptional, because towards the end of his long stay in the centre he asked for asylum. Otherwise, the time limit in the centre is one year.

²³⁹ The numbers of people who were in the Centre for Foreigners has fell in the last five years. The peak was in the year 1999 with 15.559 detainees who lived in the centre, while since 2007 until now the number has been under 1000. The last official numbers available are for the year 2009, which reveals that only 408 were in the Centre. See: <http://www.policija.si/index.php/generalna-policijska-uprava/246>, 22.2. 2010.

affects their state of mind: “How should I feel? I am depressed, humiliated by being here”. It is clear from the answers that this issue places an especially heavy burden on those who are detained for the first time in a closed facility.

As for rules, the detainees reported that they are respected but cannot be changed. Many compare the rules and routine to that of a prison. But the detention centre staff notes that on occasion detainees are able to influence the routine and rules, such as when they requested to reschedule daily dinner times.

3.4. Detention Centre Staff

Detainees maintain regular contacts with administrative, security, medical and social services staff on a frequent and daily basis. Almost 90% of detainees rate their typical interactions with staff either positively or neutrally. Persons who felt that their interactions with staff were negative put ethnic discrimination and the inability to communicate in a common language forth as reasons.

Over 70% of detainees felt that the staff supported their general needs; a smaller number felt that the staff left needs unsupported. In their answers, none of the detainees reported being mocked or physically assaulted by the detention staff. The social worker within the detention confirms these reports, and remarks that the staff acts professionally toward detainees.

3.5. Safety

Most detainees feel quite safe in the detention centre. In fact, many attributed their safety to the presence of police and security cameras. In some way this gives detainees a notion of the centre as a place where rules may be strict, but that they are at least observed.

3.6. Activities within the detention centre

In the centre detainees have the opportunity to engage in several kinds of sports and cultural activities. The majority of detainees have a lot of spare time, and as a consequence they report to enjoy participating in sports activities. The reasons given for taking part were for personal satisfaction, or for stress relief, with several people saying that they take part in order to take their mind off their situation or their worries. Detainees reported having access to books, telephone, television, and religious space (a room for silence), but they do not report access computers, the Internet, mobile phones or to educational opportunities.

When asked to give an indication of additional activities they would want the detention centre to provide, many did not answer; those who did asked for television channels from their home country, access to Internet and books in their own language. A few detainees simply said that to get out as quickly as possible would be the only way to positively impact their lives.

3.7. Medical issues

Almost all detainees said that they have regular access to nurses, doctors, and when necessary also psychiatrists. Most describe the level of medical care in positive terms, and did not report a need for additional care. All the detainees had had a medical examination upon arrival.

Despite this, 88% of detainees said that their physical health has been negatively affected in detention. Migraines, body pain, skin problems and gastrointestinal discomfort were widely reported. A number of detainees attribute their poor physical health to their situation of detainment, instead of the quality of medical care – “seeing these walls”, according to one detainee: “Yes, detention for more than one year impacted my health physically, mentally and conditionally. I have lost 13 kilos in a year.”

Nearly all detainees feel that detention has had a negative impact on their mental health as well. Sadness, confusion, feelings of anger, tension, stress, and sometimes even suicidal attempts were described by a large number of detainees. When asked why, most people again point to the simple fact of being detained. Others said that being apart from family members was affecting them: “Yes, being here without family support. I miss nephews, my daughter.”

3.8. Social interaction within the detention centre

Over 70% of detainees reported their interaction with others in the centre as being generally good. A small number specifically reported getting along well with those from their own language groups. Many even said that they could confide in their fellow co-detainees whenever problems arise. But 40% of detainees said that they had witnessed problems between detainees. One group of detainees describes social tensions as running on ethnic and cultural lines: “Detainees from ex-Yugoslavia tend to stay together in a group. There are no activities provided to bring together the different cultural groups.” Another group of detainees describe problems as being due to the stress of living in detention, and the resulting uncertainty of people’s situations. These detainees described aggressive behaviour from those who have been detained for a long time, and tension between those that are asylum seekers and those who are about to be deported. The detention staff confirms these viewpoints by saying that one of the biggest difficulties for detainees is “living in a different community with different people”.

3.9. ‘Contact with the outside world’

Detainees may use a public telephone that is available for 24 hours per day to contact persons in the ‘outside world’. While they expressed that the telephone is indeed the best way for them to communicate, a small minority said that they would like to have Internet access, which is unavailable in the centre. Other than the telephone, only a small number of detainees reported to have received visits in the centre. In fact, many comment that the staff from JRS Slovenia are the only ones who frequently visit them.

3.10. Conditions of detention and nutrition

The greater percentage of detainees did not report having any problems with the food provided in the detention centre. A smaller number felt more negatively, often saying that they missed the food from their own country: “I am not used to traditional Slovenian food: too much cabbage served, and it is always the same stuff, very predictable”. Others said that it was of poor quality or lacked variety. The detention staff acknowledged these views during their interview, but insisted that the staff tries their best, “but you can not satisfy everybody’s needs”.

Almost 70% of detainees describe experiencing changes in their appetite during the course of their detention; many of these said that they had lost their appetite. These impacts generally make detainees feel worse about their situation.

3.11. Conditions of detention and the individual

Half of the detainees reported not sleeping well at night. The stress of uncertainty was put forth as a principal reason: “When will I go out? My life – what will I do?” Some were missing their families: “I want to see my new born baby, my wife”.

The mere situation of detainment, according to detainees, is the hardest difficulty to bear. Even if conditions are suitable, the curtailment of their freedom and the uncertainty of their circumstances deeply affect detainees’ personal conditions. Being apart from their loved ones, and not knowing the outcome of their detention add to these existing difficulties. All the time spent in detention, and the resultant stress that is experienced, forced people to think critically

about their situations: “Thinking about my life. I want to go home after years of being in Europe and not making enough money.”

Through the interviews many detainees pointed to, in different ways, the central crux of their problem: “The plan to reach my destination country was interrupted by staying in the detention centre in Slovenia. It is not easy. My friends are waiting for me elsewhere”. Some detainees find time to reflect about their lives and to plan what to do next. However, with more days, weeks and months of the detainees staying in the centre, over three quarters of those interviewed said their lives in the centre became even more difficult. “Getting worse, living without life perspective is difficult”.

Detention centre staff confirmed the difficulties that detainees experienced, adding that “to reconcile with the decision to stay longer” in detention has an especially negative affect on their personal condition.

The vast majority of detainees expressed that their difficulties worsen as the length of their detention endures. Nearly all felt that every day was just as difficult as the next.

These difficulties are compounded by the fact that 88% cannot say what the outcome of their detention will be. The majority could not even say when they would be released from detention. Not knowing the date of departure or outcome of the detention makes many feel very anxious and stressful.

As a consequence, many detainees feel quite negative about themselves, comparing their situation to that of a criminal: “Being in a prison even if I did not do anything criminal”, is an oft-repeated sentiment among detainees. Another says he is “miserable, being here in a closed structure for the first time in my life.” As part of this, many display a frustration with their perceived lack of rights and bad treatment by the state: “As the victims of violence. The judge said we would be free within 48 hours, but now we have been here 40 days.” Nearly all detainees said that being in detention had impacted their self-perception negatively, saying that they had lost confidence and self-esteem: “it degrades me”.

When asking to point out others in the centre that might be vulnerable, most detainees identified persons in prolonged detention: “Some are here for many months; I do not know how they have survived”. People that cannot return to their respective countries, who do not share a common language with staff or co-detainees and those who are informed about their respective cases were additionally identified as being vulnerable in detention. Only one person pointed to elderly detainees as being vulnerable.

4. ANALYSIS OF THE DATA AND CENTRAL THEMES

4.1. Duration of detention

The data from the analysis indicates that the average time of a person in the detention centre is 3.39 months. This finding obscures the reality of *who* is subjected to prolonged detention. Detainees from southeast Europe²⁴⁰ are usually sent expelled quite easily and quickly. This is because the national administrative authorities of these countries collaborate reasonably with each other – perhaps as a consequence of their recent history as having belonged to one country (Yugoslavia). Moreover, experience shows that the countries of southeast Europe are quick to portray themselves as managing migration flows well.

²⁴⁰ Since 19th of December 2009 citizens from southeast European countries such as Serbia, Macedonia, and Montenegro can travel easier to EU as they no longer need an entry visa.

The situation is far different for detainees coming from India, Pakistan, and especially Afghanistan²⁴¹; for these persons it is very hard to get some (or any) documents and official information. As a result, many persons in these situations are forced to stay for much longer than three months in the detention centre; sometimes even longer than six months. The Slovenian Aliens Act mandates the police to release such persons after a year of detainment, even if the person cannot be returned due to a lack of documents or proof of identify. Thus we see that the duration of detention does not similarly apply to each detainee's circumstances.

The research indicates that detainees are very sensitive to the duration of their detention. Many detainees, especially if they are men, feel very ashamed by their situation in detention. Some even begin to feel desperate when they realize they have little or no influence²⁴² on their case.

Duration of detention shows itself to be a crucial factor of vulnerability. The physical and mental health of detainees, already impacted within the first weeks and month of detention, continues to deteriorate the longer they stay in the centre. The duration of detention is linked to how detainees perceive themselves, and how they are able to manage their own situation, because the longer they stay in detention, the weaker they become.

4.2. Deterioration of Mental Health

The DEVAS study shows that detention has a deteriorative effect on detainees' mental health. Detainees (both irregular migrants and asylum seekers) lack enough information about the *reasons* and *length* for their detention. This lack in understanding may be due to detainees' inability to really comprehend their legal situations, as the legal intricacies of detention and there procedures therein can be complex for people. "Why should someone be locked here? Only because one is without a (valid) document?" is a common complaint made by detainees, which reflects the fundamental disparity between what they want and need for their lives, and the exigencies of the Slovenian state. Detention, therefore, is perceived as a punishment; and one for which no wrong was done: "I am not a criminal. I did not commit any crime", exclaimed many detainees. The sense of being punished for having committed no wrong places a heavy burden on detainees' mental health, because it deeply impacts their the way they perceive themselves and the expectations they had for their lives.

It is even harder for those who in a closed detention centre for the first time, as they are not used to its environment. The tough living conditions and strict rules and routine pose a great psychological burden on these detainees. They are confined to a small and very specific world with people whom the detainee did not choose to spend their time with. After the initial shock of the detention conditions and the new situation on which one has little influence, the detainee has to come to terms with not being able to reach Europe to work in order to support their family in their home country. Knowing that they are stuck for the time being in the centre with no or little prospects for their future lives, detainees become aggressive, depressed and loose hope. Detainees thus become very vulnerable and susceptible to mental health problems, often needing medicine in to sleep, to calm down and to reduce stress. Their mental health deteriorates further as their stay in the centre becomes longer and the prospect of release does appear not on the horizon.

The mental health consequences of detention become even more acute when a detainee must return to their country of origin. The DEVAS research shows that it is often the case that detainees deeply regret that they must return, especially because they were unable to work in Europe as a result of being 'stuck' in detention. Going back home means facing a situation of unfulfilled expectations. These issues place an especially heavy burden on detainees.

²⁴¹ In the centre there was a person who wanted to go home to Afghanistan. The detention staff arranged a meeting with the Afghan Embassy. But did not want to recognize this person, even if he declared he was from Afghanistan and spoke the native language.

²⁴² The question of detainees influencing or improving their case has two important aspects. The cooperation of a detainee with the national authorities is crucial, especially if they do not have the documents to prove their country of origin, so that the authorities can receive information about their identity. The other important aspect is the response from the country of origin of the detainee to the Slovenia authorities. In some cases it takes a lot of time – even many weeks or months – for the country of origin to transmit the necessary documents. In rare cases, it happens that it turns out to be impossible to obtain these documents.

Added to this are the physical consequences of poor mental health. The loss of appetite, the inability to sleep and the loss of weight are all intricately linked to the person's state of mind.

4.3. Inter-personal issues

Inter-personal relationships are also affected by deteriorating mental health. Almost half of those interviewed mentioned problems between detainees, some of these specifically mentioning problems from the stress of being in detention, as well as the difficulties associated in being in a confined space with people of different cultural backgrounds. The issues that are present in almost every detainee's situation, unfulfilled expectations, self-uncertainty and damaged self-perception, all influence the relationships among the detainees and also with the staff. Prolonged detention worsens interactions between detainees.

The experience of JRS Slovenia shows that helping detainees to solve problems in the detention centre in a manner that aims to respect all cultures and backgrounds brings benefits. But this is also a challenge because detainees are in very vulnerable situations, making it hard for many to see the needs of others.

4.4. 'Surviving' in the detention centre

Out of the three themes described above, which are linked with the vulnerability of people, a fourth one is related: how to 'survive' in the centre. In other words, the question is how to reduce people's vulnerability to the adversities of detention.

The detention centre in Postonja provides different activities, of which almost all are related to sports. Detainees can watch a variety of television channels, receive visits from the NGOs, UNHCR and lawyers, and make and receive telephone calls, which is very important. But they cannot use computers or have access to the Internet to be more informed more about their own countries or to receive and send personal information. In the centre there is a room for silence to serve the spiritual needs of the detainees. It is of great benefit for these people. The spiritual dimension is always a source of hope and comfort for many stressful situations in the detention centre. Some prefer to pray also in their own bedrooms.

Besides sports, there are other social and cultural activities of great help to detainees. In collaboration with detention centre staff, JRS Slovenia organises a variety of activities that aim to stimulate inter-cultural interest among detainees. These practices show that allowing detainees opportunities to make the best use of their time while in detention goes a long way towards reducing their vulnerability.

4. CONCLUSIONS AND RECOMMENDATIONS

JRS Slovenia considers it a great privilege to have had access to detainees through the DEVAS study, and also by the professionalism shown by the police, social workers, medical staff and the others involved who work with the detainees. As with any situation, improvements can always be made.

The data indicates that the duration of detention is one of the major factors that influence detainees' level of vulnerability. The study revealed that the mental and physical health of detainees deteriorates as a result of the shock of detention and the living conditions that are inherent within its environment. After adjusting to detention, detainees must then confront themselves with expectations that have been left unfulfilled because of their detention, and their inability to influence their outcome in any other way. Detainees in these situations begin to worry about themselves, their families and their future. All of this makes for a very heavy burden to bear.

It is clear that detention should be used only in the very last resort. The negative consequences that it brings means that it should be avoided whenever possible. All non-coercive alternatives to detention should be explored before a person is considered for detention.

If detention cannot be avoided, then its harmful effects should be minimised to the highest extent possible, and its duration should be for the shortest time as possible. It is therefore important to holistically assess the range of factors that each person carries with him or herself, in order to identify special needs and vulnerabilities from the outset, so as to prevent the person from entering into the circle of degradation that is inherent within detention. The longer a person stays in the detention centre, the harder their lives become. This is why detention must only be used as long as it is strictly necessary and proportional to an individual's situation. The current limit of one year, as laid down in the Aliens Law, is far too long.

The DEVAS research permits JRS Slovenia to issue further recommendations to the national authorities:

- *Cultural mediators and psychologists should be made readily available to detainees.* Psychologists can help detainees to cope with the most negative mental health consequences of detention; and they can work to identify early signs of vulnerability and special need. Cultural mediators can work to reduce conflicts among detainees, and to engage them in activities that make proper use of the time that they spend in the detention centre. The atmosphere in the centre would be better and easier for the detainees as a result, and also for those who work there. NGOs in Slovenia should take an active role in creating meaningful and substantial activities for detainees.
- *More involvement of NGO's with creative and other workshops in this centre.* Through these workshops one can help a detainee to use better their time in the centre. The more a detainee is involved with activities, the less the detention conditions will have a negative impact on the detainee. For this reason even the detention staff will have fewer problems with detainees.
- *Detention centre staff should take part in intercultural and psychosocial training workshops.* Staff participation in workshops dealing with inter-cultural issues, religious dialogue, psychosocial coping skills and problem solving techniques, as well as those that identify signs of vulnerability, can all positively impact the level of interaction between staff and detainees. The manner in which staff interacts with detainees can impact their level of vulnerability to the adversities of detention – especially if such interactions are supportive. Similarly, trainings on legal issues commonly found in detainees' situations might better prepare the staff to meet the needs of persons in detention.



NATIONAL REPORT: SPAIN

By: Spanish Commission for Refugees (CEAR)

1. INTRODUCTION

CEAR interviewed detainees in three immigrant detention centres: Aluche in Madrid, Capuchinos in Málaga and Zapadores in Valencia. CEAR received authorisation from the Ministry for Home Affairs through the Secretary of State for Security Matters, who issued the corresponding instructions to the Foreign Persons and Border Controls Office, which is attached to the State Police Department. A team was brought together consisting of around 40 people (lawyers, doctors, psychiatrists, anthropologists, psychologists, translators, mediators and back-up volunteers) from different social organisations (CEAR, Community Action Group, Médicos del Mundo - Spain, Pueblos Unidos).

The team conducted 107 in-depth interviews with detainees (39 in Madrid, 33 in Malaga and 35 in Valencia). However, since most of the interviews had to be translated into English, only 52 could be finally included in the central DEVAS database; and this report is based on those 52 interviews. The team also conducted 25 interviews with staff and administrators working at the centres, as well as interviews with the director and/or head of security at each centre. There were no interviews done with NGOs, because none were allowed to enter the centres at the time of the study.

2. NATIONAL LEGAL OVERVIEW

2.1 Legal grounds for detention

The regulations concerning the detention of migrants in Spain are based on *Organic Law 4/2000 of 11 January on rights and obligations of aliens in Spain and their social integration*.²⁴³ Non-citizens can be detained by the national authorities for up to 72 hours before a judge authorises their placement in an officially designated detention centre. These centres cannot function as prisons.

Migrants can be detained for the following reasons:

- For the purpose of expulsion from the territory for violations listed under Articles 53 and 54 of Organic Law 4/2000, such as being in the territory without proper documentation and authorisation, posing a threat to public order or taking part in illegal immigration.
- When a judge orders detention in cases where the Spanish authorities cannot remove a migrant within 72 hours.
- When a migrant does not leave the country within the prescribed time limit after being issued a deportation order.

²⁴³ Reformed by organic law 11/2003 of 29 September and organic law 14/2003 of 20 November; Royal Decree 2393/2004 of 30 December, of implementation of organic law 4/2000 of 11 January on rights and freedoms of foreigners in Spain and their social integration; Ministerial order of 22 of February 1999 on functioning norms and internal procedures of foreigners in detention centre.

2.2 Legal grounds for the minimum age for detention

Minors cannot be placed in detention centres. They should be sent to the competent services of Protection of Minors. Should a judge authorise it, the minor could be sent to an internment centre if his or her parents or guardians are also in there, and request to keep the family together; the unity and intimacy of the family must be preserved in these cases.

2.3. Legal grounds for the detention order

The Centres of Internment of Foreigners (CIEs) were firstly enshrined in *Organic Law 7/1985 of 1 July, On Rights And Freedoms Of The Foreigners In Spain*. Article 26.2 enshrines the "possibility of the judicial authority to order the preventive or cautionary entrance of foreigners engaged in specific expulsion causes, in centres with no penitentiary character, while their procedure is being substantiated."

Organic Law 4/2000 of 11 January on the rights and obligations of foreigners in Spain and their social integration. Modified by: Organic Law 8/2000, of December 22; Organic Law 11/2003, of September 29 and by the Organic Law 14/2003, of November 20.

Article 62. Entrance in internment centres

1. Once the sanction procedure has started due to the causes included in paragraphs a) and b) of section 1 of the article 54, as well as a), d) and f) of article 53, by which the expulsion from Spanish territory can be proposed, the instructor could request to the competent judicial authority the entrance in an Internment Centre of irregular alien while the sanction is taking place, but without having to wait for the issuance of the expulsion order for the detention to take place.

The judge, previous audience of the interested person, will decide by means of motivated sentence, attending different circumstances and, especially, the fact that the foreigner lacks domicile or documentation, as well as the existence of previous incriminating sentences or administrative sanctions and/or other pending criminal or administrative procedures (this section has been modified by the article 2º Four of the Organic Law 11/2003, of September 29).

2. The internment will stay for the minimum time necessary for the legal procedure, and in no case can exceed forty days, neither to order a new internment for anyone by the same causes of a previous internment. The judicial sentence that authorizes the procedure, assisting to the circumstances in each case, can fix a maximum period of duration inferior to the one mentioned.

3. The opening of a file of expulsion, the precautionary measures of detention and internment and the final resolution will be communicated to the Ministry of Foreign Affairs and the embassy or consulate of their country.

Organic Law 4/2000 of 11 January on the rights and obligations of foreigners in Spain and their social integration. Modified by: Organic Law 8/2000, of December 22; Organic Law 11/2003, of September 29 and by the Organic Law 14/2003, of November 20.

Chapter VI

Centres of Internment of Foreigners

Article 153. Centres of Internment of Foreigners

1. The Judge of Instruction of the place where the foreigner has been detained, at the request of instructor of the proceedings, the responsible for the foreigners unit on of the National Police before the detainee is presented, or the governmental authority that for itself or for their agents had decided the detention, in the term of 72 hours from the detention could authorize his/her entrance in centres of internment of foreigners. The Centre will not have a penitentiary character, in the cases referred the section 2 below:

2. The internment of foreigners will be ordered only when any of the following situations occurs:

a) That the person has been detained for being included in some of the expulsion situations of the paragraphs a) and b) of the section 1 of the article 54, as well as paragraphs a), d) and f) of article 53 of Organic Law 4/2000, reformed by Organic Law 8/2000.

b) That resolution of return has been issued and it cannot be implemented within the term of 72 hours, when the judicial authority decides the internment

c) When an Agreement of Return has been issued in accordance with this Regulation.

d) That a resolution of expulsion has been issued and the foreigner has not abandoned the national territory within the timeframe given for it.

3. The foreigner's entrance in a centre of non-penitentiary internment of character won't be able to be prolonged for more time of the indispensable for the practice of the expulsion. The governmental authority should proceed to carry out the necessary measures for obtaining the documentation that was necessary at the shortest possible time.

4. The detention of a foreigner with the purpose of being expelled will be communicated to the competent Consulate, to which the information on the foreigner's identity and the internment measure will be provided. This communication will go to the Ministry of Foreign Affairs and Cooperation when it has not been possible to notify to the Consulate or when there is no Consulate of the foreigner national in Spain. The authorities will communicate the internment to the foreigner's relatives or other people in Spain, upon his/her request.

6. During the time of internment, the foreigner will be submitted to the jurisdictional body that ordered his/her internment. The governmental authority must communicate to this body any situation that may emerge in relation to the foreigner's internment.

7. People admitted in centres of a non-penitentiary character will enjoy the rights which are not affected by the interment measure, especially in articles 62 bis and 62 quarter of Organic Law 4/2000, of 11 January.

Likewise, they will have to comply with the obligations emerging from the internment situation in the conditions established in Organic Law 4/2000 of 11 January, and the norms for its implementation.

2.4. Legal grounds for judicial review of the detention order

OM of 22 Of February 1999. Article 2.2. Judicial Review

During his/her stay in the Centre, the foreigner will be under the control of the judicial authority that ordered the measure, who will be informed of any circumstance of interest that may occur in the centre. This authority will verify that the fundamental rights of foreigners in the centres are respected, *ex officio*, at the request of the Prosecutor's Office or the affected person

2.5. Legal grounds for the right of appeal against the detention order, or to challenge detention

Criminal Procedure Law (From Official Journal nº 260 of 17 September 1882 to Official Journal 283 of 10 October 1882) Modified by Organic Laws (...), 18/2006 (Official State Journal nº 134, of 6 June 2006).

Article 216

Against decisions of the Instruction Judge could be lodged the appeal mechanisms of reform, appellation and complaint.

Article 219

The reform and appellation appeals will be lodged before the same Judge that would have given the decision.

The appeal of complaint would be lodged before the competent superior Court.

Criminal Procedure Law (From Official Journal nº 260 of 17 September 1882 to Official Journal 283 of 10 October 1882) Modified by Organic Laws (...), 18/2006 (Official State Journal nº 134, of 6 June 2006).

Article 222

The appellation appeal could not be lodged but after having being lodged the one of reform; but it could also be lodged both appeals in the same written document, in which case the a

2.6. Legal grounds for the right of information about the detention order and/or the reasons for detention

Organic Law 14/2003, of November 20 that reforms L.O 4/2000.

Article 62.1 quarter. Information and Requests.

When entering the internment centre, foreigners will receive written information on their rights and obligations, issues or general organization, norms of the functioning of the Centre, the disciplinary norms and the means to lodge requests and complaints. The information will be provided in a language that they understand.

2.7. Legal grounds for the duration of detention

At the moment of the study the maximum duration of internment could not exceed 40 days. Should the expulsion of the foreigner be proven not to be possible within that that time, authorities should request his/her release prior to this date. A recent reform just approved by the Spanish Parliament has increased the maximum duration to 60 days.

2.8. Legal grounds for the provision of health care and the scope of health care benefits, and for the provision of social services

Royal Decree 2393/2004, of 30 of December

Article 154.

Health assistance and social services that is provided in these Centres could be delegated by the Interior Ministry with other ministries or public or private non profit entities, charging the costs of assistance to the pre-established budget lines for that purpose.

Ministerial Order Of 22 Of February 1999 On Functioning Norms And Internal Procedures Of Aliens Detention Centres Article 12. Health Assistance Service

1. In each centre there will be a Health Service under the responsibility of a medical doctor who will be assisted by a professional nurse. Specialised personnel of the National Police Force will fulfil those positions.

2. In order to attend the need of foreigners to be attended in a hospital as well as specialised medical assistance, the necessary agreements could be made with hospitals and specialized clinics near to the interment centre.

3. There will be function of the Health Service, besides medical and pharmaceutical assistance of the foreigners, the inspection of the hygienic system. The Health service should inform and propose the direction of the centre the necessary actions, in relation to the preparation and distribution of the food that would be appropriate for a normal diet (LO 4/2000).

LO 4/2000

Article 62.bis. Rights of the interned foreigners

To receive health adequate health assistance and being assisted by the social services of the centre.

2.9. Legal grounds for contact with the outside world

LO 4/2000. Article 62 bis. Rights of the interned foreigners

Foreigners will have the following rights: (...)

d) To receive adequate health and sanitary assistance and being assisted by the social services of the centre.

RD 1293 of 30 de December. Article 154. Competence

6. Health assistance and social services that is provided in these centres could be delegated by the Interior Ministry with other ministries or public or private non profit entities, charging the costs of assistance to the pre-established budget lines for that purpose.

Ministerial Order Of 22 Of February 1999 On Functioning Norms And Internal Procedures Of Aliens Detention Centres.

Article 13. Social assistance services

1. The centres will have the appropriate social assistance services for the foreigners assisted by social workers under the direct supervision of the Director of the centre to who they will present their plans and projects for action.

2. The social services that will be facilitated in the centres could be delegated to public entities of non governmental organizations or other no profit organizations according to article 6.

3. Social assistance will have the purpose of addressing the problems that have emerged to the foreigners in the internment centres, and if appropriate to their families, as a consequence of their internment in the centre, especially with regards to interpretation services, family relations with other countries or support in their paper work.

2.10. Legal grounds for the provision of legal aid

LO 4/2000. Article 62.bis Rights and obligations of the interned foreigners

The foreigners under conditions of internment will have the following rights:

f) To be assisted by a lawyer that will be provided ex-officio (free of charge) if necessary, and to privately communicate with him/her, even after regular visiting schedule if the urgency of the case so require.

2.11. Legal grounds for the protection of persons with special needs

No norm addresses this issue.

2.12. Legal grounds for alternatives to detention

There are no alternatives to detention laid down in law.

2.13. Legal grounds for providing release from detention

Should the expulsion of the foreigner be proven not to be possible within that that time, authorities should request his/her release prior to this date.

3. OVERVIEW OF NATIONAL DATA FINDINGS

3.1. Basic information

The average age of the detainees interviewed was 30, with the youngest being 18 and the oldest being 53. Over 80% were male. They come mainly from Central and South America, with the next biggest group coming from North and Central Africa. There are also significant minorities from Eastern Europe and Russia. Around a quarter of those interviewed were married, with the rest reporting being single, with only a couple of people who were divorced or widowed.

On average, the detainees had spent 23.15 days in detention, with a minimum stay of 3 days and a maximum of 112 days.

Almost half of detainees had been living in Spain for four or more years, and in some cases they had been in the country for more as long as 20 years. The majority had not been detained in Spain before, although 1 in 5 had been.

3.2 Case awareness

All of those interviewed were irregularly staying migrants awaiting deportations.

Many detainees had been informed about their detention by police or in courts. It seems from the answers that many had been found illegal through random checks at for example the stall where they work or just walking along the street. A couple of people said they had not been properly informed about their detention "I was not properly informed. I did not understand the Spanish that the policemen used."

While most detainees said they had been informed about the reasons for their detention, almost all also said they needed additional information. This was mostly two things, the date of possible release, and whether they will be

deported or not: "I do not know if I am going to be expelled or not. I feel completely abandoned." A further group wanted to know why they had been detained, and what their rights were: "Why have I been arrested? I have lived and worked in Spain for many years, I have not done wrong." Again, problems with communication were mentioned by many of those interviewed, who requested information in a language they could understand. Another group said that they had had no official information at all: "The only information I get come from my cellmates. We are persons, we have families, and we need to know what is happening to prepare the future. We should not live with such uncertainty. It creates panic."

When asked why they wanted this information, many of the detainees reported that uncertainty and stress of not knowing their situation was affecting their mental health: "I need to know, otherwise my head will explode. I feel rage, pain. I know there are trials, procedures, I need to be informed!!"

Others felt simply angry that their rights were not being respected: "I feel indignation, impotence and much pain. In my country we take much better care of the immigrants. I am not a murderer; it is not fair. I am a person, I have my rights and I don't feel they're respected here."

None of the centres issues an official certificate (as established by the Ministerial Order) testifying to the fact that the individual has been in the detention centre and specifying, at the very least, the cause for said detention and the date of entry and the date of discharge.

3.3 Space within the detention centre

Detainees were not positive about the rooms in the detention centre. When asked about the room that they sleep in, almost half gave outright negative answers, mostly related to the room being overcrowded, having poor quality bedding, and poor air quality. A significant minority attribute their responses to the level of cleanliness (very negative answers). Almost nobody reported positively about the room they have to sleep in.

Detainees were even more negative about the rest of the centre space, with more than half of detainees reporting that they are unhappy with the centre, with poor washing and toilet facilities, non-functioning vending machine, and not enough room to move. Detainees attributed these responses once again to the general atmosphere of the centre, but also to the conditions of the facilities that are provided.

A number of people felt like the space in the detention centre was not very important compared to the fact that they had been locked up: "I don't complain about the room, but about being locked up. We immigrants have build up Spain. We have built bridges, buildings...as slaves. Nowadays we are not needed nay more, they tell us: go back to your country." and "It's like being caged in."

70% of those detainees interviewed felt that the centre is overcrowded, saying that there are too many people for the small amount of space. One detainee reported that sometimes people are even sleeping on the floor. Noise seemed to be a problem for some, with a couple of people saying it was impossible to talk on the phone because it was so noisy. People seem to be coming and going frequently from the centres, and many people say that as soon as one detainee is deported, another comes to fill his or her space. The effect of this kind of overcrowding is evident in some of the answers: "Every day, people come in and out. Even mad people come here. It is like a prison."

The interviews with the Director and personnel in Aluche (Madrid) revealed problems with the building, rooms, toilets and showers, communal areas and exercise yard. These coincided to a large extent with comments and evaluations made by some of the administrators at the centre. The situations were found:

- Absence of toilets in the cells, which forces the detainees to use the washbasins as makeshift toilets at night, given that there is no intercom system to enable them to request permission to go to the shared

toilets;

- A complete lack of privacy in the bathrooms;
- The detainees are not given any toiletries whatsoever during their stay (soap, shampoo, toothpaste, toilet paper). Tampons for women require a medical prescription;
- The detainees are not given towels or sheets. They sleep under rigid fire-proof blankets that produce lesions on the skin;
- The detainees are not given clothing or shoes. This team was able to talk to various individuals who had been at the centre for more than ten days wearing the same clothing in which they were detained (including underwear).

The team's visit to the detention centre in Capuchinos (Málaga) with the Director and personnel revealed problems with the building, rooms, transit area, communal areas and exercise yard, as detailed in the report. There were also damp problems and a lack of light in the cell. All of these problems coincided to a large extent with comments and evaluations made by some of the administrators at the centre.

The team's visit to the detention centre of Zapadores (Valencia) with the Director and personnel revealed problems with the rooms, toilets and showers, visiting rooms, dining-hall and exercise yard, as detailed in the report. Under this heading, the following were found:

- Overcrowding in the cells;
- Absence of toilets, which forces the detainees to use empty water bottles at night in order relieve themselves, given that there is no intercom system to enable them to request permission to go to the shared toilets;
- A complete lack of privacy in the bathrooms;
- Damp in various rooms and lack of natural light;
- The detainees are not given clothing or shoes.

All of these situations impact negatively on the mental and physical health of the persons secluded in these very hard conditions.

3.4 Rules and routine

The questions about rules in the detention centre were mostly unanswered, but those who did answer seemed to suggest that there were no clear rules in the centre. "Nobody explained the rules to me. There is an absolute lack of information. I know about the rules from other detainees. The staff are dreadful people who don't care about us." Even more worrying was another person's reply when asked about rules in the detention centres: "I know the basics and I am learning over time and with every punishment. I've been sent to a guardroom."

Not all the detainees were negative about staff's attitude to rules, with one person saying that staff are sympathetic towards detainees and were open to requests to accommodate their food preferences, although in the end these were not taken into account.

The three Centres have isolation cells. The team was able to record deficiencies regarding their use from the visits themselves, as well as from interviews with the director and interviews with the detainees, especially the following:

- Non-existence of a set of punishment rules. Discretionary use depending on the criteria of the head of security, who also determines the proportionality criteria;
- Absence of a register or any other document to record use of these cells, including the name of the detainee, the time of entry and the time of discharge from the cell, so that the judge or the competent

authorities can safeguard the rights of the detainees;

- Use of police measures (handcuffs) over long periods of time, instead of non-harmful forms of restraint;
- At the detention centre in Madrid, the light is on 24 hours a day so that the guards can see inside the cells.

3.5 Detention centre staff

Feelings about the detention centre staff seem to be rather mixed. Most say that they are likely to be in contact with security staff. Almost one quarter of the detainees described their interactions with staff in negative terms; only 19% described these interactions positively, and 28% said that the quality of interactions depend on the staff person.

Most detainees did not report having experienced discrimination from the centre's staff; but 22% do claim to have experienced discrimination. Many of these detainees mention the colour of their skin, and more specifically, that Africans are treated worse than Hispanics, as reasons for the discrimination. One person felt that some staff are homophobic. Others said that non-Spanish speakers were discriminated against.

Around half of those questioned felt that the staff did not support their general needs; although for special needs and requests, slightly more felt supported. Many detainees seem to think that the staff does what they can within the limitations of their role as guards, and respond quickly to individual requests such as phone calls. Another group said the level of support by staff depends on the day, or the staff person. As for those who did not feel supported, many replied with angry sentiments about staff not answering requests or making the detainees wait for days. The biggest complaint was from people with medical problems, who felt like the staff did not help them to get access to the care that they needed. For example:

I have written 10 letters to the director because the doctor here says things that I do not understand and he does not give me anything. I have been 18 days without taking anything. This is very dangerous for my health because I have AIDS, and my immune system is low. My eye is getting worse. Half my face is paralysed. My heart is bad and I need medicines. I have only the ones my wife gave me until they run out. The director has not replied. Maybe the police don't give him my letters.

3.6 Level of safety within the detention centre

Many detainees did not feel safe in the detention centre, with almost 1 in 5 saying they felt very unsafe, and the majority saying they felt only 'somewhat safe'. Around one quarter said that they felt very safe. Those who felt safe mentioned that the centre was well run, that the police were keeping a close eye on things and would intervene if there were any problems, and that they did not experience problems with other detainees.

As for those who felt unsafe or only 'somewhat safe', a large number of these detainees felt scared of being returned to their home country, where they would not be safe; the potential for expulsion at any time was particularly frightening for these detainees: "I am scared of getting mad here. During the night, the police take out some detainees. I am terrified and I don't know when it will be my turn."

Another group said they felt unsafe because of fellow detainees being disruptive and because of petty theft within the centre. Some felt unsafe because some of the detainees are criminals. Others were more concerned with the staff of the detention centre, saying that they treat detainees as criminals. The living conditions also concerned some. One woman with a baby explained that she has to sleep on the top bunk of a bunk bed, and is afraid her baby will fall off. Another person was concerned that pregnant women were not getting fed properly in the centre.

A few people mentioned being isolated from the world as a problem. For example, one person felt unsafe because of the lack of information they had about their case, and the lack of access to a lawyer. "Because there is no

information, no lawyer, I do not feel safe.” Others expressed concerns about their level of mental health, or the mental health of their fellow detainees.

It seems feeling safe is not just about policemen keeping the detention centre running smoothly, but also includes fears for the future, overcrowding, isolation, staff interaction and attention to special needs.

A significant minority of detainees, 20%, reported that they have been mocked or insulted by others: half of these reporting being mocked by other detainees, and another half reported being mocked by detention centre staff. Mocking between detainees were attributed infrastructure reasons, such as squabbles over use of the telephone, or personal insults. As for mocking by staff, general disrespectful treatment seemed to be a major factor: “Centre employees, they treat me disrespectfully, hey you, bloody immigrant!”

Reports of physical assault or abuse were quite low. However, five detainees in the sample reported experiencing occasional physical assault by the staff; no additional details or descriptions of this were provided.

Only a couple of detainees had filed official complaints to the detention centre staff. In both cases these had been ignored, much to the frustration of the detainees involved.

3.7 Activities within the detention centre

The detainees in the three centres reported that there are no activities organised by the staff. They are given the opportunity to watch television, but have no access to books, educational opportunities or sports equipment. Some report engaging in activities that are initiated by co-detainees, such as sports with equipment brought in from the outside. There is no access to the Internet in any of the centres.

When asked about what activities they would like to have, detainees answered that they would like to actually have activities (as there are none at present), access to the Internet, books to read and religious/spiritual activities. A number of people wanted televisions in their rooms, as they spent a long time locked in there each day. A few people did not find the activities question relevant, saying that they just wanted their freedom: “Respect and that they release me. I do not want to be detained.”

3.8 Medical issues

Almost half of the detainees reported having the possibility of meeting with medical personnel either once per week or as needed. But almost one third said they only see medical personnel less than once per month. Detainees are mostly in contact with doctors, but it also seems that they are unsure of whether these doctors are provided by the centre or by an external organisation. Most detainees said that they received a medical exam upon arrival to the centre, but a significant minority, or 28%, did not receive an exam.

Just over half of detainees described the quality of the medical services as being poor, more so because of the quality of services provided, rather than level of interaction with medical personnel. Only 18% described the medical care as being good.

Over half of those questioned said they needed medical services that were not provided. Examples were access to specialists, such as a gynaecologists or cardiologists, access to certain medicine, or help for certain conditions like asthma, diabetes, or earaches. Some mentioned needing a dentist. One detainee made a request to meet with a psychiatrist.

Physical health

Detainees express that their physical health deteriorates while they are in detention. They mostly attribute this to the general condition of the facilities. In this regard they especially blame the poor quality of the food, and also the dirtiness and the poor quality of the bedding. Detainees also blame the availability of medical treatment and medical facilities, and a small minority report that psychological factors have worsened their physical health.

Mental health

Detainees recorded an even more significant degradation of their mental health, with almost all detainees reporting that there had been a general negative impact caused by detention. On entering detention, almost half rated their mental health as “very good”, where as less than 10% rated their mental health as “very good” at the point of interview.

When asked to explain why their mental health had been impacted by detention, for this they point to the general impact of being in detention, i.e. the uncertainty and anxiety, the feeling that they have done something wrong, the unfairness of detention, despair and worries about family. They also feel that detention has negatively impacted their rights. Other detainees report the emergence of mental health problems, specifically tied to negative emotions. The state of living conditions also makes for a negative impact, including the treatment from staff.

3.9 Social interaction within the detention centre

In general, detainees said that they get along well with others in the centre; if they do not report their interactions with others as being positive, then they describe them in neutral terms, i.e. “its fine”, “normal”, “ok”. Some said that they felt isolated because they could not speak Spanish, and did not have any friends; others said that people from the same country of language group made friends. And some detainees described differences between those who had been detained on criminal charges and those who were detained because of their immigration status.

However, many detainees did describe an atmosphere of tension between detainees. The bases for these tensions could be divided into two groups. The first and most frequently reported, arose over issues related to ‘common life’ in detention, and the centre facilities, i.e. fights about access to the telephone: “Problems with the TV, the bathrooms, there is not an adequate chair. We like to sit on the toilet like a human being, not like an animal.” The other set of problems were inter-cultural or inter-lingual, or in some cases inter-racial. “Some problems between the Nigerians and the Senegalese” or “some detainees argue against the ones who do not speak the same language such as certain nationalities”

3.10 Contact with the ‘outside world’

Lack of contact with the outside world seems to lead to a feeling of isolation for detainees. Most detainees do have family in their country of origin (but 34% said they do not). But many feel that their families are not being supported well without their help. Over half said that they do have family and friends present in Spain.

But almost one quarter detainees said that they have no family members or friends in Spain, making it hard for them to obtain clothing, phone cards or money, or to carry out any kind of tasks or business outside the centre (such as giving employers notice of absence from work, or paying the rent). Seventeen percent of the detainees have no contact with relatives or friends in Spain or in their country of origin; 60% are able to maintain occasional phone contact and 30% receive visits. In this respect, Valencia is the centre that keeps its detainees in the most profound isolation.

The family visit systems at the centres present significant deficiencies in terms of how they are managed. Two cases

are especially worthy of mention. At the detention centre in Madrid the management system entails waits of up to two or three hours, with the visitors not even being guaranteed entry and visits lasting a mere 5 minutes. We should mention that visual and occasionally physical contact with children and others is possible. At the detention centre in Valencia, the visiting rooms are, in the team's opinion, completely unacceptable, as detailed in the corresponding section of this report and confirmed by the monitoring and active observation activities carried out by the team regarding the visitor regime.

Although detainees have good access to the telephone, in the interviews it was possible to verify that 45% of detainees in Valencia, and 19% in Málaga are unable to use the telephone due to the high cost of making calls (higher than the average market prices in Spain). At the detention centre in Madrid, detainees are not allowed to receive incoming calls. This creates considerable anguish and anxiety among family members and detainees and leads to chaos and other problems regarding family visits. In Málaga it is possible to arrange calls and in Valencia there are public telephones available solely for receiving calls from family members, something that is greatly appreciated by the detainees.

Added to this is that detainees are not permitted to use their mobile phones. Even if public pay phones are available in the centre, detainees would actually prefer to have their mobile phones, especially because of the important data that is stored within them.

Just over one-third of detainees expressed that it would be very good to have access to the Internet in the detention centre. Another 30% believed it to be a good idea to have telephone booths available with specially agreed prices that are more affordable.

3.11 Conditions of detention and the family

No cases were found of families admitted

3.12 Conditions of detention and nutrition

A large number of detainees express a strong negative reaction to the food provided in the centre, particularly blaming the poor quality of the food. Quite a few complain about the fact that the meat is not *halal* and they are served pork. Most of them believe it is of poor quality (poorly prepared or cooked and featuring little variety); while a significant proportion believes there is insufficient quantity. As a result many detainees feel that they have lost their normal appetite while in detention, and this has made them feel worse.

A small minority of detainees have no complaints about the food, saying that at least they get fed three times a day.

3.13 Conditions of detention and the individual

The DEVAS detainee survey contained a question about the ability of detainees to sleep at night. However, most people did not answer the question, and no one commented on why.

When asked about their top difficulties in detention, the problem that came up most frequently was having "no freedom" and "being locked up". Uncertainty was also a frequent factor: uncertainty of whether one is to be deported and the waiting related to this, "to know that I could be taken from my room and expelled at any time." The inability to plan for the future, and uncertainty about how to support family members was also listed as a major difficulty in detention.

A related issue was the lack of information: "The fear of being expelled and the yearning to go out as soon as possible. The lack of information about the whole procedure."

Being separated by family also described as a problem. In addition, living conditions such as the bad food were mentioned, but never as the top difficulty. There is a very small minority who were interviewed who are drug addicts, and therefore reporting finding detention particularly difficult as they suffer withdrawal.

Although the living conditions were reported as bad across this survey, with detainees feeling unsafe, unhappy with the facilities, and the food and overcrowding, this was not ranked as being more difficult than the restriction of liberty, or the uncertainty of their position and their fear of what would happen next.

Over half of those interviewed did not know the outcome of their detention. Of those who knew, most thought they would soon be deported. When asked if they knew the date of their departure, almost 90% did not know the date. This caused a lot of anxiety and stress among the detainees. "Impotence. I can't think of anything else"; "Not to know when I'll be released makes me feel desperate." A couple of people mentioned financial problems, that their families relied on them for support and thus when they were detained they worried about their families.

Detention seemed to have affected detainees' self-perception negatively. Most detainees described themselves positively, usually with some pride (often in their ability to provide for their family). For example, detainees described themselves as: "Available, open to others, generous. I confront things", and "Hard working. I used to have two jobs at the same time to help my family go forward. I am joyful, friendly and talkative."

However, over half of the detainees said that being in detention had negatively affected their self-perception: "Before entering the centre, I was someone very normal, very affectionate. But now, I am not as I used to be. I am very nervous"; "I am full of fears, discouraged, not able to think, inhibited"; "I have lost all confidence in me, in any police officer, and in people generally. I feel used and treated like an animal." In two cases of detainees who were addicted to drugs, detention had actually had a positive impact, as they had been forced to be clean, had had regular meals and sleep, and had had a chance to reflect on their lives.

Around half of the detainees felt that they had special needs. These related to specific medical conditions, food allergies and special diets, being isolated linguistically, and those who fear persecution on return to their country. A large group of people who said that they had special needs in the sense that *everyone* has special needs in detention. All in all, most of these needs were not 'classic' vulnerabilities.

When asked who were the most vulnerable persons in detention, there were a wide range of answers: those with no family, those with children (especially women), those with families to support financially (related to this was poor people in general), depressed people, people with mental illness, people with medical conditions, pregnant people, old people, people from specific ethnic/national groups, traumatised people (a few people mentioned those who had arrived by boat and have seen people die next to them), those with drug addiction, people who have been in detention a long time, those people whose character is not strong enough, or who have been through a lot before detention. Again, many thought everyone was vulnerable: "I think nobody should be detained. We are all running from hunger, poverty and war, and have committed no crime"; "We are all in very bad shape". When analysed, only one in five of the special needs were actually 'classic' needs, i.e. needs that are already officially recognised by the authorities and other sources such as UNHCR.

4. ANALYSIS OF THE DATA AND CENTRAL THEMES

Lack of information

On the face of it, the data tells us that detainees are not getting the information they need. They face a lack of information on two counts. Firstly, the information is not well communicated to them. For example, there were a few

people who said that they didn't understand when the policeman arrested them because of language difficulties, some people that said that they had not been informed at all, and some people who said that although they had been 'informed' about their detention, they did understand or accept the legal basis as to *why* they were detained. This failure of detention centres to communicate information can also be seen in other parts of the data. For example, detainees who report that they are not informed about rules in the detention centres, those that say that they sometimes cannot understand medical staff, those that try and fail to have their complaints heard and recognized. Also important is that detainees have problems communicating with the outside world.

Secondly, detainees lack information about the outcome of their detention and their date of departure because their legal situation has not yet been decided or finalised. This is reflected in the data by the fact that although most detainees admit they were informed about why they were detained, almost all need more information. Most wanted information about when they would be released, and if they would be deported. We can see from the data that almost half did not know the outcome of their detention and 90% of those questioned did not know the date they would be released.

The reason why this is mentioned in the context of vulnerability is that this uncertainty and lack of access to information seems to cause detainees huge anxiety and distress. Detainees report that they are nervous about being expelled, because of what they expect to happen when they return but also because they don't know when they'll be expelled. This uncertainty was mentioned as one of the top difficulties in detention, and also as a reason for detainees to feel 'unsafe' in detention.

A deeper look into the numbers tells us that detainees' lack of information has serious impacts for the state of their mental health. For example, detainees that report not knowing when they'll be released also tend to report a "very poor" or "poor" state of mental health. The numbers also show that detainees who don't know when they'll be released also report very negative statements about their situation in detention: 44% of detainees who said they don't know when they'll be released also report that not having any rights in detention is the biggest difficulty they experience. Furthermore, the numbers show that detainees who don't know their release date also report high levels of worry, anxiety and stress about themselves and others.

'Lack of information' must be differentiated from being 'aware of the reasons for detention.' The data indicates that detainees who report knowing the reason for their detention also report having "very poor" and "poor" levels of mental health. At a first glance this finding may seem confusing, especially if we ask why they would report poor levels of mental health if they know the reason for their detention. However they were probably already aware of their illegal status in Spain, and have probably acknowledged that doing so poses a risk for detention and deportation. Of more concern is that information is withheld from them once they are in detention. They are deprived of a life perspective: they don't know when they'll be released, they don't receive legal counsel, they can't challenge the state of living conditions within the centre, and they don't know when they'll be expelled and what awaits them in their country of origin. The data shows that the denial of a life perspective leads to anxiety, hopelessness, despair and negative levels of mental health – also factors that lead to individual vulnerability.

The numbers tell us that the denial of a life perspective has serious negative impacts upon individual detainees in Spain. They may know that they are detained because of their illegal status, and they may know that they will eventually be expelled, but their level of awareness stops there. It is clear that detainees do not know how long they will be detained for, when they might be expelled and what waits for them in their country of origin.

Living conditions

The quality of living conditions seems to have a strong impact on the lives of detainees. From the data, it is clear that detainees find the living conditions in detention difficult. For example, detainees for the most part feel negative about their sleeping and living spaces, the food in detention, and say that they need medical care that they are not

receiving. Overcrowding seemed to be a large problem, and detainees blamed the poor quality and lack of facilities for tension that arose between detainees in the centre. Also, the detainees reported that there were no activities in the detention centres, and many reported spending long hours locked up with nothing to do. Some people described that they felt unsafe in the detention centre because of the living conditions. Bad living conditions were also mentioned by some as their top difficulties in detention, and a cause for having a special need, i.e. the centre does not provide for Halal eaters.

This is mentioned in connection with vulnerability because it seems that the poor living conditions affect the mental and physical health of many of the detainees. The data indicates that detainees who make negative statements about the room that they sleep in also rate the state of living conditions as their second-most important difficulty in detention. Similarly, the data shows that detainees who make negative statements about the rest of the centre's space also rate the state of living conditions as their second-most difficulty in detention. Detainees that negatively describe the centre's space also report "very poor" and "poor" levels of mental health. The numbers also show that detainees who negatively describe the centre's space also report detention has an "everyday" difficulty that they must endure. Living conditions impact physical health: detainees who negatively describe the centre's space report "very poor" and "poor" levels of physical health. In fact, the data indicates a strong relationship between poor living conditions and negative physical health impacts.

The data doesn't indicate that those who are negatively describing living conditions are those that are detained for a long time. Instead the data shows that those who have spent up to one month in detention are associated with the most negative descriptions about living conditions.

The level of over-crowdedness seems to have a negative personal impact upon detainees. Detainees who think the centre is overcrowded also report poor levels of mental health and physical health. Detainees who cite living conditions as a primary or secondary difficulty in detention report that the centre is overcrowded. However when we compare over-crowdedness with personal reports of safety, the numbers tell us a different story: although some detainees who feel the centre is overcrowded also report feeling "very unsafe" or "unsafe", more detainees report feeling safe in general. In other words, the data tells us that there is safety in numbers: over-crowdedness may negatively affect an individual's mental health, but not their sense of safety.

Mental health

Detainees' poor levels of mental health emerge as a pattern from the data. The numbers show that detainees' who report "very poor" mental health also rate anxiety and worry as a top difficulty in detention; detainees who report poor levels of mental health also rate the loss of rights as a top difficulty in detention. Furthermore, detainees that report poor levels of mental health also say that detention has negatively impacted their self-perception. This finding is particularly interesting, because detainees who report poor levels of mental health tend to report positive self-perceptions. In other words, detainees think of themselves positively despite being in detention. However, the negative factors of detention – lack of information, living conditions, isolation from the outside world, and lack of a life perspective – do have an impact on detainees' level of mental health.

Of significance here is that detainees who report poor levels of mental health also report having special needs, in particular, "other" special needs. This finding suggests that the factors associated with detention negatively impacts detainees' mental health and thus leads to special needs, i.e. needs that are not addressed as 'normal' or 'classical' in mainstream guidelines. Other points where it can be seen from the data that lack of information, overcrowding, uncertainty, lack of safety all seem to lead to negative statements.

5. CONCLUSIONS AND RECOMMENDATIONS

The data suggests that the denial of a life perspective may be a factor of vulnerability for detainees, in that it leads to increased stress, anxiety, hopelessness, despair and especially poor levels of mental health.

The poor state of living conditions also affect detainees' levels of mental health, such as their levels of anxiety, stress and worry. Their level of mental health while in detention is generally poor, especially when compared to pre-detention levels. The length of detention does not seem to be a factor: the average number of days spent in detention is not long when compared to other countries, and it is not associated with negative statements about mental health or self-perception. Of more significance seems to be that detention in and of itself possesses a variety of factors that leads to vulnerability in persons. In the case of the Spanish detainees the most important factors are feelings of humiliation, denial of a future perspective and the feeling of imprisonment. In addition, the lack of information seems to be a primary factor, followed by the poor state of living conditions. The type of vulnerability that emerges from these factors is the significantly poorer level of mental health that is reported by detainees.

Following from the DEVAS research conducted in Spain, CEAR makes the following recommendations to the national authorities:

Attribute responsibility in cases of torture and take the necessary measures to prevent such abuses from occurring in the future, especially the following:

- **All immigrant detention centres must have a team of social workers, as established in the Ministerial Order.** The report shows that this measure is a truly urgent necessity. The presence of such a team would help to alleviate serious deficiencies regarding lack of information, attention given to family members, the supply and provision of clothing, and communication with people outside the centres. In this respect, it would be extremely advisable to carry out the Ministerial Order recommendation of establishing agreements with social organisations that specialise in the field of immigration.
- **Detainees should be given simple and effective channels of communication with people outside the centres.** Detainees should be afforded access to the Internet, in particular. Providing good communication channels to detainees can go towards reducing isolation in the detention centre, and it can enable detainees to seek supportive social networks.
- **Guarantee immediate access to medical assistance upon the detainee's request or upon discovery of injuries,** whatever their cause may be, in accordance with Instruction 12/2007, with effective penalties for medical professionals who fail to carry out these procedures. The environment of detention can harm detainees physically and mentally, thereby making them more vulnerable to the full set of adversities in detention. This is why it is important to provide detainees with unrestricted access to medical care.
- **Effective distribution of the rules and duties sheet at the centres should be conducted by detention centre staff.** Information sheets about the right of asylum, containing the criteria established by UNHCR, should be among the information that is available to detainees. These sheets could be distributed to persons upon admission, together with the information on the rules within the detention centre. Detainees who are unaware of their rights and obligations in the centre are especially prone to increased vulnerability. Thus it is the obligation of the detention centre staff to ensure that all detainees are aware of what they can, and cannot, do in the centre, and how they can enforce their own rights.
- **Establish an effective and guaranteed complaint and request system at all the centres and especially at the immigrant detention centre in Valencia.** Through the complaint and request forms, allow detainees to address the judge or attorney handling his case, as established in the Ministerial Order. It is important for detainees to not only have information about their rights, but they should also be empowered to enforce their

rights whenever necessary. The environment of detention means that detainees are already at a disadvantage to the staff and to the authorities, simply as a consequence of the restrictions on their liberty. This is why detainees must have clear channels from which to exercise their rights in detention, and to ensure that their problems and complaints are heard and addressed.

- **Provide quality mental health care to those who need it, and regulate the transfer of psychiatric patients to appropriate centres, as occurs with minors and with members of other vulnerable groups.** Detention can bring severe consequences to the mental health of detainees. Psychological care must be provided in order to ensure that the harmful effects of detention remain minimal, and also to ensure that detainees who have serious mental health needs are cared for. If the detention centre cannot provide for adequate mental health care, then it should facilitate detainee access to external care providers.
- **Introduce an effective system of mediators and translators.** The inability to communicate in a common language with staff and detainees can have a dramatic impact on one's level of vulnerability. The DEVAS research in Spain shows that persons who cannot speak the same languages as those around them suffer from a high degree of isolation; this in turn brings negative impacts to their mental health. For this reason it is very important that translators and interpreters are made readily available to detainees.
- **Improve the organisation and visiting conditions of family members in Madrid and refurbish the visiting facilities in Valencia.** The DEVAS research shows that detainees who are isolated from their loved ones are especially vulnerable to the difficulties that detention brings. For this reason detention centre staff and the national authorities must ensure that families can easily access their loved ones in detention centres, and that the environment of such visits is respectful of family unity and intimacy.
- **Organise activities and, in particular, provide access to sports equipment.** Detainees spend long hours of their days locked in their cells with little to do. The result is that they can spend weeks, or months, without engaging in any meaningful physical or intellectual activities. This can impact not only their state of physical health, but also their levels of stress and anxiety. Detention centre staff should take an active role to ensure that detainees have opportunities to remain meaningfully occupied with sports equipment, access to books and writing materials, and access to spaces for prayer and reflection.
- **Improve the food that is provided to the detainees.** Far from being trivial, the quality of food is of especial importance to detainees. Taking nourishment is not only necessary for one's state of overall health, but it is also a factor of normality. If detainees experience stress and anxiety as a result of other factors in detention, they should at least be able to eat nutritional and satisfying meals; this would go a long way towards maintaining low levels of vulnerability within detainees.



NATIONAL REPORT: SWEDEN

By: *Jesuit Refugee Service Sweden*

1. INTRODUCTION

During the course of the project, three detention centres were visited – the Märsta Detention Centre (30 detainees interviewed), close to the Arlanda Airport in Stockholm, the Gävle Detention Centre (17 detainees interviewed), and the Flen Detention Centre (15 detainees interviewed) between February and August 2009. A staff member at each detention centre was interviewed. We also interviewed a detention support visitor from the Red Cross in Flen and a visitor from Caritas in Märsta, In Gävle no NGOs visited the centre.

Random groups of detainees were sought for interview, without preconceived notions about who is most vulnerable. In the end, the pool of interviewees has been determined by the detainees' willingness to participate – and some groups were more willing (though not necessarily more vulnerable) than others. Many had a huge need to talk about their own 'story' and the situation in their homeland, their disappointment in Sweden, etc – issues not really addressed in the questionnaires. Therefore the interviews took a long time and often became very emotional. Some detainees expressed frustration. One man got really angry at the end of the interview, walked out and slammed the door. "Why do you come and ask these questions when you can't get us out, it would be better if you never came!"

The staff members at the detention centres were very helpful. We were immediately granted access and allowed to come whenever we wanted and to stay for as long as we wanted. The staff has generally been helpful in finding rooms for us to be in when conducting the interviews. They have helped us to put up information sheets about our project on bulletin boards around the centre so that the detainees would be more prepared that we were coming.

The interviews were conducted by Marie Eidem, Christoph Hermann, Louise Degen and Karl Eidem. Linnéa Klefbäck; JRS Sweden provided the information for the national legal overview.

2. NATIONAL LEGAL OVERVIEW

Administrative detention is primarily governed by the Aliens Act ("Utlänningslagen") from 2005. The law actually came into effect in March 2006, and is accompanied by the Aliens Ordinance ("Utlänningsförordningen"). As to information and appeals, according to the law on Public Administration ("Förvaltningslagen"), a party shall always be informed about how a decision may be appealed, if it is not obviously unnecessary. Swedish detention centres are run under public law (The Swedish Migration Board is a public authority). Correctional institutions, remand centres and police arrest facilities, where detainees in some cases may be placed, are also run under public law. The law does not distinguish between detention of asylum seekers and detention of irregular immigrants; it only refers to "aliens" and the conditions to detain aliens.

2.1. Legal Basis

Legal premises for ordering detention

The conditions for detaining aliens are regulated in Chapter 10, Section 1 (aliens who have attained the age of 18) and 2 (children, that is aliens under 18) of the Aliens Act. There is no distinction made between asylum seekers or illegal migrants.

According to Section 1, paragraph 1, an alien who has attained the age of 18 may be detained if the alien's identity is unclear on arrival in Sweden or when he or she subsequently applies for a residence permit and he or she cannot establish the probability that the identity he or she has stated is correct and the right of the alien to enter or stay in Sweden cannot be assessed anyway (*"identity detention"*).

According to paragraph 2 an alien who has attained the age of 18 may also be detained if:

1. It is necessary to enable an investigation to be conducted on the right of the alien to remain in Sweden, (*"detention for investigation"*)
2. It is probable that the alien will be refused entry or expelled under Chapter 8, Section 1, 2 or 7, or
3. The purpose is to enforce a refusal-of-entry or expulsion order. (*"Detention for enforcement"*)

A detention order under the second paragraph points 2 or 3 may only be issued if there is reason on account of the alien's personal situation or the other circumstances to assume that the alien may otherwise go into hiding or pursue criminal activities in Sweden.

Chapter 8, Section 1, 2 and 7 – to which point 2 above refers – regulates the possibilities to refuse an alien entry to Sweden because the alien does not have a passport, visa or residence permit, or to expel an alien who is staying in the country but lacks a passport or the permits required to stay in the country. This would be the situation of so-called irregular immigrants.

Under Chapter 10, Section 2, first paragraph a child may be detained if:

1. It is probable that the child will be refused entry with immediate enforcement under Chapter 8, Section 6, or the purpose is to enforce a refusal-of-entry order with immediate enforcement,
2. There is an obvious risk that the child will otherwise go into hiding and thereby jeopardise an enforcement that should not be delayed and
3. It is not sufficient for the child to be placed under supervision under the provisions of Section 7.

Under the second paragraph a child may also be detained if

1. The purpose is to enforce a refusal-of-entry order in other cases than those in the first paragraph or an expulsion order under Chapter 8, Section 7 or 8 and
2. On a previous attempt to enforce the order; it has not proved sufficient to place the child under supervision under the provisions of Section 7, second paragraph.

Alternatives to detention

The only alternative to detention is supervision. This is regulated in Chapter 10, Sections 6 – 8 of the Aliens Act. According to these provisions, supervision may be used "instead of" detention. Regarding aliens that have attained the age of 18, the same conditions that apply to detention have to be fulfilled. Regarding children, Section 7 states that a child may be placed under supervision subject to the conditions set out in Section 2, first paragraph, points 1 and 2.

2.2. Legal proceedings for ordering detention during the asylum procedure

A judicial decision for ordering detention is not necessary. The competent public authority to order detention is, according to Chapter 10, Section 12 of the Aliens Act, the authority or court "handling the case". The same provision demands that the authority or court that makes a decision to refuse entry or expel an alien shall examine whether or not an alien who is detained or placed under supervision, shall be retained in detention or remain under supervision.

During the *asylum procedure*, the competent authority is normally the Swedish Migration Board, since it is the Swedish Migration Board that shall examine the question of refusing entry if the alien is seeking asylum in Sweden (Chapter 8, Section 4 of the Aliens Act). The Swedish Migration Board also examines the question if the alien has a close family member who is seeking asylum here. When the Swedish Migration Board has denied a residence permit,

the Migration Court becomes the competent authority when the decision is appealed and the case has been received by the Court (Chapter 8, Section 12 and 14).

Regarding *illegal immigrants* either the Swedish Migration Board or the police authority are competent, since they are both competent to refuse entry on grounds of not having a passport or the necessary documents to be allowed to stay in Sweden (Chapter 8, Section 4). However, if the police authority is in doubt as to whether an alien should be refused entry, the case shall be referred to the Swedish Migration Board (Chapter 8, Section 4).

Regarding *other immigrants*, both the Swedish Migration Board and the police authority are competent to refuse entry and both can therefore order detention. As seen above, if the police authority is in doubt as to whether an alien should be refused entry, the case shall be referred to the Swedish Migration Board (Chapter 8, Section 4). The Swedish Migration Board is normally the competent authority when it comes to different grounds for expulsion.

When it comes to enforcement of orders on refusal of entry or expulsion it is always either the Swedish Migration Board or the police authority that shall enforce the order and therefore also has the competence to order detention (Chapter 12, Section 14).

2.3. Appeals

There is a right of appeal against detention orders. A detention order made by a police authority or the Swedish Migration Board may be appealed to a Migration Court. If the government minister responsible for cases under the Aliens Act has issued a detention order, the Supreme Administrative Court examines, at the request of the alien, whether the measure shall remain in force (Chapter 14, Section 9).

There is also a right of appeal against the detention conditions, in so far as a decision of the Swedish Migration Board "in special cases" on questions concerning the treatment or placement of aliens being held in detention, can be appealed (Chapter 14, Section 10). The decisions concerned are for example, decisions to place an alien being held in detention in a correctional institution, remand centre or police arrest facility, decisions on restriction of freedom of movement, and right to visits or retention of property. The expression "in special cases" is supposed to mark that general regulations concerning the localities cannot be appealed.

According to the law on Public Administration (Förvaltningslag [1986:223]), a party shall always be informed about how a decision may be appealed, if it is not obviously unnecessary (Section 21). According to the same provision the authority decides if the information shall be given orally or by letter. This information shall however always be in writing, if the party so require. In practice, the detainee is informed orally about the written decision and his right of appeal by staff at the detention centre.

2.4. Case Awareness & Right of information

The detainee has the right to be informed about the reasons for his detention. The Aliens Act does not specify this, but the law on Public Administration (Förvaltningslag [1986:223]), Section 20, obliges public authorities to specify reasons for their decisions.

Regarding who and how the detainee is informed about his detention, the only given rule is the one mentioned above, Section 21 of the law on Public Administration (Förvaltningslag [1986:223]), which also states that a party shall be informed about the contents of a decision, but the public authority decides in what way the information is given. In practice the information is given orally about the written decision by staff at the detention centre.

2.6. Special needs

There are few regulations for persons with special needs in detention, except for rules regarding children. There is a general provision in the Aliens Act that in cases involving a child, particular attention must be given to what is required with regard to the child's health and development and the best interests of the child in general (Chapter 1, Section 10). More specifically regarding detention, Chapter 10, Section 3 states that a child may not be separated from both its custodians by detaining the child or its custodians, and that a child who does not have a custodian in Sweden may only be detained if there are exceptional grounds.

When it comes to detainees who are for example, mentally ill or have suicidal tendencies, such persons can be held in isolation. Chapter 11, Section 7 of the Aliens Act allows the Swedish Migration Board to decide to hold an alien who is being held in detention and who has attained the age of 18 in isolation from other persons being held in detention, if this is necessary for good order and security in the premises or if he or she constitutes a serious danger to himself or herself or to others.

The Swedish government has observed that the available institutions for placement of detainees are not the best for detainees that need medical care and support on account of their mental health. A commission assigned to suggest changes in the law required by the Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, is to specifically look into possible alternative placements for aliens in need of medical care and support.

2.7. Maximum duration of detention

According to Chapter 10, Section 4 of the Aliens Act "detention for investigation" (Chapter 10, Section 1, second paragraph point 1) may not be carried out for more than 48 hours. In other cases an alien who has attained the age of 18 may not be detained for more than two weeks, unless there are exceptional grounds for detainment for a longer period. If, however, a refusal-of-entry or expulsion order has been issued, the alien may be detained for not more than two months unless there are exceptional grounds for detainment for a longer period. According to Section 5, a child may not be detained for more than 72 hours or, if there are exceptional grounds, for a further 72 hours.

This means that there is no maximum duration of detention for adults. Instead the authorities and courts have to decide in each individual case if there are "exceptional grounds" for further detention. In case law, some guidelines as to what to consider when deciding if a lengthy detention shall continue have been given: if the authorities have acted vigorously to enforce a decision on expulsion or if the case has been left unattended to and if the alien himself is deliberately obstructing the process. In one case, an alien who had been denied asylum and had been held in detention for one and a half years was not to be continued to be held in detention, because no new efforts to enforce the decision of refusal-of-entry had been made for more than one year and four months and there was still uncertainty about if and when the decision could be enforced (the Supreme Administrative Court, case RÅ 2005 ref 60). In another case, detention for enforcement of an alien that had been expelled on account of a criminal offence, was continued for more than two years and eight months when the sole reason for the decision not having been enforced was that the alien himself refused to sign the form needed to issue a travel document (Migration Court of Appeal, case MIG 2008:44). The opposite conclusion was drawn in a case of an alien expelled on account of a criminal offence, when the alien – who had an HIV-infection and was dependant on heavy medical treatment – had been detained for nearly 18 months and there was still uncertainty about how long it could take before the decision on expulsion could be enforced (the Supreme Administrative Court, case RÅ 2006 ref 5).

2.7. Minimum age for detention

As written above, there is no minimum age for detention, although the conditions are stricter when it comes to minors.

2.8. Health care

Health care is provided for persons in detention. The right to health care is regulated in Chapter 11, Section 5 of the Aliens Act, which states that an alien who is being held in detention shall have access to the same level of health and medical care as a person who has applied for a residence permit under Chapter 4, Section 1 or 2 (“refugee” or “person otherwise in need of protection”), even if the alien has not applied for such a permit. The same section also states that if an alien who is being held in detention needs hospital care during the period of detention, he or she shall be given the opportunity for such treatment. Children have access to the same level of health care as Swedish children.

2.9. Contact with the outside world

The only regulation regarding contact with people from outside the detention centre is to be found in Chapter 11, Section 4 of the Aliens Act, which states that an alien who is being held in detention shall be given the opportunity to receive visitors and have contact with persons outside the premises with the exception of the visits or contacts which would hamper activities concerning the detention in a particular case. Normally, a detained person is allowed one visit per day, but if there are times available, several visits per day can be allowed (*Förvarsverksamheten vid Migrationsverket. Gemensamma riktlinjer, standarder och rutiner. DNR: MAL 111-2006-346*).

2.10. Social Services

Social services are not provided to detainees.

2.11. Legal Aid

A detainee always has the right to a public counsel if he has been detained for more than three days, unless it must be assumed that there is no need for a counsel. It may be that the detainee already has a public counsel based on him being an asylum seeker, but if not, a counsellor will in any case be provided concerning the question of detention (Chapter 18, Section 1 of the Aliens Act). A public counsel shall always be appointed for children held in detention, if the child does not have a custodian in the country (same Section).

2.12 Financial situation

According to Chapter 11, Section 13 of the Aliens Act, an alien who is being held in detention is entitled to the daily allowance and the special allowance referred to in Sections 17 and 18 of the Act on the Reception of Asylum Seekers, etc (1994:137). The allowance is given to aliens who do not have private means. The government sets the guidelines for the calculation of the allowances. Today (June 2009) the daily allowance is SEK 24 per day.

3. OVERVIEW OF NATIONAL DATA FINDINGS

By way of background to the data that is presented below, many of the detainees in the Swedish detention centres have removal orders and are no longer asylum seekers. If they ever were, their claims have been rejected and they are waiting to be sent back to their homelands or another EU country in accordance with the Dublin II convention. Others are irregular migrants. Some of these may have later applied for asylum and are placed in detention while their application is processed if it is considered likely that it will lead to a rejection and that there is a risk that they will not comply of their own accord. The impression was that *most of* the detainees were extremely stressed and unhappy despite the general satisfaction with conditions at the detention centre.

Some had been in the centre for a very brief period. They were still in shock – and the questions about the rooms, space, and Internet/TV felt almost inappropriate to ask. Several of the detainees said explicitly that they would commit suicide if they were sent back – it was difficult to then ask about the comfort of the room. In general it was easy to find detainees who were willing to take part in the interviews, but it varied by nationalities. Young men from North Africa and the Middle East (Libya, Algeria, Palestine, Egypt, Iraq & Afghanistan) wanted to be interviewed. These men seemed to spend time together and the word spread among them. A large group of Russians at one of the detention centres were not interested in being interviewed. African detainees were also difficult to persuade. They were sceptical as to whether the project would not make any difference. Finding women who wanted to be interviewed was difficult. There are much fewer women than men to start with in the centres. Some of the women appeared to be highly depressed. This is a concern: that those who are potentially the most vulnerable were simply not receptive to being interviewed.

There was a noticeable longing for visitors in the Gävle detention centre, where there were no visits from NGOs, in contrast to the many NGOs visiting Mårsta (although there are fluctuations there). A long queue of detainees in Gävle wanted to talk/be interviewed.

3.1 Basic information

In Sweden the average detainee who was interviewed is a 32-year-old male. The most common nationalities among the interviewees are Palestinian, Afghan, and Iraqi. As to marital status, 63% are single, 21% are married, and 10% divorced.

The average length detained among those interviewed is 6.8 months (the longest is 21 months). On average, the detainee had spent 33 months in Sweden prior to being detained, a remarkably long time.

The main languages interviewed in were Swedish (33%) or English (30%). Other interviews were held in French, Russian and German. Interviews were also conducted in Turkish and Arabic with the help of interpreters.

3.2 Case awareness

The legal status for the average detainee is a “rejected asylum seeker”, informed about the status, in most cases by the police, while living in the host country illegally. There is perceived information need by the detainees. The level of being informed measures 5.94/10. Of the interviewed, some 77% claim to need more information on why they have been detained (21%), on asylum procedures (18%) or on the duration of detention (13%).

From a *staff* perspective, the perceived information need stems from failure to take in and accept the new situation rather than any objective deficit of situational data. The detainee receives an explanation for the detention immediately upon detention. At this point, basic information about legal rights, in simplified language if considered necessary, is provided. Following the immediate briefing (the next day) the detainee is informed about the chain of events leading to detention, relevant regulations etc. The staff talks once/week with detainees about physical/mental health and case-related questions. Moreover staff is available 24h/day, i.e. whenever detainees need to talk. Whenever there is a new decision, staff actively seeks out the detainee to inform. The staff is generally aware that the level of the detainees’ awareness depends on their level of education, maturity, and situational openness to listen and take in what is being said. Some NGO quotes illustrate this:

- “Detainees experience themselves as being less informed than they perhaps are: it is hard to take in/accept information they have been given...” NGO Mårsta
- “Detainees are only somewhat informed especially as to why they are detained – when they are not criminal, it is inexplicable for many...” NGO Flen

Detainees express frustration and disbelief with regards to the situation and the detention. From their perspective, the authorities' decisions and actions are rid of any empathy. There is a Kafkaesque resignation in their voices. The most clear information need revolves around the reason for the rejection and to understand why the decision has been made. "They say I must leave the country", says one detainee, "They say I must cooperate so they can send me back. I can't help them as I have problems in my homeland." Another asks, "What do they plan to do? Migration Board says it is Police's decision, Police says it is up to Police. It is about my life!"

"I just got a rejection for no reason", asserts a detainee, "They say, 'there is no trouble in Libya and you did not say who you are.' But I will be put in jail in Libya for having applied for asylum in Europe. I also have personal problems with Muslim extremists. I had a death metal band and they think we were praying to the devil. They beat me with a knife."

3.3 Space within the detention centre

Detainees feel neutral about sleep room, and mention co-habitation issues as the biggest concern. They express equally neutral attitudes about centre space, mentioning air conditions as the biggest problem. They do not perceive the Swedish centres as being over-crowded; there is in fact space where detainees can be alone.

3.4 Rules and routines

The detainees are most likely to cite rules dictating behaviour when asked about the existence of rules and routines in the centres. The general opinion is that rules are respected, but that you cannot change rules.

3.5 Detention centre staff

The average detainee is in contact, in order of frequency mentioned, with administrative staff, social staff, domestic staff, health staff, and security staff. Opinions about the quality of the interaction differ widely, from positive to neutral and negative.

Gavle is the only detention centre that reports more negative answers than positive answers to this question. Some quotes point to the kind of negative staff interaction encountered, which often seems to centre on feeling disrespected or ignored, for example: "they laugh at me. I said, 'I am sick, I need hospital.' They don't listen..."

The average detainee does not report discrimination, but if he does (21% do), it is likely to be because of personal reasons. The answers on explanation are inconclusive as to reasons for this, with racism, and personal differences mentioned by a few.

Detainees comment both positively and negatively in regards to the staff's ability to support their needs (which, as they say, is to be out of detention and not to be sent home). One detainee says that there are "no problems here. Everyone is nice. I just don't want to be sent back." Yet another says, "I think they are trying to break me by locking me here. They know I should not be here!" Some believe that the staff is conspiring against them.

3.6 Level of safety within the detention centre

Not everyone feels safe in the detention centres. Detainees who are to be imminently deported do not feel safe, for example. Other detainees stress the lack of safety due to living in close quarters, and others describe disrespectful treatment from staff.

Detainees frequently attribute their sense of safety to the 'outside world'. Those that reported feeling 'unsafe' or 'very unsafe' did so because they can not feel safe when they do not know what will happen to them. "If I knew what would

happen to me”, says one detainee, “I would feel safe.” Another remarks, “I don't know what I'm doing here” (even people who said they feel safe made similar comments). “Here I am safe”, says another detainee, “I could be here for 10 years. I will be killed if I go back.” Other detainees attributed their sense of safety to the mix of cultures and ethnicities; one person remarked that he feared for his safety because he was being detained with people who have criminal backgrounds.

In general, detainees do not describe being verbally insulted or physically assaulted in detention. Only five people reported situations of verbal insult, blaming both co-detainees and staff. According to these detainees, the source of verbal insult from staff seems to have been rooted in disrespect: “Rude treatment, very derogatory, hushing me like a dog. They kept talking to me like a dog, that I should stay quiet.” Only one person had been physically assaulted, it was a fight with a fellow detainee.

Staff interviewed at all three centres explained that staff does not accept threats or violence as a matter of policy. They conduct regular checks in rooms and regularly separate detainees if they physically harass each other. By pressing the alarm button, other staff members arrive to assist in managing the situation. Detainees are calmed down in separate rooms.

Some detainees point to the overall insecurity of being held in custody against their free will. “How can you sit in jail and feel safe?” Safety, at some level, stems from being hidden away from earlier perpetrators. “I feel much more safe here than in Poland. There were attempts on my life there. The stress made me attempt to commit suicide. A friend told my family in Cameroon. They have separated themselves from me as it is seen as a curse on the family when someone attempts to commit suicide.”

3.7 Activities within the detention centre

In the Swedish centres detainees have access to many activities. There is access to computers, books, Internet, telephones, televisions, religious space, gym with sports equipment and small outdoor spaces. But there is little to no access to educational activities.

The average detainee restricts his participation to Internet and television. This is most likely due to mental health reasons: people suffering from psychological stress may lack an interest in engaging in activities. Staff shares the view that many detainees are too depressed to take part in activities. English lessons used to be provided in one Swedish centre; however it was discontinued, as detainees were not motivated to participate.

Detainees were asked to list which activities they would prefer to have in the detention centre. Approximately one quarter said they would prefer “freedom”, and another quarter “nothing”. The range of detainees’ responses to this area reflects their desire to leave the detention centre. The irrelevance of their responses points to the fact that detention itself, coupled with uncertainty about the future, is a major concern for detainees, more so than the facilities of the centre. “I have no interest in anything. No appetite. When I watch TV, I am not really watching. I cannot enjoy anything.”

3.8 Medical issues

Medical

Medical staff is available once per week. Access to a nurse is frequently reported, however only 21% report access to a doctor.

Physical health

63% of detainees say that detention has impacted their physical health. On average, detainees’ level of physical health deteriorates quite severely in detention. A majority of detainees point to psychological stress as a reason for

the decline in their physical health. Smaller numbers of detainees attributed it to the detention centre facilities; an even smaller number blamed the level of medical treatment. Certain special needs are expressed. A detainee with diabetes says, for example, "I need help for my pain. If you have a toothache, you take out the tooth or get it fixed. That's what I need for my pain, not just the painkillers they give me. They have no effect on my pain." Another detainee says, "I don't get the cancer treatment I need. Before, I did not think about it, but now I think about it all the time."

Mental health

Detainees' level of mental health is very negatively affected in detention. They point to several contributing factors: disconnection from the outside world, disruption of their life plan, self-worries and worries about others, medical and mental health problems, and simply being behind bars. Others expressed worry about what would happen to them upon return to their home country. One detainee says he feels "stressed", adding, "I have lost 7 years of my life." Another laments, "I'm feeling worse and worse because I don't know what is going to happen with me. I just feel weak."

One detainee describes his situation in very stark terms: "I have tried to kill myself. I asked for one Alvedon from eight different people. Took them all. Was sent to hospital. If they send me back, I will hang myself. If I die here or in Libya, it doesn't matter. But it will be messier and worse for the immigration authorities if I die here."

Quality of medical care

One in three detainees reports feeling negative about the quality of medical care; only one person feels positively. Almost half report that they need medical services that they do not currently have access to. Three people were concerned about the way they had been treated by medical staff: "My eye needs operation. They don't care, they are waiting until I go blind."

From an NGO perspective, the quality of medical care differs between centres. Both staff and NGOs raised the issue relating to the detention centre's competence to determine the psychological state of detainees as being problematic.

3.9 Social interaction within the detention centre

Detainees feel neutral about the level of social interaction within the detention centre. There are no problems between detainees in general in the Swedish centres. But not all detainees who were interviewed feel that there is someone in the centre whom they can trust should any problems arise.

3.10 Contact with the 'outside world'

Almost three fourths of the detainees interviewed report to have family in their country of origin. Of these, a majority said that their family was being supported. The same number of detainees describe having friends and family in the host country (reflecting the long time people have been in the country before being detained, and their high level of integration). Contact with persons in the 'outside world' is most likely to be done through telephone. Many detainees report receiving visits from friends, but less receive visits from family. Almost half say that they receive visits from lawyers. However we noted that detainees in Gävle are least likely to be visited by a lawyer. Approximately one quarter of detainees describe receiving visits from external NGOs. Again, we noted that in Gävle no one reported receiving visits from NGOs.

3.11 Conditions of detention and the family

The DEVAS study in Sweden did not collect data from detained families.

3.12 Conditions of detention and nutrition

More than half of detainees are dissatisfied with the food, mostly because it is of poor quality (although one-third thought it is adequate). There were many complaints among detainees with regard to the lack of variety of the food and that the food is lacking in vitamins and other nutrients. A large number of detainees described weight loss as a result of the poor quality of the food.

According to the *staff*, the food is adapted to serve people of different cultures: no pork, vegetarian options, food allergies are accounted for and halal meat is served. But the staff remarks that the food has to remain neutral so it does not cause problems among detainees. The staff does insist that the food is nutritional. There is recognition among staff that detainees' appetite is affected by their unhappiness, sleep during daytime, the lack of routines and also their loss of freedom.

3.13 Conditions of detention and the individual

Difficulties

Insomnia is a frequently reported condition: 83% said that they do not sleep well at night. The psychological stress that comes as a result of detention is a principal cause, according to detainees.

When asked to describe the biggest difficulties experienced in detention, approximately one-third of detainees stated factors relating to the situation of detention itself, i.e. being behind bars, the disruption of their life plan, the lack of contact with the outside world and their loss of rights in detention. Smaller numbers were specifically concerned about being cut off from friends and family, the living conditions. Others pointed to worry and stress as being their main problem in detention; medical problems, especially relating to physical health, were also seen as major difficulties in detention.

In this respect, the living conditions factor highly, i.e. the lack of fresh air and the number of detainees in the centre. But the mere situation of their imprisonment, and the resultant disruption of their lives, figures even more prominently. "Conditions much worse in Afghanistan, but I will be killed when I go back", worries one detainee.

One fourth of all detainees interviewed said that their difficulties become worse as detention progresses. A number of detainees describe particularly difficult times in detention: for some it is when they think of loved ones, or for others when they cannot go to mosque on Friday. Yet other detainees describe the first nights of detention as being the most difficult.

The responses of the detention centre *staff* closely confirm the difficulties that detainees report to experience. One NGO visitor comments: "Some get used to it. For some, it is worst in beginning, then they adjust, for some, they get more and more stressed, some become lethargic and passive – it varies."

Outcome of detention

The final outcome of the detention is to a large extent unknown to the detainee; 78% do not even know when they will be released from detention. According to detainees, not knowing when they will be released leads to a deep sense of worry and stress. "I don't know what will happen", says one detainee, "if I think about it, I feel pain and cry."

The *staff* emphasised that they treat these issues with a high degree of professionalism: "We are very honest when we inform detainees – we do not give false hopes." According to staff, the impact of detention on those who experience it varies from person to person: "It breaks people down to varying degrees, depending on their mental state and what they have experienced, including the thought of returning home. Loss of freedom must be different for everyone. People are very different at dealing with this – some accept, some become depressed." Another staff

person says, "Detainees become more sensitive. They have time to reflect over their lives, hear other people's life stories. Many turn to religion, start to pray."

Self-perception

On average detainees hold neutral perceptions of themselves. However, this is not to say that their self-perception is adequate or tolerable by standards usually applied for persons not in the situation of detention. A number of detainees describe themselves in very negative terms. One detainee describes himself as "someone they don't care about, laugh at, don't listen to." Another says he is "a person without rights, powerless. I have lost my human dignity here."

Special needs and vulnerability

The average detainee does not feel that he has special needs. Detainees frequently describe "everyone" as having special needs and vulnerabilities. "There is an Iraqi 75-year old woman here", states one detainee, "she is sick, has diabetes, high blood pressure, is depressed. This is a shame for Europe that she is here. A shame how they treat a sick person. She should be in hospital and then free." Another says: "Us Africans [are vulnerable]. They treat us badly. Even if we are sick, they don't care. There was an African girl, who was pregnant, carried out by six policemen." A severely handicapped Lebanese man (with a handicap due to a previous car accident) awaiting deportation back to Italy states: "I am handicapped. I want to go to Italy, my church, people who care. Here I am like a dog, not important. No feelings here. No heart. I came to Sweden for help. You don't help me. My muscles are disappearing. I can't work, do anything." In this way detainees often describe special needs and vulnerabilities that are not usually officially recognised.

The detention centre *staff* states that the most vulnerable in detention are very elderly people and young women (especially victims of trafficking/prostitution). They also identify persons with psychological problems as being particularly vulnerable. The staff sometimes worries that suicides might happen within the detention centre. "Very old people are often illiterate and cry all the time", says one staff person, "Young people manage somehow. They miss their families." Another says: "Those who have families outside [are most vulnerable], they worry about their wives and children; they feel frustrated, powerless and helpless."

4. ANALYSIS OF THE DATA AND CENTRAL THEMES

- **Detention itself is a major factor of vulnerability. Detainees report a significant deterioration in physical and mental health caused by stress and uncertainty (rather than any physical mistreatment or poor living conditions).**

While detainees reported needing better medical care, they are unlikely to mention this as a cause of physical health deterioration; this is instead primarily seen as the result of the psychological pressure of being in detention. Detainees do not know about the outcome of their detention and when they will be released. Consequently, this causes stress, an inability to plan for the future, anger and mental health problems (one in five report this). The steep deterioration of mental and physical health indicates that detention is, in and of itself, makes detainees more vulnerable to negative impacts.

- **Stress and uncertainty is a consequence of detainees' lack of information about their situation, and the lack of clarity about their future. Many fear imminent return to their homeland.**

Many detainees feel that their situation is unjust. Although they are likely to have been informed about the reasons for their detention, a large number still feel like they are in need of more personalised information. At the root of their sense of injustice is the level of disrespect they claim to experience, especially from the staff. Added to this is the fact

that many detainees come from refugee producing countries, and as a result they fear the possibility of experiencing violence in the future; all of which fosters very negative mental health conditions.

The stress and uncertainty detainees feel has a deteriorative effect on their self-perception. A sense of worthlessness and self-degradation is acutely prevalent. The ongoing deterioration of their self-perception means that detainees become more susceptible to the environment of detention. "I see myself as an innocent who is detained", says one detainee, "My self respect has decreased. I am only a paper, a number....I have no control or power. I'm a prisoner."

- **The situation of detention itself is a more prominent factor of vulnerability than the living conditions.**

Except for the food and the lack of fresh air, detainees do not tend to complain about the detention conditions. Based on their statements, detainees seem less concerned about the living conditions than their restriction of freedom. The stress of being detained, the disruption of their lives and the fear of being returned home are all too much to bear. Within this context, activities simply do not seem to be important or helpful.

- **Women may be especially vulnerable to the adversities of detention.**

The voices of women are not numerous in this study, as many tended to shy away from the interviewers. But as a general observation from visits to the detention, there seems to be higher degree of visible depression and numbness among women than men. Many of the women we approached to interview appeared withdrawn and catatonic. Since most declined to participate in the study, we can only speculate about their reticence. Based on our observations alone, we would venture to say that these signs are indicative of vulnerabilities or special needs that are left unaddressed.

- **A number of factors at the level of the individual create and shape vulnerability.**

The research suggests a variety of factors that impact an individual's level of vulnerability to the adversities of detention. Gender, the duration of detention, the level of information, the country of origin, the condition of physical and mental health, and prior experiences of traumatic events are just some examples of personal factors that affect one's susceptibility in detention. The presence and strength of these factors vary between each person. Moreover, each factor has the potential to either improve an individual's ability to cope with detention, or to make them weaker and thus more vulnerable to further negative consequences.

5. CONCLUSIONS AND RECOMMENDATIONS

The focus of the DEVAS project has been to assess vulnerability by setting aside predetermined notions of vulnerability and listening to the voices of the detainees. Vulnerability is a fundamentally weakened sense of being both in terms of physical and mental integrity. It can be seen as a loss of control over oneself to someone with more power. The DEVAS research shows that detention has the potential to make almost any person vulnerable in this way.

Relatively speaking, Swedish detention centres are humane. They are managed by professional, well-trained and diverse groups of staff. But the psychosocial impact of detention upon individuals remains strikingly clear; this much is confirmed not only by detainees, but even by NGOs and detention centre staff. Despite the humane conditions of detention in Sweden, there appears to be a lack of staff competence with regard to identifying the signs of psychological deterioration in detainees, and obtaining appropriate care for those who need professional help. It is apparent that the loss of freedom, the uncertainty and lack of control of one's destiny has a profound effect on the

mental well being of the individual; these consequences overshadow any positive element that exists within detention centres in Sweden.

Based on the conclusions of the research, JRS-Sweden offers the following recommendations:

Detainees should receive greater psychosocial support in the detention centre. The detention centre staff, as well as NGOs, has an important role to play in this regard. This is especially true for NGOs, considering that they are granted wide access to detention centres in Sweden. In one of the detention centres we visited we observed that no NGOs were present, which was to the detriment of detainees since it appear that they could have benefited from such external support. Even in detention centres where NGOs are frequently present, such as in Stockholm, a better coordinated NGO effort could bring very beneficial results for detainees.

Detainees should be provided with accurate and relevant information about their situations. The DEVAS research clearly shows that the lack of information leads to a sense of confusion and depression among detainees. The information that is provided does not appear to be understood very well, either because it is not presented in a suitable manner, or because the shock of detention prevents individuals from fully understanding their circumstances. Detention centre staff should acknowledge the fragility of each detainee's situation, and thus provide them with all relevant information in as clear and understandable manner as possible

The negative consequences of detention mean that alternatives to detention should be considered first. The DEVAS research shows that detention is almost certainly harmful for any person who experiences it. Even the most humane conditions cannot take away from the inherent isolation, stress and uncertainty that come with the deprivation of personal freedom. Non-coercive alternatives to detention should always be implemented and thoroughly exhausted before detention is considered for any individual.

In the case that detention cannot be avoided, there should be frequent holistic assessments of the person's condition and to ensure that the harmful effects of detention are reduced to the highest extent possible. Such holistic checks should also be used to continually determine the necessity and proportionality of detention. Assessments should take into account all of the factors that impact an individual's level of vulnerability in detention, such as their gender, country of origin, history of trauma, their state of physical and mental health. The persons who conduct these assessments should not be the persons who determine whether detention is implemented or not.



ANNEX

NATIONAL REPORTS

- *Estonia*
- *Italy*
- *United Kingdom*

Editor's note:

The following three national reports are distinct from the rest because they are not based on the methodology of detainee interviews as the other national reports are. The Estonian Refugee Council was able to interview only one detainee, because during the time of the data collection phase only one person was actually detained in Estonia. JRS-Italy (Centro Astalli) was not able to access the detention centre in Rome as planned, due to the severance of their Memorandum of Understanding with the Italian Red Cross, which had previously permitted them access to the centre. JRS-UK was unable to interview detainees due to the UK Home Office's refusal to allow the implementation of DEVAS in the UK.

As an alternative each of these partners wrote reports from an external perspective, based primarily on interviews with national NGOs, the existing literature on detention and on their own experience as detention-visiting organisations.



NATIONAL REPORT: ESTONIA

By: Estonian Refugee Council

1. INTRODUCTION

In Estonia, the Estonian Refugee Council implemented the DEVAS research. Due to the low number of asylum seekers in the country generally and even lower number of asylum seekers in detention only one person was involved and thus conducted the interviews. During the period the interviews were to be conducted there was only one asylum seeker in detention and by the virtue of the low number of asylum seekers in detention there only is one Detention/Expulsion Centre (Citizenship and Migration Board Migration Surveillance Department Repatriation Centre) in Estonia that is situated in Harku about 15 km from the capital Tallinn. For the present research one staff member from the above-mentioned Centre was interviewed and one NGO (Johannes Mihkelson Centre) representative who works as a supportive person for asylum seekers in detention. There is only one NGO besides ERC that has very recently started to visit the asylum seeker(s) in detention. No organization has interviewed the detainees before in the past so the present project, national report and results of the interviews are the “first” to reflect the feelings and experiences of detainee(s), NGO representatives but also the staff member(s) of the Detention Centre.

The main obstacle implementing the project was the language barrier between the detainee and the interviewer. The same issue was also pointed out by the NGO representative and detainee.

Clearly in order to receive thorough results the lack of target group, in other words asylum seekers in detention, was limiting the amount of data necessary to write a reliable report and draw some strong conclusions.

2. NATIONAL LEGAL OVERVIEW

From 1997 until the 3rd quarter of 2009 the number of asylum applications in total is 174 so it is very marginal in general and therefore the number of asylum seekers in detention is almost non-existing. Before 1997 when there was no Refugee Act and Estonia had not ratified the 1951 Convention Relating to the Status of Refugees all asylum seekers were treated as illegal immigrants and imprisoned.

In 2006 Estonia issued a new law Act on Granting International Protection to Aliens that says that an asylum seeker, who submitted his/her application while staying in the Detention Centre or in the course of the execution of his/her expulsion, must remain in the said Centre or in prison until the end of the asylum procedure.²⁴⁴

Main laws relating to detention in Estonia:

- Act on Granting International Protection to Aliens (AGIPA)
- Aliens Act
- Obligation to Leave and Prohibition on Entry Act (OLPEA)
- Imprisonment Act
- State Borders Act

²⁴⁴ AGIPA, Art.33 (1)

- Internal Rules of the Detention Centre (decree)

2.1. Legal grounds for detention and ordering detention

In Estonia asylum seekers are not detained and they stay in the Reception Centre in Illuka that is not a closed facility. However there are grounds for ordering detention according to Estonian national legislation. Firstly a person can be detained because of illegal stay and if he/she does not leave the country within 7 days as fixed up in the legislation and stated in prescription to leave the person will be placed in the Detention Centre that is a closed facility.

According to Article 32 (1) of AGIPA an applicant who has submitted an application during his or her stay in the country may be detained at the initial reception Centre but not for longer than forty-eight hours. In practice there still is no such facility as the initial reception Centre. After the above-mentioned 48 hours with the permission of an administrative court judge, an applicant may be detained and be required to stay at the initial reception Centre in the following cases:

- 1) The identity of the applicant has not been ascertained, including in the case where the applicant does not co-operate in the identification or hinders identification;
- 2) For establishing circumstances relevant to the asylum proceedings if the applicant does not co-operate in establishment of the circumstances provided for or hinders the establishment thereof;
- 3) There is good reason to believe that the applicant has committed a serious criminal offence in a foreign state;
- 4) The applicant has repeatedly or seriously violated the internal procedure rules of the reception Centre;
- 5) The applicant fails to comply with the surveillance measures applied with respect to him or her, or fails to perform other duties provided by law;
- 6) The applicant's stay at the initial reception Centre is necessary in the interests of the protection of national security and public order.

Furthermore AGIPA Article 62 (6) says that with the permission of an administrative court judge, an applicant for residence permit may be detained and be required to stay at the initial reception Centre if the applicant has repeatedly or seriously violated the internal procedure rules of the reception Centre or the place designated by the Ministry of Social Affairs or the staying of the applicant for residence permit at the initial reception Centre is necessary in the interests of the protection of national security and public order.

Alien staying illegally in Estonia and has an obligation to leave the country and if the person does not fulfil the percept to leave an expulsion order can be issued and the person can be detained in order to carry out the expulsion. OLPEA regulates the placement in detention, providing that if it is not possible to carry out the expulsion within the limited timeframe 48 hours, the person will be placed in the pre-expulsion centre, upon the request of the institution requiring the expulsion usually The Citizenship and Migration Board (CMB) or the institution responsible for the enforcement of expulsion, with the consent of the Administrative Court judge. A person in the Detention Centre cannot be detained longer than 2 months. In practice, it can be indeterminately extended by the Administrative Court upon the request of the CMB or the Police.

A person to be expelled who is to be placed in an Expulsion Centre may be detained in a police detention house for up to thirty days instead of an Expulsion Centre. The conditions of execution of detention specified in the Imprisonment Act apply to detention in police detention houses.

Initial detention of asylum seekers for up to 48 hours can be prolonged in specified cases by the Administrative Court order.

2.2. Legal grounds for the minimum age for detention

The law does not set clearly the minimum age for detention for asylum seekers or for illegally staying third country nationals. If there is a need to detain both of the parents then the child is kept with the parents and is detained.

A minor shall be accommodated separately from adult persons except if this is evidently in conflict with the interests of the minor. If possible then family members shall be accommodated together. The provision of food for minors shall be organized taking into consideration the needs resulting from their age.

AGIPA also speaks about unaccompanied minors who are not detained in the Detention Centre but because of being a minor might not enjoy all the freedom that asylum seekers usually enjoy at the reception Centre and are under supervision and care. According to the applicable laws an applicant who is an unaccompanied minor shall be placed in the reception Centre or a social welfare institution for the time of the asylum proceedings, and welfare services appropriate to the age of the applicant shall be guaranteed to him or her. But he/she also may be placed with an adult relative or a foster family if the recipient is suitable to take care of a minor. When placing an applicant who is an unaccompanied minor in the reception Centre, a social welfare institution, with an adult relative or foster family, the rights and interests of the minor shall be taken into consideration above all. If possible, unaccompanied minors who are siblings shall not be separated from one another. The applicant who is an unaccompanied minor may be placed in the initial reception Centre for the time of examination (i.e. medical examination to determine the age).

2.3. Legal grounds for judicial review of the detention order

There is no automatic judicial review of the decision to detain in Estonia. According to OLPEA Article 25 that regulates the extension of term for detention in Expulsion Centre says that if it is not possible to enforce the expulsion an administrative court shall, at the request of a competent official of the Citizenship and Migration Board, extend the term of detention in the Detention Centre of a person to be expelled by up to two months at a time until expulsion is enforced or the alien is released.

2.4. Legal grounds for the right to appeal against the detention order

Detention order is an administrative act or court order in Estonia, it can be appealed in the Administrative Court and general rules of administrative court procedures apply.

An administrative act always contains a reference to the possibilities and place of and terms and procedure for the challenging of the administrative act²⁴⁵.

In the case of an asylum seeker, the court must order the detention, so there is a court review before the person can be detained. By the law the person to be detained has the right to appeal the decision. In practice no asylum seeker has been detained so far and the asylum seekers in detention are the ones who have applied asylum after being placed to the Detention Centre.

In case where the Citizenship and Migration Board, an administrative body, have issued the expulsion order the person has the right to appeal the decision to the Administrative Court.

2.5. Legal grounds for the right of information about the detention order and/or the reasons for detention

²⁴⁵ Administrative Procedure Act, Art. 57

The detainee has the right to be informed about the reasons for detention and this is done by the Citizenship and Migration Board official or/and also by the Detention Centre official.

The ground(s) for detention are listed in the administrative court order and the person to be detained shall be informed about the grounds, court decision, how to appeal/procedures, right to legal representation etc. immediately. The detainee has the right to access to this court order that is kept in his/her personal file in the Detention Centre at any time upon the request and in accordance with the Internal Rules of the Detention Centre.

2.6. Legal grounds for the duration of detention

If it is impossible to enforce expulsion within the term of detention in an Expulsion Centre, an administrative court shall, at the request of a competent official of the Citizenship and Migration Board, extend the term of detention in the Expulsion Centre of a person to be expelled by up to two months at a time until expulsion is enforced or until the alien is released²⁴⁶. The law does not fixate the maximum duration of detention so this two-month period can be reviewed over and over again and the detention extended. In practice persons have been under detention for years before they will be either released or expelled. The period however has shortened remarkably over the past years due to the re-admission agreements with third countries including Russian Federation.

2.7. Legal grounds for the provision of health care and the scope of health care benefits, and for the provision of social services

Health care is provided in the detention centre and in the Act on Granting International Protection regulates the health care provisions for asylum seekers in initial reception centre.

Detention centre(s) shall have permanent treatment facilities for the supervision of the state of health of persons in detention and emergency medical care shall be ensured. Health care services are provided by people with the qualifications pursuant to the provisions regulating specialised out-patient care. The persons providing health care services are required to supervise the state of health of persons in detention on a constant basis and place them in treatment in the Central Hospital of Prisons if necessary. The in-patient treatment in the Detention Centre shall be conducted under supervision in the Central Hospital of Prisons. The medical expenses of emergency services and regular/hospital treatment shall be paid from the state budget.

There are no social services provided in the Detention Centre and to ease somewhat the problem an NGO named Johannes Mihkelson Centre has provided supportive persons for the asylum seekers in detention. The detainee may call or write to his/her supportive person at any time and the supportive persons visit them at the Detention Centre approximately once a month.

2.8. Legal grounds for contact with the outside world

OLPEA Article 26 regulates the terms and conditions of visiting the persons to be expelled.

Visits by the following are allowed for persons to be expelled:

- 1) Consular officers of the country of nationality;
- 2) Legal counsels;
- 3) Ministers of religion with regard to whose reputation the head of the Expulsion Centre has no reasoned doubts.

²⁴⁶ OLPEA, Art. 25

With the permission of the head of an Expulsion Centre, a person to be expelled may be allowed to receive short-term supervised visits of personal, legal or commercial interest. Persons to be expelled are permitted to receive visits only from persons with regard to whose reputation and motives the head of the Expulsion Centre has no reasoned doubts.

Officials of an Expulsion Centre have the right to search visitors and examine their personal effects. It is prohibited to review the content of written material brought by legal defence counsel. An official of the same sex as the visitor must conduct the search. Items the holding of which is prohibited in an Expulsion Centre shall be temporarily deposited during the duration of the visit.

Persons to be expelled shall be visited pursuant to the procedure, at the times and in rooms prescribed by the internal rules of the Expulsion Centre. The duration of visits shall be determined by the head of the Expulsion Centre and shall not exceed three hours.

Persons to be expelled shall be visited in the presence of an official of the Expulsion Centre. Visits from a legal defence counsel or a minister of religion are allowed within sight but not within hearing distance from officials of the Expulsion Centre. OLPEA Article 26 sets the rules for correspondence and use of means of communication by persons to be expelled:

- Persons to be expelled have the right of correspondence and the use of telephone and other public communication channels if relevant technical conditions exist in the Expulsion Centre.
- Correspondence and the use of telephone and other public communication channels shall be affected pursuant to the procedure provided for in the internal rules of the Expulsion Centre.
- An official of an Expulsion Centre shall open letters sent to a person to be expelled in the presence of the person to be expelled and confiscate any items the holding of which in the Expulsion Centre is prohibited by the internal rules of the Expulsion Centre.
- The content of the correspondence of a person to be expelled and of messages forwarded by telephone or other public communication channels by or to a person to be expelled may be examined only with the permission of a court and on the basis and pursuant to the procedure provided for in the Surveillance Act.

The head of an Expulsion Centre may restrict the correspondence and use of telephone and other means of communication of persons to be expelled if this may violate the internal rules of the Expulsion Centre or impede enforcement of the expulsion. The correspondence of persons to be expelled with state agencies, legal defence counsels, ministers of religion and consular officers of the country of nationality shall not be restricted.

Costs related to correspondence and the use of telephone and other public means of communication shall be borne by the person to be expelled. For correspondence with Estonian state agencies, legal defence counsels, ministers of religion and consular officers of the country of nationality, a person to be expelled shall be provided with stationery and postal charges shall be covered if the person to be expelled does not have funds.

2.9. Legal grounds for the provision of legal aid

Asylum seekers have the right to legal aid guaranteed by the state, regulated by the State Legal Aid Act. State Legal Aid Act Article 6 says that a person may receive state legal aid if he/she is unable to pay for competent legal services due to his/her financial situation at the time the person is in need of legal aid or is able to pay for legal services only partially or in instalments or whose financial situation does not allow meeting basic subsistence needs after paying for the legal services.

2.10. Legal grounds for the protection of persons with special needs

There are no special legal provisions in the law for the protection of vulnerable people, with the exception of unaccompanied minors who seek asylum. In terms of law they cannot be detained.

In practice if possible and free rooms available then people with special needs are separated to their own rooms. Also specific diets required due to some illness are taken into consideration.

2.11. Legal grounds for alternatives to detention

There is no alternative to detention since in normal situations the asylum seekers are not detained. In case of an illegal immigrant who is placed in the Detention Centre to wait for the expulsion and while being in the detention decides to apply for asylum he/she shall not be released and one must stay in detention until the decision has been made.

2.12. Legal grounds for providing release from detention

When the legal grounds for detention cease to exist the person shall be released. There are no specific release provisions stated in the legal acts and the decision rests with the Administrative Court. According to OLPEA a person will be released when the expulsion is possible, when he/she gets a permission to stay in the country or when the precept to leave is declared void.

3. OVERVIEW OF THE NATIONAL DATA FINDINGS

3.1. Detainees' awareness of their asylum case

The court shall decide upon the use of detention, and its extension. The person is informed about the court decision (including the reasons for detention) immediately. Whenever the detainee has a question concerning his or her status they have a right to send a request letter to CMB and the CMB is obliged to reply. Before the CMB sends out its official decision the detainee receives a letter from the CMB with the grounds that support the decision to be made and then within 2-3 weeks the detainee has the right to respond before the official decision will be served.

3.2. Space, rules, routine and the Detention Centre staff

The Detention Centre (also known as Expulsion Centre) is situated 12 km outside Tallinn, the capital of Estonia. The Centre falls within the Citizenship and Migration Board structure and its internal code of conduct (internal rules) and is an administrative detention facility for rejected asylum seekers and illegally staying third country nationals waiting for their expulsion. It consists of one building and an outdoor area, part of which is closed to the detainees. The premises are rather new and in good condition. The Centre has 21 rooms and it accommodates max 42 people, including children. In their rooms there is a bunk bed, wardrobe, stools, table and a chair. All the furniture is made from metal and fixed on the floor. There are windows in every room. Men and women are detained in different floors. The average number of persons staying in the Centre is 12-15 so the Centre is not overcrowded. During the visits of ERC (Estonian Refugee Council) and JMC (Johannes Mihkelson Centre) representatives in June 2009 each of the detainees has his/her own room, the TV room and showers and toilets in the corridor are shared.

The Centre has clear rules, daily schedule, procedures that usually are respected by the detainees. The detainees cannot propose changes to the rules. Visiting days are twice a week; the time spent with the visitors is limited, and meetings are observed by staff persons that are either in the room, or in an adjoining room.

Based on the few contacts that ERC and JMC have had the staff seems to be professional, friendly, and tolerant and there seems to be no discrimination or misuse of power.

3.3. Safety

The general feeling about the safety of the Detention Centre is positive and the detainees get along well that was also said by the detainee. When accommodating the detainees the staff considers their religion and ethnicity.

The guards are on duty 24 hours a day and the Centre is surrounded by electric fence. All the visitors are registered (arriving time and leaving time) and get the permission to enter the Centre only if they present an identity card with picture, incoming mail (packages) are opened by the staff in the presence of the receiver (detainee).

If the detainee has conflicts with others he/she will be placed in a separated and locked room on the basement that has a bed, table, chair, hallstand, sink and a toilet. The detainees stay separately in a locked room until they calm down. After the wakening the mattress, pillow and blanket are taken away. Occasionally there have been conflicts but they have minor relevance; and the staff has been able to solve the conflicts. Generally the detainees get along well and no major conflicts have occurred.

3.4. Activities and social interaction

There are no organised activities according to schedule but the Detention Centre has provided different equipment for different activities. Most of the activities are connected to sports (table tennis, basketball, football etc). The detainees also have an opportunity to have outside activities (play football and other ball games mainly). Usually the detainees participate in these activities but it depends on their own free will.

There are books and newspapers available in English and in Russian, people not speaking the above mentioned languages do not find anything to read unfortunately. Indoor activities include board games and table tennis for example. The Centre provides appropriate equipment.

The Centre also has a separated place for religious rituals however there are no pastoral workers within the Centre or religious literature to read in various languages.

Often the language barrier and differences between the nationalities of the detainees affect their participation in activities or being active socially within the Centre.

If there is only one female detainee or vice versa and he/she wishes to communicate with the detainees from the opposite sex the manager of the Detention Centre shall consider that wish and normally the permission is granted.

3.5. Hygiene, sanitation, medical services and nutrition

The hygiene and sanitation conditions are well looked after. The detainees have the responsibility to take care of their rooms and all the necessary supplies are provided. All detainees must utilize rationally commodities given for his/her use and keep tidy and clean the premises for his/her use.

The detainee has the right to receive aid from the Detention Centre for acquiring toiletries if he/she does not have sufficient financial resources. Bed linen is changed every Wednesday and there are washing machines and dryers in every bathroom that can be used daily.

Medical

The doctor will examine the detainee upon the arrival. They also receive an examination at the hospital to make sure they don't have any contagious diseases and if treatment is necessary they will receive it.

The Detention Centre has first level medical service all examinations are made in the hospital on demand of detainee which means that the detainees also may receive medical care outside the Centre. If the detainee needs immediate medical help the staff will call the ambulance, external medical care is also provided whenever needed.

In the Centre doctor, nurse and the therapist receive detainees twice a week. There is female medical staff in the Centre and they are easily accessible to female detainees. The following medical services are available in the Detention Centre:

- Nurse (every day for 2 hours)
- Doctor (twice a week for 4 hours)
- Psychiatrist (every other week up to 8 hours)
- Psychologist (every week up to 4 hours)
- Special medical analysis shall be made if necessary.

According to the JMC the medical staff are able to speak in languages that the detainees are able to understand or if not, they are able to forward the information with the help of the translator. However according to the French speaking detainee and very often in other similar cases this might not be true the medical staff does not speak the language and there are no interpreters available every day so the medical staff has to do it's best to make themselves understandable to the detainee and be very open minded to understand the person in need.

Usually the detainees do not report about their physical conditions to the NGO representatives because the Centre provides relevant medical care. They sometimes report about sadness, feelings of tension, confusion and suicidal thoughts. These feelings usually come from the uncertainty about the future. In such cases they have the opportunity to speak to the therapist or NGO representatives (supportive persons) and these conditions normally are remedied. Each detainee has his/her own supportive person provided by the JMC whom he/she can call any time.

Nutrition

There is no kitchen for detainees in the Detention Centre. The detainees are given simple food from European kitchen mainly and hot meal at least once a day. The menu is checked over and confirmed by the doctor. From the nutritious perspective the food meets all the requirements however considering the fact that in the Centre there are people from different parts of the world lack of variety in different foods was mentioned. All people are not used to eat European food and therefore malnutrition might lead to weak physical but also mental health.

Special needs of a child are taken into consideration also people in need of specific diet due to some illness. The Detention Centre also considers persons religious and cultural customs and provides them appropriate meals.

3.6. Contact the 'outside world'

There is a possibility to use a phone (pre-paid phone cards provided by the NGOs upon the request) and write letters. There is no computer and Internet for detainees to keep contact with the outside world including friends and family members. Personal contact is allowed twice a week during the visiting hours.

Both calling and personal meetings are considered as effective means and used widely. Russian speaking detainees usually have friends or family in Estonia and people from further countries (Asia, Africa) use phones more however it

is quite expensive to call and detainees who can not afford these cards face difficulties being in contact with their friends and family. The detainees have the right to receive personal visits from family members, friends, religious persons, lawyers and other organisations (including international UNHCR etc.).

3.7. Conditions of Detention and Family Relations

Families are accommodated together in the section/floor where female stay and never the other way around. Married couples can stay in the same room with their children, fortunately children are not common in the Detention Centre and there have been only a few cases. There are no educational opportunities or special areas/spaces for children to play within the Centre. The children are treated with special care and the needs of a child shall be considered (food, medical attention, activities, and education). According to the Estonian legislation the Detention Centre has to organise schooling for the child (or children).

3.8. Conditions of Detention and the Individual

According to the NGO representative from the Johannes Mikhelson Centre, the main factors that influence the physical and sometimes mental well being of the detainee are uncertainty about their future and lack of family's and friend's presence and support. Based on the experience and observations the top three difficulties that the detainees face are loneliness, stress and uncertainty. Usually detention becomes difficult when the detainee receives bad news from home.

During the time of detention some detainees' physical condition has improved. The Detention Centre continues to assure the good workout conditions. Very often the detainees speak about their mental well being in other words they speak about their concerns and worries. The most common problems from the staff perspective are insomnia, depression and sadness caused by the uncertainty about the future, being away from family and friends, being captivated etc. The detainees also have the possibility to speak with the psychiatrist and/or Psychologist where they get appropriate treatment.

The vulnerability is determined by the JMC based on many factors for example if the detainee is without contact with his close family and when his/her family is in a war or conflict zone. The detainee is definitely more vulnerable if he/she has some illness or has had serious traumas/experiences in the past (war, torture, death etc.). At the moment there are no persons whom JMC supportive persons would call vulnerable nor is the asylum seeker in detention calling himself vulnerable or a person with special needs. He had been in the Centre for almost 3 months and regardless of the months spent there he still felt that his mental and physical health is very good just like before the detention. Also the interviewer's impression was that he was fit mentally and physically and his only concern was uncertainty about the decision as well as the future in general. However the longer he has to stay in the Detention Centre the more likely he might become vulnerable because of the possible stress and depression.

4. ANALYSIS OF THE DATA AND CENTRAL THEMES

The present research and its findings is the first step towards finding out how detention affects the mental and physical health of the detainee and what makes the detainee vulnerable. Unfortunately it is impossible to say much based on these three conducted interviews when only one of them was a detainee interview that really reflects the influence of being detained to a person.

The central themes mentioned in these 3 interviews and based on ERC previous experiences are pretty much the same and one confirmed the other.

2. Case awareness- in principle the detainee understands the reasons for being detained however either due to the shock and great concern of being detained or language barrier the details of the case might be misunderstood or not understood at all. Uncertainty about the future what type of status will be given, will he/she be expelled or given the permission to stay in the country, when the detainee will be released etc. According to Estonian legislation there is no maximum period of detention and in the past sometimes persons were detained up to 2-3 years before they were either released or expelled.
3. Language barrier during ordering detention and being in detention, influences in many ways every detainees' daily lives if one can not communicate with the Centre staff, medical personnel or with other detainees. The feeling of being helpless and lonely is much greater without a doubt if there is no one to communicate with and if one can not explain his/her health concerns and it definitely leads to vulnerability eventually.
4. Lack of social activities and difficulties communicating with the outside world makes the time spent in the detention look even longer. Lack of information about family on the outside (especially in conflict zones) and not being able to support them creates great sadness and depression among the detainees, as does the lack of activities. There is no internet and for many of the detainees no newspapers, magazines or other literature provided in the language they understand to find out about the news in their home country and so on.

It would also be good to point out that many of the findings were positive such as there is no misuse of power or discrimination by the Detention Centre staff, the quality of medical services provided is high, the Centre itself is newly renovated and modern building with rooms where there is enough silence, light and space and it has never been over crowded. The staff in the Detention Centre is well trained, friendly, helpful, open minded and tolerant towards detainees from different countries, cultures and religious backgrounds.

5. CONCLUSIONS

Estonia is a good example for many other European countries that detain asylum seekers. Regular asylum seekers in normal circumstances are not detained and the grounds for detention are listed in legal acts and can be enforced only with court order.

When we speak about asylum seekers with special needs and vulnerable asylum seekers, then Estonian relevant legislation does not speak about these people separately at all except for a few clauses for minors.

Considering the fact that some of the problems in the Detention Centre that were mentioned in the previous chapter might eventually lead to vulnerability, or make the situation of vulnerable detainees even more serious, the following ideas might help to improve the situation in the future.

Today if the detainee has enough financial resources he/she can hire an interpreter to help him communicating with the medical staff, Centre staff, etc. But in most of the cases the detainees do not have that kind of financial resources and they are left with the doctor who tries to be open minded and understanding. Using this method many serious illnesses or other problems/worries may be left unaddressed and this definitely affects detainees' physical and mental well being, level of stress and depression. Language barriers should be taken more seriously, and additional funding for using interpreters whenever necessary (especially when providing medical services) should be possible. Many problems and misunderstandings could be avoided and solved if an interpreter and/or cultural mediator would be present.

In the Detention Centre in Estonia there are no social workers, nor any organised activities by the Centre staff or by the organisations from outside the Centre. Some extra attention and organised activities might help the detainees to be preoccupied with the activities, think positively, and worry less about their future and this way not to fall in depression. Involving NGOs, volunteers and people with different skills and qualifications from outside the Centre would also be good means in helping the detainees pass by the time in the Centre and wait for their decision. Seeing that there are people who care about you might reduce the level of tension and stress and help a person being more stable mentally but also physically.

Last but not least by far is the question of how long a person can be detained in total. This maximum period of detention is not fixed in legal acts. According to Estonian legislation a person cannot be detained longer than two months; but in practice the detention can be indeterminately prolonged by the Administrative Court, upon the request of the CMB or the Police. As already mentioned several times the uncertainty about the future is the most serious factor in creating mental and physical health problems for detainees, and it makes them fall into depression and therefore they might become very vulnerable. Over the past years the period of detention has shortened considerably. But in the case of an asylum seeker where the procedure might take up to six months, and if the decision made by the CMB is negative, if the applicant decides to appeal it might still take years and the whole time the asylum seeker still has to stay in the Detention Centre. It would be very important to lay down the maximum period of detention and to be absolutely sure that it is absolutely necessary to detain the asylum seeker(s), and to take the risk and responsibility that by detaining the person he or she might be further traumatised.



NATIONAL REPORT: ITALY

By: *Jesuit Refugee Service Italy (Centro Astalli)*

1. INTRODUCTION

The work carried out by Centro Astalli has been strongly conditioned by an external factor: the impossibility to obtain interviews directly from detainees.

In fact, while previously Centro Astalli could enter regularly (once a week) the detention centre of *Ponte Galeria* in Rome, during the period scheduled for the interviews by the DEVAS timetable the authorisation was suspended. This was due to the change of organization that managed the Centre, and also to the expiration of the contract. All these changes resulted in the suspension of the authorisation by the Italian Ministry of Interior, and in the consequent reduction in providing assistance by Centro Astalli.

As an alternative, Centro Astalli collected data from six NGOs and three former detainees. This was the only alternative option, since it was not clear when the government could have given the new authorization; thus waiting for a response would have resulted only in a loss of time.

This resolution was successful in collecting meaningful data about the conditions of detainees from multiple points of views. The involved NGOs belong to different intervention sectors and are specialised in different target groups (some of them work only for refugees, other for detainees in general; others are focused on women slave trade etc.). Thus they can bring different perspectives and enrich the resulting overview. Furthermore, they are some of the most active and appreciated NGOs at the national level.

The limitations of these solutions are obviously due to the lack of direct evidence obtained from detainees *during* their detention period; but the data provided by the NGOs, together with the three interviews with ex-detainees, could in any case provide a small measure of a reliable and complete depiction of the overall situation.

Research participants

Three former detainees from Nigeria were interviewed at Centro Astalli and “Cases di Giorgia” (a shelter for refugee women run by Centro Astalli).

The interviews with NGOs were planned taking into consideration the role and the engagement each of the NGOs have in the Ponte Galeria centre. They were six in all:

1. CIR – *Consiglio Italiano per i Rifugiati* (Italian Council for Refugees)
2. Centro Astalli
3. USMI – *Unione Superiore Maggiori di Italia* (Union of Major Superiors of Italy), Ethnic Mobility and Trade Sector
4. Office of the Guarantor for Detainees’ rights of Lazio Region (*Ufficio del Garante dei Diritti dei Detenuti della Regione Lazio*)
5. Italian Red Cross – Provincial Committee of Rome
6. Caritas International, *Caritas diocesana di Roma*

Research instrument and protocols

The data were collected making use of formatted questionnaires with open and closed questions: NGO staff questionnaires for NGOs' representatives and detainees' questionnaires for former detainees.

In order to ensure homogeneity to the data presented and discussed, the report will be focused only on the data coming from the NGOs' representatives.

2. NATIONAL LEGAL OVERVIEW

The following sub-sections summarise the most relevant findings of the survey carried out about the current Italian regulation for asylum seekers and irregularly staying third-country nationals.

This is a very important issue for the Italian government, since in summer 2009 Italy's parliament has given final approval to a law criminalizing irregular immigration and allowing citizens' patrols to help the police keep order.

The new measures have been strongly criticised by human rights groups and the Vatican. According to the new law, irregular immigration is punishable by a hefty fine and those who knowingly house irregular migrants will face up to three years in prison.

The law also extends detention periods for irregular migrants to six months.

2.1. Legal ground for detention

The basic ground for the Italian regulation is the Legislative Decree 25 July 1998 n. 286 "Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero" ("Consolidated Act of the provisions about regulations on immigration and norms on the condition of foreign citizens"). It collects the majority of the rules about migration and thus is called "testo unico" (consolidated act). It contains the rules established by the first law trying to systematically face the different issues posed by the immigration, i.e. the Law n. 40 6 March 1998 "Regulations on immigration and norms on the condition of foreign citizens" (s.c. Turco-Napolitano Law). It comprises provisions about health, education, housing and social assistance, but it does not give indications about crucial issues such as the request for asylum. Furthermore, it has undergone many deep changes by a series of other laws.

Currently, detention is based on the *Simplified Procedure* established by the Law n. 189 30 July 2002, Art. 32. This article says that the asylum seeker cannot be detained only to examine his or her application. He or she can anyway be detained for the time strictly necessary to determine the authorisations for the stay in the State, such as in the following cases:

1. To verify or determine his/her nationality of identity, if he/she is lacking documents of trip or of identity, or if at the arrival in the State territory he/she showed false documents;
2. To verify the elements the asylum application is based on;
3. Following the proceeding related to the recognition of the right to be admitted into the State territory.

The detention must always be ordered:

1. When the asylum seeker has applied after having evaded or having tried to evade border controls or, immediately after entry, he or she has met conditions of irregular stay;
2. When the asylum seeker has applied having already received a deportation or an expulsion decision.

Art. 21 of the legislative decree n. 25/2008 adds that the detention is ordered for whom is suspected of crimes and/or committed crimes and offences related to drugs, sexual freedom, illegal immigration, prostitution, exploitation of minors.

As regards the terms of detention, article. 1, paragraph 22, letter l, of the Law n. 94 15 July 2009 brings some crucial changes to the paragraph 5 of the Art. 14 of the legislative decree 286/1998 "Deportation execution". According to the new law, in case of difficulties in the verification of the identity/nationality, or for the acquisition of documents for the deportation, the detention can be extended again until hundred and eighty days (6 months). This last regulation is addressed in general to irregular migrants, but it also involves also asylum seekers.

3. OVERVIEW OF THE NATIONAL DATA FINDINGS

This section presents the data obtained from interviews with NGOs questionnaire. The following section will present the results of the analysis of these responses.

All of the interviews refer to the same centre, the CIE of Ponte Galeria (Rome), but one (by CIR) refers to the CIE of Gradisca d'Isonzo, at the Italian border with Slovenia.

All the involved NGOs operate as external stakeholders in the centres, except the Red Cross because they manage the CIE in Ponte Galeria. For this reason, some of questionnaire's items were not applicable to the Red Cross (e.g. "How often does your organisation visit the centre?" or "Does the staff regularly provide information to your organisation about conditions in the detention centre?").

3.1. Detention facility

The detention centres are C.I.E. (Centro di Identificazione ed Espulsione – Centre for Identification and Deportation) for irregularly staying third-country nationals, foreigners who committed an offence and were previously taken in prison, asylum applicants and people without stay a permit in general.

Detainees are typically visited once or twice per week, or as much as five times a week (by the CIR). Caritas visits the centre(s) only occasionally. The duration of each visit varies from few minutes up to several hours, depending on the requests and on the needs of the detainees.

In most cases the detention centre staff keeps NGOs informed about the conditions in the centres; CIR and Caritas report experiences where they remain uninformed by detention centre staff.

The purpose of the visits is to essentially provide legal, health and psychosocial assistance to detainees. There are no punishment or seclusion rooms in the Ponte Galeria centre, but this is a fact that can be registered only by operators or organisations having the possibility to enter all the rooms in the centres - many NGOs do not have this permission. In the case of the CIE in Gradisca d'Isonzo, we have no information about this point, while for the CIE in Rome we have the direct testimony of the Guarantor for Detainees' rights of Lazio Region who is allowed to enter the whole centre (we have information also by the Red Cross, but, being the manager of the centre, it could not be taken as an objective source).

3.2. Case awareness

The answers to this point seem to be polarized between two opposite visions: some NGOs are sure that detainees are well informed about their situation, while others are not. But, when asked to give a value (from 1 to 10, with 10

being 'fully informed') to the information level, all them – except the Red Cross – do not go over 5 (only “somewhat informed”).

The explanation provided by the Guarantor for Detainees' rights of Lazio Region, who feels detainees are not so well informed, is the following:

The majority of them do not know why they are there. They do not make any connection between staying there and not having a permit to stay [...] they are persons who have been living in Italy since they was a child (or also were born in Italy), having Italian as their mother tongue [...] persons whose father is Italian but did not register him/her in Italy so they are illegal as well [...] many Roma people. In theory they should be informed about the reason for their detention and the perspective of their stay within 24 hours interception, when the Judge confirms their illegal status. But in practice it always happens that the Judge does only an administrative act without any provision of information.

On the other hand, the Caritas representative says:

They are in general quite aware of their conditions: they know they are detained and why. This does not mean that the situation is good. There is in particular a great difference between the situation of those who are just arrived in Italy and those who have been living in Italy for many years, but have been stopped by the police and found without stay permit [...] the first ones tend to accept more easily their detention [...] the others feel to be victims of a great injustice, since they did not commit any crime so they ask themselves why they must be in prison.

3.3. Space

Access to the living quarters of the detainees is normally denied to NGO staff. For this reason, the most relevant data come from the Guarantor for Detainees' rights of Lazio Region, who is allowed to enter each room and observe its conditions. His description of the detention centre is as follows:

It looks like a 'hen-house': big spaces rounded by iron cages. It is very large but also empty. The furniture is scarce and poor. It is a very desolate place. Each room has at least 6 beds.

Other interesting remarks come from the Caritas representative, who has been in charge of several investigations about living conditions in detention centres in Italy and beyond:

Space, size of the centre and type of organization really make the difference in how detainees are treated. In this sense, if the centres are built up just with the purpose of becoming detention centres for illegal migrants and/or any people living in Italy on irregular basis, living conditions are generally quite good, since spaces have been designed for specific purposes related to this kind of users. If the centres are structures previously used for different purposes and only adapted to the current function, living conditions can be very hard.

The centres have separate areas for men and women, but the privacy level seems to be insufficient, even though all the NGOs affirm that the centres are not overcrowded. For example, the CIE of Ponte Galeria can contain up to 350 detainees but they try to host less than the maximum in order to be ready to face unexpected arrivals. The mobility in the centre is also very high: people continually come and go.

As regards a possible restriction on how many hours detainees can spend indoors and outdoors, the sleeping quarters are closed after midnight and open at 7 am.

3.4. Routine

The centres seem to be less regulated than expected. Rules concern essentially the fact that the detainees can be visited only in certain moments. Other rules regard security: detainees cannot have potentially dangerous objects with them (such as sharp things or electric wires). They also cannot take food from the outside.

The scarcity of rules is not always associated with a positive evaluation. These are the words by the Caritas representative:

Rules are different from one centre to another and impact the lives of detainees in different ways. Once, for instance, I asked an operator how they arranged the use of the football field in Ponte Galeria, and he told me that they "self-managed" it, meaning without any standardized rule or procedure. This implies much discrimination between detainees, because it is impossible to manage those things in the proper way when there are so many people in the centre: abuses are unavoidable when there are no rules and many people inside. Rules – good and right rules – and logistics are necessary for a good management.

3.5. Detention centre staff

The centres have management staff and police force staff (outside, for security reasons). The interaction between staff and detainees is described as good enough. No kind of discrimination between detainees is reported.

3.6. Safety

Safety does not to be a problem in the detention centres. Sometimes violent episodes occur but without any serious consequences. The causes of fights are mostly due to ethnicity. All of the interviewees agree that these episodes are normal given the place and the circumstances.

3.7. Activities

The scarcity of activities is always reported as a relevant issue for the detainees. Books and computer are rarely available. Sport, education, entertainment and group activities are quite never provided. There is no room dedicated to religious services, so the detainees have to pray in common spaces.

3.8. Hygiene & Sanitation

Hygienic and sanitation conditions are described as being generally good.

3.9. Medical

The centres offer general health care. Specialised health services are not provided but there are specific conventions with external providers. Detainees can have access to medical services outside the centre when they show serious symptoms of any disease, especially if potentially infectious as AIDS or tuberculosis. Detainees receive medical examinations at their arrival.

Male and female medical staff is available. A common problem is the fact that the staff is not always able to speak to detainees in a language they can understand, and often there are no interpreters or cultural mediators available. This problem is usually resolved by asking other detainees to serve as interpreters.

Regarding health conditions of the detainees, it is very common for them to report very negative psychological impacts. According to some NGO representatives, these feelings are not caused by the centre itself but by the lack of hope and/or the fear of be expelled. Others NGO representatives who were interviewed instead attribute such impacts to the place detainees live in: *a place that makes people get sick*, in the words of the Guarantor for Detainees' rights of Lazio Region, who adds also: *they are in the centre without any sound information and hope, and they do not have anything to do to kill time. The place they live in is very desolate: no trees, no covering to protect them from the sun, only big empty spaces and nothing to do all the time.*

Psychological suffering appears as the most important health related problem. Depression is described as common and even may have led to a number of suicides that occurred in the last year. The lack of hope and certainty about their destiny, together with the desolation of the place they live in, are some of the causes.

Another explanation relates to the previous experience in the prison. As the Red Cross director says. *Many of them come from the prison and do not understand why they cannot be released. Moreover, while in prison their life was full of activities, and in the centre they cannot do anything interesting. They also use to work in prison and earn money, while in the centre they cannot work.*

Past experience in prison has also another aspect related to drug-addiction, as the Caritas representative points out. *Many detainees coming from the prison are drug-addicted and/or very aggressive: their presence catalyses the attention of the whole staff, distracting them from other people needing care and assistance for other reasons. In this way, other detainees develop physical and psychological diseases, but cannot receive the proper help. Often the only way to keep them quiet and to soothe their pain is to give them sedatives.*

3.10. Social Interaction within the Detention Centre

Relations between staff and detainees are described as generally good. Relations among detainees are also seen as good, although often groups are form along ethnic lines. Forms of spontaneous help (detainees who invite others to access assistance services provided by the centre, or helping other in translating when someone cannot speak with operators, or also sharing telephones and other tools) have been frequently noticed.

3.11. Contact the 'Outside World'

Detainees can meet with their relatives but not their friends. They can communicate by phone with anyone.

Detainees are allowed to receive personal visits from: religious persons, UNHCR staff, lawyers and representatives of other NGOs such as "Be Free" and "Differenza Donne" regarding women rights, as well as the NGOs involved in the research.

The presence of freelance lawyers is not always seen as a positive factor. As the Caritas representative points out: *there is always a number of professionals - especially lawyers – profiting from the detainees' situation and giving them false hopes of freedom. Detainees prefer to believe them if they say there is a chance instead of believing NGOs who might say there is no chance at all; all without considering that NGOs do not gain any money from their assistance.*

3.12. Conditions of Detention and Family Relations

Conditions of detention may vary from one centre to another. In the centre of Ponte Galeria children are not admitted. Detainees can have their spouses in the same centre but they have to live in separate quarters.

3.13. Conditions of Detention and Nutrition

The quality of the food is generally good, but some detainees complain about it due to their previous habits. Changes in the detainees' appetite can certainly occur due both to the change of food type and to their condition of detention.

3.14. Conditions of Detention and the Individual

According to all of the interviewees, detention severely affects both the psychological and the physical health of detainees.

Besides the obvious lack of freedom, the sense of failure, lack of future perspective and the lack of activity/work opportunities are reported as being the difficulties faced by detainees. For many of them, detoxification from drug abuse in prison is also a major factor affecting both physical and psychological well-being.

When the NGO representatives were asked to describe the self-perception of detainees, many interesting insights were offered. *I see them as anime in pena*, answered the representative of Centro Astalli, using a typical Italian idiom meaning lost, suffering souls; people in torment as they are passing time waiting for something, divided between the memories of their past – and of the terrible events they experienced – and the hope and the fear for the future. This definition can give an effective idea of detainees' vulnerability.

It is remarkable that this definition occurs also in the words of another NGO. The Caritas International representative, who has a long lasting experience in detention centres and in the problems of the detainees, said in fact: *They are anime in pena, suffering persons who do not know where to go and what to do and keep on suffering without finding any solution.*

This idea is more explicit in the words of the Guarantor for Detainees' rights of Lazio Region: *I see them...as weak, unaware and desperate persons, locked up in cages, offended by the deep injustice of a bad world, in which solidarity is dying.*

4. ANALYSIS OF THE DATA AND CENTRAL THEMES

The interviews with the NGOs have provided very interesting insights about the reality of detention in Italy, especially because of their expertise and engagement in the issue, and, because of the richness of their differing points of view. Nevertheless, they all tend to converge on a number of aspects, thus creating clusters of opinions and evaluations.

The most relevant findings of the interviews seem to be the following:

1. Their state of **uncertainty**: in most cases the detainees lack any kind of information about their legal procedure, the real chances of success of their application and the end of their detention;
2. Their state of **neglect**: there are no things to do for them inside the detention centres, except to continue waiting. The Italian detention centres do not provide the detainees any possibility to do something interesting in order to kill time without thinking to their situation in an obsessive way;
3. Their **prison-like state**: although the laws never use the term "detention" but "trattenimento" (a softer expression meaning holding someone back), people in the centres such as CIE are treated as prisoners.

These factors make people detained more and more vulnerable, as time inside the centre passes by. They are directly linked to a structural issue, i.e. that centres are not organised and equipped for long stay. As the Caritas representative pointed out, the existing centres can be good places for short-time stay, while they are surely bad

places for long stay. But they all have been built and organised only for short period of detention, so they cannot provide the detainees with all the services they need. Detention centre staff tries to do their best in tackling the daily challenges, but even the best efforts cannot solve all the problems.

The key-issue seems rather to be an institutional and legislative one: mainly the fact that in Italy the regulation about immigrants has undergone several deep changes in the last years, increasing the punishment for irregular migrants but without upgrading the structures of reception and relevant management systems. Thus, there is a constant gap between what the regulation prescribes and the actual available resources.

These results are fully consistent with NGOs' experience and in particular with Centro Astalli's prior observations as a detention-visiting organisation. All of the NGOs interviewed for this study consider the entire detention system for irregular immigrants in Italy as deeply unequal and oppressive.

5. RECOMMENDATIONS AND CONCLUSIONS

Even if Centro Astalli has not been allowed to enter the centre in Ponte Galeria in time to properly conduct the research, several interesting issues have been identified by means of this "reduced" version of the research, i.e. mainly by means of interviews to selected NGOs operating in the detention centres in Italy. These issues are mainly:

- a) The state of uncertainty in which the majority of the detainees live, not knowing why they are detained or when they will be released;
- b) The lack of activities during their stay in the centre: no work or educational or entertainment opportunity available for them

These two key-issues, the second in particular, appear to be related to a deep gap between the actual resources available (in terms of structures, staff and services) and the constraints imposed by a more and more restrictive law. Furthermore, as it often happens in Italy, there is never enough clarity about the process and the outcome of the asylum/citizenship application, thus increasing the situation of uncertainty.

These issues seem to be relevant and should need more investigation, given a proper framework in terms of accessibility of the centres and of stability of the centres' management.

A general recommendation can be made for policy makers, NGOs' staff and for detention monitors/visitors: *there must be consistency between resources available and constraints imposed by the law; otherwise any subsequent changes will cause further disorganisation of services to detainees.*

This means also restructuring the staff management, introducing more professionals to the staff, establishing tailor-made services for detainees and maintaining a constant effective flow of information between administration, staff and detainees. With regard to the current Italian regulation, this implies a radical change of perspective in running the detention centres, as they were built and organised for different purposes and are not adequate for people staying longer than two months.

Description of the NGOs involved in the research (with regard to the research purposes)

1. CIR – *Consiglio Italiano per i Rifugiati* (Italian Council for Refugees)

The CIR is an NGO dealing with the problem of migration, refugees and asylum seekers in Italy. It periodically issues reports about the situation in Italy, pointing out the various aspects of the Italian government policy on migration. It also provides services to migrants and refugees in particular, offering directly legal and psychosocial assistance at its

main office in Rome and at some centres in Italy, like the CARA/CIE in Gradisca d'Isonzo (Gorizia). In these cases, the CIR uses to work mainly at the CARA centres, going to the CIE only on demand, i.e., if there is a detainee or a group of detainees asking for CIR assistance.

2. Centro Astalli

The Centro Astalli provides a free legal service to people in the centre by offering the possibility to be assisted by specialised lawyers who can assess their situation, and decide if there are the proper conditions to apply to asylum or for other kind of protection.

3. USMI – *Unione Superiore Maggiori di Italia* (Union of Major Superiors of Italy) – Ethnic Mobility and Trade Sector

USMI deals with the problems of “trade victims”. The majority of them are women from Nigeria, who come from the streets since they used to prostitute themselves. They are detained in the CIE together with the other kind of people but they represent a peculiar group. In the majority of the cases they do not have the conditions to apply for the asylum with any probability of success, but they do this anyway since they let lawyers convince them that they can. In such cases the procedure often results in a failure and they lose the possibility of make other legal actions and especially that of applying for humanitarian protection, the most appropriate for them.

4. Office of the Guarantor for Detainees’ rights of Lazio Region (*Ufficio del Garante dei Diritti dei Detenuti della Regione Lazio*)

The Guarantor verifies and controls the situation in the detention centres of Lazio Region, in order to assess the respect of the detainees’ rights.

As regards the CIE of Ponte Galeria for third-country nationals, according to special agreements with the Prefecture of Rome and with the Italian Red Cross (managing the CIE of Ponte Galeria), the Guarantor:

- Checks the living condition of the people in the CIE by means of periodic (weekly) visits;
- Facilitates the relationships between the centre and the health care system, in order to guarantee a proper health assistance to the centre’s guests;
- Promotes prevention actions to prevent diseases, in particular HIV and TBC infections;
- Promotes improvements in the overall centre management, in order to ensure a better quality of life for the centre’s guests.

5. Italian Red Cross – Provincial Committee of Rome

The Italian Red Cross – Provincial Committee of Rome – currently runs the detention centre of Ponte Galeria, thus providing all the basic services for the entire centre (accommodation, food, health care etc.).

6. Caritas International, *Caritas diocesana di Roma*

Caritas does not currently have a “mandate” in any particular detention centre, but occasionally visits the detention centres in Italy in order to assess the situation of the detainees, to identify the problems and propose improvements. It also takes part in various national and international projects aiming at improving the living conditions of these persons. For example, in the recent past it took part in a very important investigation activity within the “Commissione De Mistura”, aiming at gaining an in-depth knowledge of the detention condition of the detainees in all Italian centres.



NATIONAL REPORT: UNITED KINGDOM

By: Jesuit Refugee Service United Kingdom

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1. INTRODUCTION

Historically the UK has a proud tradition of helping asylum seekers, who in turn have contributed much to the culture of this country.²⁴⁷ In contrast to this notion the present day findings and recommendations of the Independent Asylum Commission²⁴⁸ serve only to underline the fact that there are serious injustices in the system, and unacceptable hardships being inflicted on these highly vulnerable people.²⁴⁹ During their numerous hearings the Commission gained 'unique insights into the trials and tribulations of the most vulnerable asylum seekers in the UK.'²⁵⁰ Immigration detention is a specific area known to impact greatly on the health and well being of many people including the very young, elderly and infirm.

Detention in the United Kingdom is one of the most controversial asylum issues to date. Nearly 30,000 people every year experience immigration detention. Many of those detained have been dramatically affected by their incarceration and their stories paint a disturbing picture.²⁵¹

Within the detention estate the Jesuit Refugee Service-UK visits detainees in a pastoral capacity, striving to enhance the dignity and strengthen their resolve to remain strong in the face of much uncertainty. Outside the estate, the team, working in collaboration with Church and secular organisations, voluntary and governmental, is proactive in defending the rights of refugees by influencing public opinion, lobbying and raising awareness of the plight of asylum seekers caught in the web of asylum procedure. It is as a consequence of our mission to defend the rights of those we serve, in particular those residing in the detention estate, that JRS-UK agreed to take part in the research project DEVAS.

Regrettably, the United Kingdom refused JRS UK personnel permission to interview detainees and staff.

Several weeks after JRS UK made its application to access the client groups essential to the research, it received a decision from the Home Office. Having considered the terms of reference, they could not accede to our request. The

²⁴⁷ Preface to Asylum Matters Rt Hon Iain Duncan Smith MP 2008

²⁴⁸ Independent Asylum Commission, Saving Sanctuary, (Primary Report 2008)

²⁴⁹ Preface to Asylum in Britain A Question of Conscience, Anthony Harvey 2009

²⁵⁰ The Independent Asylum Commission Sir John Waite, Co Chair of the Commission (2008)

²⁵¹ Out of sight, out of mind: experiences of immigration detention in the UK – *BID Bail for Immigration* (2009)

grounds for refusal related to detention estates already being exposed to independent scrutiny by HM Inspectorate of Prisons and other departments, both statutory and non-statutory. It was held that the recommendations from these bodies already addressed the issues that the DEVAS project intended to research.²⁵²

JRS Europe in tandem with JRS UK wrote several letters to prominent and influential people in the hope that the Home Office decision could be overturned.²⁵³ Dame Anne Owners (HM Inspector of Prisons) approached the Home Office on our behalf arguing that a comparative study may be of value.²⁵⁴ However, all efforts to overturn the decision were unsuccessful.

Having liaised with JRS Europe it was decided the UK would proceed with the DEVAS research omitting the main subject group: detainees.

The refusal of the Home Office to allow interviews of asylum seekers and irregularly staying third-country nationals, resident within detention, significantly limited the findings and influenced the outcomes of the study within the United Kingdom.

The research was taken from the perspective of Non-Governmental Organisations (NGOs). These NGOs who routinely visit and assess individual detainees within the Immigration Removal Centres (IRCs) will provide descriptive material thus, giving the researcher data to determine which vulnerable groups exist in detention, what the conditions of detention are and how these groups cope with their confinement.

In addition to the above, a legal questionnaire was used to research the existing laws relating to detention in the UK with the intent of examining how these laws indirectly contribute to vulnerability within the person detained.

The research was undertaken over an 18-month period, beginning from 17 November 2008 to March 2010.

Research Participants

For the purpose of this research, focus was restricted to NGOs who responded positively to the invitation, of JRS UK, to take part in this study. It was the intention of the researcher to select a group of NGOs from different professional disciplines (medical, social, child welfare and psychiatric) in order to give the study an inclusive perspective. Eight organisations were approached. However, due to the constraint of workload, only four agreed to take part.

- I. The Children's Society (Defend, safeguard and protect the childhood of children via welfare assessments and liaising with the most appropriate service provider). – IRC Yarl's Wood.
- II. London Detainee Support Group (To improve the welfare of asylum seekers /immigrants detained) – IRC Colnbrook and Harmondsworth
- III. Yarl's Wood Befrienders (Visits and supports women in detention)- IRC Yarl's Wood
- IV. CCRJ Churches Together (Bail Circle –and Advocacy) - Nationally

Participants were in contact with the detainees routinely via telephone and email in addition to visiting detention on regular basis.

Detention Centres (selected for research purposes)

The objective was to gather data from a wide distribution of asylum seekers visited by NGOs. In the light of this, three Immigration Removal Centres were selected for the study (IRC Colnbrook, IRC Harmondsworth and IRC Yarl's

²⁵² Appendix 1 (Letter of refusal/Alan Kittle Director *Home Office* -March 2009)

²⁵³ Appendix 2 (Letters of appeal and their responses-2009)

²⁵⁴ Appendix 3 (Letter of response- Dame Anne Owners, *HM Inspector of Prisons*/June 2009)

Wood). The resident population consisted of male, female, families and young adults. The latter three categories were housed in a specialist centre, Yarl's Wood.

IRC Yarl's Wood is the main removal centre for women and families. The centre has a bed occupancy of 405 - 284 allocated to single females and 121 given to families. Around 2000 children a year are held in immigration removal centres: Half are in Yarl's Wood, which has been run by a private company, (Serco) since 2007.²⁵⁵

IRC Colnbrook (Category B/secure facility) is known to have a high proportion of ex-prisoners co-existing with detainees who 'had proved difficult to control elsewhere (in the immigration estate), these individuals, held for months-sometimes years-in conditions designed for short stays'²⁵⁶. Colnbrook 'manages the most challenging and vulnerable detainees in the Immigration estate. The difficulties facing staff are compounded by the increasing length of stay of many detainees and the frustration ensues.'²⁵⁷

IRC Harmondsworth has two separate immigration teams. One addressing the fast-track asylum process (a process in which asylum seekers are held in detention while their asylum claims are decided within an accelerated legal schedule), and a smaller team associated with Border and Immigration Agency (BIA) case holders located elsewhere.

Research Instrument and Protocols

The research instrument used for this section of the project was an open ended social questionnaire. The aims and objectives of the study explained, informed consent was obtained from the research participants. In order to determine reliability, the same questions were asked in every interview and responses recorded as accurately as possible, in addition to time given, following each interview, to consider the facts and ensure non-bias.

2. NATIONAL LEGAL OVERVIEW

Administrative detention is regulated by laws that have been passed by Parliament and are directly enforceable in any Court. It is also regulated by guidelines provided by national authorities i.e. guidelines from the Home Office, UK Boarder Agency (UKBA) etc. The Immigration Act 1971, Nationality and Immigration and Asylum Act 2002 are both in force and are national laws.

The law does not distinguish between asylum and other categories. The basis for all immigration detention is the lack of immigration status of the detainee.

There are, however, policies that give further guidance on how to exercise the discretion to detain amongst different types of person, as part of the government's policy to detain asylum seekers where claims can be determined quickly. In practice however there is not enough detention space to achieve this so only around 10-15% of asylum seekers are detained upon arrival under this policy at present.

2.1. Legal Basis

Legislation allows detention in the following cases that apply to all including asylum seekers:

- a. Persons seeking entry at ports pending an examination on whether they will be given leave to enter
- b. Persons reasonably suspected to be illegal entrants who may be given removal directions

²⁵⁵ Inside Yarl's Wood: Britain's shame over child detainees - The Independent (April 2009)

²⁵⁶ Report on an unannounced inspection of Colnbrook IRC (HM Chief Inspector of Prisons 2009)

²⁵⁷ Report on an unannounced inspection of Colnbrook IRC (HM Chief Inspector of Prisons 2009)

- c. Persons found to be illegal entrants pending the setting of removal directions
- d. Persons served with a notice of intention to deport or an actual deportation order

Asylum seekers not falling within the above categories cannot be detained but in practice almost all of them do because of their mode of entry and/lack of lawful status.

The general policy or “Enforcement Instruction and Guidance” (EIG)²⁵⁸ indicates which persons from the above groups merit detention in the exercise of discretion. It will be seen that it states that ‘detention must only be used to effect removal, to initially establish a person’s identity or basis of claim or where there is reason to believe the person will fail to comply with conditions on temporary admission or release’ (55.3.1).

The policy sets out groups of persons whom it would be appropriate to detain in ‘very exceptional circumstances.’ These are unaccompanied children, the elderly, pregnant women (unless removal is imminent and birth is not going to occur before this), cases of serious medical conditions or mental illness, cases with independent evidence of torture and those with serious disabilities (EIG 55.9).

Conditions necessary to carry out detention during the asylum procedure

There is a special policy called on detention linked to “fast-track” asylum procedures. This allows detention during the process up to the first decision and including appeal (EIG 55.4) even if a person is not identified as worthy of detention under the general policy of detention. The fast-track detention policy thus allows detention regardless of whether an asylum seeker presents an absconding risk. The stated aim is said to facilitate quick processing of claims by holding people in special facilities with interpreters and lawyers on site.

Not all asylum cases are simple and can be decided quickly. However, claims involving pregnant women, family cases involving a minor child, unaccompanied minors, persons with disabilities, serious mental health problems or infectious diseases, trafficking victims and torture victims can be complex.

The detention of foreign criminals who are being deported on public order grounds is a stricter policy set out under EIG 55.1.3 and 55.3.A. This suggests that where a person faces deportation due to their criminal offences then release would have to be carefully justified.

Alternatives to detention

Alternatives to detention include reporting and/or tagging.

2.2. Legal proceedings for ordering detention during the asylum procedure

A judicial decision is not required to carry out detention during the asylum procedure. The most competent public authority to order detention during the asylum procedure is the judicial authority. However, there is no automatic judicial review but all detainees regardless of status can apply to an independent immigration judge for bail that involves release to a defined address upon reporting conditions. The immigration judge requires lawful residents to be sureties for the detainee and provide promises of money that will be forfeited to the court if the person absconds.

Detainees can apply to Administrative Court (High Court) for judicial review to challenge the legality of detention but this is not automatic.

²⁵⁸ Enforcement Instruction Guidance – *Factors influencing a decision to detain* (2009)

2.3. Appeals

There is no requirement for the judicial authority to decide upon negative decisions relating to legal status or the conditions of detention. Borders and Immigration Agency officers make these decisions. This decision can be subjected to administrative law review by a court but only upon application by the detainee and only on the grounds of illegality.

2.4. Case Awareness & Right of information

The Borders and Immigration Agency officers authorising detention have to give their reasons to the detainee on Form 1SR91R. This is required by the EIG policy at 55.6 and must give one or more reasons set out at 55.6.3, which express the grounds for detention set out in the policy. Thereafter there is an obligation to provide monthly detention reviews explaining why detention is continuing. These reviews must be conducted by officers of increasing seniority, in line with the increasing duration of detention.

The detainee may obtain access to an interpreter via their legal representative. The BIA will use interpreters to interview detainees pursuant to their asylum or other claim to remain or in order to process them for travel documents. There is no legal obligation upon the state to neither provide an interpreter in general nor advise the detainee on detention specifically.

2.5. Special Needs

There are regulations that issue guidance for persons with special needs via EIG in addition to the provisions for medical examination set out in the Detention Centre Rules 2001. Those recognised as having special needs are set out below:

- Unaccompanied minors
- Disabled people
- Elderly people
- Pregnant women
- Single parents with children
- Victims of torture and violence
- Traumatized persons
- Families
- Persons with suicidal tendency

Long-term detainees are not recognised as coming under the category of 'special needs' nor any other vulnerable group. However, it is always discretionary to detain so the BIA can release on compassionate grounds in any case where convinced.

2.6. Maximum duration of detention

There is no legal maximum duration of detention. Unlimited detention is possible subject to the case law. *R v Governor of Durham Prison ex parte Hardial Singh (1984) WLR 704* held that detention must only be for a reasonable period. There must be realistic prospect of removal within a reasonable period. Where it becomes clear that removal within this timescale is not likely then the detainee must be released. This is a flexible standard that will depend upon each case's specific facts including the behaviour of the detainee, foreign governments, the risk of offending or absconding and other factors. In practice detentions can last several years although this is quite rare. Detention for six to twelve months is not unusual.

2.7. Minimum age for detention

There is no age restriction. The EIG states that unaccompanied children should not be detained in exceptional circumstances and then only overnight (55.9.3) Therefore they should be placed in care with social services agency. Where a person's age is in dispute the case must be referred to the Refugee Council's Children's Panel. The BIA does not commission age assessments but will receive evidence from social services or doctors on this question if it is filed. The BIA will assess such evidence along with their appearance to decide on whether to treat them as an adult and hence detain them if appropriate.

Families and young children can be, and are, detained. The policy EIG (55.9.4) refers to this being on the same basis as other detainees under 55.3. Children detained should be given more reviews of detention (55.8).

2.8. Health Care

Detention Centre Rules (DCR) 2001 set out obligations to assess the health needs of detainees within 24 hours (rule 34) and provide appropriate care for detainees. The medical practitioner, who finds a person's health is being injuriously affected by detention, has suicidal intentions or has been a victim of torture must report this to the manager of the centre (rule35).

2.9. Contact with the outside world

The DCR 2001 provides for visits to detainees in general without specifying categories of visitor (rule 26). A right of correspondence exists. Detainee's who lack funds can be assisted with reasonable cost of postage (rule 27).

2.10. Social Services

There appears to be no legal obligation for the BIA to refer cases to social services. This said, children fall under the jurisdiction of local social services departments. There is no obligation for them to visit all detained children but they may do so if an allegation of neglect is made.

2.11. Legal Aid

There is a legal scheme that allows lawyers to provide free legal advice in immigration and asylum cases on certain grounds.²⁵⁹ There is no right to a lawyer if one is not willing to act or cannot be found. If the detainee wants representation in a substantive case there is a requirement that the case meet the merits test. Half succeed in passing this test. However, a detainee can receive free legal advice and representation in bail hearings to challenge their detention or judicial review. This is not assessed by a merits test.

2.12. Legal Entity

From the basis of national law, detention centres are run under public law. The Borders and Immigration Agency are responsible for detainees.²⁶⁰

²⁵⁹ Access to Justice Act 1999

²⁶⁰ Immigration Act 1999

3. OVERVIEW OF NATIONAL DATA FINDINGS

3.1. Case Awareness

Across the spectrum of IRCs represented in this study it was widely reported that sources of information e.g. immigration casework, advice and how to access such information was poor, leaving people anxious and afraid. The official monthly reports, issued by the Home Office, were found to be inadequate, reiterating the same information from month to month with little or no specific guiding principle.

3.2. Space

Access to the living quarters of the detainee's is denied to NGO personnel. As a consequence, no first hand information could be reported. Nevertheless, detainee's experiences were conveyed as, generally positive with good clean sleeping and shower facilities in addition to libraries, sports and educational amenities. However, a common complaint related to heating and ventilation. In most cases detainees were expected to share their sleeping accommodation. Fluctuating room temperatures and poor ventilation has led to poor sleeping patterns.

3.3. Rules

Respondents highlighted that the day-to-day living of detainees was highly regulated and all requests had to go through the appropriate channels. This regularity was perceived as infringing on their right to freedom and the rules were said to feel restrictive.

Detainees believed the complaints procedures were rarely used and when they were used staff did not take them seriously. Others were mistrustful of the procedure and held a deep-seated fear of reprisals, should they complain.

3.4. Detention centre staff

Staff were perceived as having a formal and impersonal relationship with detainees and were seen as the 'enforcer of the rules' whilst others had more positive experiences of staff treating them with respect. Detainees also confided that certain staff members engaged in favouritism, racism, rudeness, arbitrary punishment and verbal harassment.

3.5. Safety

The majority of detainees believed that the centres provided secure accommodation and a safe physical environment. However, episodes of sporadic violence were noted with variable causes. Two specific triggers were seen to be, ethnicity and personality clashes.

3.6. Activities

Sport, education, entertainment, group activities (especially for the children), arts and crafts, access to books, computer access and internet together with the provision of prayer rooms and religious services. The respondent perceived these activities, as generally positive although daily routines and rules did interfere on occasion with certain activities.

3.7. Medical care

Access to medical and nursing staff exists for the detainee, but patients were mostly assessed by the nurse. The nurse would arrange for the detainee to be reviewed by a member of the medical staff or he/she would prescribe

simple medication themselves, medication which might alleviate the symptom without addressing the cause. Detainees believed this to be an inhibiting factor and detrimental to their health and well being.

Hospital care is, in theory, available for those who warrant it. However, in practice, detainees have been known to miss their 'out-patient' appointments.

Reportedly, the physical and mental well being of the detainees is seriously affected by detention. Presenting symptoms of the detainees include sadness, irritability, insomnia, stress, confusion, and social withdrawal. They are known to suffer from varying degrees of clinical depression and have suicidal thoughts and tendencies. Access to psychiatric care is variable with treatments generally given in the form of medication. Counselling or psychological services are not always able to meet the demand of the client group.

The above-mentioned symptoms are particularly associated with long-term detention. The system leaves the detainee feeling powerless and uncertain. Some respondents insist on pre-existing conditions worsening in detention, especially victims with a history of torture, rape and persecution.

Detained children were noted to mirror certain aspects of their parent's experience of detention that manifests itself in the child through bed-wetting, loss of appetite and evident weight loss.

3.8. Social interaction within the centre

Relations between staff and detainees are seen to be generally good. However, clashes between ethnic groups can and have erupted, in addition to certain groups choosing to socialise independently of others. This mentality, sometimes, led to isolation of certain individuals who belonged to a minority ethnic group or language.

3.9. Contact with the 'outside world'

The provision of mobile phones; access to the internet; receiving visits from family, friends and NGOs in addition to liaising with their solicitors was received positively.

3.10. Families in the detention centre

Yarl's Wood IRC is the main immigration removal centre for women and families. The findings reveal good, appropriate facilities designed to accommodate the specific client group. In addition to the formal school schedule there are fun activities available for the children on a regular basis, together with the provision of a youth club for the teenagers supervised by youth workers.

Respondents emphasised that the detention regime was ill suited to children. High levels of stress among family members impacted on the general health and well being of their children.

3.11. Nutrition

Described by the detainees, food was unpalatable and the same was believed to be a contributory factor related to weight loss.

4. ANALYSIS OF THE DATA AND CENTRAL THEMES

For reasons above, the data gathered cannot be considered as offering more than a general reference to the entire issue of detention in the UK. Independent of the two remaining social questionnaires, i.e. for detainees and detention centre staff, this study can only provide restricted analyses based on the findings gathered from NGOs in the preceding chapter.

1. Detention of families with children

“Children suffer nightmares, bedwetting and mothers tell me their children's behaviour has changed e.g. they refuse to talk and become withdrawn whilst others become difficult to control...they are angry, confused and very frightened.” (*Respondent 06/2009*)

Bedwetting, reluctance to eat, interrupted sleeping patterns attributable to nightmares and wet sheets disclose, from the onset, the detained child's vulnerable state. Additionally, the daily schedule often impinges on the need for children to eat when they are hungry and not when the detention routine dictates causing weight loss and lethargy that in turn affects their concentration.

Parents experiencing confinement, sharing life with strangers who themselves are suffering uncertainty and insecurity have a subliminal, overshadowing affect on children. There, children struggle to make sense of the pervasive atmosphere reeking of fear and anxiety among their parents, who under normal circumstances would represent strength and protection for their child. There is little doubt that detention of children within the asylum estate is seen to have detrimental effects on their mental and physical well being.

The findings of this small study only serve to underline the ongoing psychological and physical problems highlighted in previous studies related to detained children. In a recent study carried out by several royal colleges (paediatrics and child health care, general practitioners and psychiatrists and nursing) it was found that ‘detaining children and their families caused significant harm... worsened physical and mental health and expressed worrying levels of trauma and sickness, despite well intentioned staff.’²⁶¹

2. The mental health impact of detention

“Clients feel themselves to be locked in a cycle that just keeps turning round, yet which lacks any sense. Indeterminate length of detention is a form of ‘mental torture.’” (*Respondent 01*)

“In most cases we saw a rapid deterioration of existing latent or not yet entirely crippling PTSD, to clinically often serious levels.” (*Respondent 04*)

Headaches, gastric problems, lethargy, loss of appetite, poor concentration, aggressive behaviour, social withdrawal and frustration are frequent in detention. Feelings of disempowerment, frustration, low self esteem, hopelessness, confusion and perplexity are but a few indicators of the detainee's vulnerability in the face of prolonged detention.

Findings gathered have underlined the fact that prolonged detention appears to cause serious psychological damage to detainees whose claims for asylum have been unsuccessful. Patterns emerging are characterised by stages of increasing depression and suicidal thoughts and tendencies. In addition to the above-mentioned findings further contributory factors leading to vulnerability within the general population of detained asylum seekers are as follows:

- a. Lack of information about removal process pertinent to the individual
- b. Clinical approach of staff and verbal abuse

²⁶¹ Child Abuse & Neglect the International Journal – 15 October 2009

- c. Insufficient access to medical staff
- d. Unwillingness and failure to ensure continuity of medical treatment by obtaining medical information from previous doctors and hospitals
- e. Sharing accommodation with unstable characters

Home Office guidelines state that detention is considered unsuitable unless there are exceptional circumstances, as in the case of those 'suffering from serious medical conditions or the mentally ill'.²⁶²

Despite this directive, the practice of detaining people with physical and mental health conditions in addition to those who show manifestations of developing serious mental health problems continues to undermine government guidelines.

Mental health services are limited and inconsistent, leading to psychological disturbance being treated superficially or in some cases ignored.

A report by HM Inspectorate of Prisons in 2008 on Harmondsworth IRC found there was no mental health needs assessment to identify the level of need for the primary mental health services; the only primary mental health care was provided by General Practitioners.²⁶³

"Many Anglican chaplains serve the spiritual and emotional needs of asylum seekers within detention centres. They have seen the scars, both figuratively and literal, left by torture and abuse on people, who are currently deprived of liberty, even though they have broken no laws and pose no threat to society." Dr Rowan Williams (*Archbishop of Canterbury*)

"Libyan: Persecution as a result of conversion to Christianity from Islam. Client diagnosed as having 'Post Traumatic Stress Disorder (PTSD)'. Client reported as being tearful when recounting history of imprisonment, beatings, suspension from wrists and instrumental rape. On arrival in the UK he was detained 2008. Attempted overdose-hospitalised then *returned* to detention centre. Was assaulted by Muslims whilst detained and separated. Laceration to head required stitches then transferred to another detention centre. Antidepressant medication prescribed. Presented as highly anxious during telephone conversations during attempts to halt removals."

(*Respondent 05*)

"There is a glaring absence of mental health diagnostic and therapeutic skills in the immigration statutory sector as a whole, and specifically in its detention establishment." (*Respondent 06*)

The United Nations High Commissioner for Refugees (UNHCR) believes that mechanisms to identify torture and violence are required at the earliest possible stage in the asylum procedure, and specialist medical staff and organisations should undertake treatment of such persons.²⁶⁴ However, the Home Office states that it is not for the Border and Immigration Agency (BIA) to judge and only where appropriate will the BIA advise the claimant of the existence of such help.

In the report, *Deserving Dignity*, the Commission concluded that all those who seek asylum in the UK deserve to be treated with dignity over which mere administrative convenience must never prevail; and recommends that urgent action is taken to remedy situations where the dignity of those who seek sanctuary is currently compromised, particularly in the treatment of those who are detained, or women, children, torture survivors, those with health needs.²⁶⁵

²⁶² Medical Foundation for the Care of Victims of Torture (2004) *Harm on removal: Excessive force against failed asylum seekers*

²⁶³ HM Inspectorate of Prisons (January 2008) *An Inspection of Harmondsworth Immigration Removal Centre*

²⁶⁴ Medical Foundation for the Care of Victims of Torture (2004) *Response to the implementation of Reception Directive*

²⁶⁵ Independent Asylum Committee – *Deserving Dignity* (2008)

5. CONCLUSIONS AND RECOMMENDATIONS

There are a number of external factors that indirectly impact on the life of the asylum seeker detained. This impact can be seen as a contributory factor towards vulnerability.

No right to legal representation makes serious demands on an already traumatised person, thus exacerbating their fragility in the face of removal. The fast-track system leaves little time for the detainee to gather evidence to support their claim for asylum. The detention of recognised vulnerable groups (torture victims and children), despite recommendations to the contrary, are detained, exacerbates vulnerability and causes unnecessary suffering.

Internal factors that directly impact on vulnerability range from lack of information, in particular information related to removal orders, to evidence of sporadic violence that keeps the detainee on heightened alert. This state of alert impinges on their ability to relax and interferes with their need to relate to others, often resulting in an increasing sense of isolation. Many detainees continue to live out of fear in uncertainty, which in turn increases levels of anxiety and adding to their vulnerable state.

Indefinite detention appears to cause serious psychological damage. Patterns emerging are characterised by increasing stages of depression, which all too frequently lead to suicidal thoughts and tendencies. Recent studies have found a clear correlation between 'prolonged detention' and mental illness.²⁶⁶ This fact alone calls into question the ethical and moral issues surrounding indefinite detention here in the UK.

Supporting this argument one can only conclude that mandatory detention of asylum seekers is an excessive response that arbitrarily denies people of certain human rights; prolongs and exacerbates the trauma they have experienced before and during flight; denies them the possibility and security of normal family life; impairs their successful resettlement; and severely affects their mental health and well being.²⁶⁷

To conclude, one of the most vulnerable groups, highlighted in this report, are children. In a recent study (*Child Abuse and Neglect the International Journal*) eleven children aged between 3 and 11 years old, were seen by a clinical psychologist. All eleven had symptoms of depression and anxiety since being detained. All of these children presented as being confused and frightened by the detention setting and eight had developed severe emotional and behavioural problems.²⁶⁸

Children are impressionable, sensitive and unremarkably intuitive. They are often bewildered in the light of experiencing their parent's treatment during detention. Their experience of detention remains a cause of grave concern for many organisations, statutory and non-statutory alike, who continue to campaign on behalf of this vulnerable group.

Immigration detention is intrinsically damaging and detrimental to children and can never be in their best interest. Children and families continue to suffer deteriorating mental and physical health in detention.²⁶⁹

The House of Commons Home Affairs Committee documented 'that the improvements at Yarl's Wood are tackling the symptoms of the problem rather than the cause and that sustained improvements in the treatment of children in the immigration system will be as a result of reform to the overall asylum process. Focussing on the undoubted, very visible, improvements at Yarl's Wood alone does not address the wider issues.'²⁷⁰

²⁶⁶ Prolonged Immigration Detention Puts Detainees At Higher Risk – Medical Journal of Australia (2009)

²⁶⁷ Public Health Association of Australia Inc (2005) *Asylum Seekers-Mandatory Detention*

²⁶⁸ Child Abuse and Neglect-*The International Journal* (October 2009)

²⁶⁹ Amanda Shah, Assistant Director of Policy (Bail for Immigration Detainees)

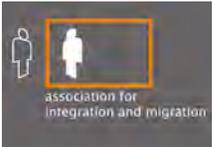
²⁷⁰ House of Commons Home Affairs Committee *The Detention of Children in the Immigration System – First Report of Session 2009-10/HC73*

Using the findings gathered from NGOs for this study, and based on its ongoing experiences from its accompaniment and service towards detainees, JRS UK endorses the following recommendations made by the International Detention Coalition²⁷¹:

- The detention of refugees, asylum seekers should be avoided.
- Vulnerable groups, including children should not be placed in detention.
- Alternatives that ensure the rights, dignity and well being should be considered and pursued before detention. Alternatives include, such as supervised release, regular reporting requirements, posting bail or community management.
- Governments should, in compliance with international and regional human rights standards, only detain in circumstances where alternatives have been assessed as insufficient and only as a last resort.
- Detention should be for the shortest possible time. There must be limits on the length of detention, ensuring no one is subject to arbitrary or indefinite detention.

²⁷¹ The International Detention Coalition is a coalition of detention visiting and advocacy organisations from around the world. For more information, visit their website: <http://idcoalition.org>

Profile of the DEVAS project partners

	<p>Caritas Austria's mission is to accompany people in difficult conditions, including refugees and migrants. In the field of refugee protection, Caritas Austria offers social assistance and housing, provides legal advice and is engaged in integration programs. www.caritas.at</p>
	<p>JRS Belgium visits asylum seekers and migrants in five detention centres, offering support and legal counselling. As part of its advocacy work, JRS Belgium is involved in different networks to lobby against the detention of families and children. www.jrsbelgium.org</p>
	<p>The Bulgarian Helsinki Committee promotes respect for the human rights of every individual by means of advocacy and monitoring the civil rights situation in Bulgaria. The committee reports on human rights violations with a special emphasis on the rights of ethnic and religious minorities, refugees and asylum-seekers. www.bghelsinki.org</p>
	<p>Symfiliosi is a non-profit, non-governmental, non-partisan organisation based in Cyprus. Its mission is to actively engage Cypriot society in a dialogue on reconciliation between the two larger communities of Cyprus, Turkish-Cypriots and Greek-Cypriots, with the aim of promoting a culture of reconciliation, peace, democracy and cooperation. The organisation also has a keen interest in the integration of migrant communities.</p>
	<p>The Association for Integration and Migration is based in the Czech Republic. Its primary mission is to provide legal, social and psychological assistance to those applying for asylum in the Czech Republic. They help asylum seekers to solve problems that may occur during the asylum procedure and also regularly visit asylum seekers at refugee facilities. www.uprchlici.cz</p>
	<p>The Estonian Refugee Council's main objective is to ensure that persons coming to Estonia in need of international protection are treated in accordance with international standards and receive suitable protection.</p>
	<p>JRS Germany provides legal, social and pastoral support in detention centres in Berlin, Eisenhüttenstadt and Munich (almost 2500 individuals per year). JRS Germany is a member of the Berlin Commission. www.jesuiten-fluechtlingsdienst.de</p>
	<p>The Greek Council for Refugees (GCR) is the only Greek NGO that deals exclusively with refugees and asylum seekers living in Greece. GCR provides assistance to refugees by means of counselling, social services and the implementation of special projects for the solution of their problems, such as their adaptation to their social environment, and securing the means for their livelihood. www.gcr.gr</p>



The Hungarian Helsinki Committee (HHC) monitors the enforcement of human rights, provides legal assistance to victims of human rights abuses falling, and informs the public about rights violations. The main activities of HHC focus on protecting the rights of asylum seekers and foreigners in need of protection, and monitoring the human rights performance of law enforcement agencies and the judicial system. <http://helsinki.hu>



JRS Ireland provides psychosocial support service to women detainees. Through its project *Community Links*, JRS Ireland offered an education employment and cultural services. It also organises intercultural events, and training for teachers on immigration and human rights. www.jrs.ie



JRS Italy (Centro Astalli), with the support of UNHCR, provides a wide range of health services and social services to refugees, and support to victims of torture. The office organises a yearly project in the schools to promote better understanding of the migrants issue. www.centroastalli.it



Caritas Latvia's mission is to promote the Caritas Network among the Catholic population in Latvia, as well as to serve and assist the socially deprived part of the population of Latvia, which includes working with migrants and refugees. Since 2005 Caritas Latvia has joined the Equal Project "Step by Step" initiated by the Office of Citizenship and Migration Affairs in Latvia. www.caritas.org/worldmap/europe/latvia.html



Caritas Vilnius serves people in need in the Archdiocese of Vilnius, Lithuania. Amongst others, Caritas Vilnius organises measures for the integration of refugees and migrants in the local community. www.vilnius.caritas.lt



JRS Malta visits detainees in three detention centres, offering legal, social and pastoral services to detainees. JRS Malta conducts work with cultural mediators and social psychologists, in order to better communicate and learn from the traumatic experiences of migrant women who are residing in Malta. www.jrsmalta.org



The Dutch Refugee Council (Vluchtelingenwerk Nederland) is a non-profit organization representing the rights and interests of refugees and asylum seekers for over 25 years. Working with 29 regional branches and over 8000 volunteers, the Dutch Refugee Council provides practical support for refugees during the asylum procedure, naturalization, and integration into Dutch society. www.vluchtelingenwerk.nl

	<p>Caritas Poland runs three Centres of Support for Migrants and Refugees located in Białystok, Lublin and Zgorzelec. Support is offered for recognised refugees, asylum seekers, persons under subsidiary forms of protection, migrants, repatriants, and mixed marriages. They offer psychological support, legal counselling, social support and social integration activities. www.caritas.pl</p>
	<p>JRS Portugal provides a number of services for marginalised migrants, such as temporary accommodation, health services, psychological and cultural support. They provide psychosocial services in the detention centre in Oporto and raise public awareness to promote integration of migrant communities. www.jrsportugal.pt</p>
	<p>JRS Romania provides temporary accommodation, as well as legal, psychological and medical assistance, to migrants in Romania. They organise cultural integration workshops and inter-religious events on a regular basis. JRS Romania volunteers visit the detention centre in Bucharest once a week. www.jrsromania.org</p>
	<p>Caritas Slovakia is a Catholic relief, development and social service organisation. Its activities are focused on poverty and social inequality, migration, asylum in Slovakia. www.charita.sk</p>
	<p>JRS Slovenia, with around 20 volunteers, visits the open centre for asylum seekers in Ljubljana four times a week, where they organise different activities, cultural events and workshops. They also visit once a week the detention centre in Postojna. www.rkc.si/jrs</p>
	<p>The Spanish Commission for Refugee Aid (Comisión Española de Ayuda al Refugiado) is a Spanish independent and non-governmental organisation founded in 1979 in order to protect the right to seek asylum. Its main goals are to provide legal and social assistance to refugees and migrants and to advocate for the interests of asylum seekers. www.cear.es</p>
	<p>JRS Sweden organises visitor groups to provide support to detainees, and connects them to legal services and relatives, and mediates between detainees, the police and the Swedish migration board.</p>
	<p>JRS UK staff and volunteers work in coalition to undertake lobbying and campaigning work on destitution and detention issues. Up to ten volunteers visit approximately 40 to 60 detainees a week, also liaising with health professionals and legal advisors. www.jrsuk.net</p>



The DEVAS project is coordinated by
JRS-Europe in partnership with:

Caritas Austria
JRS-Belgium
The Bulgarian Helsinki Committee
Symfiliosi (Cyprus)
The Association for Integration and Migration (Czech Republic)
The Estonian Refugee Council
JRS-Germany
The Greek Council for Refugees
The Hungarian Helsinki Committee
JRS-Ireland
JRS-Italy (Centro Astalli)
Caritas Latvia
Caritas Vilnius
JRS-Malta
The Dutch Refugee Council
Caritas Poland
JRS-Portugal
JRS-Romania
Caritas Slovakia
JRS-Slovenia
The Spanish Refugee Commission
JRS-Sweden
JRS-United Kingdom



Jesuit Refugee Service-Europe

www.jrseurope.org
www.detention-in-europe.org



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Manual do *United Nations Office on Drugs and Crime* (UNODC)

- Módulo 1

- Módulo 2

- Módulo 5

- Módulo 8

- Módulo 9



UNODC

United Nations Office on Drugs and Crime

UN.GIFT

Global Initiative to Fight Human Trafficking



Manual contra o tráfico de pessoas para profissionais do sistema de justiça penal

Resumos dos Módulos

ESCRITÓRIO DAS NAÇÕES UNIDAS SOBRE A DROGA E CRIME
Viena

Manual contra o tráfico de pessoas para profissionais do sistema de justiça penal

Tradução não oficial financiada e coordenada por

OBSERVATÓRIO DO TRÁFICO DE SERES HUMANOS

MINISTÉRIO DA ADMINISTRAÇÃO INTERNA

ORGANIZAÇÃO DAS NAÇÕES UNIDAS
Nova Iorque, 201



Introdução

O crime do tráfico de seres humanos é clandestino e complexo. Quando os elementos do crime, tal como definidos no «Protocolo Adicional à Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional relativo à Prevenção, Repressão e Punição do Tráfico de Pessoas, em especial Mulheres e Crianças» (Protocolo contra o Tráfico de Pessoas) não são corretamente compreendidos, as respostas da justiça penal podem ser inadequadas e ineficazes. O crime floresce maioritariamente na clandestinidade e por vezes estende-se pelas jurisdições de vários Estados, o que torna difícil a sua deteção e a aplicação da lei.

Para além disto, as abordagens múltiplas no combate contra o tráfico de seres humanos são relativamente novas no contexto das práticas do sistema de justiça penal. Por conseguinte, a resposta da justiça penal ao tráfico de seres humanos pode, por vezes, ser morosa e colocar uma maior ênfase na punição dos culpados do que na proteção das vítimas. Pontualmente, isto levou a que crimes de tráfico de seres humanos fossem tratados de forma incorreta, com as vítimas do crime a serem detidas e tratadas como os seus autores. Este procedimento não só destrói a relação de confiança necessária para uma colaboração eficaz na investigação e no procedimento criminal do crime, como revitimiza e estigmatiza as vítimas.

O Manual contra o Tráfico de Seres Humanos para Profissionais do Sistema de Justiça Penal foi elaborado para dar resposta a esta multiplicidade de desafios. Tem por objetivo responder às lacunas de capacidade dos profissionais do sistema de justiça penal que trabalham para prevenir e combater o tráfico de seres humanos, proteger e apoiar as vítimas, e cooperar de forma eficaz entre si no decorrer da sua atividade. O manual apresenta em pormenor práticas promissoras em cada uma das fases da resposta ao tráfico de seres humanos efetuada pela justiça penal, constituindo, por conseguinte, um guia prático e uma ferramenta de formação para os profissionais do sistema de justiça penal.

O Manual contra o Tráfico de Seres Humanos para Profissionais do Sistema de Justiça Penal é o produto da perícia abrangente acumulada durante uma série de reuniões de especialistas em que participaram juizes, procuradores e autoridades de aplicação da lei, todos eles profissionais que atuam no domínio da luta contra o tráfico de seres humanos. Cada um dos módulos do manual está concebido para preparar os profissionais do sistema de justiça penal no sentido darem resposta de forma adequada aos desafios colocados pelo crime de tráfico de seres humanos. As práticas promissoras apresentadas em cada um dos módulos destinam-se a revelar a complexidade do assunto e a capacitar os profissionais do sistema de justiça penal para a aplicação, às suas próprias experiências no terreno, das lições retiradas por outros profissionais do mesmo domínio de atuação.

Os módulos tratam cada uma das fases da resposta da justiça penal ao tráfico de seres humanos, desde a identificação das vítimas, investigações e instauração de procedimento criminal aos traficantes até à proteção das primeiras. Cada um dos módulos está concebido para funcionar como um todo em relação às necessidades concretas da fase específica de resposta da justiça penal a que procura responder. O manual não deve ser encarado como um ensaio académico, mas antes como um guia prático para os profissionais do sistema de justiça penal.

Visão geral dos módulos

Módulo 1: Definições de tráfico de pessoas e de auxílio à imigração ilegal

O primeiro módulo funciona como chave para alguns dos termos usados ao longo do manual. Os termos em causa são definidos de acordo com os instrumentos das Nações Unidas, nomeadamente a Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional e o Protocolo Adicional contra o Tráfico de Pessoas. Este módulo enfatiza a definição de tráfico de seres humanos apresentada no Protocolo contra o Tráfico de Pessoas e a definição de auxílio à imigração ilegal, tal como apresentada no Protocolo contra o Tráfico Ilícito de Migrantes, para além das diferenças centrais entre as duas.

Módulo 2: Indicadores de tráfico de seres humanos

Este módulo apresenta alguns dos sinais reveladores que podem alertar as primeiras pessoas a chegar à cena do crime para potenciais situações de tráfico. Estes sinais são descritos no módulo como indicadores de que o tráfico pode ter tido lugar (e não provas de que teve lugar), pelo que, por conseguinte, deverão desencadear investigações subsequentes. O módulo cataloga os indicadores segundo as diferentes situações de tráfico, por forma a oferecer orientação à polícia fronteiriça e a outros intervenientes que poderão contactar com vítimas de tráfico de seres humanos.

Módulo 3: Reações psicológicas das vítimas de tráfico de seres humanos

Este módulo centra-se principalmente no impacto da exploração e abuso sexual em vítimas de tráfico de seres humanos. Analisa a forma como o processo inerente ao tráfico de seres humanos afeta a saúde mental e física das vítimas. O módulo explica igualmente como as condições de saúde de uma vítima podem afetar a investigação e o procedimento criminal por crime de tráfico de seres humanos, discutindo, adicionalmente, estratégias penais adequadas para permitir a cooperação das vítimas no exercício da ação penal. Por último, o módulo oferece orientação relativamente à minimização do impacto psicológico que as investigações podem ter nas vítimas de tráfico de seres humanos.

Módulo 4: Métodos de controlo

Este módulo explica os principais métodos de controlo utilizados pelos traficantes, descrevendo como, ao longo do processo de tráfico, pode ser usada uma combinação dos mesmos. Para mais, analisa as opções de resposta contra os principais métodos de controlo disponíveis durante a investigação de casos de tráfico de seres humanos.

Módulo 5: Avaliação do risco nas investigações de tráfico de seres humanos

Este módulo sublinha a necessidade de uma avaliação contínua do risco, explorando ainda as questões essenciais a ter em consideração ao efetuar avaliações do risco em investigações de tráfico de seres humanos. Com esse intuito, explica o conceito de risco e indica condições que aumentem a probabilidade de determinadas pessoas estarem em risco no contexto dos casos de tráfico de seres humanos. O módulo descreve igualmente quais são os riscos, como determinar o grau e a gravidade do risco, bem como as ações a ponderar como resposta contra um risco identificado.

Módulo 6: Cooperação internacional nos casos de tráfico de pessoas

Dada a natureza transnacional de muitos dos casos de tráfico de pessoas, é necessária cooperação internacional para a investigação eficaz. Este módulo explica o fundamento dessa necessidade, recordando as diferentes formas e princípios de cooperação internacional, discutindo tipos de cooperação internacional para além das formas tradicionais da extradição e auxílio judiciário mútuo, tal como definidos pela UNTOC, e ainda o impacto dos diferentes sistemas jurídicos na cooperação internacional entre Estados. Além disso, o módulo permite conhecer o processo de apresentação de requerimentos formais para auxílio judiciário mútuo, os conteúdos da carta rogatória e os aspetos a ter em consideração aquando da apresentação da mesma. O módulo analisa igualmente as possibilidades de contacto direto entre autoridades na apresentação de cartas rogatórias a outra jurisdição, bem como as ações de cooperação necessárias aquando do repatriamento de vítimas de tráfico de seres humanos.

Módulo 7: Análise de provas materiais e da cena do crime nas investigações de tráfico de seres humanos

Este módulo explica a relevância das investigações da «cena do crime» nos crimes de tráfico de seres humanos. Por conseguinte, descreve os tipos de provas materiais encontrados com maior frequência nas investigações de tráfico de seres humanos e sublinha as ações básicas necessárias para preservar e documentar a cena do crime e recolher vestígios de provas materiais. O módulo analisa também os aspetos essenciais a ponderar e as possíveis ações a tomar nos casos de tráfico de seres humanos quando se analisam:

- Vítimas e suspeitos;
- Locais;
- Veículos;
- Documentos encontrados na cena do crime, nas vítimas, nos suspeitos ou em veículos;
- Equipamento de tecnologias de informação e comunicação encontrado na cena do crime, nas vítimas, nos suspeitos ou nos veículos.

Módulo 8: Entrevistas a vítimas de tráfico de seres humanos que constituem potenciais testemunhas

Este módulo identifica o objetivo geral das entrevistas de investigação criminal às vítimas de tráfico que constituem potenciais testemunhas. Identifica cinco etapas do modelo «PEACE» para a entrevista a vítimas de crime:

- Planeamento e preparação da entrevista;
- Estabelecimento de relação com a vítima/testemunha, explicação do processo e do conteúdo da entrevista;
- Obtenção do depoimento da vítima/testemunha,
- Conclusão adequada da entrevista;
- Avaliação do conteúdo da entrevista.

O módulo enumera os passos concretos do planeamento deste tipo de entrevista e os elementos necessários para iniciar uma inquirição a uma vítima/testemunha de tráfico numa entrevista probatória. O módulo apresenta também técnicas especializadas de entrevista e explica as diferenças entre perguntas abertas, específicas, fechadas e orientadas.

Módulo 9: Entrevistas a crianças vítimas de tráfico de seres humanos

Este módulo define «criança» como uma pessoa com idade inferior a 18 anos, tal como determinado no Protocolo contra o Tráfico de Pessoas. Por conseguinte, determina que o princípio subjacente que deve orientar as entrevistas a crianças é o da sua condução tendo em atenção o interesse superior da criança. O módulo reconhece que as crianças consideradas possíveis vítimas de tráfico de seres humanos poderão ser mais vulneráveis do que uma possível vítima adulta, adaptando em conformidade cada uma das cinco etapas do modelo PEACE de entrevista às vítimas.

Módulo 10: A utilização de intérpretes nas investigações de tráfico de seres humanos

Este módulo enumera situações em que poderá ser necessário recorrer à utilização de intérpretes no decurso das investigações e explica porque é importante manter o mesmo intérprete ao longo de uma investigação de tráfico de seres humanos. Adicionalmente, explica os fatores relevantes a ter em conta durante o planeamento de serviços de interpretação e as ações a adotar durante a preparação de uma entrevista. Identifica também as informações a que os intérpretes devem e não devem ter acesso no decurso da prestação dos seus serviços.

Módulo 11: As necessidades das vítimas durante os procedimentos criminais nos casos de tráfico de seres humanos

É preciso reconhecer o impacto de vitimização do tráfico de seres humanos e enfrentar as suas consequências em todas as fases de resposta da justiça penal. O Protocolo contra o Tráfico de Pessoas estabelece a base legal para a proteção e apoio a vítimas/testemunhas. Este módulo analisa detalhadamente a proteção e apoio em todas as fases do exercício da ação penal e apresenta as vantagens que a proteção e apoio prestados às vítimas acarretam não só para estas, mas também para os objetivos da justiça penal. O módulo demonstra igualmente os desafios colocados pelo respeito pelos direitos das vítimas, independentemente do seu grau de cooperação com o sistema de justiça penal.

Módulo 12: Proteção e apoio a vítimas/testemunhas nos casos de tráfico de seres humanos

Este módulo define e explica o conceito de proteção de testemunhas em geral, a sua necessidade e as suas limitações em relação aos casos de tráfico de seres humanos. O módulo reconhece a vulnerabilidade das vítimas/testemunhas do tráfico de seres humanos e o risco a que estas se encontram expostas durante o exercício da ação penal. Assim, analisa pormenorizadamente o papel dos vários profissionais do sistema de justiça penal nas diferentes fases de resposta e as medidas a instaurar para proteger as vítimas/testemunhas. Reconhece-se que a vítima/testemunha necessita potencialmente de um tipo de proteção que se inicie no momento de identificação, continue ao longo da investigação e que se prolongue no decorrer e para além do procedimento criminal.

Módulo 13: A indemnização das vítimas de tráfico de seres humanos

Este módulo identifica a Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional e o Protocolo Adicional contra o Tráfico de Pessoas, tal como implementados na legislação nacional dos Estados Partes, como o quadro jurídico internacional para a concessão de indemnizações nos casos de tráfico de seres humanos. O módulo sublinha também as diferenças jurisdicionais em termos de administração, financiamento, pedido e pagamento de indemnizações. Analisa depois as bases legais possíveis para os pedidos de indemnização das vítimas, identificando os diferentes tribunais que podem decidir pedidos de indemnização.

Módulo 14: Considerações sobre a aplicação das penas em casos de tráfico de seres humanos

Este módulo analisa as teorias de punição existentes, oferece sugestões práticas e examina o papel dos juízes na determinação da pena. Recorda os factores /circunstâncias agravantes e atenuantes mais frequentes a considerar durante a

determinação da pena dos traficantes e explora algumas formas de utilização de informação para fundamentar as determinações das penas em casos de tráfico de seres humanos.

Módulo 15: Formas de investigação nos casos de tráfico de pessoas

Este módulo enquadra as diversas de formas de investigação do tráfico de pessoas abordadas ao longo do Manual. As quais são agrupadas em abordagens reactivas e pró-ativas de investigação, a par da produção de Informações e das táticas disruptivas. Adicionalmente, sustenta o ganho de eficácia de uma abordagem relacionada, assente na combinação, contínua e complexa, daqueles meios de investigação. Identifica e analisa os cinco elementos do processo comercial mais comuns no tráfico de pessoas – anúncios, instalações, transporte, aspectos financeiros e comunicações – sobre os quais pode ser estruturada uma investigação, obtidas Informações e recolhida prova, permitindo disromper o processo comercial e fazer cessar a actividade criminosa.

Módulo 16: Técnicas de investigação conjunta nos casos de tráfico de pessoas

Este módulo explica a necessidade de investigações conjuntas, bem como as suas vantagens. O tráfico de pessoas é um crime com características transnacionais, constituindo um dos crimes que suscita vários problemas de jurisdição no que toca à aplicação da lei. Face a isso, torna-se imprescindível a realização de investigações conjuntas pelas autoridades de diferentes jurisdições, para impedir que os traficantes atuem livremente e combater eficazmente o crime de tráfico.

Demonstra ainda quais os diversos Modelos práticos de investigação conjunta que actualmente existem e os elementos comuns a todos os modelos.

Módulo 17: Informações nas investigações de tráfico de pessoas

Este módulo enquadra a actividade das informações no contexto do tráfico de pessoas, abordando todo o ciclo de produção de informações e relacionando-o com os cinco processos comerciais do tráfico de pessoas. A utilização das informações no âmbito das operações de combate ao tráfico de pessoas é enquadrada na perspectiva estratégica e tática, sendo abordadas questões relativas às fontes, ao registo de informações de relevo e aos cuidados a ter com a partilha de informações entre jurisdições, actividade essencial no combate a esta actividade criminosa transnacional.

Módulo 18: Técnicas especializadas nas investigações de tráfico de pessoas:

Este Módulo esclarece o que são técnicas especializadas e quais as existentes. Elenca ainda os objectivos e vantagens da utilização destas técnicas nas investigações, bem como os cuidados legais e práticos a ter na sua implementação.

Módulo 19: Vigilância nas investigações de tráfico de pessoas

Este módulo tem como objetivo dotar o investigador de conhecimentos sobre seis formas de técnicas de vigilância (pontos de observação estáticos, vigilâncias a pé, vigilâncias móveis, vigilâncias dissimuladas em zonas rurais e vigilâncias intrusivas com identificação/localização eletrónicas) e sobre quais as suas aplicações nas investigações de tráfico de pessoas. Visa igualmente aprofundar considerações sobre o uso de cada uma delas e sugerir possíveis técnicas alternativas e relacionadas, de molde a fornecer ao investigador ferramentas para um ponto de partida em investigações de tráfico de pessoas. Informando-o finalmente acerca de quais os principais aspetos a ponderar ao planear e realizar uma operação que requeira a utilização de técnicas de vigilância.

Módulo 20: Agentes encobertos/infiltrados nas investigações de tráfico de pessoas

Este módulo enquadra as acções encobertas nas técnicas especiais de investigação, fornece orientações e princípios gerais a observar na utilização deste meio de investigação e identifica alguns problemas específicos e formas de os evitar, tais como eventuais alegações de actuação provocatória do crime por parte do agente encoberto.

Alerta ainda para o elevado grau de risco que esta forma de investigação comporta para o(s) agente(s) envolvido(s) e para a conseqüente necessidade de elaboração de um cuidadoso plano de actuação conjugado com a avaliação contínua e dinâmica dos riscos associados à sua utilização.

Módulo 21: Dados de comunicações nas investigações de tráfico de pessoas

Este Módulo explica o que são dados de comunicações, que tipos existem e o que permitem identificar. Aponta vantagens da sua utilização nas investigações, quer como forma de obtenção de prova, quer como ponto de partida para desenvolver outras linhas investigatórias.

Módulo 22 - Interceção de comunicações nas investigações de tráfico de pessoas

Este módulo tem como objetivo dotar os investigadores de conhecimentos sobre interceções de comunicações como apoio para as investigações de tráfico de pessoas. Visa igualmente identificar alguns dos desafios e oportunidades inerentes a esta

ferramenta, bem como descrever os requisitos práticos do uso da interceção de comunicações e indicar onde se pode obter mais apoio.

Módulo 23: Utilização de informadores nas investigações de tráfico de pessoas

O presente módulo visa prover os investigadores com um conjunto de conhecimentos sobre o emprego de informadores, no decurso de investigações, no contexto de tráfico de pessoas. No documento são focados, entre outros aspectos, os tipos de informadores que podem ser empenhados e os processos de gestão que lhe estão associados, sendo ainda abordadas as técnicas relacionadas com este recurso e as alternativas nos casos em que este meio seja contra-indicado.

Módulo 24: Investigações financeiras nos casos de tráfico de pessoas

Este módulo fornece orientações sobre a realização de investigações financeiras, tendo por referência os processos comerciais do tráfico de pessoas, sem pretender ser exaustivo face à complexidade e abrangência desta matéria. Explica o que é uma investigação financeira e uma análise financeira. Identifica as três fases de uma investigação financeira e suas etapas. Enuncia os objetivos da identificação de bens de proveniência criminosa e descreve as técnicas de investigação apropriadas para identificar bens de proveniência criminosa nas investigações de tráfico de pessoas. Define as ordens de fornecimento de informação e de documentos, as ordens de controlo e monitorização e como podem ser utilizadas na investigação. Identifica alguns dos aspetos a serem considerados ao planear a apreensão e perda de bens nos casos de tráfico de pessoas. Finalmente, enuncia outras oportunidades de investigação do tráfico de pessoas que possam emergir de uma investigação financeira.

Módulo 25: Reconhecimento de documentos nas investigações de tráfico de pessoas

Este módulo enuncia as definições utilizadas por examinadores e peritos em análise documental, caracteriza a fraude de identidade e descreve os três métodos de a perpetrar, visando compreender como a deteção de documentos falsificados pode ajudar nos casos de tráfico de pessoas. Neste módulo são ainda enunciadas as técnicas utilizadas para identificar documentos falsificados, em especial as técnicas que envolvem o uso de luz, os diferentes processos de impressão e os principais mecanismos de segurança adotados na criação de documentos de identificação.

Módulo 26: Contraposição das estratégias de defesa nos casos de tráfico de seres humanos

Este módulo visa alertar para a necessidade e vantagem de, nas várias fases do processo, desde a investigação à audiência de julgamento, serem perspectivadas as potenciais estratégias de defesa, por forma a que, atempadamente, sejam recolhidos os elementos probatórios que permitam contrariá-las e, bem assim, ponderar as iniciativas processuais mais adequadas para levar ao conhecimento do tribunal todos os factos relevantes para a decisão.

São ainda identificadas algumas das mais comuns estratégias de defesa utilizadas nos casos de tráfico de seres humanos e apontadas algumas vias para a sua refutação.



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Módulo 1

ESCRITÓRIO DAS NAÇÕES UNIDAS
SOBRE DROGAS E CRIME
Viena

Manual contra o tráfico de pessoas para profissionais do sistema de justiça penal

Módulo 1:

Definições de Tráfico de Pessoas e de Introdução
Clandestina de Migrantes

Tradução não oficial financiada por



MINISTÉRIO DA ADMINISTRAÇÃO INTERNA
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As designações empregues e a apresentação dos conteúdos desta publicação não correspondem à expressão de qualquer opinião do Secretariado das Nações Unidas relativamente ao estatuto legal de qualquer país, território, cidade ou área, ou das suas autoridades, ou relativamente às suas fronteiras ou delimitações. Os países e áreas são referidos pelos seus nomes oficiais à data de recolha dos dados relevantes.

Esta publicação não foi formalmente editada.

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Nota Introdutória

As definições adotadas no presente Manual, respeitantes aos crimes de Tráfico de Pessoas e Introdução Clandestina de Migrantes, são as constantes das traduções oficiais portuguesas dos instrumentos legislativos das Nações Unidas que versam a matéria, a saber: o «Protocolo Adicional à Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional relativo à Prevenção, Repressão e Punição do Tráfico de Pessoas, em especial Mulheres e Crianças» (Protocolo Contra o Tráfico de Pessoas) e o «Protocolo contra o Tráfico Ilícito de Migrantes por Via Terrestre, Marítima e Aérea» (Protocolo relativo ao Tráfico Ilícito de Migrantes), respectivamente¹.

A definição de Tráfico de Pessoas consta na alínea a) do art.º 3.º do Protocolo Contra o Tráfico de Pessoas. A alínea a) do art.º 3.º do Protocolo relativo ao Tráfico Ilícito de Migrantes define Tráfico Ilícito de Migrantes. Com a ratificação destes instrumentos legislativos, os Estados comprometem-se a adaptar a sua legislação nacional ao sentido e conceitos presentes nos Protocolos, não estando no entanto obrigados a seguir *ipsis verbis* a linguagem utilizada nos mesmos.

Na ordem jurídica portuguesa, a transposição dos conceitos definidos no art.º 3.º do Protocolo Contra o Tráfico de Pessoas foi operada através da nova redação do tipo penal do crime de Tráfico de Pessoas, tal como actualmente consagrado nos n.ºs 1 a 6 do art.º 160 do Código Penal Português². A consagração penal do crime de Introdução Clandestina de Migrantes consta do art.º 183.º da Lei n.º 23/2007³, tendo sido adotada pela ordem jurídica portuguesa a designação de Auxílio à Imigração Ilegal. Através do art.º 184.º do mesmo diploma é penalizada a conduta de “... grupo, organização ou associação...” cuja atividade consista na prática das condutas típicas do crime de Auxílio à Imigração Ilegal, tal como definidas pelo art.º anterior.

Os Protocolos a que nos vimos referindo têm vindo a ser ratificados pelos países de língua oficial portuguesa. De acordo com os dados recolhidos à data de publicação do Manual, Brasil, Cabo Verde, Moçambique, Timor e São Tomé e Príncipe ratificaram quer o Protocolo Contra o Tráfico de Pessoas quer o Protocolo relativo ao Tráfico Ilícito de Migrantes. Por seu turno, a Guiné-Bissau terá ratificado apenas o Protocolo Contra o Tráfico de Pessoas. Não existe informação respeitante à assinatura e ratificação de nenhum destes instrumentos legislativos por parte de Angola.

¹ Aprovados para ratificação pela Resolução da Assembleia da República n.º 32/2004 de 12 de Fevereiro e ratificados pelo Decreto do Presidente da República n.º 19/2004 de 2 de Abril, publicados no Diário da República n.º 79, I série A, de 02 de Abril de 2004.

² Na redação que lhe foi impressa pela Lei 59/07 de 4 de Setembro, publicada no Diário da República n.º 170, I série A, de 4 de Setembro de 2007.

³ Publicada no Diário da República, I série, de 4 de Julho de 2007, aprovando o regime jurídico de entrada, permanência, saída e afastamento de estrangeiros do território nacional.

⁴ Informação disponível para consulta em: <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>

Apesar do acima exposto e até ao momento da publicação deste Manual, alguns dos países que já ratificaram os Protocolos terão ainda de proceder à adaptação da respectiva legislação interna, por forma a cumprirem com a obrigação de transposição e adaptação das disposições destes instrumentos legislativos internacionais.

A título meramente exemplificativo, refira-se o sistema legal cabo-verdiano, que não possui nenhum normativo que tipifique penalmente a Introdução Clandestina de Migrantes. O mesmo ocorre no sistema jurídico moçambicano que, no entanto, já conta com a consagração do crime de Tráfico de Pessoas⁵, respeitando a definição e exigências estipuladas pelo Protocolo Contra o Tráfico de Pessoas.

O sistema jurídico timorense consagra os crimes de Auxílio à Imigração Ilegal e Tráfico de Pessoas, através do disposto nos art.ºs 79.º e 81.º da Lei 9/2003 de 6 de Maio, respetivamente. Esta tipificação é anterior à ratificação dos Protocolos, ocorrida em 09 de Novembro de 2009, pelo que a legislação timorense na matéria terá ainda de ser adaptada às exigências contidas nos instrumentos legislativos das Nações Unidas.

O Brasil, por sua vez, pune a conduta de quem introduzir clandestinamente ou ocultar clandestino ou irregular, através do § XII do art.º 125.º da Lei 6.185 de 19 de Agosto de 1980, estando já prevista a entrada em vigor de um novo regime jurídico de estrangeiros no decurso do ano de 2010, a ser aprovado com base no Projecto-lei n.º 5655/2009. Prossegue ainda uma Política Nacional de Enfrentamento ao Tráfico de Pessoas, com o objectivo de prevenir e reprimir o tráfico de pessoas, responsabilizar os seus autores e garantir atenção e suporte às vítimas⁶.

O sistema penal angolano consagra penalmente a conduta tipificada como Promoção e Auxílio à Entrada Ilegal, conforme definida no art.º 113 da Lei n.º 2/2007, de 31 de Agosto, restringindo no entanto o âmbito de aplicação da norma à promoção e/ou ajuda à entrada de cidadão estrangeiro em território angolano, à sua hospedagem e ocultação.

A Guiné-Bissau não adotou ainda nenhum diploma legislativo que proceda à criminalização do tráfico de pessoas ou da introdução clandestina de migrantes.

Finalmente, São Tomé e Príncipe adotou a designação de Auxílio à Imigração Ilegal⁷ na tipificação penal da conduta descrita no Protocolo relativo ao Tráfico Ilícito de Migrantes como Introdução Clandestina de Migrantes.

⁵ Cfr. art.º 10.º da Lei n.º 6/2008, de 9 de Julho.

⁶ Com base no regime constante do Decreto n.º 5.948/06, de 26 de Outubro de 2006.

⁷ Cfr art.ºs 93.º e 94.º da Lei n.º 5/2008 de 12 de Agosto de 2008.

Módulo 1:

Considerações sobre a aplicação das penas em casos de tráfico de pessoas

Objetivos

No final deste módulo, os utilizadores deverão ser capazes de:

- Identificar os elementos constitutivos dos tipos de crime de tráfico de pessoas e introdução clandestina de migrantes, como definidos nos protocolos relevantes das Nações Unidas;
- Distinguir os elementos das definições de tráfico de pessoas e introdução clandestina de migrantes tal como definidos nos protocolos das Nações Unidas;
- Explicar o significado dos elementos «ação», «meios» e «objetivo» nos casos de tráfico de pessoas;
- Compreender o problema do consentimento num caso de tráfico de pessoas e a forma como o consentimento é viciado;
- Enumerar alguns dos crimes conexos com o crime de tráfico de pessoas;
- Identificar os fatores envolvidos na escolha da jurisdição para o exercício da ação penal nos casos de tráfico de pessoas.

Introdução

É importante distinguir entre tráfico de pessoas e introdução clandestina de migrantes por duas razões:

- Os elementos constitutivos dos respetivos crimes são diferentes; e
- A resposta exigida às autoridades irá variar, dependendo do crime em causa.

As definições de tráfico de pessoas e de introdução clandestina de migrantes encontram-se no «Protocolo Adicional à Convenção das Nações Unidas contra a Criminalidade Organizada

Transnacional relativo à Prevenção, Repressão e Punição do Tráfico de Pessoas, em especial Mulheres e Crianças» (Protocolo contra o Tráfico de Pessoas) e no «Protocolo contra o Tráfico Ilícito de Migrantes por Via Terrestre, Marítima e Aérea» (Protocolo relativo ao Tráfico Ilícito de Migrantes), respetivamente.

Protocolo contra o Tráfico de Pessoas, Artigo 3.º (a)

«Tráfico de pessoas» significa o recrutamento, transporte, transferência, alojamento ou o acolhimento de pessoas recorrendo à ameaça ou ao uso da força ou de outras formas de coação, ao rapto, à fraude, ao engano, ao abuso de autoridade, ou de situação de vulnerabilidade, ou à entrega ou aceitação de pagamentos ou benefícios para obter o consentimento de uma pessoa que tem autoridade sobre outra, para fins de exploração. Exploração inclui, pelo menos, a exploração de prostituição ou outras formas de exploração sexual, de serviços ou trabalhos forçados, de escravatura ou práticas semelhantes à escravatura, servidão ou à extração de órgãos.

Protocolo relativo ao Tráfico Ilícito de Migrantes, Artigo 3.º (a)

O tráfico ilícito de migrantes ou «Introdução clandestina de migrantes» significa facilitar a entrada ilegal de uma pessoa num Estado do qual essa pessoa não é nacional ou residente permanente com o objetivo de obter, direta ou indiretamente, um benefício financeiro ou outro benefício material.

Tabela 1. Definições de tráfico de pessoas e de introdução clandestina de migrantes

	<i>Tráfico de pessoas (adultos)</i>	<i>Tráfico de pessoas (crianças)</i>	<i>Introdução clandestina de migrantes</i>
Idade da vítima	Maiores de 18	Menores de 18	Irrelevante
Elemento Subjectivo	Dolo	Dolo	Dolo
Elemento Material	<ul style="list-style-type: none"> • Ato • Meios • Objetivo de exploração 	<ul style="list-style-type: none"> • Ato • Objetivo de exploração 	<ul style="list-style-type: none"> • Ato: Facilitação de entrada ilegal • Objetivo: Benefícios financeiros ou outros benefícios materiais
Consentimento	Irrelevante, sempre que forem usados os meios previstos no tipo	Irrelevante. Independentemente dos meios utilizados	A pessoa consente na ação
Transnacionalidade	Não exigido	Não exigido	Exigido
Envolvimento de um grupo de crime organizado	Não exigido	Não exigido	Não exigido

Tráfico de pessoas

O Artigo 3.º do Protocolo contra o Tráfico de Pessoas define três elementos constitutivos do crime de tráfico de pessoas:

- (1) Um ato/ação (o que é feito);
- (2) Os meios (como é feito); e
- (3) Objetivo de exploração (porque é feito).

O Artigo 5.º requer ainda que os países assegurem que a conduta descrita no Artigo 3.º seja criminalizada na sua legislação nacional. É importante recordar que a definição constante no Protocolo contra o Tráfico de Pessoas se destina a alcançar consenso em todo o mundo relativamente ao fenómeno do tráfico de pessoas; a legislação nacional de cada país, no entanto, não precisa de seguir a linguagem exata do Protocolo. Pelo contrário, a legislação nacional deverá ser adaptada aos sistemas legais nacionais e aplicar o sentido e conceitos presentes no Protocolo contra o Tráfico de Pessoas.

Exemplos de legislação penal

Código Penal de Portugal

Art. n.º 160º da Lei 59/2007, de 4 de Setembro

1 – Quem oferecer, entregar, aliciar, aceitar, transportar, alojar ou acolher pessoa para fins de exploração sexual, exploração do trabalho ou extracção de órgãos:

- a) *Por meio de violência, rapto ou ameaça grave;*
- b) *Através de ardil ou manobra fraudulenta;*
- c) *Com abuso de autoridade resultante de uma relação de dependência hierárquica, económica, de trabalho ou familiar;*
- d) *Aproveitando -se de incapacidade psíquica ou de situação de especial vulnerabilidade da vítima;*
ou
- e) *Mediante a obtenção do consentimento da pessoa que tem o controlo sobre a vítima; é punido com pena de prisão de três a dez anos.*

2 – A mesma pena é aplicada a quem, por qualquer meio, aliciar, transportar, proceder ao alojamento ou acolhimento de menor, ou o entregar, oferecer ou aceitar, para fins de exploração sexual, exploração do trabalho ou extracção de órgãos.

3 – No caso previsto no número anterior, se o agente utilizar qualquer dos meios previstos

nas alíneas do n.º 1 ou actuar profissionalmente ou com intenção lucrativa, é punido com pena de prisão de três a doze anos.

4 – Quem, mediante pagamento ou outra contrapartida, oferecer, entregar, solicitar ou aceitar menor, ou obtiver ou prestar consentimento na sua adopção, é punido com pena de prisão de um a cinco anos.

5 – Quem, tendo conhecimento da prática de crime previsto nos n.ºs 1 e 2, utilizar os serviços ou órgãos da vítima é punido com pena de prisão de um a cinco anos, se pena mais grave lhe não couber por força de outra disposição legal.

6 – Quem retiver, ocultar, danificar ou destruir documentos de identificação ou de viagem de pessoa vítima de crime previsto nos n.os 1 e 2 é punido com pena de prisão até três anos, se pena mais grave lhe não couber por força de outra disposição legal.

Código Penal do Canadá

279.01: Qualquer pessoa que recrutar, transportar, receber, detiver, esconder ou alojar uma pessoa ou direcionar, influenciar ou exercer poder sobre os movimentos de uma pessoa, com o objetivo de a explorar ou facilitar a sua exploração é responsável por um crime e punido com:

(a) pena de prisão perpétua, se raptar, cometer uma ofensa corporal qualificada ou violência sexual grave, ou causar a morte à vítima durante o crime; ou

(b) a prisão por um período não superior a catorze anos em qualquer outro caso.

279.04: Para o efeito de crimes de tráfico de pessoas, uma pessoa explora outra se:

Obrigar outra a executar, ou a disponibilizar-se a executar, um trabalho ou um serviço, mediante a prossecução de uma conduta que, em todas as circunstâncias, pode razoavelmente levar a outra pessoa a acreditar que a sua segurança ou a segurança de terceiros será ameaçada se esta não executar ou não se disponibilizar a executar o trabalho ou serviço; ou

Obrigar outra, mediante a utilização do engano, da ameaça ou da força, ou de qualquer outra forma de coação, a extrair um órgão ou tecido.

Código Penal de Itália

600: (Colocar ou manter pessoas em condições de escravatura ou servidão). -Qualquer pessoa que exerça sobre outra direitos ou poderes correspondentes a uma relação de propriedade; colocar ou mantiver outra pessoa em condições de escravatura contínua, que explorar sexualmente essa pessoa, a coaja a trabalhar ou a force a mendigar, ou a explorar de qualquer outra forma, será punida com pena de prisão de oito a vinte anos.

Diz-se que alguém coloca ou mantém outrem numa condição de escravatura quando se faz uso de violência, ameaças, engano ou abuso de autoridade; ou quando alguém se aproveita de uma situação de inferioridade mental ou física, e/ou de pobreza para disso retirar vantagem; ou quando se promete dinheiro, são feitos pagamentos, ou se promete qualquer outro tipo de benefícios às pessoas que são responsáveis pela pessoa em questão.

A pena atrás mencionada torna-se mais severa, aumentando de um terço a 50%, se os crimes a que se fez referência no primeiro parágrafo forem perpetrados contra menores de dezoito anos ou em casos de exploração sexual, prostituição ou com o propósito de extração de órgãos.

601: (Tráfico de pessoas). - Quem quer que leve a cabo o tráfico de pessoas nas condições acima referidas no Artigo 600.º, isto é, tendo em vista a prática dos crimes referidos no primeiro parágrafo do artigo mencionado; ou quem quer que leve algumas das pessoas mencionadas, pelo meio de engano ou fazendo uso de violência, ameaças, ou abuso de autoridade; retirando vantagem de uma situação de vulnerabilidade física ou mental e de pobreza; ou prometendo dinheiro, ou fazendo pagamentos ou concedendo qualquer outro tipo de benefícios aos responsáveis pela pessoa em questão, para entrar no território nacional, permanecer, abandonar ou migrar para o dito território, será punido com uma pena de prisão de oito a vinte anos.

A pena atrás mencionada torna-se mais severa, aumentando de um terço a 50%, se os crimes a que se fez referência no primeiro parágrafo forem perpetrados contra menores de dezoito anos ou em casos de exploração sexual, prostituição ou com o propósito de extração de órgãos.

602: (Venda e compra de escravos). - Quem quer que, noutros casos que não os referidos no Artigo 601.º, comprar ou vender ou transferir qualquer pessoa que estiver nas condições mencionadas no Artigo 600.º, será punido com uma pena de prisão de oito a vinte anos.

A pena atrás mencionada torna-se mais severa, aumentando de um terço a 50%, se os crimes a que se fez referência no primeiro parágrafo forem perpetrados contra menores de dezoito anos ou em casos de exploração sexual, prostituição ou com o propósito de extração de órgãos.

Elementos constitutivos do crime de tráfico de pessoas

O Protocolo contra o Tráfico de Pessoas exige que o crime de tráfico seja definido mediante uma combinação de três elementos constitutivos, não bastando a verificação isolada de cada um deles – embora, nalguns casos, estes elementos individuais possam constituir crimes autónomos. Por exemplo, o rapto ou a agressão constituirão provavelmente crimes autónomos no âmbito da legislação penal de cada país.

Na terminologia do Direito Penal, estes três elementos constitutivos podem também ser identificados com o elemento objetivo/material do crime - o *actus reus* – e com o seu elemento subjetivo) – a *mens rea* –. Não pode haver condenação na ausência destes pressupostos, fundamentais nos sistemas penais de todo o mundo.

Requisitos de *Actus reus*

O *actus reus* (ato físico) ou elemento material do crime de tráfico de pessoas varia de acordo com a legislação de cada país. No caso do crime de tráfico, como definido no Protocolo contra o Tráfico, o *actus reus* divide-se em duas partes :

1) **Ação**

O crime deverá incluir um dos seguintes elementos:

- Recrutamento;
- Transporte;
- Transferência;
- Alojamento;
- Acolhimento de uma pessoa.

Alguns ou todos estes termos têm provavelmente um significado claramente definido no sistema penal do seu país.

2) **Meios**

Deverá conter pelo menos um dos seguintes meios:

- Uso da força;
- Ameaça;
- Coação;
- Sequestro;
- Fraude;
- Engano;
- Abuso de autoridade ou de uma situação de vulnerabilidade;
- Concessão ou recepção de benefícios.

Mens rea/Elementos Subjetivos do Tipo Penal

Os elementos subjetivos do crime referem-se à atitude subjetiva ou psicológica do agente do crime. Apenas a pessoa que age com determinado grau de culpa pode ser sujeita a responsabilidade criminal. Só nalgumas jurisdições e em alguns casos limitados pode ser imputada responsabilidade penal «objetiva» (crimes de «responsabilidade objetiva»).

O elemento subjetivo especificamente exigível no caso de tráfico de pessoas é que o agente tenha cometido os atos materiais com o propósito de exploração da vítima (tal como definido na legislação anti-tráfico de cada país).

O Protocolo contra o Tráfico de Pessoas não define «exploração», antes apresenta uma lista não-exaustiva de formas de exploração:

«Exploração inclui, pelo menos, a exploração da prostituição de outrem ou outras formas de exploração sexual, de serviços ou trabalhos forçados, de escravatura, de práticas similares à servidão ou a extração de órgãos.»

É importante recordar que o Protocolo contra o Tráfico de Pessoas obriga à criminalização do tráfico de pessoas, mas não exige que a legislação nacional use os termos exatos da definição de Tráfico de Pessoas nele constante. Ao invés, a legislação nacional deve ser elaborada de modo consistente com o quadro legal existente em cada país, consagrando, no entanto, os elementos típicos contidos naquela definição.

Para que se consuma o crime de tráfico de pessoas, não é necessária a efectiva exploração da vítima. Como se encontra claro no Protocolo contra o Tráfico de Pessoas, não é necessário que exista uma ação concreta de exploração, bastando que se verifique uma intenção de explorar a pessoa. Apenas é necessário que o agente pratique um dos atos constitutivos do crime, empregando um dos meios enumerados para alcançar aquele objetivo ou, por outras palavras, que tenha a intenção de que a pessoa seja explorada.

O elemento subjetivo pode ser provado de várias formas. Importa realçar que o Protocolo contra o Tráfico de Pessoas requer a criminalização do tráfico de pessoas quando este é levado a cabo de forma intencional, conforme o Artigo 5.º (1). No entanto, os países não estão proibidos de estabelecer o elemento *mens rea* com um padrão menos exigente, como seja mediante a imputação a título de negligência (consciente ou inconsciente, eventualmente apenas nos casos de negligência grosseira) de acordo com os requisitos do sistema jurídico do país em causa.

⁸ “Objectivo de exploração” é um *dolus specialis* do *mens rea*: *Dolus specialis* pode definir-se como o objectivo que o agente pretende alcançar quando comete os actos físicos do crime. É o objectivo que conta, e não o resultado prático alcançado pelo agente do crime. Por conseguinte, a satisfação do elemento *dolus specialis* não requer que o objectivo da acção seja realmente atingido. Por outras palavras, os “atos” e “meios” do agente têm de corresponder a um objectivo de explorar a vítima. Não é, por conseguinte, necessário que o infractor explore efectivamente a vítima.



Orientação prática

Muitos casos de tráfico poderão ser óbvios. Um caso em que as pessoas são recrutadas, transportadas para outro país, nunca lhes sendo permitido deixar as instalações da fábrica, onde são obrigadas a trabalhar 24 horas por dia, insere-se claramente na definição de tráfico de pessoas e a conduta deve ser criminalizada em conformidade.

Da mesma forma, casos que envolvam mulheres recrutadas ou alojadas e obrigadas a prestar serviços sexuais preenche, indubitavelmente, a definição de tráfico de pessoas. Alguns casos, no entanto, poderão ser mais complicados. Quando existem dúvidas sobre se determinado caso preenche a definição de tráfico, deverá prestar-se atenção à definição constante no Protocolo contra o Tráfico de Pessoas e aos elementos constitutivos deste tipo de crime, como definido na legislação nacional do seu país. Quando possível, os agentes de segurança e outras autoridades competentes para a aplicação da lei poderão desejar consultar os procuradores públicos para, juntos, avaliarem se determinado conjunto específico de factos preenche a definição de tráfico de pessoas, tal como contemplada na respectiva legislação nacional.

Outros exemplos de tráfico, tal como contemplados pelo Protocolo contra o Tráfico de Pessoas

- Os casamentos forçados poderão implicar uma ação, meios e objetivos que preencham o tipo legal de tráfico, tal como contemplado no Protocolo. A ação poderá consistir em transferir ou receber uma pessoa; os meios incluem o uso de força, ameaças, coação ou sequestro; o objetivo pode ser exploração sexual e/ou servidão.
- Em algumas sociedades, quando um membro de uma família comete um crime, poderá ser enviada uma mulher jovem da família do autor do crime para viver em servidão com um sacerdote ou com a família da vítima, como forma de “compensação”. Nestes casos, podemos afirmar que a ação pode ser o acolhimento ou alojamento, os meios utilizados podem ser a coação, abuso de autoridade ou de uma situação de vulnerabilidade, e o objectivo poderá consistir na exploração laboral ou sexual, servidão ou escravatura.
- Os funcionários diplomáticos empregam frequentemente empregados domésticos. Nalguns casos, ocorridos em várias partes do mundo, alguns destes empregados foram recrutados e forçados a trabalhar como empregados domésticos do agregado familiar.
- O rapto e a mobilização de crianças e adultos para exércitos / forças de combate em alturas de conflito podem ser caracterizados como um crime de tráfico de pessoas. As crianças são particularmente vulneráveis ao recrutamento militar devido à sua imaturidade física e emocional. A ação consistirá no recrutamento, transporte, ou acolhimento de uma criança ou adulto, utilizando como meio a ameaça, o uso da força, ou o abuso de uma situação de vulnerabilidade, com o objetivo de servidão, trabalho forçado ou exploração sexual.
- Nalguns países, especialmente naqueles com um mercado privado de adoção já implantado, estão a tornar-se cada vez mais comuns as práticas ilícitas de adoção, práticas estas que podem ser incluídas na definição geral de tráfico, como por exemplo quando as crianças sejam separadas à força das mães, que foram previamente coagidas a assinar documentos

em branco, mais tarde transformados em contratos ilegais. A ação pode ser o transporte ou acolhimento de uma criança e o objetivo poderá ser a escravatura ou a exploração sexual. Não é necessário estabelecer os meios quando a vítima de tráfico é menor de 18 anos, embora a coação, fraude e engano sejam normalmente usadas relativamente à mãe para obter assinaturas, amostras de sangue e certidões de nascimento.

- As operações pós-conflito armado e de manutenção de paz criam condições para que o tráfico de pessoas floresça, sobretudo quando falamos de tráfico de mulheres para fins de exploração sexual. A ação pode ser o recrutamento, transferência ou acolhimento, os meios podem ser a coação, engano ou abuso de autoridade ou de uma situação de vulnerabilidade e o objetivo pode ser a exploração sexual, servidão ou trabalho forçado.

Tabela 2. Tráfico de Pessoas – matriz dos elementos do crime

Recrutamento	+	Ameaça ou uso da força	+	Exploração da prostituição de outrem	= Tráfico de pessoas
Transporte		Outras formas de coação		Exploração Sexual	
Transferência		Rapto		Exploração Laboral	
Alojamento		Fraude		Escravatura ou outras situações semelhantes à escravatura	
Acolhimento de pessoas		Engano		Extração de órgãos	
		Abuso de autoridade		Etc.	
		Abuso de uma situação de vulnerabilidade			
		Entregar ou aceitar pagamentos ou benefícios para obter o consentimento de uma pessoa com autoridade sobre outra.			



Autoavaliação

Quais são os elementos constitutivos do crime de tráfico de pessoas?

Enumere alguns dos crimes que poderão ser cometidos em conjunto com o crime de tráfico de pessoas na sua jurisdição.

A questão do consentimento

O Artigo 3.º (b) do Protocolo contra o Tráfico de Pessoas determina que o consentimento de uma vítima de tráfico de pessoas em relação à sua exploração é irrelevante, assim que for demonstrado terem sido usados engano, coação, força ou outros meios ilícitos. O consentimento, por conseguinte, não pode ser usado como defesa para eximir alguém de responsabilidade penal. Consulte o módulo 13: «A indemnização a vítimas de tráfico de seres humanos» para obter mais pormenores.

Em casos de tráfico que envolvam crianças, o Protocolo contra o Tráfico de Pessoas determina que o crime se verifica independentemente dos meios utilizados.

Em qualquer destes casos, torna-se claro que nenhuma pessoa pode consentir na sua exploração, porque, no caso dos adultos, esse consentimento não traduz uma vontade séria, livre e esclarecida - por ter eventualmente sido obtido mediante meios ilícitos e, no caso das crianças, a sua vulnerabilidade torna o consentimento irrelevante.

Se o consentimento for obtido mediante quaisquer meios ilícitos, ou seja, mediante o uso de ameaça, força, engano, coação ou abuso de uma posição de autoridade ou de situação de vulnerabilidade, o consentimento não é válido.

Uma criança não tem capacidade para consentir em tal conduta, independentemente do consentimento ter sido ou não obtido de forma imprópria, pois a lei concede-lhes um estatuto especial, devido à sua situação de particular vulnerabilidade.

O problema do consentimento é complexo, pois o consentimento pode tomar muitas formas. Os seguintes exemplos ilustram a questão do consentimento.

Exemplo de irrelevância do consentimento

Anita, de vinte e três anos, vive na Ásia Central. Como quer viver e trabalhar no estrangeiro, um dia responde a um anúncio num jornal que oferece uma vaga para uma empregada de mesa. O anúncio exige explicitamente o conhecimento da sua língua materna. Anita responde ao anúncio e, quando o seu avião aterra, um homem leva-a para um apartamento onde já estão doze mulheres. Anita pergunta-lhes se todas elas trabalham no restaurante como empregadas de mesa. Riem-se dela e uma diz: «Restaurante? Não vais trabalhar em restaurante nenhum! Hoje à noite logo vês onde vais trabalhar!»

Ana é mantida presa durante seis meses e forçada a prostituir-se pelos seus traficantes, que reclamam tê-la comprado por várias centenas de dólares. Dizem-lhe que ela lhes deve o dinheiro do bilhete de avião, do alojamento e da alimentação. Batem-lhe quando ela recusa um cliente.

Exemplo de consentimento obtido por meio de fraude relativa às condições de trabalho

Bela vive num país da América do Sul e trabalha como prostituta. Um dia, um cliente regular, que a visita periodicamente sempre que tem negócios na sua cidade, diz-lhe que podia ganhar

muito mais dinheiro na cidade dos Estados Unidos em que ele vive. Este cliente, chamado Nick, diz-lhe que as prostitutas da sua cidade estão sempre em discotecas, ganham muito dinheiro, e se divertem imenso. Nick oferece-se para lhe comprar o bilhete de avião e Bela concorda, tratando de obter obtendo um visto para viajar para a nova cidade.

Nick encontra-se com Bela no aeroporto e ela fica em sua casa durante alguns dias. Um dia, chega um grupo de homens à casa para a levarem para o seu novo local de trabalho. Os homens dão a Nick 10 000 dólares e levam Bela para uma localidade nos arredores da cidade. É posta a trabalhar em três bordéis e forçada a ter relações sexuais com cerca de nove clientes por dia. Se recusar, a sua dívida aumenta. Todo o dinheiro pago pelos seus serviços vai ou para os proprietários dos bordéis ou para os homens que a compraram. É-lhe dito que não se pode ir embora antes de pagar a sua dívida. Vê ser usada violência contra algumas das suas amigas.



Autoavaliação

Quando é que o consentimento é irrelevante na prática do crime de tráfico de pessoas?



Discussão

Considera que o caso seguinte é um caso de tráfico de pessoas? Existe uma ação, meio e objetivo? Consegue identificá-los?

A dirige uma fábrica que tece seda para vestidos. O trabalho é muito delicado, o fio é muito fino, e requer dedos ágeis e boa vista.

A tecelagem de seda é um setor muito competitivo, em que os fornecedores de tecido estão constantemente a oferecer preços cada vez mais baixos aos fabricantes de vestidos. A decide obter mão-de-obra que consiga executar este trabalho delicado a um baixo custo. Resolve contratar algumas crianças para trabalhar na sua fábrica.

A informa-se e ouve falar de um intermediário, B, com uma boa reputação por fornecer às tecelagens meninos que aprendem de forma rápida e recebem pouco. A aborda B e pede-lhe para arranjar uma dúzia de rapazes para trabalhar na sua fábrica.

B viaja para uma zona rural, para uma aldeia que sabe ser pobre e com famílias numerosas. Grande parte dos homens trabalha fora, muitas vezes no estrangeiro.

B diz a C, mãe de D (uma criança de nove anos), que tem trabalho para D na cidade. Será aprendiz de um tecelão e ser-lhe-á ensinado tudo sobre o ofício. D terá alojamento, alimentação, e um pequeno ordenado. B paga a C cerca de vinte dólares por D. B leva D para a cidade e para a fábrica de A.

D é posto a trabalhar com dois rapazes mais velhos que lhe mostram o que tem de fazer. A maior parte do tempo dão-lhe um caldo pouco consistente para comer. Dorme na palha debaixo das máquinas. Pagam-lhe uma moeda por semana.

Introdução clandestina de migrantes

O Artigo 3.º do Protocolo relativo ao Tráfico Ilícito de Migrantes estabelece que a «introdução clandestina de migrantes» é constituída pelos seguintes elementos:

- facilitação da entrada ilegal de outra pessoa;
- noutro Estado;
- com o objetivo de obter um benefício material ou financeiro.

A alínea b) do Artigo 3.º explicita o conceito de “entrada ilegal” como passagem de fronteiras (internacionais) sem preencher as condições necessárias para a entrada legal no Estado de acolhimento.

O Artigo 6.º do Protocolo relativo ao Tráfico Ilícito de Migrantes requer, entre outras coisas, a criminalização da introdução clandestina de migrantes.

Exemplos de legislação penal

Portugal

O artigo 183.º da Lei n.º 23/2007, de 4 de Julho define auxílio à imigração ilegal da seguinte forma:

1 – Quem favorecer ou facilitar, por qualquer forma, a entrada ou o trânsito ilegais de cidadão estrangeiro em território nacional é punido com pena de prisão até 3 anos.

2 – Quem favorecer ou facilitar, por qualquer forma, a entrada, a permanência ou o trânsito ilegais de cidadão estrangeiro em território nacional, com intenção lucrativa, é punido com pena de prisão de 1 a 4 anos.

3 – Se os factos forem praticados mediante transporte ou manutenção do cidadão estrangeiro em condições desumanas ou degradantes ou pondo em perigo a sua vida ou causando-lhe ofensa grave à integridade física ou a morte, o agente é punido com pena de prisão de 2 a 8 anos.

4 – A tentativa é punível.

5 – As penas aplicáveis às entidades referidas no n.º 1 do artigo 182.º são as de multa, cujos limites, mínimo e máximo são elevados ao dobro, ou de interdição do exercício da actividade de um a cinco anos.

Bélgica

O Artigo 77.º da Lei de Imigração criminaliza a introdução clandestina de pessoas, e o Artigo 77.ºbis penaliza o envolvimento de um indivíduo na entrada de um estrangeiro na Bélgica

se forem usados violência, intimidação, coação ou engano, ou se se verificar o abuso da situação de vulnerabilidade do estrangeiro em relação ao seu estatuto ilegal, à sua situação precária, gravidez, doença ou deficiência. Ambas as normas são usadas para criminalizar a introdução clandestina de pessoas, com a diferença de que as violações constantes em 77bis acarretam uma pena mais pesada. As circunstâncias agravantes incluem violações levadas a cabo de forma regular ou por um grupo organizado (constituído por duas ou mais pessoas) e as sanções aumentam até 10 a 15 anos de prisão e multa.

Colômbia

A Colômbia tem uma lei abrangente no que concerne ao tráfico de pessoas, que inclui crimes como o de introdução clandestina de migrantes e declara que «qualquer pessoa que promover, induzir, coagir, possibilitar, financiar, cooperar ou participar na transferência de outrem dentro do território nacional ou estrangeiro, recorrendo a qualquer forma de violência, engano ou artifício, com objetivos de exploração, para levar tal pessoa a trabalhar em prostituição, pornografia, servidão por dívidas, mendicância, trabalho forçado, casamento servil, escravidão com o objetivo de obter lucro financeiro ou outros benefícios, para ele próprio ou para outra pessoa, incorrerá numa pena de prisão de 10 a 15 anos e multa...». A lei criminaliza a facilitação da migração ilegal realizada com objetivo lucrativo e tem disposições relativas à obtenção de lucro ou propriedade a partir da introdução clandestina de migrantes, punindo a conduta com seis a oito anos de prisão.

Elementos constitutivos do crime de introdução clandestina de migrantes

O *actus reus*, ou seja, os elementos objetivos que tipificam o crime de introdução clandestina de migrantes, pode variar, dependendo da legislação do seu país. No caso do crime de introdução clandestina de migrantes, tal como definido no Protocolo relativo ao Tráfico Ilícito de Migrantes, o tipo objetivo integra os seguintes elementos:

- facilitação da entrada ilegal de uma pessoa;
- num país do qual não é nacional nem residente legal;
- mediante um acordo de pagamento de um benefício financeiro ou de outra natureza.

O Protocolo relativo ao Tráfico Ilícito de Migrantes não define «facilitação». Em termos gerais, esta refere-se ao ato que leva a um determinado resultado. No caso da introdução clandestina de migrantes, o resultado é a entrada ilegal de uma pessoa num país do qual não é nacional.

O elemento subjetivo do crime, ou *mens rea*, reflete a atitude subjetiva ou psicológica do agente no momento da prática do crime. Apenas a pessoa que age com determinado grau de culpa pode ser sujeita a responsabilidade criminal. Apenas em algumas jurisdições e em determinados casos é consagrada a existência de crimes de «responsabilidade objetiva», praticados na ausência de *mens rea*.

Para que possa ser subjectivamente imputado o crime de introdução clandestina de migrantes, o agente tem de ter atuado dolosamente, com o objetivo de obter, direta ou indiretamente, um benefício financeiro ou outro benefício material. Por conseguinte, a introdução clandestina de migrantes sem objetivos lucrativos não cai no âmbito do Protocolo relativo ao Tráfico Ilícito de Migrantes.

O elemento subjetivo pode ser provado de várias formas. Deve ser notado que o Protocolo relativo ao Tráfico Ilícito de Migrantes exige que os países apenas criminalizem a introdução clandestina de migrantes quando esta é levada a cabo de forma intencional, de acordo com o Artigo 6.º (1), exigindo assim a intenção dolosa. No entanto, os países não estão proibidos de estabelecer o elemento *mens rea* com um padrão menos restritivo, como seja mediante a imputação a título de negligência (consciente ou inconsciente, eventualmente apenas nos casos de negligência grosseira), de acordo com o sistema jurídico do país em causa.

Mais uma vez, é importante recordar que a obrigação de criminalizar a introdução clandestina de migrantes constante no Protocolo relativo ao Tráfico Ilícito de Migrantes não exige que a legislação de cada país siga os termos exatos contemplados na definição ali adoptada. Ao invés, a legislação nacional deve ser elaborada de modo consistente com o quadro legal existente em cada país, consagrando, no entanto, os elementos típicos contidos naquela definição.

É também importante notar que, no âmbito do Protocolo relativo ao Tráfico Ilícito de Migrantes, estes não serão perseguidos criminalmente pelo facto de terem sido objeto de introdução clandestina, conforme estipulado no seu Artigo 6.º.

Principais diferenças entre o tráfico de pessoas e a introdução clandestina de migrantes

Na prática, poderá ser difícil distinguir entre estes dois tipos penais, numa primeira abordagem. Em muitos casos, as vítimas do tráfico poderão começar por ser migrantes objeto de introdução clandestina. Por conseguinte, ao investigar casos de tráfico de pessoas, poderá ser por vezes necessário recorrer às medidas instituídas para o combate à imigração ilegal. É vital, no entanto, que os profissionais que investigam os casos de introdução clandestina de migrantes estejam familiarizados com o crime do tráfico de pessoas, já que tratar um caso de tráfico como se fosse um caso de introdução clandestina pode ter consequências graves para a vítima.

Identificar as diferenças

Nalguns casos, poderá ser difícil estabelecer, de forma célere, se um caso pertence ao âmbito da introdução clandestina de migrantes ou do tráfico de pessoas. As distinções entre estes tipos de crime são frequentemente muito subtis, existindo mesmo pontos coincidentes. Identificar se o caso é de introdução clandestina ou tráfico pode ser muito difícil por diferentes razões:

- Algumas das vítimas de tráfico poderão começar a sua viagem com o objetivo de serem introduzidas ilegalmente noutro país, acabando posteriormente por constatar terem sido enganadas, coagidas ou forçadas a aceitar uma situação de exploração (por exemplo, ao

serem obrigadas a trabalhar por salários extremamente baixos para pagarem o seu transporte);

- Os traficantes podem apresentar às suas potenciais vítimas uma oportunidade que lhes pareça ser de imigração ilegal. Poderá ser-lhes pedido o pagamento de uma taxa, tal como a todas as outras pessoas que são objeto de introdução clandestina. No entanto, a intenção do traficante consiste, desde o início, na exploração da vítima. A taxa paga fazia parte do engano e da fraude e constituía um meio de fazer algum dinheiro extra;
- A introdução clandestina de migrantes pode ser a intenção inicial mas, no decurso do processo, pode apresentar-se aos traficantes/facilitadores uma oportunidade de tráfico demasiado boa para a perderem;
- Os criminosos podem traficar pessoas e introduzi-las clandestinamente noutros países em simultâneo, utilizando as mesmas rotas;
- As condições a que os migrantes são sujeitos ao longo da viagem podem ser tão más que é difícil acreditar que alguém tenha consentido na situação.

Dito isto, existem algumas diferenças essenciais entre a introdução clandestina de migrantes e o tráfico de pessoas.

Consentimento

A introdução clandestina de migrantes geralmente envolve o consentimento das pessoas que são objeto dessa introdução clandestina. As vítimas de tráfico, por outro lado, ou nunca deram o seu consentimento ou, se deram o seu consentimento inicial, tal consentimento tornou-se irrelevante devido aos meios usados pelos traficantes.

Transnacionalidade

Introduzir ilegalmente uma pessoa significa facilitar a sua passagem ilegal por uma fronteira e a sua entrada ilegal noutro país. O tráfico de pessoas, por outro lado, não precisa de envolver a passagem por qualquer fronteira. Nos casos em que tal acontece, a legalidade ou ilegalidade da passagem da fronteira é irrelevante. Por conseguinte, enquanto a introdução clandestina de migrantes é sempre, por definição, transnacional, o tráfico de pessoas não precisa de o ser.

Exploração

A relação entre o facilitador e o migrante termina geralmente após a facilitação da passagem da fronteira. Na introdução clandestina de migrantes, o pagamento pode ser efetuado previamente, ou à chegada. O facilitador não tem intenção de explorar a pessoa objeto de introdução clandestina após a sua chegada. O facilitador e o migrante são parceiros, ainda que muito diferentes, numa operação comercial em que o migrante entra voluntariamente. O tráfico envolve uma exploração contínua das vítimas, de forma a gerar lucros ilegais para os traficantes. É intenção do traficante que a relação com as vítimas exploradas seja uma relação contínua e se prolongue para além da passagem da fronteira e do destino final. A introdução clandestina pode transformar-se em tráfico, por exemplo, quando o facilitador vende

a pessoa e a dívida acumulada, ou engana/coage/força a pessoa a pagar os custos de transporte por meio de trabalho em condições de exploração.

Fonte do lucro

Um importante indicador da existência de tráfico ou de introdução clandestina de migrantes é a forma como os autores do crime obtêm os seus lucros. Os facilitadores obtêm o seu rendimento do montante cobrado para deslocar as pessoas. Os traficantes, por outro lado, continuam a exercer controlo sobre a vítima de tráfico, com o objetivo de conseguir lucros adicionais mediante a exploração contínua da vítima.

Qualificação adequada dos factos

Como explicámos acima, o crime de tráfico de pessoas pode envolver vários atos e agentes diferentes. O crime é cometido mediante atos de recrutamento, transporte, transferência, alojamento ou acolhimento de pessoas por meio de ameaça ou o uso da força ou de outras formas de coação, de sequestro, de fraude, de engano, de abuso de autoridade, ou de abuso de uma situação de vulnerabilidade, ou da entrega ou aceitação de pagamentos ou benefícios para conseguir o consentimento de uma pessoa que tenha autoridade sobre outra, com um objetivo de exploração.

É provável que os casos de tráfico, pela sua própria natureza, envolvam outros crimes. Estes crimes podem constituir parte integrante do processo de tráfico, e podem ser usados para provar que se verificou um elemento do crime de tráfico de pessoas. O procedimento criminal pode também ser autónomo relativamente a cada crime, ou estes podem ser objeto de procedimento alternativo ou cumulativo, dependendo do sistema penal. Podem também ser designados crimes subjacentes ao tráfico.

Podem ser cometidos outros crimes contra a vítima de tráfico ou outras, mas estes não constituírem parte integrante do crime de tráfico. Estes casos deverão ser alvo de um procedimento criminal autónomo, de acordo com a lei de cada país.

	Autoavaliação
<p>O que é a introdução clandestina de migrantes?</p> <p>Quais são as diferenças fundamentais entre o tráfico de pessoas e a introdução clandestina de migrantes?</p>	

Exemplos

Identificar se ocorreu um crime de tráfico de pessoas ou de introdução clandestina de migrantes, na prática, pode ser difícil. Leia atentamente estes exemplos, que ilustram as

diferenças entre os dois tipos de crime. Note, por favor, que estes casos têm de ser analisados no contexto da lei nacional e das circunstâncias locais. Neste módulo, examinamos os casos à luz do Protocolo Adicional Relativo à Prevenção, à Repressão e à Punição do Tráfico de Pessoas, em especial de Mulheres e Crianças e do Protocolo Adicional contra o Tráfico Ilícito de Migrantes por Via Terrestre, Marítima e Aérea.



Exemplo

Uma agência de recrutamento põe um anúncio num jornal local de uma cidade. Promete bons ordenados num país estrangeiro, para mulheres de limpeza e empregadas domésticas. Todos os requisitos relativos ao visto e outros procedimentos de imigração serão tratados pelo empregador.

Uma jovem mulher responde ao anúncio. Está preocupada porque pensa que terá de pagar uma taxa. É-lhe dito para não se preocupar porque todas as taxas serão liquidadas quando chegar ao seu destino. Tranquilizada, concorda em apanhar o avião para o país desenvolvido, em busca do trabalho prometido. É levada ao aeroporto, é-lhe dado um passaporte, e é-lhe dito que funcionários da agência a esperam no destino.

Quando chega ao destino, esperam-na um homem e uma mulher. Dizem-lhe que deve entregar o passaporte, como medida de segurança. Levam-na de carro a uma grande casa, onde lhe dizem que irá trabalhar como empregada. É trocado dinheiro entre os «funcionários» da «agência» e o seu novo «empregador».

Antes de partirem, a jovem mulher pergunta aos «funcionários da agência» sobre o seu ordenado. É-lhe dito que irá receber um ordenado, mas que terá de pagar o seu alojamento e alimentação. Pergunta também quando lhe será devolvido o seu passaporte. É-lhe dito que receberá o seu passaporte de volta assim que reembolsar o empregador dos custos do recrutamento. Para além disso, é-lhe dito que é perfeitamente possível poupar dinheiro dos seus ordenados para pagar a taxa que o «empregador» pagou pelos seus custos de transporte. À medida que as semanas passam, a soma «em dívida» aumenta, porque o ordenado é muito baixo e os custos da alimentação e alojamento são elevados. Ao mínimo erro, é agredida. Não tem outra alternativa se não trabalhar 14 horas por dia, sete dias por semana.

Este caso configura um crime de tráfico de pessoas ou de introdução clandestina de migrantes?



Exemplo

É publicado um anúncio no jornal local em que é dito que uma agência se encarrega de organizar viagens para um país estrangeiro, onde existem boas oportunidades para trabalhadores agrícolas, trabalhadores fabris, empregados de mesa e cozinheiros.

Um homem vê este anúncio e contacta o anunciante. É-lhe dito que a taxa correspondente é de 10 000 dólares. Será levado de camião para um país vizinho, onde apanhará o avião para o país de destino. Todos os documentos de imigração necessários serão disponibilizados pelos recrutadores. Pede empréstimos à família, trabalha de forma extenuante em três empregos e 18 meses depois consegue juntar o dinheiro necessário. Paga a soma à agência e parte para a sua viagem.

Ao viajar no camião, de início com dez pessoas, surpreende-se quando vê que se dirigem para um porto marítimo e não para um aeroporto. É-lhe dito, e ao resto do grupo, que abandonem o camião e se escondam num terreno baldio junto ao porto, até que alguém venha ter com eles. Dois dias mais tarde, após terem sobrevivido a comer restos de comida de caixotes do lixo, são contactados por um homem e escondidos a bordo de um navio.

Durante os 12 meses seguintes, são utilizados métodos de transporte semelhantes. O grupo mantém-se unido, mas um homem acaba por morrer e tem de ser deixado à beira da estrada, num dos países que atravessam.

Por fim, o grupo encontra-se num camião e quando este pára as portas abrem-se e descobrem que estão no meio de uma cidade. É-lhes dito que acabaram de chegar e têm de sair. O homem pede o passaporte que lhe foi prometido. Dizem-lhe para não criar problemas e que se desvencilhe. O camião parte e o grupo rapidamente se dispersa pela cidade.

Três dias mais tarde, juntamente com outros dois homens do grupo, encontra trabalho a apanhar batatas. É-lhe permitido viver em edifícios da quinta juntamente com os outros trabalhadores. O ordenado que recebe é extremamente baixo, comparado com o padrão do país de destino.

Este caso configura um crime de tráfico de pessoas ou de introdução clandestina de migrantes?



Casos práticos: Caso 1.

Pedro vive na América do Sul. Tem 35 anos de idade e não tem um emprego fixo. Ganha algum dinheiro em trabalhos sazonais de construção civil, mas não é suficiente para sustentá-lo a ele, à sua mulher e aos seus dois filhos pequenos. Ao trabalhar em obras na sua cidade, ouve falar de um homem que está à procura de pessoas interessadas em vender um dos rins para transplante de órgãos. Este homem organiza viagens para um país estrangeiro em que o rim é extraído por profissionais de saúde. Os recetores pagam até 60 000 dólares por um rim saudável.

Embora Pedro esteja preocupado em viver apenas com um rim, concorda em realizar a operação. São-lhe prometidos 30 000 dólares pelo seu rim, bem como o pagamento de todas as despesas de viagem e de alojamento, para que possa passar o período de convalescença num ambiente agradável e confortável. O organizador ajuda Pedro a pedir o passaporte e o visto e encarrega-se, por ele, de todos os preparativos da viagem. Ao chegar ao seu destino, é interrogado pelos funcionários do serviço de imigração, mas como se encontra na posse de um bilhete de regresso, é-lhe permitida a entrada no país. No aeroporto, vai ter com ele um homem chamado Luís, e levam-no para um pequeno apartamento, muito diferente da acomodação luxuosa prometida pelos organizadores. Após alguns dias de descanso, durante os quais não lhe é permitido deixar o alojamento, levam-no para um apartamento pequeno e sujo, em que a operação tem lugar. Antes da operação, Pedro assina um documento em inglês, mas como o seu inglês é muito limitado, não percebe bem aquilo que assina.

Após a operação, Pedro é levado de volta ao apartamento onde inicialmente fora instalado, onde recupera durante uma semana. Luís dá-lhe apenas 500 dólares, em vez dos 30 000 dólares que lhe tinham sido prometidos. Pedro zanga-se com Luís e exige o resto do dinheiro que lhe é devido. Luís diz-lhe que o comércio de órgãos, tecidos e outras partes do corpo é estritamente proibido por lei e que, se Pedro se quiser dirigir à polícia, ele próprio acabará por ser preso e deportado sem receber qualquer dinheiro. Luís também faz notar a Pedro que, como assinou um documento a declarar que o doador e recetor do órgão eram familiares e que não existia qualquer troca de dinheiro envolvida, não pode provar que lhe devem o que quer que seja. Pedro decide que, no fim de contas, é melhor receber 500 dólares do que nada, pelo que acaba por concordar e ir para casa. Uma semana mais tarde, Pedro adoece com uma grave infeção.

Pontos para discussão

- Note que, como acontecerá sempre em situações da vida real, os casos apenas podem ser analisados à luz da informação disponível.
- Com base nos Protocolos relativo ao Tráfico Ilícito de Migrantes e contra o Tráfico de Pessoas, pode considerar-se que este caso configura um crime de tráfico de pessoas e não de introdução clandestina de pessoas?
- Com base na legislação do seu país, qual é o crime que este caso configura?
- Encontram-se presentes os três elementos do crime de tráfico?
- Qual é o ato típico neste caso? Quais são os meios usados para cometer o ato? Qual é o objetivo de todo o processo?
- Que outros crimes existem na legislação do seu país que poderiam ser usados para processar criminalmente este caso (acusação principal/acusações alternativas)? Que crimes conexos foram cometidos?



Casos práticos: Caso 2.

Krasimir vive na Europa do Leste e tem 10 anos. Vive com os pais, os dois irmãos mais velhos, uma irmã mais nova e os avós. O pai, Nikolay, é alcoólico e está desempregado. A sua mãe está doente e não se encontra capaz de trabalhar. Os irmãos mais velhos de Krasimir também estão desempregados. A família debate-se constantemente com problemas financeiros e o pai bate regularmente em Krasimir e nos irmãos.

Um dia, um velho amigo de Nikolay, dos tempos do exército, vem visitá-lo. Promete a Nikolay 150 euros por mês se lhe «alugar» Krasimir para que este peça esmola numa capital da Europa Ocidental. Iliya promete pagar o alojamento e alimentação de Krasimir e promete tomar conta dele. Nikolay aceita.

Uma semana mais tarde, Iliya aparece para levar Krasimir e dá ao seu pai 100 euros em dinheiro. Na carrinha, vão outros três rapazes com Krasimir. Primeiro, param para obter os passaportes junto das autoridades competentes. Com os passaportes, atravessam a fronteira, mas os guardas fronteiriços nem sequer param Iliya, apenas lhe acenam com um sorriso.

Na manhã seguinte, chegam os cinco ao seu destino final. Iliya leva-os para um apartamento, em que os três rapazes partilham um quarto e Iliya fica noutra quarto. Iliya dá aos rapazes uma cópia dos seus passaportes e fica com o original. Na manhã seguinte, «começam a trabalhar». Todos os dias vão mendigar para um sítio diferente. Iliya indica-lhes o lugar e escolta-os até lá. Têm de pedir desde as 9 da manhã até às 6 da tarde e depois ir para casa sozinhos. Iliya bate-lhes se ganharem menos de 40 euros por dia, dá-lhes comida suficiente e não há abusos sexuais.

Não é permitido a Krasimir telefonar à família e não sabe quanto tempo ainda tem de ficar longe dela. Iliya diz-lhes para dizerem que são turistas e estão à espera do pai se forem apanhados pela polícia. Ameaça fazer mal a toda a família dos rapazes caso eles passem qualquer informação à polícia.

Pontos para discussão

- Note que, como acontecerá sempre em situações da vida real, os casos apenas podem ser analisados à luz da informação disponível.
- Com base nos Protocolos relativo ao Tráfico Ilícito de Migrantes e contra o Tráfico de Pessoas, pode considerar-se que este caso configura um crime de tráfico de pessoas e não de introdução clandestina de pessoas?
- Com base na legislação do seu país, qual é o crime que este caso configura?
- Encontram-se presentes os três elementos do crime de tráfico?
- Qual é o ato típico neste caso? Quais são os meios usados para cometer o ato? Qual é o objetivo de todo o processo?
- E se Krasimir tivesse 18 anos de idade?
- Que outros crimes existem na legislação do seu país que poderiam ser usados para processar criminalmente este caso (acusação principal/acusações alternativas)? Que crimes conexos foram cometidos?



Casos práticos: Caso 3.

Lisa vive numa pequena cidade no Sudeste da Ásia e tem 18 anos. Os seus pais e irmãos mais novos dependem do seu apoio e ela luta constantemente para encontrar trabalho que os alimente a todos. Um dia, ouve falar de uma agência na cidade que fornece mão-de-obra a fábricas no estrangeiro. No seu país, o salário mínimo mensal são 40 dólares, mas nestas fábricas pagam 2,25 dólares por hora e a empresa fornece também alimentação e alojamento. Lisa sabe que terá de trabalhar ilegalmente, mas acha que valerá a pena pelo dinheiro que poderá mandar para casa, para a família.

Vai à agência e descobre que esta cobra 2000 dólares por um contrato de trabalho. Ela não tem dinheiro nenhum, mas sabe que há outras pessoas que estão a pedir dinheiro emprestado a usurários. Vai ter com um usurário e dá a casa da família como garantia do empréstimo. Agora precisa de enviar um pagamento mensal não só à sua família mas também ao usurário. Está inquieta mas também convencida de que está a tomar a decisão certa. Assina o contrato de trabalho e deixa o seu país.

Depois de trabalhar numa fábrica durante um mês sem ser paga, ela e os colegas reclamam os seus ordenados em atraso. São informados de que receberão 100 dólares cada um pelo mês de trabalho. Lisa e outros trabalhadores protestam e não lhes é dado trabalho no mês seguinte. Entretanto, são forçados a dormir numa camarata com 36 camas e apenas quatro casas de banho. Frequentemente, a comida que lhes é dada não é comestível ou está estragada. O local em que habitam encontra-se sempre encerrado das 9 da noite às 6 da manhã e está infestado com baratas e ratas.

Lisa fica desesperada e decide ir falar com o gerente para pedir desculpa e tentar arranjar algum trabalho. Ela sabe que, embora haja trabalho suficiente, o gestor não dá nada para fazer aos trabalhadores que se queixam das condições. Em vez de ouvir as suas desculpas, o gerente faz-lhe uma proposta sexual e diz-lhe que pode ter um confortável trabalho de escritório caso aceite. Lisa recusa. O gerente ordena-lhe que volte ao trabalho e diz que a denuncia ao serviço de imigração caso ela não aceite.

Pontos para discussão

- Note que, como acontecerá sempre em situações da vida real, os casos apenas podem ser analisados à luz da informação disponível.
- Com base nos Protocolos relativo ao Tráfico Ilícito de Migrantes e contra o Tráfico de Pessoas, pode considerar-se que este caso configura um crime de tráfico de pessoas e não de introdução clandestina de pessoas?
- Com base na legislação do seu país, qual é o crime que este caso configura?
- Encontram-se presentes os três elementos do crime de tráfico?
- Qual é o ato típico neste caso? Quais são os meios usados para cometer o ato? Qual é o objetivo de todo o processo?
- Que outros crimes existem na legislação do seu país que poderiam ser usados para processar criminalmente este caso (acusação principal/acusações alternativas)? Que crimes conexos foram cometidos?



Casos práticos: Caso 4.

Anna é de um país da Europa do Leste. Desde que deixou a escola que trabalhava numa fábrica, mas recentemente perdeu o seu emprego. Tem dois filhos pequenos para sustentar e divorciou-se há pouco tempo do marido. Sabe que muito dificilmente encontrará um novo emprego no seu país. Um dia, o irmão de uma amiga diz-lhe que pode ganhar bastante dinheiro num hotel da Europa Ocidental como mulher de limpezas. Anna concorda e ele promete telefonar ao amigo para tratar de todos os preparativos.

Alguns dias mais tarde, deixa as crianças com a mãe, prometendo mandar dinheiro para casa, e o irmão da amiga leva-a de carro através de uma fronteira não identificada, altura em que é transferida para uma carrinha que está à sua espera com outras seis mulheres, adultas e menores, e dois homens. Ao longo de uma viagem de vários dias, as mulheres e crianças trocam sucessivamente de meio de transporte, da carrinha para pequenos barcos e de novo para carrinha, passando de um país para outro, evitando sempre os pontos de passagem autorizados. Por vezes, as mulheres e crianças são trancadas em apartamentos ou casas e vigiadas continuamente. Estão desorientadas e começam a sentir-se desconfiadas e com medo.

Finalmente, as mulheres e crianças chegam a uma casa e ordenam-lhes que se dispam em frente de um grupo de homens. Ana obedece às ordens e é vendida ao dono de um bar. O dono diz-lhe que ela se encontra no país de forma ilegal e tem de trabalhar como prostituta para pagar as dívidas relativas à viagem e transporte. Avisa-a também de que será presa se deixar as instalações do bar e que, se não obedecer às ordens que lhe são dadas, irão bater-lhe ou vendê-la a pessoas «mais perigosas» que a tratarão bem pior.

É obrigada a trabalhar todos os dias das seis da tarde às seis da manhã e dão-lhe apenas uma refeição por dia. É multada por qualquer erro que cometa e obrigada a comprar a lingerie e a comida, cujo preço é adicionado à sua dívida.

Pontos para discussão

- Note que, como acontecerá sempre em situações da vida real, os casos apenas podem ser analisados à luz da informação disponível.
- Com base nos Protocolos relativo ao Tráfico e contra a Introdução Clandestina de Migrantes, pode considerar-se que este caso configura um crime de tráfico de pessoas e não de introdução clandestina de pessoas?
- Com base na legislação do seu país, qual é o crime que este caso configura?
- Encontram-se presentes os três elementos do crime de tráfico?
- Qual é o ato típico neste caso? Quais são os meios usados para cometer o ato? Qual é o objetivo de todo o processo?
- Que outros crimes existem na legislação do seu país que poderiam ser usados para processar criminalmente este caso (acusação principal/acusações alternativas)? Que crimes conexos foram cometidos?

Qualificação adequada dos factos

Como explicámos acima, o crime de tráfico de pessoas pode envolver vários atos e agentes diferentes. O crime é consumado mediante a prática de atos de recrutamento, transporte, transferência, alojamento ou acolhimento de pessoas, por meio de ameaça ou o uso da força ou de outras formas de coação, de sequestro, de fraude, de engano, de abuso de autoridade ou de abuso de uma situação de vulnerabilidade ou da entrega ou aceitação de pagamentos ou benefícios para conseguir o consentimento de uma pessoa que tenha autoridade sobre outra, com um objetivo de exploração.

É provável que os casos de tráfico, pela sua própria natureza, envolvam a prática de outros crimes. Estes crimes podem constituir parte integrante do processo de tráfico e podem ser usados para provar que se verificou um elemento do crime de tráfico de pessoas. O procedimento criminal pode ser autónomo relativamente a cada crime, ou estes podem ser objeto de procedimento alternativo ou cumulativo, dependendo do sistema penal vigente. Podem também ser designados crimes subjacentes ao tráfico. Estes podem ser cometidos contra a vítima de tráfico ou outras, apesar de não serem parte integrante do crime de tráfico. Estes casos deverão ser alvo de um procedimento criminal autónomo, de acordo com a lei de cada país.

Os crimes conexos ao tráfico podem incluir as seguintes situações, mas não estão limitadas a estas⁹:

- Escravatura;
- Práticas semelhantes a escravatura;
- Servidão;
- Trabalho forçado ou obrigatório;
- Servidão por dívidas;
- Casamento forçado;
- Aborto forçado;
- Extorsão;
- Tortura;
- Tratamento cruel, desumano ou degradante;
- Violação;
- Violência sexual;
- Agressão;
- Ofensas corporais;
- Homicídio;
- Rapto;
- Sequestro;
- Confinamento ilegal;
- Exploração laboral;

⁹ Foram mantidas as designações usadas no texto original, nem sempre correspondentes a tipos de ilícitos penais em todos os ordenamentos jurídicos.

- Retenção dos documentos de identidade;
- Violação da lei de imigração;
- Lavagem de dinheiro;
- Corrupção;
- Abuso de poder;
- Introdução clandestina de migrantes.

O procedimento criminal pelos crimes acima mencionados pode ser particularmente útil em situações e países em que:

- Não existe ainda uma previsão legal específica destinada à criminalização do tráfico de pessoas;
- As penas para o tráfico de pessoas não refletem de forma adequada a natureza do crime e não têm efeitos dissuasores; ou
- Existem casos em que as provas existentes não são suficientes para despoletar um procedimento criminal por tráfico de pessoas, mas são no entanto suficientes para perseguir criminalmente estes crimes. Se o sistema penal o permitir, em geral recomenda-se a imputação de todos os crimes possíveis, para que, no caso de *plea bargaining*, se possa desistir de algumas acusações.

Quando existem provas, dever-se-á tentar perseguir criminalmente os autores do crime pelo crime de tráfico de pessoas. Se tal for possível no seu sistema penal, utilize os crimes conexos como acusações autónomas, para aumentar as hipóteses de obter uma condenação.

Se o crime de tráfico de pessoas estiver tipificado na sua jurisdição, os crimes conexos são particularmente úteis em situações em que não se tenham recolhido provas suficientes para deduzir uma acusação de tráfico. As provas poderão ainda assim ser suficientes para sustentar a acusação pelos crimes conexos ao tráfico. Se o crime de tráfico de pessoas estiver previsto na sua jurisdição, os crimes que lhe são conexos são particularmente úteis em situações em que não se tenha recolhido prova suficiente para a dedução de uma acusação pela prática daquele crime. A prova poderá porém ser suficiente para proceder criminalmente contra alguns factos autónomos ou crimes associados, tais como o confinamento ilegal, a violência sexual, as ofensas corporais, a retenção de documentos de identificação, etc.

Mesmo que inicialmente se escolha proceder criminalmente contra o crime de tráfico de pessoas, se as provas recolhidas não forem suficientes para sustentar uma acusação por este crime (*beyond a reasonable doubt*), estas poderão, todavia, ser suficientes para obter uma condenação pelos crimes conexos. Por conseguinte, os crimes que estão normalmente associados ao tráfico podem também ser invocados. Alguns termos do acordo entre traficante/facilitador e vítima podem vir a ser qualificados como crimes adicionalmente praticados ou em concurso, para demonstrar a gravidade de determinado caso de tráfico de seres humanos.

Enquanto profissional do sistema penal, deve estar consciente da enorme complexidade, custo e dispêndio de tempo acarretados pela investigação e procedimento criminal dos crimes

de tráfico de seres humanos. Por conseguinte, não é surpreendente que exista um grande número de exemplos de casos em que o tráfico de pessoas se encontra presente, sendo na verdade a sua força motriz – talvez a razão de ser de um caso –, mas os únicos crimes objeto de acusação são os crimes que lhe estão associados, tais como confinamento ilegal, violência sexual, ofensas corporais, retenção de documentos de identificação, etc.

Desistir da acusação por tráfico pode ter vantagens a curto prazo, mas acarreta várias consequências que poderão ser graves a longo prazo. Em muitas ocasiões, o procedimento por crime de tráfico poderá dar à vítima acesso a serviços de apoio ou proteção a que, de outra forma, não teria acesso. Estes serviços de apoio à vítima poderão incluir a concessão de um período de reflexão, de autorização de residência temporária ou mesmo permanente no país de destino, e acesso a serviços de apoio a vários níveis, incluindo alojamento, cuidados de saúde, aconselhamento jurídico e psicológico, e acesso a programas de reinserção.

Os efeitos traumáticos da experiência podem afetar a qualidade do depoimento da vítima. Disponibilizar apoio e proteção às vítimas de tráfico ajuda-as a ultrapassar as consequências mais graves do trauma e ajuda o profissional do sistema penal a conquistar a sua confiança.

Em muitos ordenamentos jurídicos, a pendência de um procedimento criminal por tráfico de pessoas irá desencadear várias medidas de apoio e de proteção às vítimas. Poderá igualmente significar que a vítima não é responsabilizada por crimes que possa ter cometido durante o processo a que foi sujeita. Perseguir criminalmente a vítima por crimes que ele ou ela tenha cometido como consequência direta de ter sido objeto de tráfico poderá destruir a relação que precisa de construir para obter o melhor depoimento possível para o seu caso. Poderá ter como consequência direta o enfraquecimento significativo do seu depoimento e contribuir para a decisão da vítima de não cooperar com o sistema de justiça penal. Consulte-se também o módulo 13: «A indemnização a vítimas de tráfico de seres humanos».

Não conseguir processar criminalmente os crimes de tráfico de pessoas poderá também significar a continuação do funcionamento impune das redes de tráfico mais vastas.



Autoavaliação

Quais são alguns dos crimes associados ao tráfico de pessoas?

Quando é que é útil investigar e acusar um traficante por estes crimes?

Jurisdição

A Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional (Convenção TOC) requer que os Estados Partes estabeleçam a jurisdição em que se processa a investigação, o procedimento criminal e a punição de todos os crimes estabelecidos pela Convenção e por quaisquer protocolos de que o país em questão seja um Estado Parte.

De acordo com o princípio da jurisdição territorial, um Estado deverá ser considerado competente para perseguir e punir os autores dos crimes praticados no seu território, que inclui para estes efeitos navios e aeronaves.

Se a legislação nacional proibir a extradição dos seus cidadãos, a jurisdição também deve ser declarada sobre os crimes cometidos por estes fora do seu território nacional. Tal permite ao país cumprir a obrigação, decorrente da Convenção, de perseguir criminalmente os criminosos que não possam ser extraditados, com fundamento na sua nacionalidade. A jurisdição estabelecida por um Estado sobre crimes cometidos pelos seus nacionais designa-se jurisdição pelo princípio de personalidade ativa.

A Convenção encoraja igualmente, mas não exige, o estabelecimento da jurisdição noutras circunstâncias, tais como os casos em que os cidadãos de um Estado são vítimas ou criminosos¹⁰. A jurisdição estabelecida sobre os crimes cometidos contra os cidadãos de um Estado designa-se jurisdição pelo princípio da personalidade passiva.

Os casos de tráfico de pessoas poderão envolver uma série de jurisdições diferentes. Sempre que tal se verifique, tem de ser tomada uma decisão sobre qual a jurisdição em que o processo judicial deverá decorrer. Existe uma série de princípios que deverão orientar esta decisão.

É muito importante que identifique, o mais cedo possível, se é possível que o procedimento criminal de determinado caso se realize em mais do que uma jurisdição.

Assim que esta possibilidade for identificada, o passo seguinte deverá ser determinar qual a jurisdição onde é mais provável o sucesso do procedimento criminal. Qualquer decisão sobre qual a jurisdição que se encontra em melhor posição para iniciar o procedimento criminal deverá ser tomada caso a caso, ponderando todos os fatores relevantes.

O princípio básico subjacente a qualquer decisão é o de que uma pessoa não deverá ser processada criminalmente mais do que uma vez pela mesma conduta criminal. Este princípio aplica-se mesmo nos casos em que uma pessoa foi inocentada de uma acusação relativa à mesma conduta noutra jurisdição. Este princípio é conhecido pelo nome de *ne bis in idem* ou princípio da proibição do duplo julgamento.

O procedimento criminal deve ter lugar na jurisdição em que a maior parte da atividade criminal ocorreu ou em que os danos ocorreram. Nos casos de tráfico, esta é frequentemente o lugar de destino da vítima de exploração. Deverão ser tomados em consideração os seguintes fatores:

¹⁰ § Convenção Art.15.º, para.(i) (jurisdição obrigatória); Art.15.º, para.(2) (jurisdição opcional); e Art.6.º,para.(io) (obrigação de processar quando não for possível a extradição devido à nacionalidade do criminoso). Consulte-se também a discussão das questões de jurisdição no capítulo 9 do Guia Legislativo da Convenção.

Existência de legislação

A legislação da jurisdição inclui o crime de tráfico de pessoas? A legislação é abrangente e inclui todos os tipos de exploração?

Moldura penal

Embora não seja o principal fator a ter em consideração, as penas devem refletir a gravidade do crime.

Localização dos suspeitos

É possível perseguir criminalmente um suspeito na jurisdição onde ele se encontra?

São possíveis procedimentos de transferência ou extradição? Aqui aplica-se o princípio geral *aut dedere aut judicare* (extraditar ou processar).

Divisão do procedimento criminal

Os casos poderão ser complexos e atravessar fronteiras. Não é desejável que o procedimento criminal tenha lugar em mais do que uma jurisdição.

Que medidas (consideradas de forma prática e realista) podem ser tomadas para permitir que o processo judicial tenha lugar numa só jurisdição?

Comparência da testemunha

A comparência das vítimas, como testemunhas, é frequentemente inevitável nos casos de tráfico de pessoas.

Assegure-se de que são tomadas todas as medidas possíveis para assegurar o apoio a essas testemunhas.

Nos casos de tráfico transnacional, poderão ser necessários depoimentos de testemunhas que se encontram noutros países. Pondere quais as partes do testemunho que poderão ser recebidas por outros meios como, por exemplo, depoimento por escrito ou mediante vídeo-conferência.

A experiência tem demonstrado ser proveitoso fornecer telemóveis às vítimas. Averigue se a pessoa em causa consegue utilizar correio eletrónico, pois assim será possível a criação de uma conta de correio electrónico como forma de manter o contacto.

Apoio e proteção às testemunhas

Que apoio pode ser dado a uma testemunha numa jurisdição particular?

A jurisdição possui algum quadro jurídico que conceda proteção ou apoio à testemunha?

Ainda que não haja nenhum quadro jurídico oficial, existe algum programa de apoio «de facto», ou alguma possibilidade de disponibilizar tal apoio ou proteção caso a caso?

Que provas existem de que dado programa de assistência a testemunhas é na prática eficaz? Há algum indício de que não é eficaz?

Os traficantes têm capacidade para condicionar as testemunhas, dentro de uma dada jurisdição?

Existem ou podem emergir conflitos que afetem a capacidade de proteger as testemunhas?

Prazos

Embora o tempo não seja um fator essencial, deve ser alvo de ponderação, devendo ser minimizadas eventuais causas de demora. Deverá assim ter-se em consideração a existência de procedimentos pendentes e bem assim o tempo médio de pendência de um procedimento numa determinada jurisdição.

Qual seria a demora potencial até um caso chegar a julgamento numa jurisdição concreta?

Interesses da vítima

Os interesses da vítima seriam prejudicados pela mudança de jurisdição?

A indemnização das vítimas é possível dentro de determinada jurisdição?

Que montantes de indemnização podem ser esperados nas diferentes jurisdições?

Questões probatórias

Os casos devem fundamentar-se nas melhores provas. A admissibilidade da prova varia de jurisdição para jurisdição.

Dadas as provas disponíveis e as regras de admissibilidade, qual a jurisdição que oferece a melhor hipótese de um procedimento criminal bem-sucedido?

Garantias legais

As decisões relativas à jurisdição processual não podem ser tomadas para evitar cumprir os requisitos legais de uma ou outra jurisdição.

Benefícios provenientes de atividades criminosas

De novo, não se trata de um fator essencial, mas os pontos a ponderar incluem:

- Localização dos bens;
- Local onde se verifica a melhor hipótese de apreensão dos bens;
- As jurisdições permitem que os bens apreendidos constituam receitas para as autoridades ou vítimas de outras jurisdições?
- As vítimas têm acesso a bens recuperados, a título de indemnização?

Custos do procedimento criminal

Este fator apenas deverá ser ponderado quando existir um equilíbrio entre todos os outros.



Autoavaliação

Quais são os fatores que determinam a jurisdição a privilegiar num caso concreto?

Resumo

O tráfico de pessoas, tal como definido pelo Protocolo contra o Tráfico, requer a prática de determinados atos materiais, o uso de determinados meios e um propósito específico.

- O consentimento encontra-se viciado se for obtido por meios impróprios;
- O tráfico de pessoas pode ocorrer dentro e fora das fronteiras de um país;
- A introdução clandestina de migrantes implica sempre o cruzamento de fronteiras internacionais.

Quando tem de ser tomada uma decisão sobre qual a jurisdição em que o procedimento criminal deverá decorrer, os seguintes fatores devem orientar essa decisão:

- Existência de legislação;
- Moldura penal;
- Localização dos suspeitos;

- Divisão do procedimento criminal;
- Comparência da testemunha;
- Apoio e proteção às testemunhas;
- Prazos;
- Interesses da vítima;
- Questões probatórias;
- Garantias legais;
- Benefícios provenientes de atividades criminosas;
- Custos do procedimento criminal.



Módulo 2

ESCRITÓRIO DAS NAÇÕES UNIDAS
SOBRE DROGAS E CRIME
Viena

Manual contra o tráfico de pessoas para profissionais do sistema de justiça penal

Módulo 2:
Indicadores de tráfico de pessoas

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Módulo 2:

Indicadores de tráfico de pessoas

Objetivos

No final deste módulo, os utilizadores deverão ser capazes de:

- Explicar de que forma os profissionais do sistema de justiça penal podem identificar o tráfico de pessoas;
- Enunciar os principais indicadores do tráfico de pessoas;
- Justificar a necessidade de corroboração dos indicadores do tráfico de pessoas.

Introdução

Este módulo destina-se a ser utilizado por quem, devido à função que exerce, entra primeiro em contacto com vítimas de tráfico e tem, por isso, necessidade de conhecer os indicadores de tráfico de pessoas e o tipo de atitudes/ações que podem ajudar a descobrir esses indicadores, de forma a permitir a proteção das vítimas e o início das investigações.

A primeira parte do documento salienta alguns métodos que podem ser utilizados na identificação do tráfico de pessoas. A segunda parte apresenta alguns indicadores genéricos associados às vítimas de tráfico de pessoas. A terceira parte disponibiliza informação sobre alguns indicadores específicos, que podem ser divulgados em folhetos destinados: ao público; aos operadores do sistema de justiça penal; para organizadores e parceiros sociais.

Para que seja eficaz, a identificação deve ter uma abordagem multidisciplinar. As organizações devem partilhar toda a informação possível para maximizar a identificação, corroborar os dados apurados e, em última análise, identificar o crime de tráfico de pessoas de forma a proteger as vítimas e punir os seus autores. Muitas das organizações envolvidas têm diferentes objetivos na execução das respetivas funções. Por exemplo, as organizações não-governamentais (ONG) podem apenas pretender dedicar-se ao apoio às vítimas, proporcionando-lhes alojamento

seguro e aconselhamento, entre outros apoios. Poderão não ter como objetivo apoiar as investigações policiais. Para que seja alcançada a cooperação necessária, terá de haver um reconhecimento dos objetivos da missão de cada um, idealmente através do estabelecimento de uma forma de acordo escrito, por exemplo um Memorando de Entendimento (MdE), Termos de Referência ou diretrizes de cooperação entre Autoridades e ONG.

A identificação do tráfico de pessoas não é um processo simples: os traficantes aplicam esforços consideráveis para se certificarem de que será difícil detetar as suas atividades. Não sendo possível que todos os casos de tráfico sejam idênticos, os indicadores de tráfico serão, provavelmente, diferentes de caso para caso.

Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional (UNTOC)

A utilização de medidas de identificação eficazes ajuda os Estados na satisfação do requisito do Artigo 27.º (1) (b) (i) que indica:

«Os Estados Partes deverão cooperar estreitamente, em conformidade com os respetivos ordenamentos jurídicos e administrativos, a fim de reforçar a eficácia das medidas de controlo do cumprimento da lei destinadas a combater as infrações previstas na presente Convenção. Em concreto, cada Estado Parte deverá adotar medidas eficazes:

(a)...

(b) Cooperar com outros Estados Partes, quando se trate de infrações previstas na presente Convenção, na condução de investigações relativas aos seguintes aspetos:

(i) Identidade, localização e atividades de pessoas suspeitas de implicação nas referidas infrações, bem como localização de outras pessoas envolvidas»

Indicadores – não provas

É importante ter em conta que os indicadores referidos neste módulo são apenas indicadores. Isoladamente, não são provas de que está a ocorrer tráfico de pessoas. A observação de um indicador deve ser o ponto de partida para iniciar uma investigação.

Situações prováveis de tráfico de pessoas

A identificação do tráfico de pessoas poderá ser um processo moroso. Um incidente poderá dar uma indicação imediata e direta de que está a ocorrer tráfico de pessoas mas, em muitos casos, poderá haver apenas um ou dois indicadores havendo, normalmente, muito pouca informação concreta ou sinais óbvios de tráfico de pessoas. É frequente existir apenas a impressão incómoda de que se está a presenciar uma situação de tráfico. O tráfico de pessoas pode ser confundido facilmente com outras formas de criminalidade, como a introdução clandestina de migrantes ou agressão sexual ou ofensa à integridade física. Os efeitos traumáticos nas vítimas de tráfico são tais que essas vítimas poderão não revelar a sua situação durante semanas ou até meses.

Queixas diretas por parte das vítimas e de outras pessoas

Uma vítima pode abordar diretamente uma patrulha de polícia ou uma esquadra de polícia para comunicar a sua situação. Outras organizações podem e têm encaminhado um grande número de vítimas para as autoridades competentes em todo o mundo. Muitos destes encaminhamentos têm vindo de ONG que, muitas vezes, têm objetivos anti-tráfico específicos.

Nos casos de tráfico de pessoas para exploração sexual, têm sido observados «salvamentos pelo cliente». Um exemplo destas situações ocorre quando um homem paga para ter relações sexuais com uma mulher, ela o informa de que é vítima de tráfico e o cliente a leva consigo à polícia ou a outra entidade, ou sai sozinho e denuncia a situação.

Outros indivíduos que não clientes também já «salvaram» vítimas, sinalizando-as às autoridades ou outras instituições.

Atividades de policiamento regular

As atividades de policiamento regular, que lidam com ocorrências que não estão diretamente relacionadas com o tráfico (por exemplo, assaltos, acidentes rodoviários e queixas sobre distúrbios de ordem pública), podem constituir oportunidades para identificar o tráfico de pessoas. Seguem-se alguns exemplos específicos:

- Atividade de controlo fronteiriço;
- Queixas nas quais as vítimas de tráfico sejam potenciais testemunhas;
- Denúncias contra as vítimas de tráfico;
- Atividades da polícia e de outras autoridades competentes, tais como: controlo de pessoas, veículos e estabelecimentos para verificação de documentos ou outros;
- Policiamento de rotina às instalações nas quais as vítimas possam estar a ser exploradas, por exemplo estabelecimentos de diversão noturna, fábricas ou explorações agrícolas;
- Pesquisa e análise de anúncios nos meios de comunicação social, incluindo a Internet;
- Policiamento comunitário e de proximidade;
- Atividade de rotina em embaixadas e consulados;
- Inquéritos sobre desaparecimento de crianças.

Impacto da atividade de policiamento regular no comportamento dos traficantes

Em algumas jurisdições, foi constatado que os traficantes não mudam necessariamente os seus métodos, localizações ou transportes utilizados devido às atividades de rotina das autoridades competentes (ou aquilo que aparentam ser atividades de rotina), mesmo onde essas atividades originam detenções.

Atividade pró-ativa

As operações pró-ativas, muitas vezes alicerçadas nas informações recolhidas, demonstraram que são bem-sucedidas na identificação e libertação das vítimas de tráfico. Seguem-se alguns exemplos:

- Rugsas planeadas a instalações e localizações suspeitas, como fábricas, minas, estabelecimentos de diversão noturna e explorações agrícolas;
- Acompanhamento de outras agências, como inspetores do trabalho, de saúde e segurança nas respetivas operações pró-ativas, para observação das condições e identificação de quem está presente;
- Identificação das rotas utilizadas e das operações de planeamento nas infraestruturas de transporte e noutros pontos de ligação;
- Operações encobertas (onde for permitido pela legislação respetiva) para determinação do que está a acontecer e de quem está envolvido numa atividade específica;
- Vigilância e outras técnicas de investigação pró-ativas;
- Operações planeadas nas fronteiras.



Exemplo

As autoridades da Índia verificaram que um número significativo de pessoas estava a ser vítima de tráfico a partir de um país vizinho. Para a passagem da fronteira, as vítimas saíam de um autocarro de um lado da fronteira, atravessavam o ponto de controlo a pé e entravam noutra autocarro no outro lado.

A polícia e outras agências, incluindo ONG, estabeleceram um centro de aconselhamento conjunto na passagem da fronteira. Foi dado aconselhamento sobre questões como direitos e autorizações laborais na Índia. A entrada no centro era totalmente voluntária. Foi dada ao pessoal do centro uma orientação sobre a identificação das possíveis vítimas de tráfico e a forma de efetuarem entrevistas de modo a filtrar as possíveis vítimas.

Indicadores que corroboram o tráfico

A corroboração dos indicadores pode ser efetuada de várias formas, consoante as circunstâncias do caso. Poderá envolver averiguações específicas, formais ou dissimuladas. Poderá ser tão simples quanto fazer perguntas a uma pessoa.

O resultado destes indicadores deverá dar origem a uma decisão sobre qual a ação a desencadear. As ações variam consoante a natureza do tráfico, os riscos para as vítimas e outras pessoas e as informações disponíveis.

O mesmo processo básico é aplicável se se tratar de um caso de grande escala liderado pela informação recolhida ou de uma simples verificação de rotina por um profissional.

O tempo que este processo demora pode variar de acordo com as circunstâncias. As operações em grande escala podem demorar semanas, apesar de poderem descobrir informações que requerem ação imediata. Uma verificação de rotina pode começar por um indicador e evoluir rapidamente para uma situação que requeira uma atuação em poucos minutos. Em alguns casos como, por exemplo, quando uma vítima se apresenta à polícia, poderá ser necessária uma decisão imediata sobre a ação a adoptar.

	Autoavaliação
Por que motivo é necessária a corroboração dos indicadores nos casos de tráfico de pessoas?	

Indicadores gerais de que uma pessoa pode ter sido vítima de tráfico

Estes indicadores revelam alguns dos fatores prevaletentes nas vítimas de tráfico. Deve ter-se em conta que são indicadores de natureza geral e que nem todos podem ser aplicados em todos os casos de tráfico.

Diferentes tipos de tráfico de pessoas produzem diferentes perfis de vítima. Até o mesmo tipo geral de atividade de tráfico de pessoas terá grandes diferenças consoante o local onde se desenvolve.

Estes indicadores devem ser utilizados em conjunto com as informações disponíveis para criar um perfil específico para determinado contexto local. Se não houver informações prévias sobre o tráfico de pessoas, alguns destes indicadores podem ajudar a sinalizar um problema de tráfico novo ou emergente.

Idade

A faixa etária das vítimas de tráfico num dado local depende da natureza do tráfico e da procura no ponto de exploração. Com algumas exceções, quanto mais velha for a pessoa, menos provável é que seja vítima de tráfico. Este indicador é especialmente importante nos casos de exploração sexual. Normalmente, os traficantes não traficam pessoas mais velhas para exploração sexual por haver pouca «procura pelos clientes». Porém, já foram observadas exceções, nas quais pessoas mais velhas de uma determinada etnia são encaradas como jovens pelo mercado «cliente».

A mesma regra geral pode ser aplicada à exploração laboral, dado que, quanto mais velha for a pessoa, menos produtiva poderá ser em condições de trabalho árduo ou escravo. Há exceções a esta regra, como por exemplo o tráfico de idosos para mendicidade.

As crianças são particularmente vulneráveis ao tráfico, dado que são mais fáceis de controlar e podem ser exploradas de várias formas: na indústria do sexo, nos mercados de trabalho ilegais, para mendicidade e furto de carteiras, como «escravos» domésticos e para remoção de órgãos.

Gênero

O tráfico sexual afeta sobretudo as mulheres. Há provas substanciais de tráfico para exploração sexual heterossexual em praticamente todos os países do mundo.

Verificou-se que existe tráfico de homens para prostituição, especialmente de adolescentes e rapazes mais novos, mas a investigação e os conhecimentos nesta área são limitados.

O tráfico de pessoas para exploração de trabalho forçado afeta tanto os homens como as mulheres. As proporções variam consoante a forma do trabalho e o papel social de género prevalectente no local.

Local de origem

A rede de angariação de vítimas baseia-se num conjunto de fatores, incluindo a pobreza, discriminação e falta de oportunidades. Muitas vítimas são provenientes de países em vias de desenvolvimento ou de países em transição, onde as oportunidades são limitadas.

Em países desenvolvidos, o tráfico é praticado com vários objetivos. Por exemplo, as jovens são preparadas para terem relações sexuais por «namorados» e, em seguida, deslocadas dentro do país ou entre países para exploração sexual. A investigação e os casos mais recentes demonstraram que as vítimas provenientes de países desenvolvidos são vítimas de tráfico também com o objetivo de exploração laboral. Porém, mesmo nestes casos, as vítimas vêm normalmente de populações desfavorecidas e vulneráveis.



Exemplo

Num caso ocorrido no Norte da Europa, um cidadão da UE foi acusado e condenado por sujeitar quatro vítimas, duas das quais também cidadãos da UE, a trabalhos forçados. De acordo com a acusação deduzida, em data anterior a Agosto de 2007, o arguido e o seu irmão recrutaram várias pessoas na UE. Estas pessoas encontravam-se numa situação vulnerável porque não tinham onde viver, eram portadoras de deficiência mental ou não tinham emprego ou rendimentos. O arguido explorou as vítimas através da utilização de um regime muito rígido e recorreu a violência e ameaças para que executassem trabalho de asfaltagem e assentamento de pedras. As vítimas não tiveram qualquer oportunidade real e aceitável de pôr termo à relação laboral. O trabalho era extremamente mal pago, recebiam um salário inferior ao acordado, eram obrigadas a viver em condições desumanas, por vezes com horários de trabalho extremamente longos e estando constantemente sob vigilância, tendo-lhes sido dado a entender que, caso não fizessem o trabalho ou fugissem, seriam perseguidas, espancadas ou mortas.

Documentação

A apresentação por uma pessoa de documentação de identificação e viagem pertencente a outras, numa passagem de fronteira ou ponto de controlo, poderá constituir um indicador geral de tráfico de pessoas. Além disso, a falta de documentação ou o uso de identidade ou documentação falsificadas poderão também constituir fortes indicadores de tráfico.

Última localização

O local onde a vítima se encontrava imediatamente antes de o caso chegar à atenção das autoridades competentes é sempre importante: um bordel/estabelecimento de diversão noturna, uma agência de acompanhantes ou clube de «strip-tease», locais de exploração de trabalho como fábricas ou lojas que empregam pessoas com baixos salários e longas horas de trabalho em condições insalubres (sweatshops), cozinhas de restaurantes, minas, pedreiras ou explorações agrícolas podem ser indicadores de potencial exploração.

Na origem ou em trânsito, o local onde as vítimas foram encontradas, incluindo instalações nas quais tem lugar o recrutamento, tais como bares ou terminais de transportes já associados ao tráfico de pessoas, podem ser importantes.

Também o país ou região de origem da vítima poderão ser importantes indicadores, se houver informações que os referenciem como locais de tráfico ou trânsito endémico de pessoas.

Transporte

A forma como uma pessoa foi ou está a ser transportada poderá representar um indicador de tráfico. Algumas características do transporte nos casos de tráfico são muito semelhantes às características de introdução ilícita de migrantes, mas há algumas potenciais diferenças.

Por exemplo, muitas vezes, os traficantes tentam controlar todos os aspetos do transporte durante a transferência, desde o local de origem até ao local de destino, uma vez que apenas aí concretizam o seu investimento. Por outro lado, os facilitadores podem já ter recebido dos migrantes, pelo menos uma parte dos seus honorários, antes de estes terem deixado o local de origem.

Outro indicador de tráfico poderá consistir na verificação de que um indivíduo que atravessa as fronteiras está permanentemente acompanhado ou sob controlo. Um pequeno número de vítimas é conduzido por um grupo constituído por um significativo número de controladores e níveis crescentes de supervisão à medida que se aproxima de um destino identificado/local de exploração. Esta crescente supervisão poderá tornar-se necessária nos casos em que é relativamente fácil enganar as vítimas na origem, mas os traficantes receiam que, à medida que o grupo se aproxima do destino, as vítimas percebam que irão ser exploradas. O controlo crescente é o mecanismo utilizado em situações como esta.

As autoridades competentes em várias partes do mundo observam que, muitas vezes, os traficantes utilizam uma rota única de transporte durante um período de tempo prolongado. O motivo pode ser a complexidade inerente à preparação de transporte através de vários países, especialmente se os traficantes tiverem poucos contactos locais. Desta forma, é

importante monitorizar contínua e rotineiramente as rotas de transporte regulares conhecidas.

Contexto do encaminhamento

As autoridades competentes podem ter conhecimento de situações de tráfico através de um encaminhamento efetuado por ONG ou por clientes que recorreram aos seus serviços (salvamento pelo cliente).

As circunstâncias que dão origem ao encaminhamento serão sempre um indício importante: circunstâncias como a retirada da vítima dum bordel/estabelecimento de diversão noturna pela polícia, salvamento pelo cliente ou identificação e salvamento por parceiros de ONG.

Sinais de abuso

Quaisquer lesões ou marcas das mesmas observadas nas vítimas podem ser um indicador de tráfico. As vítimas são sujeitas a abuso pelos traficantes e pelos clientes.

Porém, não deverá assumir-se que uma pessoa não é vítima de tráfico se esta não apresentar lesões ou marcas destas ou de abuso físico. Poderão ter sido utilizadas outras medidas de controlo tão ou mais eficazes, incluindo a ameaça de abuso ou retenção de documentação.

Avaliação pela entidade encaminhadora

Se o caso tiver sido encaminhado para as autoridades competentes por uma ONG, a opinião das pessoas que trabalham nesta área e que encaminharam o caso será sempre relevante para o processo e deverá ser incluída na avaliação geral.

Conhecimentos atuais

Compare todos os indicadores anteriores com as informações que tem disponíveis sobre a atual situação de tráfico de pessoas na sua área de responsabilidade. As anteriores categorias de indicadores são aplicáveis à situação na sua área de responsabilidade? Qual é o modus operandi utilizado na sua área?

Recomendação

Poderá não dispor de quaisquer informações sobre tráfico de pessoas ou poderá não ter informações suficientes sobre a forma de tráfico específica à qual foi submetida uma vítima. Tenha especial atenção quando houver vários indicadores presentes sem que os mesmos encaixem num padrão conhecido. Esta situação deverá determinar a realização de mais diligências ou averiguações com vista a identificar uma eventual situação de tráfico.



Autoavaliação

Quais são os indicadores gerais do tráfico de pessoas?

Leia sobre os indicadores dos diferentes tipos de exploração. Quais destes serão relevantes para o seu trabalho?

Na prática, de que forma poderá utilizar estas listas de indicadores na área em que trabalha?

Tem conhecimento de mais algum indicador de tráfico de pessoas com base na sua experiência anterior?

Indicadores de tráfico de pessoas

Nem todos os indicadores da lista adiante estão presentes nas situações que envolvem tráfico de pessoas. Apesar de a presença ou ausência de qualquer um dos indicadores não permitir concluir que está ou não a ocorrer tráfico, a presença dos indicadores deverá originar mais averiguações.

As vítimas de tráfico de pessoas podem ser encontradas em muitas situações. Como interveniente no processo, poderá desempenhar um papel para a sua identificação.

As pessoas que tenham sido vítimas de tráfico podem:

- Acreditar que têm de trabalhar contra a sua vontade;
- Ser incapazes de sair do ambiente de trabalho;
- Apresentar sinais de que os seus movimentos estão a ser controlados;
- Sentir que não podem ir-se embora;
- Mostrar medo ou ansiedade;
- Estar sujeitas a violência ou ameaças de violência contra elas próprias ou contra membros das suas famílias e pessoas próximas;
- Apresentar ferimentos que aparentem resultar de agressão;
- Apresentar ferimentos ou deficiências típicas de determinados trabalhos;
- Apresentar ferimentos que aparentem resultar da aplicação de medidas de controlo;
- Ser desconfiadas em relação às autoridades;
- Ser ameaçadas com a entrega às autoridades;
- Ter medo de revelar o respetivo estatuto legal;
- Não ter passaporte ou outros documentos de viagem ou identidade, por esses se encontrarem na posse de terceiros;
- Ter documentos de identidade ou viagem falsos;
- Ser encontradas num tipo de local que é (provavelmente) utilizado para exploração de pessoas, ou estar associadas a esse tipo de local;

- Não estar familiarizadas com o idioma local;
- Não conhecer a morada da própria casa ou do local de trabalho;
- Deixar que terceiros falem por elas quando são diretamente interpeladas;
- Agir como se estivessem a cumprir instruções de terceiros;
- Ser obrigadas a trabalhar sob determinadas condições;
- Ser disciplinadas através de castigos físicos;
- Ser incapazes de negociar as respetivas condições de trabalho;
- Receber pouco ou nenhum rendimento;
- Não ter acesso aos respetivos rendimentos;
- Trabalhar durante demasiadas horas e durante períodos excessivamente prolongados;
- Não ter dias de folga;
- Viver em instalações pobres ou sem condições;
- Não ter acesso a cuidados médicos;
- Ter interação social limitada ou inexistente;
- Ter um contacto limitado com as respetivas famílias ou com pessoas exteriores ao seu meio envolvente;
- Não conseguir comunicar livremente com outras pessoas;
- Acreditar que têm dívidas com terceiros;
- Estar numa situação de dependência;
- Ser provenientes de um local identificado como origem de tráfico de pessoas;
- Ter de trabalhar ou prestar serviços aos traficantes no país de destino como forma de retribuição pelo transporte pago;
- Ter agido com base em falsas promessas.

As crianças que tenham sido vítimas de tráfico podem:

- Não ter acesso aos respetivos pais ou tutores legais;
- Parecer intimidadas e comportar-se de uma forma que não corresponde ao comportamento típico das crianças da sua idade;
- Não ter amigos da sua idade fora do local de trabalho;
- Não ter acesso à educação;
- Não ter tempo para brincar;
- Viver separadas de outras crianças e em instalações sem condições;
- Comer separadas de outros membros da «família»;
- Ser alimentadas apenas com sobras;
- Participar em trabalho não adequado a crianças;
- Viajar sem companhia de adultos;
- Viajar em grupos com pessoas que não são seus familiares.
- As seguintes situações também podem indicar que as crianças foram vítimas de tráfico:
- A presença de roupas de tamanho de criança tipicamente utilizadas no trabalho físico ou para fins sexuais;
- A presença de brinquedos, camas e roupas de criança em locais inadequados, como estabelecimentos de diversão noturna e fábricas;
- Uma participação de uma criança encontrada sem companhia de adultos;
- Crianças sem companhia de adultos e com números de telefone para chamarem táxis;
- A descoberta de casos que envolvam adoção ilegal.

As pessoas que são vítimas de tráfico para servidão doméstica podem:

- Viver com uma família;
- Não comer com a família;
- Não ter um espaço próprio privado;
- Dormir num espaço partilhado ou inadequado;

- Ser dadas como desaparecidas pelo respetivo empregador numa comunicação às autoridades, apesar de estar ainda a viver em casa do empregador;
- Nunca ou raramente sair de casa por motivos sociais ou outros;
- Nunca sair de casa sem o respetivo empregador;
- Ser alimentadas apenas com sobras;
- Estar sujeitas a insultos, abusos, ameaças ou violência.

As pessoas que são vítimas de tráfico para exploração sexual podem:

- Ter qualquer idade, apesar de a idade poder variar de acordo com o local e o mercado;
- Deslocar-se de um bordel/estabelecimento de diversão noturna para outro ou trabalhar em vários locais;
- Estar sempre acompanhadas quando vão e vêm do trabalho ou de outras atividades exteriores;
- Ter tatuagens ou outras marcas que indiquem que são «propriedade» dos exploradores;
- Fazer turnos prolongados ou ter poucos ou nenhuns dias de folga;
- Dormir no local de trabalho;
- Viver ou viajar em grupo, por vezes com outras mulheres que não falam a mesma língua;
- Ter muito poucas peças de roupa;
- Ter roupas que são normalmente utilizadas para fazer serviços sexuais;
- Apenas saber dizer apenas palavras relacionadas com sexo no idioma local ou no idioma do grupo de clientes;
- Não ter dinheiro;
- Não possuir ou não poder apresentar documento de identidade.
- Apresentar sinais de que tiveram sexo sem proteção e/ou violento;
- Ser incapazes de recusar ter sexo sem proteção e/ou violento;
- Ter sido sujeitas a compra e/ou venda;

- Ter integrado grupos de mulheres controlados por outros;
- Figurar em anúncios para bordéis e/ou locais semelhantes que ofereçam os serviços de mulheres de uma etnia ou nacionalidade específica;
- Ser referenciadas em relatórios que indicam que as trabalhadoras do sexo disponibilizam serviços a clientela de uma etnia ou nacionalidade específica;
- Nunca sorrir.

As pessoas que são vítimas de tráfico para exploração laboral são normalmente obrigadas a trabalhar em setores como: agricultura, construção, entretenimento, indústria de serviços e manufatura. As pessoas que são vítimas de tráfico para exploração laboral podem:

- Viver em grupos no mesmo local onde trabalham e raramente ou nunca sair desses locais;
- Viver em locais degradados e inadequados, como edifícios agrícolas industriais;
- Não se encontrar adequadamente vestidas para o trabalho que fazem: por exemplo, podem não ter equipamento de proteção ou roupas quentes;
- Ser alimentadas apenas com sobras;
- Não ter acesso aos respetivos rendimentos;
- Não ter contrato de trabalho;
- Trabalhar diariamente durante demasiadas horas;
- Dependem do respetivo empregador para uma série de serviços, incluindo trabalho, transporte e alojamento;
- Não ter alternativa de alojamento;
- Nunca sair do local de trabalho sem o respetivo empregador;
- Não ter possibilidade de se deslocar livremente;
- Estar sujeitas a medidas de controlo concebidas para manter as vítimas no local de trabalho;
- Ser disciplinadas através de multas;
- Estar sujeitas a insultos, abusos, ameaças ou violência;
- Não ter formação básica nem licenças profissionais.

As seguintes situações podem também indicar que as pessoas foram vítimas de tráfico para exploração laboral:

- Afixação no local de trabalho de avisos em línguas diferentes da língua local;
- Inexistência, no local de trabalho, de avisos sobre saúde e segurança;
- O empregador ou gerente não apresentar os documentos necessários para empregar trabalhadores provenientes de países estrangeiros;
- O empregador ou gerente não apresentar os registos dos salários pagos aos trabalhadores;
- O equipamento de saúde e segurança ser de má qualidade ou inexistente;
- O equipamento ter sido concebido ou alterado de forma a poder ser utilizado por crianças;
- Haver indícios de transgressão das leis laborais;
- Haver indícios de que os trabalhadores têm de pagar pelas ferramentas, comida ou alojamento, ou que esses custos lhes são deduzidos dos salários.

As pessoas que são vítimas de tráfico para mendigar ou cometer pequenos delitos podem:

- Ser crianças, idosos ou migrantes portadores de deficiência, que normalmente mendigam em locais e transportes públicos;
- Ser crianças que transportam e/ou vendem estupefacientes;
- Apresentar deficiências físicas que aparentem ser o resultado de mutilação;
- Ser crianças da mesma nacionalidade ou etnia que se deslocam em grandes grupos com apenas alguns adultos;
- Ser menores não acompanhados que tenham sido «encontrados» por um adulto da mesma nacionalidade ou etnia;
- Movimentar-se em grupos quando viajam em transportes públicos: por exemplo, podem andar constantemente de uma extremidade para a outra dos comboios;
- Participar em atividades de grupos de crime organizado;
- Fazer parte de grandes grupos de crianças com o mesmo tutor adulto;
- Ser castigados se não receberem ou roubarem o suficiente;

- Viver com membros do respetivo grupo de crime organizado;
- Viajar com membros do respetivo grupo de crime organizado para o país de destino;
- Viver, como membros do grupo de crime organizado, com adultos que não são os respetivos pais;
- Deslocar-se diariamente em grandes grupos e ao longo de distâncias consideráveis.

As seguintes situações podem também indicar que as pessoas foram vítimas de tráfico para exploração laboral:

- Novas formas de crimes relacionados com grupos de crime organizado;
- Indícios de que o grupo se deslocou, ao longo de um período de tempo, por vários países;
- Indícios de que estiveram envolvidas em mendicidade ou pequenos delitos noutra país.

Resumo

Os indicadores não constituem prova da ocorrência de tráfico de pessoas, são antes o ponto de partida da investigação.

O tráfico de pessoas pode ser identificado por:

- Participações diretas das vítimas e de outras pessoas;
- Investigações reativas;
- Investigações pró-ativas.

Devem ser aplicados todos os esforços para corroborar os indicadores de tráfico, considerando não apenas os aspetos superficiais.

Entre os indicadores gerais de que uma pessoa pode ter sido vítima de tráfico, incluem-se:

- A idade – normalmente são as pessoas mais novas de ambos os géneros que estão mais vulneráveis ao tráfico para qualquer objetivo;

- O género – na exploração sexual, sobretudo as mulheres. Noutras formas de tráfico, os tipos de vítima podem divergir de acordo com a natureza da exploração;
- O local de origem – economias em vias de desenvolvimento ou regiões em crise ou transição;
- A documentação – documentos de viagem ou de identidade na posse de terceiros;
- A última localização – localização associada à exploração;
- O transporte – viagens com acompanhante mesmo em curtas distâncias;
- As circunstâncias da participação do caso – após ação de uma ONG, salvamento pelo cliente, participação pela própria vítima, etc.;
- Indícios de abuso – sinais físicos e formas de controlo mais subtis;
- Avaliação da entidade de encaminhamento – quaisquer informações fornecidas à entidade que indiquem que pode haver tráfico de pessoas;
- Conhecimentos atuais – informações existentes sobre tráfico de pessoas, mas tendo em conta que poderá encontrar indicadores de uma situação sobre a qual não tenham informações.



Módulo 5

ESCRITÓRIO DAS NAÇÕES UNIDAS
SOBRE DROGAS E CRIME
Viena

Manual contra o tráfico de pessoas para profissionais do sistema de justiça penal

Módulo 5:

Avaliação do risco nas investigações de tráfico de pessoas

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Módulo 5:

Avaliação do risco nas investigações de tráfico de pessoas

Objetivos

No final deste módulo, os utilizadores deverão ser capazes de:

- Identificar os princípios da avaliação contínua do risco nos casos de tráfico de pessoas;
- Indicar as questões essenciais a ter em consideração durante a avaliação do risco nos casos de tráfico de pessoas;
- Compreender o conceito de «risco» no contexto dos casos de tráfico de pessoas;
- Identificar o objeto do risco («quem»/«o quê») no tráfico de pessoas;
- Descrever a forma como a gravidade e probabilidade do risco são considerados para determinar o seu grau;
- Relembrar as ações a considerar na altura de decidir o que fazer perante um determinado risco e o seu grau;
- Descrever quais os riscos, qual o seu grau e a possível ação a desencadear, considerando:
 - Todas as categorias de vítimas de tráfico de pessoas;
 - Vítimas que cooperam com as investigações;
 - Vítimas que cooperam apenas parcialmente com as investigações;
 - Vítimas que não cooperam com as investigações;
 - Familiares e amigos das vítimas;
 - Profissionais do sistema judicial e outros profissionais envolvidos na investigação;
 - A investigação do tráfico de pessoas;
 - O período pós-investigação (repatriamento e reintegração).

Avaliação do risco nas investigações de tráfico de pessoas

As redes de tráfico de pessoas são, mais do que outros grupos de crime organizado, uma fonte

de potencial risco para as vítimas e para as pessoas que lhes são queridas, assim como para os profissionais da justiça penal. Tal acontece quando uma vítima é vista a colaborar com o sistema de justiça penal ou quando a atividade criminosa é ameaçada pelas investigações. Este risco deverá não só ser ponderado e planificado, mas constituir um aspeto central da estratégia dos investigadores durante a investigação de tráfico de pessoas. É obrigação do investigador, por uma questão de princípio, identificar e avaliar o risco durante a investigação e fazer tudo o que for possível para o eliminar ou reduzir.

Embora haja muito poucos estudos relativos ao risco específico deste crime, existe um elevado número de exemplos que ilustram os seus riscos.

Define-se «risco» como a probabilidade de um perigo potencial se tornar realidade e as consequências da sua concretização. A avaliação do risco no tráfico de pessoas é, por conseguinte, uma tentativa de apurar quão provável um perigo se torne realidade e que medidas deverão ser tomadas para o reduzir ou anular completamente, protegendo assim a vítima. Não existe um método generalizado para a avaliação do risco no tráfico de pessoas. Cada caso tem especificidades particulares e poderá apresentar diferentes desafios face à nossa própria vivência de casos anteriores.

A informação a considerar na avaliação do risco pode ter como fonte as entrevistas com as vítimas, ONG, um cliente, depoimentos, informações ou dados de vigilância previamente recolhidos ou outras técnicas de investigação especializada. Qualquer que seja a fonte de informação, não deverá ser ignorada. Além do mais, poderão existir riscos diferentes em diferentes etapas do tráfico de pessoas e, por conseguinte, a avaliação do risco deve ser um processo contínuo.

Algumas das consequências de não conseguirmos identificar e gerir o risco são:

- Intimidação, ameaças, agressão ou morte das vítimas, suas famílias ou amigos (por intermédio dos traficantes e pessoas a eles ligadas, antes, durante e após a identificação do caso/vítima);
- Doença – quer física quer mental;
- Exploração ou exploração continuada;
- Condenação injusta de um inocente, impunidade do culpado, fuga do culpado ao procedimento criminal;
- Redução da capacidade das autoridades para lidarem com o tráfico de pessoas;
- Desaparecimento de provas ou de elementos relevantes para a prova.

Princípios e procedimento da avaliação contínua do risco

Os princípios que sustentam a avaliação do risco são os seguintes:

- Os investigadores têm um claro dever humanitário de apoiar as vítimas de crimes de tráfico de pessoas;
- Segundo a Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional e o seu Protocolo Adicional Relativo ao Tráfico de Pessoas, uma série de outros instrumentos legais internacionais, e algumas legislações nacionais e respetivas disposições de aplicação, os investigadores têm igualmente o dever legal de apoiar e proteger as

vítimas de tráfico cujo caso é levado ao seu conhecimento. Uma parte fulcral do cumprimento deste dever consiste na avaliação do risco quer em relação às vítimas identificadas quer em relação a outras existentes ou potenciais;

- A par da obrigação legal e humanitária imposta pela lei, uma avaliação eficaz do risco aumenta a probabilidade de sucesso na investigação criminal;
- A avaliação do risco deverá ser desencadeada o mais cedo possível após a sinalização de um caso de tráfico, devendo ser continuamente atualizada;
- O risco só pode ser avaliado com base nos dados de que o profissional tenha conhecimento concreto e aqueles que razoavelmente possa vir a obter.

Segundo o Artigo 6.º (5) do Protocolo contra o Tráfico de Pessoas, cada Estado Parte deverá esforçar-se por garantir a segurança física das vítimas de tráfico de pessoas enquanto estas se encontrarem no seu território.

O Artigo 8.º (2) do Protocolo contra o Tráfico de Pessoas também defende a necessidade da avaliação do risco nas seguintes situações. «Quando um Estado Parte repatria uma vítima de tráfico de pessoas para um Estado Parte do qual essa pessoa é nacional ou no qual esta tinha direito de residência permanente, no momento da sua entrada no território do Estado Parte de acolhimento, deverá assegurar que esse repatriamento tenha devidamente em conta a segurança da pessoa, bem como o estado de qualquer processo judicial relacionado com o facto de ela ser uma vítima de tráfico, e que seja, de preferência, voluntário.»

A avaliação do risco ajuda a implementar estes artigos.

As quatro questões fulcrais

As quatro questões fulcrais a que deve responder em qualquer processo de avaliação do risco nos casos de tráfico de pessoas são:

- Quem ou o quê está em risco?
- Qual é o risco?
- Qual é o grau do risco?
- Que ação deve ser adotada?

Estas questões fulcrais serão tratadas em pormenor mais abaixo.



Autoavaliação

Quais são os princípios da avaliação contínua do risco nos casos de tráfico de pessoas?

Quais são as quatro questões fulcrais a analisar durante o processo de avaliação do risco no tráfico de pessoas?

Quem ou o quê está em risco?

Este ponto poderá incluir:

- Vítimas de tráfico de pessoas, incluindo vítimas identificadas e não identificadas, vítimas que cooperam totalmente com as autoridades como testemunhas, vítimas que cooperam parcialmente com as autoridades, vítimas que não cooperam com as autoridades;
- Família, amigos, companheiros das vítimas;
- Testemunhas;
- Autoridades responsáveis pela aplicação da lei, Ministério Público ou outras organizações, como ONG e intérpretes;
- Integridade da investigação.



Discussão

Informações anônimas indicam que uma unidade agroindustrial da sua área está a utilizar mão-de-obra resultante do tráfico de pessoas.

Os dados iniciais não indicam qualquer risco concreto. É decidido o envio de agentes para investigar a unidade agroindustrial. Estes recebem informação sobre o potencial risco envolvido na investigação de tráfico de pessoas e é-lhes dito para comunicarem quaisquer dúvidas e/ou preocupações.

Um carro é visto a deixar a fábrica. A matrícula é anotada e conferida. Um homem que foi associado ao carro há três semanas tem condenações anteriores por atos de violência e um historial de uso de armas contra agentes policiais.

Quais são os potenciais riscos a ponderar na resposta a esta situação? Quem está em risco?

Qual é o risco?

Os riscos associados ao tráfico de pessoas são numerosos e diversificados. À natureza coerciva e de exploração do crime de tráfico de pessoas associam-se riscos de saúde e outros. É necessária uma avaliação abrangente do risco, que tenha em conta o comportamento dos traficantes, os motivos para temer atos de vingança, a segurança do local em que a vítima viveria no seu país de origem, até que ponto as autoridades do país de origem seriam capazes e estariam dispostas a salvaguardar a sua segurança e integridade física. É aos órgãos e autoridades de polícia criminal e autoridade judiciária que compete a responsabilidade primária neste campo e devem ser eles a liderar o processo.

A cooperação das vítimas com as autoridades implica sempre um risco para as mesmas e provavelmente também para as suas famílias. O ponto crucial a ter em consideração é que deverão ser plenamente elucidadas de todas as questões e dos riscos associados a qualquer

decisão que o investigador lhes peça para tomar, de forma a que possam tomar uma decisão informada. Quanto maior for a cooperação da vítima, maiores serão os riscos potenciais para ela, para a sua família e para outras potenciais vítimas. Quanto maior o risco, maior o desafio que se coloca ao profissional do sistema de justiça penal para o controlar. O grau do risco varia em cada caso e é determinado por múltiplos fatores, incluindo a forma de tráfico, o perfil das vítimas, a natureza da rede de crime organizado e a capacidade das autoridades de execução da lei.

No contexto do crime de tráfico de pessoas, «risco» refere-se a:

- Existência de uma ameaça à segurança das pessoas acima indicadas;
- Integridade da investigação mediante qualquer fator que afete:
 - Provas e admissibilidade das provas (isto é, qualquer item que possa confirmar ou refutar o cometimento do crime);
 - A aplicação equitativa da lei penal e da lei processual penal;
 - A aplicação equitativa das políticas e procedimentos organizacionais.

As vítimas poderão estar sujeitas a riscos para a sua integridade física e psicológica devido às condições de exploração ou à agressão direta, usada como medida de controlo pelos traficantes. O risco para a saúde poderá prolongar-se após as intervenções iniciais das autoridades. Isto poderá acontecer como resultado de doenças contraídas durante o tráfico, da agressão direta dos traficantes para impedir a sua cooperação com as autoridades ou forçar o seu regresso ao país de origem, etc.

A intimidação ou agressão das vítimas/testemunhas aumentam o risco de não cooperação com a investigação ou de não prestarem depoimento, determinando o insucesso do procedimento criminal.

O repatriamento das vítimas para o seu local de origem acarreta o risco de estas serem estigmatizadas, voltarem a ser colocadas nas mesmas circunstâncias que as levaram a ser traficadas, ou numa situação em que existe muito pouco apoio disponível. Todos estes riscos têm consequências para a saúde das vítimas e aumentam a hipótese de voltarem a ser traficadas.

Família, amigos e companheiros das vítimas poderão estar em risco de serem intimidados ou agredidos pelos traficantes, como forma de controlo das vítimas, nos casos em que façam tentativas de descobrir o que aconteceu à vítima ou quando cooperam com as autoridades.

As testemunhas nos casos de tráfico de pessoas poderão estar em risco perante todos os elementos de uma rede criminosa.

Os agentes policiais ou outras autoridades envolvidos na investigação dos casos de tráfico de pessoas poderão correr riscos de ataque durante ações policiais, e riscos de segurança devidos ao ambiente em que decorre a exploração ou a manobras de intimidação para impedir

a investigação.

Os procuradores e os juizes poderão estar sujeitos a intimidação, ameaças e agressão.

Os trabalhadores de ONG ou de outros serviços de apoio à vítima envolvidos no processo poderão estar expostos a agressão e intimidação durante os esforços dos traficantes para atacar as vítimas; podendo também estar expostos à enfermidade ou doença e à tensão prolongada devido ao seu trabalho com as vítimas traumatizadas.

Intérpretes: se forem utilizados intérpretes durante a prestação de depoimento, é importante que tenha consciência de que também eles estão sujeitos a riscos semelhantes.

Os profissionais do sistema de justiça penal podem, em alguns casos, estar em risco devido às atividades dos colegas noutras jurisdições: por exemplo, devido à revelação de pormenores relativos a uma unidade de investigação ou pessoa envolvidos numa investigação a decorrer noutro país.

A dificuldade de obtenção de prova testemunhal, como resultado de ameaças às pessoas acima indicadas, corrupção direta dessas pessoas, sistemas de gestão de justiça penal pouco eficientes ou aplicação não equitativa da lei e das políticas, poderá comprometer o sucesso das investigações.

Qual é o grau do risco?

Pela sua natureza, o tráfico de pessoas acarreta um risco considerável para as vítimas. A determinação exata do grau do risco é difícil e depende de vários fatores, incluindo o tipo de tráfico, os traficantes e vítimas individualmente considerados, e a origem cultural das vítimas e traficantes. Um método usual para avaliar o grau do risco consiste em ponderar a gravidade do mesmo e a probabilidade deste se concretizar. Tanto a gravidade como a probabilidade são classificadas em elevado, médio e baixo. A cada uma das classificações é dada uma pontuação (baixo: 1; médio: 2; elevado: 3). A classificação global do risco calcula-se multiplicando a gravidade pela probabilidade.

Este cálculo pode ser ilustrado numa tabela (Ver tabela 1)

Gravidade	3	Médio	Elevado	Elevado
	2	Médio	Médio	Elevado
	1	Baixo	Médio	Médio
		1	2	3
	Probabilidade			

Tabela 1. Matriz de Classificação de Riscos

Como se pode ver na matriz, um risco com baixa gravidade e baixa probabilidade será classificado como um risco baixo. Os riscos médios ocorrem quando quer a gravidade quer a probabilidade são médias, ou quando uma é elevada e a outra baixa. Os riscos elevados têm lugar quando ambas são elevadas ou quando uma é elevada e a outra é média.

Questões para ajudar a avaliar o grau do risco

Algumas das questões fulcrais a colocar durante a avaliação do risco incluem:

- Existe alguém em perigo imediato? As pessoas em perigo podem incluir outras vítimas ou familiares e amigos da vítima. Circunstâncias em que uma presumível vítima foi gravemente agredida ou violada, com ferimentos e elevada probabilidade de trauma psicológico, etc. De igual modo, trabalhadores de indústrias perigosas podem ser presumíveis vítimas com elevada probabilidade de apresentarem ferimentos graves.
- Existem presumíveis vítimas que se destaquem? Vítimas óbvias podem aumentar os graus globais de risco de várias formas, sobretudo para si próprias. O grau exacto do risco dependerá da resposta às outras questões desta lista;
- Os traficantes têm antecedentes de ameaças ou violência? Os fatores que afetam a classificação do risco incluem a natureza da violência (gravidade) e a sua frequência (probabilidade). Se existir alguma prova de violência ou ameaça prévias, é provável que o grau do risco seja mais elevado;
- Que informações possuem os traficantes? Os traficantes conhecem a morada de casa/trabalho da vítima, o seu número de telefone ou pormenores semelhantes em relação à sua família? O conhecimento deste tipo de informação por parte dos traficantes aumenta a probabilidade do risco;
- Que serviços de apoio, incluindo proteção física, estão disponíveis? Bons serviços de apoio, como cuidados de saúde, apoio psicológico e alojamento seguro podem reduzir a probabilidade de riscos tais como agressões às vítimas/testemunhas, não prestação de depoimentos, etc. Tais serviços de apoio também reduzem a gravidade do risco, por exemplo, aumentando a hipótese de a vítima recuperar a sua saúde;
- Qual é a rede social de suporte da vítima? A vítima é casada? Tem filhos? A existência de uma rede social de apoio poderá ajudar a vítima a recuperar (reduzindo a gravidade do risco) ou proporcionar-lhe uma proteção informal (reduzindo a probabilidade do risco e, assim, a classificação final). Noutros casos, os suspeitos de tráfico poderão ter capacidade para intimidar a família ou rede social de suporte da vítima, o que aumenta quer a gravidade do risco (por exemplo, persuadindo a vítima/testemunha a não depor), quer a probabilidade da sua concretização;
- Os traficantes conhecem (ou alegam conhecer) a localização das casas seguras para vítimas de tráfico, moradas de familiares, etc.? O conhecimento concreto desse tipo de informação faz aumentar a probabilidade do risco para as vítimas. A alegação de conhecimento dessa informação, mesmo que tal não seja verdade, tem um impacto no risco porque poderá ser difícil avaliar a probabilidade de os traficantes terem acesso a essa informação, e a gravidade do risco também aumenta, porque poderá ter o efeito de intimidar a testemunha;

- Quem é que os traficantes têm capacidade de atacar? Os traficantes parecem ter cúmplices em localidades a partir das quais podem atacar a vítima, a sua família ou amigos, aumentando, por conseguinte, a probabilidade do risco de alguém ser ferido ou de uma testemunha ser impedida de depor?
- Quão «segura» é a investigação? As ameaças à segurança e integridade da investigação poderão apresentar várias formas. A existência de traficantes com um historial prévio de corrupção de funcionários públicos aumenta a gravidade do risco de a investigação falhar; dinheiro nas mãos desses mesmos traficantes aumenta a probabilidade da ocorrência de corrupção. Outras questões que afetam a segurança e integridade incluem (por exemplo), sistemas pouco eficientes de gestão dos elementos de prova, acesso pouco controlado a informação/fontes de informação, etc.

	Autoavaliação
<p>Que significa «risco» no contexto do tráfico de pessoas?</p> <p>Quem tem probabilidade de estar em risco no crime de tráfico de pessoas?</p> <p>De que forma se considera que a gravidade e probabilidade do risco determinam o grau do risco?</p>	

Que ação deve ser adotada?

As opções táticas à disposição dos investigadores para responder a um caso de tráfico de pessoas têm os seus próprios riscos e desafios associados. Por exemplo, as táticas reativas poderão salvar uma vítima, mas também expor outras pessoas ao perigo. As abordagens pró-ativas poderão fornecer provas sólidas, mas colocar os agentes em situações arriscadas. Os métodos disruptivos poderão criar um ambiente hostil ao traficante, mas tornam mais difícil a recolha de prova, porque levam os autores do crime a mergulhar ainda mais na clandestinidade. A aplicação de uma só destas abordagens poderá não ser suficiente em alguns casos. Uma tática (ou melhor, uma combinação de um leque de táticas) que tem sido empregue de forma eficaz consiste na combinação destas três abordagens numa única operação.

Questões para ajudar a decidir a ação adequada

Algumas das questões fulcrais para ajudar a escolher a ação a desenvolver incluem:

- Qual é a abordagem investigatória mais apropriada? Que riscos poderá essa abordagem acarretar para as vítimas, e para ONG, outros serviços de apoio às vítimas e outros agentes de autoridade envolvidos?
- O risco corrido pelas vítimas atuais, evidentes ou potenciais é tão elevado que seja necessária uma intervenção imediata?

- Se é necessária uma intervenção imediata, que ações podem ser tomadas para impedir que os suspeitos de tráfico se apercebam de que as autoridades têm conhecimento das suas atividades?
- Se não é necessária uma intervenção imediata, pode o grau do risco ser gerido de forma segura enquanto a investigação pró-ativa é iniciada/conduzida/continuada?
- Se a investigação pró-ativa não é exequível, pode o grau do risco ser gerido para permitir o início/condução de uma estratégia disruptiva?

Remover, aceitar, reduzir e evitar.

Um dos modelos utilizados para lidar com o risco nalgumas jurisdições tem sido refletir sobre como se poderá:

- Remover;
- Aceitar;
- Reduzir; e/ou
- Evitar o risco.

Mais precisamente, trata-se de saber qual destas abordagens é apropriada ao risco específico identificado. Nos casos de tráfico de pessoas, os seguintes exemplos ilustram a utilização do modelo.

Remover

É libertada uma vítima e as investigações mostram que o traficante tem um longo historial de violência. É promovida a aplicação da medida de coação de prisão preventiva para impedir o traficante de agredir a vítima. Se o pedido for bem-sucedido, a ameaça é removida.

Aceitar

Uma investigação revela que as vítimas de tráfico de pessoas são mantidas numa fábrica em condições perigosas. É necessária uma ação que liberte as vítimas, mas essa ação poderá alertar os traficantes e permitir-lhes mudá-las de local, bem como ocultar outras provas. É tomada a decisão de entrar e libertar as vítimas. É aceite o risco de perda de provas.

Reduzir

Obtém-se a informação de que alguns trabalhadores mineiros vítimas de tráfico sofrem de uma doença contagiosa. É tomada a decisão de os libertar e de, simultaneamente, procurar aconselhamento médico especializado e equipamento de proteção individual para os profissionais envolvidos nos esforços de libertação. O risco para a saúde foi reduzido.

Evitar

Algumas pessoas estão a ser traficadas através de uma fronteira nacional para trabalhar em condições muito perigosas em minas. Uma operação de patrulhamento da fronteira levada a cabo por vários departamentos identifica potenciais vítimas, disponibiliza informação e aconselhamento e persuade as pessoas que estão a ser traficadas a não prosseguirem. O risco para a sua segurança e saúde foi evitado.

Este modelo simplifica o método. Na verdade, cada um dos riscos identificados necessitará, provavelmente, de uma combinação de abordagens. É igualmente importante recordar que os riscos e as respostas equacionadas devem estar em constante revisão.

Princípios e procedimento da avaliação contínua do risco

O que diz o Protocolo contra o Tráfico de Pessoas sobre autorizações de residência e repatriamento de vítimas de tráfico

Segundo o Artigo 7.º do Protocolo contra o Tráfico de Pessoas, cada Estado Parte deverá considerar a possibilidade de adotar medidas legislativas ou outras medidas adequadas que permitam às vítimas de tráfico de pessoas permanecerem no seu território, se for caso disso, temporária ou permanentemente. Ao aplicar esta disposição do artigo, cada Estado Parte deverá ter devidamente em conta fatores humanitários e de bondade.

Segundo o Artigo 8.º do Protocolo contra o Tráfico de Pessoas, quando um Estado Parte repatria uma vítima de tráfico de pessoas para um Estado Parte do qual essa pessoa é nacional, deverá assegurar que esse repatriamento tenha devidamente em conta a segurança da pessoa bem como o estado de qualquer processo judicial relacionado com o facto da pessoa ser uma vítima de tráfico. O repatriamento deverá ser, preferencialmente, voluntário.

A avaliação do risco noutras jurisdições

Poderá haver muitas ocasiões em que os profissionais do sistema de justiça penal precisem de avaliar o risco em jurisdições que não a sua. Exemplos incluem os preparativos para o repatriamento da vítima, a identificação de serviços de apoio adequados, e a avaliação do risco para a família e amigos residentes no país para o qual a vítima é repatriada.

Na sua essência, deverá seguir-se o mesmo processo acima apresentado. No entanto, existem inúmeros desafios que, na prática, se colocam. Estes incluem:

- Inexistência de uma língua comum;
- Questões legais respeitantes à cooperação judiciária internacional;
- Dificuldade em avaliar a qualidade de uma resposta «local» noutra jurisdição;

- Nalguns casos, a necessidade de agir rapidamente para reduzir o risco.

O conselho geral dado aos profissionais do sistema de justiça penal é o de trabalharem com as estruturas existentes que têm por função facilitar a cooperação judiciária. Mesmo nos casos em que a investigação é urgente, estas estruturas poderão ser capazes de dar indicações sobre com quem falar ou quais as organizações dignas de confiança. Quando contactar os gabinetes de ligação, realce a necessidade de realizar os inquéritos da forma mais rápida e segura possível.

Caso não existam gabinetes de ligação, poderão existir outras organizações nacionais ou internacionais ou pessoas que o possam aconselhar.

Faça perguntas gerais sobre as condições de cooperação antes de colocar questões concretas sobre pessoas.

Mantenha um controlo estrito da informação relativa a pessoas e partilhe-a apenas com quem tenha a certeza de que a utilizará de forma responsável.

Muitas das questões que envolvem o repatriamento da vítima giram em redor das diferenças entre o nível dos serviços de apoio e proteção no país de destino e o nível desses mesmos serviços no seu país de origem. Regra geral, quanto maior for o apoio prestado à vítima, menos probabilidades existem de ela voltar a ser uma vítima no futuro e menos graves serão as consequências para a sua saúde. Ao avaliar o grau do risco implícito no repatriamento, é importante que considere os seguintes fatores:

- A vítima repatriada pode continuar a sofrer de problemas de saúde e de problemas psicológicos como resultado de ter sido traficada;
- Os seus traficantes podem continuar à procura de oportunidades de vingança;
- As condições da vítima no país de origem continuam a ser as mesmas, logo, a vítima continua exposta aos fatores que a empurraram para a sua situação de sofrimento;
- A vítima poderá deparar-se com a estigmatização e a rejeição da família e dos membros da comunidade, etc., o que poderá resultar na falta de alternativas e, logo, numa maior exposição ao risco de tráfico.

Estas questões, entre outras, necessitam de uma avaliação específica do risco antes de se dar início ao processo de repatriamento. A avaliação do risco nestas situações poderá exigir que se apurem os factos relativos às seguintes questões:

- Que serviços de apoio social se encontram disponíveis no país de repatriamento para apoiar a vítima na sua recuperação?
- Que nível de proteção física contra traficantes e seus cúmplices poderia ser disponibilizado

à vítima pelo governo do país de destino?

- Existe algum fator social, cultural ou religioso que torne perigoso o repatriamento? Ou seja, a vítima regressa a uma família que a vendeu ou a própria natureza da exploração (por exemplo, exploração sexual) põe a vítima em risco devido à sua religião se for repatriada como vítima de tráfico?
- Que ONG ou outros serviços de apoio à vítima existem no país de destino e/ou de origem que possam apoiar o repatriamento da vítima, permitir-lhe atrasar o repatriamento ou mesmo conseguir o não-repatriamento?
- É seguro permitir que a vítima regresse ao país natal ou, pelo contrário, ficará de novo em risco de ser agredida e/ou traficada?
- Caso o repatriamento não seja seguro, como pode o profissional do sistema de justiça penal reduzir ou eliminar o risco? Se as vítimas se encontram fora do seu país de origem, pode ser-lhes concedido um estatuto de residência temporária? Qual o apoio e assistência disponíveis?

O planeamento é essencial em todos os casos em que se procura minimizar o risco do tráfico, permitindo-lhe avaliar as opções que tem disponíveis, os procedimentos a cumprir e analisar as pessoas e organizações em que pode confiar. Embora não seja sempre possível planear antecipadamente, este é um passo necessário na avaliação do risco. Ainda que possa ser forçado pelas circunstâncias a contactar pessoas e entidades exteriores à sua jurisdição pela primeira vez quando está a tratar de um caso, tal não é desejável, pois os seus contactos poderão precisar igualmente de fazer um planeamento prévio.

Se for o responsável pelo planeamento estratégico, deve ponderar efetuar contactos com outras instituições e organizações de apoio à vítima, incluindo ONG exteriores à sua jurisdição, para saber se podem dar apoio em assuntos como o fornecimento imediato de alojamento, ou se estarão dispostos a fazê-lo no futuro.

Cada vítima de tráfico é um caso diferente. Descubra exatamente o tipo de apoio de que a pessoa repatriada precisa. A informação necessária pode ser obtida através de um planeamento cuidadoso, prévio ao repatriamento, ponderando os seguintes fatores:

- Coordenação com os serviços de apoio à vítima existentes na área do profissional do sistema de justiça penal, para determinar as necessidades desta, e como poderá ajudá-la. Se a vítima deseja regressar ao seu país, faça uma análise da situação de risco e ajude-a nos preparativos e a obter apoio antes do repatriamento;
- A situação e a capacidade de prestação de cuidados e apoio por parte da família ou parentes mais próximos;
- Se desempenha funções táticas, deve informar-se dos serviços que as organizações de apoio à vítima, incluindo ONG, podem disponibilizar no que diz respeito à convalescença,

apoio e repatriamento seguro das vítimas de tráfico. Se nenhuma das organizações estiver disponível, pense em contactar instâncias decisoras e em chamar a sua atenção para a situação;

- Informe-se sobre a política do seu país relativamente ao repatriamento de vítimas de tráfico. O seu país oferece um prazo de reflexão às vítimas de tráfico? Esta disposição aplica-se à vítima com quem está a trabalhar? Se sim, que procedimentos precisa de seguir e quem precisa de contactar para o implementar?
- Poderá ter de obter informações no local de origem da vítima para se inteirar dos riscos que ela poderá enfrentar no seu regresso. Tal poderá implicar o contacto com instituições locais para obter a informação necessária;
- Tenha cuidado com as pessoas que contacta: poderá não conhecer as pessoas com quem está a falar e elas podem não ser dignas de confiança;
- Nos casos em que necessitar de obter informações internacionais para assegurar um regresso e repatriamento seguros, contacte sempre primeiro a instituição do seu país que lida com esse tipo de informações. É função dessa instituição trabalhar com instituições homólogas noutros países, pelo que poderá ser capaz de lhe fornecer pormenores de organizações ou pessoas dignas de confiança que poderá contactar. Realce a necessidade de obter as informações da forma mais rápida e segura possível.
- Se se tratar de recolha de informações dentro do seu próprio país, apure qual o contacto indicado. Procure pessoas nas quais possa confiar e com potencial acesso à informação de que necessita. Fale com outras pessoas que tenham realizado recolhas de dados semelhantes, para determinar se estas foram feitas de forma adequada.
- Não se limite apenas a autoridades e organismos públicos do sistema de justiça: as ONG e outros serviços de apoio à vítima poderão ter no terreno funcionários dignos de confiança, que poderão dar-lhe a informação de que precisa. Quando necessário, certifique-se de que existe um acordo de partilha de informação com a outra organização.
- Faça perguntas gerais sobre as condições no local antes de começar a fazer perguntas específicas sobre pessoas. As respostas às perguntas gerais poderão permitir-lhe avaliar se é seguro prosseguir para as perguntas sobre as vítimas e traficantes.
- O planeamento deverá incluir a avaliação da informação relativa a fatores sociais, culturais ou religiosos aplicáveis às vítimas, que provavelmente irá encontrar na sua área de responsabilidade. Existe sempre a possibilidade de encontrar vítimas de um meio sociocultural inesperado, mas este tipo de planeamento será, em princípio, muito útil na maioria dos casos.
- A informação relacionada com a vítima deverá ser mantida sob controlo estrito. Deverá ser guardada sob segurança apertada, com acesso limitado e não deverá ser partilhada

a não ser que tenha a certeza de que a pessoa ou instituição em causa a utilizará de forma responsável.

Casos que envolvem repatriamento pela Organização Internacional para as Migrações (OIM)

A Organização Internacional para as Migrações (OIM) tem uma experiência considerável e já lidou com um vasto número de programas para o repatriamento e reinstalação de migrantes, incluindo vítimas de tráfico de pessoas. É aconselhável que, ao planear o repatriamento ou ao avaliar a situação de risco antes do repatriamento, assegure a ligação com a filial da OIM no seu país.



Exemplo

Angelica foi recrutada pela sua prima, que vive num país do Leste da Ásia. Esta pediu-lhe que trabalhasse para si como babysitter. Angelica não sabia que a sua prima era namorada de um membro de um grupo de crime organizado e que trabalhava como intermediária no recrutamento de mulheres latino-americanas para a indústria do sexo. Após a sua chegada, foi-lhe dito que devia uma grande soma de dinheiro que, por razões inexplicadas, continuava a aumentar substancialmente. Disseram-lhe que, caso não aceitasse a situação, os seus dois filhos sofreriam as consequências. Foi forçada a trabalhar em vários locais de comércio do sexo, como stripper e prostituta.

Após alguns meses, conseguiu fugir e dirigiu-se a uma esquadra de polícia. A polícia contactou a embaixada do seu país. Angelica disse-lhes que o seu passaporte, roupas e bilhete estavam no apartamento em que tinha estado alojada e queria o apoio da polícia para os recuperar. A polícia identificou o apartamento como uma morada conhecida por ser controlada por um grupo de crime organizado e estava reticente em entrar no apartamento sem provas adicionais, mas por fim, concordou em ir ao apartamento com Angelica e funcionários da Embaixada, conseguindo recuperar o bilhete, passaporte e roupas.

Angelica foi colocada sob proteção policial numa casa-abrigo, enquanto esperava pelo voo de regresso a casa. Quando estava na casa-abrigo, adoeceu e teve de ser internada no hospital. O hospital concordou em não divulgar o seu paradeiro, colocando-a numa ala isolada, onde apenas era admitida a entrada de funcionários da referida casa-abrigo, da polícia e da embaixada. Membros do grupo de crime organizado dirigiram-se ao hospital, mas foram incapazes de a localizar. Pouco depois, Angelica foi repatriada.

Human Trafficking for Sexual Exploitation in Japan, OIT, Genebra, 2004



Autoavaliação

Nos casos de vítimas de tráfico de pessoas:

Quais são os riscos?

Que fatores podem determinar o grau do risco?

Que ações poderá adotar para responder aos riscos?

Resumo

- O tráfico de pessoas implica uma série de riscos diferentes dos riscos associados à generalidade de outras investigações criminais;
- Os investigadores têm um claro dever humanitário de proteger as vítimas de crimes de tráfico. Este dever de proteção tem uma série de fundamentos legais internacionais, incluindo a Convenção das Nações Unidas contra a Criminalidade Organizada Transnacional e o Protocolo contra o Tráfico de Pessoas;
- O risco para as vítimas varia consoante o seu nível de cooperação;
- A avaliação do risco de tráfico não deve estar limitada aos riscos enfrentados diretamente pelas vítimas. Outras áreas de risco potencial são:
 - Parentes e amigos das vítimas de tráfico;
 - Outros membros da comunidade;
 - Agentes da autoridade e outros profissionais que investiguem o tráfico de pessoas e trabalhem com as próprias vítimas;
 - O sucesso da investigação criminal.
- As questões fulcrais a que deve responder em qualquer processo de avaliação do risco são:
 - Qual é o risco?
 - Quem está em risco?
 - Qual é o grau do risco?
 - Que ação deve ser adotada?



Módulo 8

ESCRITÓRIO DAS NAÇÕES UNIDAS
SOBRE DROGAS E CRIME
Viena

Manual contra o tráfico de pessoas para profissionais do sistema de justiça penal

Módulo 8:

Entrevistas a vítimas de tráfico de pessoas que
constituem potenciais testemunhas

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Módulo 8:

Entrevistas a vítimas de tráfico de pessoas que constituem potenciais testemunhas

Objetivos

No final deste módulo, os utilizadores deverão ser capazes de:

- Enunciar o objetivo geral das entrevistas conduzidas pelas autoridades competentes às vítimas de tráfico de pessoas enquanto potenciais testemunhas;
- Indicar algumas das principais diferenças entre as entrevistas de eventuais vítimas de tráfico de pessoas que podem ser testemunhas deste crime em tribunal e as de vítimas de outros tipos de crime;
- Identificar as cinco etapas de uma entrevista a uma vítima:
 - Planeamento e preparação;
 - Estabelecimento de relação com a vítima/testemunha e explicação do processo e do conteúdo;
 - Obtenção do depoimento da vítima/testemunha;
 - Conclusão adequada de uma entrevista; e
 - Avaliação do conteúdo de uma entrevista (etapas normalmente referidas pelo acrónimo inglês, PEACE);
- Explicar por que motivo é importante planear as entrevistas às vítimas/testemunhas nos casos de tráfico;
- Descrever os aspetos práticos a considerar no planeamento de uma inquirição a uma vítima/testemunha de tráfico de pessoas;
- Identificar os requisitos legais de uma entrevista a uma vítima/testemunha de tráfico de pessoas para que esta tenha valor probatório;
- Indicar o que deve ser explicado a uma possível vítima/testemunha de tráfico de pessoas;
- Identificar em que circunstâncias uma entrevista não deve avançar para a fase de depoimento;
- Dar uma explicação básica sobre o que é um «relato livre»;
- Descrever o que pode ser compreendido como colaboração complacente no contexto

de uma entrevista a uma pessoa vulnerável;

- Explicar as diferenças entre perguntas abertas, específicas, fechadas e direcionadas;
- Explicar a forma como a natureza dos casos de tráfico poderá afetar as várias técnicas utilizadas nas entrevistas a pessoas vulneráveis;
- Indicar técnicas especiais de entrevista e explicar quem deve (e quem não deve) utilizá-las;
- Descrever o que é necessário fazer na fase de conclusão de uma entrevista;
- Descrever os passos práticos para avaliação de uma entrevista.

Introdução

Este módulo é dedicado às entrevistas de pessoas sinalizadas como possíveis vítimas/testemunhas nas investigações de tráfico de pessoas. Salienta-se que vítima e testemunha são termos que têm significados específicos e diferentes em cada jurisdição.

Em algumas jurisdições, uma pessoa é declarada «vítima» após um procedimento criminal ou administrativo. A atribuição do estatuto de «vítima», nestes casos, proporciona uma série de direitos e proteções. Noutras jurisdições, o termo «vítima» é interpretado num sentido mais lato, sem quaisquer requisitos legais/administrativos.

Em algumas jurisdições, o termo «testemunha» é limitado a uma pessoa que deponha em tribunal, enquanto noutras é utilizado para descrever uma pessoa que tem informações sobre um crime ou uma pessoa que faz uma declaração por escrito ou deponha em tribunal.

Não é possível produzir um módulo sobre entrevistas adequado para todos os sistemas legais do mundo. Poderá ser necessário adaptar algumas das informações incluídas neste módulo ao sistema legal do seu país.

Seja qual for a terminologia e estrutura específicas da sua legislação, esta orientação destina-se principalmente às situações que envolvam pessoas sinalizadas como potenciais vítimas de tráfico e às quais é necessário efetuar uma entrevista com vista à obtenção de um depoimento que possa ser utilizado nos procedimentos do tribunal. Mesmo que as informações obtidas não sejam utilizadas em tribunal, esta abordagem dá-lhe a melhor oportunidade de obter informações de elevada qualidade, que poderão ser utilizadas para combater atividades de tráfico de pessoas.

A entrevista a presumíveis vítimas como parte de um processo de filtragem inicial nas operações no terreno é diferente, em muitos aspetos, das entrevistas com valor probatório, apesar de poderem ter muitos pontos em comum.

Em algumas jurisdições, as decisões sobre o estatuto de vítima requerem uma abordagem que utiliza uma estrutura específica. O estatuto de vítima pode estar relacionado especificamente com o tráfico (por exemplo, como parte de um mecanismo nacional de referência de vítimas de tráfico) ou pode estar relacionado com todas as formas de crime nessa jurisdição.

Mesmo que uma entrevista não se destine principalmente à recolha de provas para um procedimento criminal, deverá preparar-se para todas as eventualidades e conceber a entrevista

num formato que seja admissível no seu sistema legal. Por exemplo, a defesa poderá pretender saber o que foi dito na entrevista de filtragem inicial nas operações no terreno, nas entrevistas para determinar o estatuto de vítima e na entrevista probatória propriamente dita.

Idealmente, as entrevistas às vítimas de tráfico de pessoas devem ser conduzidas por profissionais com formação especial para o efeito. Entre as unidades que normalmente incluem profissionais com esta formação, incluem-se os investigadores de crimes sexuais e as unidades de violência doméstica e infantil.

Este documento tem três objetivos principais de utilização:

Em primeiro lugar, fornece uma orientação específica para os entrevistadores sobre questões que devem ser consideradas nas entrevistas às vítimas de tráfico. No entanto, é importante salientar que, apesar de este documento disponibilizar uma descrição geral de determinadas técnicas que realçam os aspetos específicos do tráfico, não dispensa a necessidade de haver uma formação mais completa dos entrevistadores especialistas.

Esta necessidade leva-nos ao segundo objetivo do presente documento. Apesar de, numa situação ideal, apenas deverem intervir profissionais qualificados, é reconhecido que, por vários motivos, tal poderá não ser possível. Nestas circunstâncias, este documento poderá proporcionar uma orientação aos entrevistadores que, embora competentes, possam não ter recebido formação especializada adequada. É importante realçar que esta situação não é a ideal, mas poderá ajudar a evitar os problemas mais graves associados à falta de formação específica em casos de tráfico, além de aumentar a eficácia das entrevistas.

Finalmente, este documento pode ainda ser útil para quem faz a gestão das investigações e orienta as entrevistas. Um tema internacional comum que surgiu durante a elaboração do presente manual foi o facto de os responsáveis pelas investigações não compreenderem as complexidades das entrevistas às vítimas de tráfico. Uma das consequências desta incompreensão, verificada com frequência, traduziu-se na tendência dos responsáveis pressionarem os entrevistadores para apressarem as entrevistas. Este comportamento pode ter implicações sérias numa investigação de tráfico. Este documento pode facultar aos responsáveis pelas investigações de tráfico uma perspetiva sobre tudo o que estas investigações implicam, e pode ajudar a planear a gestão diária dos entrevistadores.

Este módulo começa por explicar alguns dos motivos pelos quais as entrevistas nos casos de tráfico são diferentes das de muitas outras investigações.

A secção seguinte lida com a forma como as entrevistas relacionadas com tráfico devem ser planeadas. A base desta parte do módulo é a compreensão de que todas as vítimas de tráfico devem ser consideradas testemunhas vulneráveis.

Em seguida, o módulo avança para o tópico relativo à execução de uma entrevista a uma testemunha num caso de tráfico. Apesar de as inquirições a testemunhas vulneráveis de casos de tráfico apresentarem a mesma estrutura que qualquer outra inquirição a uma testemunha vulnerável, há algumas diferenças na forma como (e no motivo pelo qual) as inquirições de tráfico devem ser efetuadas. Algumas notas específicas identificarão estas diferenças e disponibilizarão conselhos sobre a adaptação às mesmas ao longo da presente secção.

Os anexos deste módulo também disponibilizam algum material de apoio que poderá utilizar na prática.

O Anexo A disponibiliza uma checklist de perguntas a colocar às testemunhas de tráfico relacionadas com os mercados de origem, trânsito e destino, e também com as fases de recrutamento, transporte e exploração e com os processos comerciais de tráfico.

O Anexo B disponibiliza uma lista das respostas que os investigadores de casos de tráfico devem (idealmente) obter antes de prosseguirem a investigação.

O Anexo C disponibiliza orientações específicas para os responsáveis pelo planeamento estratégico das entrevistas às vítimas/testemunhas de casos de tráfico.

Objetivos das entrevistas

O principal objetivo de qualquer entrevista efetuada no âmbito das atividades das autoridades competentes é a obtenção de um depoimento rigoroso. Este objetivo é aplicável às entrevistas a vítimas, testemunhas e suspeitos. Neste âmbito, as entrevistas em casos de tráfico de pessoas não são diferentes de muitos outros tipos de entrevista.

Como qualquer entrevistador experiente saberá, a obtenção de um depoimento rigoroso é normalmente um objetivo difícil de alcançar na prática. As entrevistas em casos de tráfico de pessoas, especialmente quando envolvem vítimas, apresentam vários desafios que é necessário conhecer para maximizar as possibilidades de obter um relato que reflita tudo o que aconteceu.

	Autoavaliação
<p>Qual é o objetivo geral de qualquer entrevista?</p> <p>De que forma pode esse objetivo aplicar-se a uma entrevista a uma vítima/testemunha de um caso de tráfico de pessoas?</p>	

Quais são as especificidades dos casos de tráfico de pessoas?

A quantidade e tipo de serviços de apoio necessários à investigação de tráfico de pessoas raramente encontra paralelo em qualquer outro tipo de investigação. Com efeito, poderá ser necessário providenciar alojamento, apoio médico, aconselhamento, serviços de interpretação, roupas, comida e planeamento do regresso ao país de origem. São estes os serviços de apoio que devem ser antecipados a partir da fase de planeamento e implementados a partir do momento em que entra em contacto com a possível vítima para a entrevista, não devendo deixar-se para o fim da entrevista ou série de entrevistas. Este tipo de apoio não é fácil de organizar e, quanto mais cedo o iniciar, melhor. Será muito difícil ganhar a confiança e obter a cooperação da vítima/testemunha antes de tomar algumas medidas no sentido de fazer estes preparativos e informar a vítima/testemunha sobre o que está a fazer.

Sem a cooperação e o depoimento da vítima, será difícil iniciar uma investigação. Porém, o depoimento da vítima não deve ser a única prova na qual se baseia o processo. Tudo o que a vítima declarar deverá ser corroborado ou complementado por outros meios de prova, tais como outros depoimentos ou provas materiais.

Alteração de depoimentos

Os depoimentos sofrem alterações durante as inquirições a vítimas de todos os tipos de crime. Em inquirições a vítimas de tráfico de pessoas, as alterações nos depoimentos são consideradas um fenómeno especialmente comum. Apesar de esta observação não ser baseada em estudos científicos, foi comunicada de forma consistente por investigadores de todo o mundo.

Uma mudança num depoimento é obviamente um risco para qualquer potencial procedimento criminal. A defesa poderá facilmente dar como mentirosa uma pessoa que mude a história que conta e, desta forma, abalar a credibilidade do testemunho.

Os motivos da mudança de um depoimento são muito complexos. São explicados sucintamente neste módulo e com mais detalhe noutros módulos, como o módulo 3: «Reações psicológicas das vítimas de tráfico de pessoas» e módulo 4: «Métodos de controlo».

Apesar de um depoimento poder mudar por a história não ser verdadeira, os investigadores devem ter sempre em mente a eventualidade de situações específicas associadas aos casos de tráfico de pessoas. Assim, é possível que a vítima ainda esteja a sofrer de perturbação de stress pós-traumático, ou que se encontre comprometida por motivos de ameaça, intimidação ou outras circunstâncias. Por isso, é muito importante que os investigadores não encarem estas mudanças nos depoimentos de forma simplista, assumindo que a pessoa está a mentir ou que, se uma parte do depoimento não está correta, também o resto é necessariamente falso. Todos os depoimentos devem ser verificados e corroborados tanto quanto possível através de outros meios de prova.

Contudo, cada vítima é diferente das outras e poderá encontrar depoimentos de vítimas muito rigorosos e que nunca mudam. A existência de discrepâncias é, no entanto, a situação mais comum, razão pela qual os depoimentos necessitam de ser corroborados.

Comentário dos investigadores

Durante um curso de formação de investigadores de tráfico de pessoas, um investigador experiente fez a seguinte observação:

«Quando estou a investigar estes casos, desconfio mais dos depoimentos muito detalhados contados desde o início até ao fim e que nunca mudam, do que dos depoimentos que andam para trás e para a frente, têm lacunas e mudam várias vezes».

Não se deve pensar que, com esta afirmação, se pretende dizer que os depoimentos consistentes são sempre suspeitos, mas sim que as mudanças nos depoimentos não são necessariamente uma indicação de mentira.

O processo de tráfico de pessoas

O tráfico de pessoas é uma prática comercial criminosa. A condenação de autores de crimes de tráfico é importante mas o impacto da condenação nas redes de tráfico será mínimo se o processo comercial não for afetado. Mantenha sempre uma mente aberta relativamente à possibilidade de a entrevista poder originar um processo sustentável em tribunal. Por vezes, poderá ser necessário considerar não avançar com um processo em tribunal se sentir que as provas disponíveis não justificam esse procedimento e, em vez disso, usar o depoimento da

vítima para recolher informações e desenvolver abordagens pró-ativas e disruptivas.

Deverá avaliar continuamente o risco que resulta do relato da testemunha. O que a testemunha diz pode significar que é necessária ação imediata para proteger a sua família, amigos ou outras vítimas.

Poderá ser necessário tomar medidas dentro das fronteiras do seu país e/ou em países estrangeiros de origem, trânsito e/ou destino.

Língua

Muitas potenciais vítimas de tráfico de pessoas não falam a língua dos investigadores, o que suscita a necessidade de intérpretes. Esta necessidade não é exclusiva dos casos de tráfico de pessoas, mas é provável que seja neles mais comum.

É fornecida uma orientação extensiva sobre a utilização de intérpretes nos casos de tráfico no módulo 10: «A utilização de intérpretes nos casos de tráfico de pessoas»

Cultura

A satisfação dos requisitos básicos da cultura de uma pessoa é importante para a ajudar a sentir-se relaxada, confortável e com vontade de cooperar. Entre estes requisitos incluem-se a comida, a roupa e as cerimónias religiosas. Apesar de muitos investigadores terem experiência no trabalho com estes requisitos, importa ter presente que, nos casos de tráfico de pessoas, a testemunha pode ser proveniente de uma comunidade ou cultura com a qual o investigador não está familiarizado, pelo que não saberá se outros preparativos são necessários.

Nos casos de exploração sexual, as famílias das vítimas podem considerar que uma mulher que foi obrigada a prostituir-se trouxe vergonha e desonra à família. Ainda que tenha sido enganada, ameaçada ou agredida, é provável que a mulher esteja muito ansiosa em relação à reação da família e amigos quando souberem o que lhe aconteceu.

Vitimização e trauma

Uma parte significativa das vítimas pode ter sofrido abusos prolongados mesmo antes de ter sido traficada e, por conseguinte, não estar habituada a confiar noutras pessoas.

Os processos de vitimização no tráfico de pessoas têm várias consequências muito sérias para as vítimas, consequências essas que são explicadas detalhadamente no módulo 3: «Reações psicológicas das vítimas de tráfico de pessoas». O nível de trauma é diferente da maioria dos casos (até da maioria das investigações de crimes de natureza sexual). Este trauma pode originar dificuldades na obtenção de depoimentos precisos, sendo frequentemente necessário efetuar inquirições mais prolongadas em comparação com outras investigações criminais. A desorientação proveniente da vitimização ou da experiência de viver num local estranho pode impossibilitar as vítimas de identificarem claramente o local onde ocorreram os crimes ou a localização de sítios importantes para o depoimento.

Sistemas de justiça penal

Nalguns códigos e sistemas penais o período de tempo durante o qual uma pessoa pode ser detida sem ser formalmente acusada é muito restrito — em alguns países, esse período é de

apenas seis horas. Esta restrição pode revelar-se um grande desafio para os investigadores, especialmente quando um suspeito é detido na mesma altura em que é resgatada uma vítima. Os investigadores podem ser pressionados para obterem um depoimento de uma testemunha ou vítima para consolidar um procedimento criminal. Contudo, é pouco provável que as vítimas de tráfico (especialmente para exploração sexual) consigam dar um depoimento muito preciso em períodos de tempo curtos. É por este motivo que a utilização de períodos de reflexão, nas jurisdições em que está disponível, é crucial.

Estatuto de vítima

Em alguns países, o estatuto de vítima depende da cooperação das pessoas com o sistema de justiça penal: se não cooperarem, não lhes é concedido o estatuto de vítima. Por essa razão, a decisão sobre se a pessoa está ou não a cooperar pode ter que ser tomada numa fase inicial da investigação, uma vez que tal pode ter sérias consequências para a vítima. Se a pessoa não for identificada como vítima, poderá não ter direito a importantes medidas de apoio.

Familiares e amigos

Os traficantes podem conhecer (ou ser) os familiares da vítima. As ameaças diretas e assumidas aos familiares e amigos são mais comuns nos casos de tráfico e, conseqüentemente, as vítimas/testemunhas de tráfico podem sentir-se relutantes em cooperar numa entrevista.

Dinheiro

A maioria das testemunhas não perderá dinheiro se o caso que está a investigar avançar para um procedimento criminal, mas no caso do tráfico de pessoas é provável que se verifique o contrário, uma vez que, se a testemunha sair da rede de tráfico, deixará de ter rendimentos. Mesmo que se trate de uma quantia muito reduzida, poderá ser a base de sobrevivência de uma família no país de origem, no qual esse rendimento será mais valioso. A família pode passar dificuldades se esse dinheiro deixar de ser enviado. As vítimas não aceitam ser traficadas, mas podem estar presas numa situação muito difícil na qual têm de decidir entre cooperar consigo ou manter o pouco rendimento que têm.

A servidão para pagamento de dívidas, existente em várias formas, é comum nas investigações de tráfico de pessoas e pode não ter implicações apenas para a vítima: os traficantes podem conhecer a sua família e podem ter a capacidade de exercer violência sobre a mesma se a dívida não for paga. Esta ameaça, expressa ou implícita, pode exercer um poderoso efeito de controlo sobre a vítima, sendo muito raramente encontrado noutros tipos de investigação.

Estatuto de imigração

Nos casos de tráfico, há sempre uma maior probabilidade de as testemunhas e as vítimas se encontrarem ilegalmente no país do que na maioria das outras investigações. Por isso, há o risco de fazerem afirmações que pensam poder ajudá-las a permanecer mais tempo no país, o que torna ainda mais complicada a avaliação da exatidão do seu depoimento. Por vezes, a factualidade descrita pode parecer inverosímil, o que abre a possibilidade de a defesa alegar

que a testemunha mentiu por desejar permanecer no país.

Devem ser feitos todos os esforços para corroborar os detalhes do depoimento com elementos materiais e estabelecer a identidade da pessoa com a qual está a falar. Poderá ser extremamente difícil conseguir fazê-lo no curto período de tempo que provavelmente terá disponível.

Alojamento

As testemunhas de casos como a violência doméstica e a agressão podem necessitar de ajuda a encontrar alojamento mas, na maioria dos casos, as testemunhas voltam aos seus lares sem ser necessária qualquer ajuda das autoridades ou de outras entidades neste âmbito. Nos casos de tráfico, é muito pouco provável que tal seja possível. São necessários serviços de alojamento seguro e apoio social. É provável que seja exigido apoio de repatriamento das vítimas de tráfico.

O alojamento das vítimas de tráfico é normalmente disponibilizado e controlado pelos traficantes. Quando um traficante não controla diretamente o alojamento, é provável que saiba onde a vítima reside. Não será possível à vítima (nem a outras testemunhas) voltar ao local onde residia depois de ter sido entrevistada ou de ter feito uma declaração. Os profissionais do sistema penal devem ter conhecimentos e capacidades para disponibilizarem alojamento seguro às vítimas, ou a capacidade para as encaminharem para um fornecedor de alojamento seguro. Está disponível, no módulo 12, uma orientação sobre as considerações necessárias para o fornecimento de alojamento às testemunhas: «Proteção e apoio a vítimas/testemunhas nos casos de tráfico de pessoas».

Idade

Por razões várias, as vítimas de tráfico de pessoas podem não indicar a sua verdadeira idade, o que pode complicar o caso com procedimentos que vêm a revelar-se desnecessários, tornar mais difícil a sua identificação e criar uma inconsistência significativa no seu depoimento, que pode ser explorada posteriormente pela defesa.

Poderá determinar a idade da vítima verificando os seus documentos de identidade e solicitando informações no local de origem, ou poderá ter de utilizar técnicas como exames médicos e dentários para o conseguir. Se utilizar técnicas médicas, deverá fazê-lo de acordo com a legislação do seu país e com o consentimento da vítima. Outra consequência deste problema poderá consistir na utilização involuntária de um procedimento incorreto para inquirir a vítima, tornando as suas declarações inúteis do ponto de vista da sua utilização como prova em tribunal.

Crimes sexuais

Nos casos de tráfico, os crimes sexuais podem, sob várias formas, ser diferentes de outros crimes aparentemente semelhantes. A vitimização prolongada e o trauma daí resultante, descritos acima e noutros módulos, são apenas um dos motivos. Esta situação pode ainda diferenciar-se e complicar-se devido ao número de vezes em que a vítima tenha sido violada ou abusada sexualmente e ainda porque as lesões e outros indícios ou elementos de prova

podem ser provenientes de crimes que ocorreram muito tempo antes, por vezes noutros países.

As vítimas de exploração sexual devem ser examinadas por um médico com formação forense com vista a recolher, tanto quanto possível, indícios materiais que corroborem o depoimento daquelas. Os exames médicos também podem revelar provas materiais acerca das quais a vítima não o informou, devido ao estigma e vergonha inerentes. Estes exames devem ser efetuados em conformidade com a legislação do seu país e com o consentimento da vítima.

Para obter mais apoio sobre exames forenses, consulte o módulo 7: «Análise de provas materiais e da cena do crime nas investigações de tráfico de pessoas»



Autoavaliação

Indique algumas das principais diferenças entre as entrevistas de eventuais vítimas de tráfico de pessoas que podem ser testemunhas deste crime em tribunal e as de vítimas de outros crimes.

Conceitos de entrevista

A utilização de boas práticas nas entrevistas a testemunhas vulneráveis e intimidadas (tanto adultos como crianças) permitem-lhes dar a sua melhor prova. Porém, é essencial que a polícia, as instituições sociais, a acusação e a defesa, bem como os profissionais do tribunal, tenham em conta as circunstâncias individuais, necessidades e desejos específicos de cada testemunha. Por conseguinte, o texto que se segue não deve ser encarado como uma lista rígida de tarefas, mas antes como uma ferramenta útil para o planeamento e execução de entrevistas às testemunhas dos casos de tráfico de pessoas.

Esta secção associa dois conceitos de entrevista: o modelo PEACE e as diretrizes ABE (Achieving Best Evidence - Alcançar a Melhor Prova).

O modelo de entrevista PEACE é utilizado em muitos países de todo o mundo e é aplicável à entrevista de suspeitos, testemunhas e vítimas.

PEACE é um acrónimo que significa:

Planning and Preparation (Planeamento e Preparação)

Engage and Explain (Abordagem e Explicação)

Account (Depoimento)

Closure (Conclusão)

Evaluate (Avaliação)

O resumo seguinte proporciona uma descrição geral dos termos adiante explicados com mais detalhe.

Planeamento e preparação

O planeamento e a preparação abrangem muitos aspetos das entrevistas. Os casos de tráfico de pessoas podem exigir mais planeamento do que outros no que se refere a entrevistas, nomeadamente o contacto com intérpretes e assistentes sociais e a preparação de alojamento.

Abordagem e explicação

A abordagem consiste no estabelecimento de uma relação ou ligação com a pessoa que está a ser entrevistada. A explicação pode ser feita em termos muito gerais, especialmente nos casos de tráfico. Em regra, a vítima deve ser informada sobre o que vai acontecer na entrevista, de que forma as informações obtidas serão utilizadas e quais os seus direitos.

Depoimento

Na fase inicial da entrevista deve deixar-se a pessoa entrevistada fazer um relato dos factos, sem interrupções. Este procedimento é, por vezes, designado por «relato livre». Este relato livre inicial deve ser complementado pela intervenção do inquiridor com a formulação de perguntas especificamente dirigidas ao esclarecimento de determinados pontos do relato ou à obtenção de informação sobre factos não abordados pela testemunha. Na fase final revêem-se as declarações prestadas e questionam-se as eventuais inconsistências das mesmas.

Conclusão

Nesta fase, o conteúdo da inquirição pode ser resumido, é dada à vítima a oportunidade de acrescentar algo e é-lhe dito o que acontecerá em seguida.

Avaliação

Após a sua conclusão, a entrevista deve ser avaliada para aferir se os seus propósitos e objetivos foram alcançados, de que forma as novas informações obtidas afetam a investigação, como correu de uma forma geral, e que aspetos podem ser melhorados.

Se os entrevistadores fizerem parte de uma equipa maior, a avaliação deve ser efetuada pelos membros relevantes desta.

Alcançar a melhor prova (ABE)

A orientação ABE disponibiliza diretrizes sobre como entrevistar testemunhas vulneráveis e intimidadas. É normalmente utilizada para entrevistar vítimas de crimes graves, tais como crimes sexuais e abusos graves. A abordagem ABE deve ser utilizada nas entrevistas relativas a casos de tráfico e é aplicável em todas as fases de uma entrevista.

Tenha em atenção que todas as vítimas de tráfico de pessoas são consideradas testemunhas vulneráveis.

	Autoavaliação
Quais são as cinco fases de uma entrevista a uma vítima/testemunha?	

Planeamento e preparação das entrevistas

A importância do planeamento

Esta secção considera sobretudo o planeamento tático diário das entrevistas. O Anexo C disponibiliza alguma orientação adicional para decisores estratégicos.

A entrevista destas testemunhas é um processo humano, e não algo que se baseie em tecnologia como equipamentos de vídeo e gravação. Estes podem ajudar a tornar as entrevistas mais fáceis, reduzir os problemas legais e melhorar a qualidade dos depoimentos, mas não são o aspeto mais importante de uma entrevista: o mais importante é o entrevistador.

As técnicas aqui exploradas podem ser utilizadas em qualquer ambiente, independentemente do equipamento técnico disponível. Uma avaliação honesta daquilo que consegue alcançar com os recursos disponíveis, seguida do planeamento da utilização dos mesmos (e não dos recursos que gostaria de ter disponíveis) ajudará a produzir entrevistas com grande qualidade.

O planeamento da entrevista a testemunhas vulneráveis deve ser cuidadoso. O tempo gasto durante a fase de planeamento aumentará as hipóteses de produzir as melhores provas, minimizando, em simultâneo, a possibilidade de ocorrerem erros e inconsistências numa fase posterior.



Autoavaliação

Por que motivo o planeamento das entrevistas a potenciais vítimas/testemunhas de tráfico é tão importante?

Em que fase está o caso?

Não pode planear uma entrevista se não souber nada sobre as circunstâncias do caso. Como primeiro passo, terá de averiguar tudo o que se apurou até ao momento.

Nos casos de tráfico de pessoas, esta tarefa pode ser difícil, especialmente se a entrevista ocorrer na fase inicial de uma investigação. Os problemas mais recorrentes são a falta de uma língua comum para comunicar com a vítima ou esta ter sido encontrada em circunstâncias que sugerem que foi traficada, mas não querer falar com as autoridades.

Sugestões práticas

- Verifique tudo o que sabe sobre a pessoa. Indicou a respetiva nacionalidade? Qual a língua que fala? Onde foi encontrada: em instalações com um particular significado, tais como locais de trabalho, bordéis ou infraestruturas de transporte? Qual a idade que afirma ter? Qual a idade que aparenta realmente ter?
- Tente descobrir alguma informação sobre o país do qual a pessoa é proveniente: por exemplo, onde se situa, a cultura e o nível de desenvolvimento. O tempo e outras pressões podem tornar esta situação tudo menos ideal, mas é um ponto de partida para o desenvolvimento do caso.
- Mantenha as vítimas separadas umas das outras e dos suspeitos. Se permitir que as vítimas se juntem, poderão surgir alegações de que combinaram o depoimento. Nas fases iniciais de uma investigação, poderá não conseguir identificar claramente quem é a vítima ou quem é suspeito. É provável que as testemunhas se sintam intimidadas se virem os suspeitos. Porém, a necessidade de manter as vítimas isoladas tem de ser equilibrada com a respetiva necessidade de apoio.
- Se, no início de uma entrevista, questionar uma pessoa sobre assuntos como a idade, poderá prejudicar os seus esforços para estabelecer uma relação empática com a testemunha. Identifique os aspetos com os quais não está satisfeito e planeie a forma como irá investigar ou corroborá-los no futuro.
- Se a pessoa tiver sido encontrada juntamente com outras vítimas, verifique quem são, de onde vêm, quais as línguas que falam e considere a consulta de bases de dados nacionais e internacionais para estabelecer quais os dados existentes sobre estas, caso existam.
- Se as vítimas forem encontradas pelas autoridades competentes, equipas médicas, pessoal de uma ONG ou outras testemunhas, os investigadores devem falar com estas pessoas para saberem quais as circunstâncias em que as vítimas foram encontradas. No caso de terem sido encontradas com outras vítimas, averigue se havia alguma prova de que uma ou mais pessoas exercia domínio ou controlo sobre as possíveis vítimas ou outros elementos do grupo e o que disseram, até esse momento, às pessoas que as encontraram.
- As informações que obtiver destas investigações deverão ajudar a criar um perfil geral do caso. Em algumas circunstâncias, poderá ser necessário fazer perguntas diretas logo no início: por exemplo, se considerar que a vítima, a respetiva família ou outras pessoas podem estar em risco. Muitas vezes, essas perguntas mais diretas dar-lhe-ão uma base que lhe permitirá investigar durante os momentos mais adequados da entrevista.
- A revisão dos dados conhecidos poderá sugerir outras linhas de investigação que devem ser seguidas fora da entrevista. Entre essas linhas de investigação, podemos incluir a verificação da identidade da vítima e seus antecedentes, procedimentos que permitam estabelecer quais as informações disponíveis sobre o tráfico de pessoas no suposto local de origem da vítima.

Intérpretes

Em muitos casos, é provável que seja necessário um intérprete numa das fases iniciais durante o planeamento de uma entrevista. Para este caso, consulte o módulo 10: “A utilização de intérpretes nas investigações de tráfico de pessoas”.

Outras medidas

O sucesso das entrevistas não depende apenas daquilo que acontece na sala. É necessário considerar outros aspetos, tais como, eventuais riscos para a vítima e para outras pessoas, saúde, vestuário, alimentação, alojamento, estatuto de residência e eventual repatriamento da vítima.

Logo que for possível, efetue uma avaliação do risco para a vítima e outras pessoas. Utilize o módulo 5: «Avaliação do risco nas investigações de tráfico de pessoas» para o ajudar neste procedimento. Em alguns casos, poderá, numa das fases iniciais, ser necessário fazer perguntas diretas e específicas para avaliar o risco. Consoante as circunstâncias, essas perguntas poderão ter precedência sobre o estabelecimento de uma relação empática com a vítima.

- Poderá ser necessária uma avaliação psicológica de uma presumível vítima antes de a entrevistar (ver adiante), mas também poderá ser necessária uma avaliação mais básica da respetiva saúde física. A simples observação poderá demonstrar alguma doença óbvia. Planeie um exame e pergunte às vítimas se têm algum problema de saúde.
- Dê às vítimas a opção de receberem outro vestuário. Poderá obter roupas através de patrocínios de lojas, comerciantes locais, organizações de apoio à vítima (incluindo ONG) ou dos fundos da polícia, se os houver disponíveis para o efeito.
- Planeie as refeições das presumíveis vítimas. Evite dar-lhes refeições de detido. As refeições devem ser adequadas à cultura e religião da pessoa.
- Procure um alojamento tendo em conta a avaliação do risco e a adequação do mesmo ao caso específico. Poderá utilizar alojamento disponibilizado pelo Estado, pelas autoridades locais ou por organizações de apoio à vítima, incluindo ONG. Em alguns casos, poderá ser necessário disponibilizar o alojamento recorrendo aos fundos das autoridades competentes.
- Guarde registos de tudo o que fornecer às vítimas. Os bens e serviços facultados devem ser adequados e aceitáveis, mas não extravagantes.
- Logo que lhe for possível, apure quais os direitos de residência que a presumível vítima tem. Se for necessário, contacte o serviço de estrangeiros. Se for possível obter uma autorização de residência temporária na sua jurisdição, deverá iniciar o processo prontamente.

Objetivos das entrevistas

As vítimas de tráfico são vítimas vulneráveis. Os entrevistadores devem ser cuidadosos, sensíveis e atenciosos. Porém, deverão também ter em conta que a inquirição não é aconselhamento. É um método de obter provas e informações. Todas as técnicas adotadas e todas as perguntas feitas devem servir os objetivos de uma entrevista policial/de investigação. Esses objetivos são os seguintes:

- Apurar todos os factos do caso e elaborar um histórico do mesmo tão lógico e sequencial quanto possível;
- Utilizar os factos para corroborar o relato da vítima e a sua credibilidade como testemunha;
- Utilizar as provas para identificar, deter e perseguir criminalmente os traficantes;
- Analisar continuamente o risco para a família da vítima, para outras vítimas e para potenciais vítimas. Se o grau do risco não for aceitável, considere se é vantajoso continuar as entrevistas à vítima e/ou utilizá-la como testemunha;

Identificar oportunidades de investigações pró-ativas, disruptivas ou de desenvolvimento de informações, quer na sequência de um procedimento criminal, quer como alternativa.

As secções seguintes facultam uma estrutura para entrevistas a uma testemunha vulnerável. Tal como foi anteriormente referido, o anexo A disponibiliza checklists que dão ideias sobre qual deve ser o conteúdo das inquirições. As listas foram concebidas para realçar aspetos tais como: a forma utilizada pelos traficantes para «recrutar» ou angariar vítimas, a forma como as exploram e como desenvolvem estas atividades em cada uma das fases do percurso comercial e criminoso que é o tráfico. As probabilidades de a inquirição alcançar os objetivos visados serão maiores se combinar a estrutura da mesma com o conteúdo da checklist.

O resultado das entrevistas efetuadas desta forma poderá, obviamente, ser utilizado em procedimentos criminais contra os traficantes. Mas pode, também, ser utilizado de outras formas. Por exemplo, a divisão das entrevistas por tipos de mercado e processos comerciais permite-lhe identificar, com exatidão, outras investigações ou inquéritos que estejam a decorrer no seu país ou no estrangeiro.

Elaboração de um plano escrito

Antes de iniciar uma entrevista, é importante que tenha um plano escrito. As entrevistas a vítimas de tráfico são normalmente complexas devido à natureza deste processo, ao número

de pessoas e locais que podem estar envolvidos e ao efeito de vitimização na testemunha.

Uma estrutura sugerida para este plano é a de criação de uma lista com as fases da entrevista (Planeamento e preparação, Abordagem e explicação, Depoimento, Conclusão e Avaliação). Em cada uma destas fases, poderá anotar pontos que o lembrem de fazer determinadas tarefas, dizer algo ao entrevistado ou colocar perguntas específicas.

Através da orientação disponibilizada no resto deste módulo, poderá planear a forma como vai utilizar os princípios de «Alcançar a melhor prova» para conduzir todas as fases da entrevista. Por exemplo, na fase «Abordagem e explicação», poderá registar uma nota para informar o entrevistado sobre a forma como pretende registar a entrevista e perguntar-lhe se aceita essa forma.

Na fase do depoimento, poderá optar por anotar perguntas específicas que pretenda fazer ao entrevistado. É provável que utilize as informações que já tem como base para as perguntas, mas poderá optar também por utilizar algumas das perguntas sugeridas no anexo A deste módulo.

A criação de uma lista dos aspetos principais que devem ser abordados numa inquirição pode ajudar a manter o rumo certo desta, o que pode ser particularmente útil no caso de a vítima prestar um depoimento muito extenso que inclua muitos detalhes irrelevantes para a investigação. A lista evitará que o(s) entrevistador(es) se perca(m) nos detalhes.

Os planos escritos não têm de ser complexos e é importante que sejam flexíveis, uma vez que a testemunha poderá relatar factos que levem a uma alteração completa do plano inicial.

Reunião de planeamento

É recomendada uma reunião de planeamento entre a polícia e o Ministério Público ou entidade competente para exercer a ação penal, para discussão das questões relevantes. Na decisão sobre se uma testemunha vulnerável deve ser inquirida, deverá ser mantido um equilíbrio entre a necessidade de obter a melhor prova e os interesses da testemunha. Também deverá ser alcançado um acordo sobre a forma como será registada a declaração. Consulte a secção “Como será registada a entrevista?” adiante.

Avaliar a testemunha

Poderá ser aconselhável a realização de uma avaliação individual levada a cabo por um especialista com o objetivo de identificar quaisquer dificuldades específicas que a testemunha possa ter na produção de um depoimento satisfatório.

A avaliação deve ser efetuada depois do primeiro contacto da vítima com a polícia e antes da primeira entrevista. Antes da avaliação, as entrevistas devem limitar-se a um número reduzido de assuntos, com o objetivo de proteger a vida da pessoa entrevistada ou de outras vítimas, ou para impedir a fuga do suspeito.

Esta avaliação deve ser efetuada depois do primeiro contacto da vítima com a polícia e antes da primeira inquirição e pode ser efetuada por um médico ou por outras pessoas com a formação adequada. Todas as avaliações devem ser efetuadas em conformidade com os requisitos da legislação local e devem ter em conta a condição física e psicológica da vítima. O material disponível no módulo 3: «Reações psicológicas das vítimas de tráfico de pessoas» proporciona mais detalhes sobre os efeitos e as implicações do processo de tráfico sobre as vítimas.

Decisões tomadas com base em avaliações

Poderá haver circunstâncias nas quais um examinador conclua que uma pessoa não se encontra na condição necessária para ser entrevistada ou que uma entrevista provocaria um novo trauma. Nestas circunstâncias é, em regra, recomendada a colocação dos interesses da vítima em primeiro lugar. Contudo, poderá haver circunstâncias que justifiquem avançar para a entrevista, independentemente desta recomendação.

Apesar de ser uma decisão muito difícil de tomar, é possível que uma vítima tenha informações que possam levar ao resgate de outras vítimas em risco grave. A entrevista poderá ser prejudicial para a própria vítima, mas o resultado desta pode salvar muitas outras. Noutras circunstâncias, é possível que uma vítima não consiga fornecer informações de nível probatório mas que forneça outras informações valiosas.

Se tiver de ser tomada a decisão de avançar com a entrevista em oposição às recomendações da avaliação, aquela apenas deve abordar os aspetos estritamente necessários, para evitar provocar traumas mais graves. Se este procedimento for seguido, poderão ser necessárias medidas de apoio adicionais para as vítimas.

Em todos os casos, a decisão deve considerar o necessário equilíbrio entre o eventual prejuízo que pode causar a uma pessoa e a possibilidade de ajudar outra ou outras.

Algumas testemunhas vulneráveis podem não estar habituadas a falar com estranhos. As testemunhas que se sintam intimidadas podem sentir-se assustadas e podem precisar de algum tempo para conhecerem o entrevistador antes de se sentirem prontas ou estarem dispostas a prestar depoimento.

O planeamento deve ter em conta as capacidades e as possíveis incapacidades das testemunhas vulneráveis. É provável que seja necessário mais tempo para garantir que as testemunhas conseguem compreender e responder às dificuldades e pressões que enfrentam, devido à obrigação de fazerem uma declaração/depoimento que seja aceitável em tribunal. Deve ser dada uma atenção constante às questões de idade, género, raça, cultura, religião e língua. Pode ser contactado um especialista ou uma pessoa responsável que conheça bem a vítima para dar uma opinião sobre se a testemunha beneficiaria com alguma proteção especial ou medidas de apoio.



Orientação prática

Sempre que for possível, é uma boa prática ter apoio disponível para dar resposta a questões não diretamente relacionadas com a entrevista.

O estabelecimento da relação de confiança pode demorar algum tempo e, por conseguinte, durante a preparação, os entrevistadores devem ponderar se deve ser planeada uma reunião (ou mais) com a testemunha antes da prestação de depoimento. Este tipo de reunião deve ser levado a cabo em conformidade com os requisitos da legislação aplicável. Em algumas jurisdições, qualquer reunião deste tipo é considerada uma entrevista e é registada. Independentemente dos requisitos impostos pela sua jurisdição, é recomendado que registe tudo o que for dito durante estas reuniões para evitar que a defesa alegue que a vítima foi induzida a fazer determinadas declarações ou depoimentos.

A preparação deve também considerar o local mais adequado para a entrevista entre outros aspetos importantes, tais como pausas regulares para repouso e intervalos para permitir que a testemunha se movimente pela sala, caso lhe seja difícil permanecer sentada durante muito tempo.

Local da entrevista

Em muitas jurisdições, o local da entrevista é determinado pela lei. Se este não for o caso na sua jurisdição, a pergunta será: Onde deverá realizar a entrevista? Deverá a testemunha deslocar-se a um local familiar ao entrevistador mas estranho para si, ou será possível entrevistá-la num local que lhe é familiar e no qual se sente confortável?

Seguem-se alguns dos aspetos que deverá considerar relativamente ao local:

- A vítima/testemunha ficará incomodada se a entrevista for realizada num local que lhe é estranho?
- A realização da entrevista num local familiar à vítima/testemunha terá um efeito negativo sobre o seu depoimento?
- É possível disponibilizar o apoio adequado (por exemplo, intérpretes, serviços de saúde, etc.) no local escolhido? Esta questão é especialmente importante nos casos que envolvem vítimas gravemente traumatizadas.
- O local é seguro, limpo e isento de interrupções e distrações, e tem as condições necessárias para que o entrevistado não seja visto nem ouvido por terceiros?
- O equipamento necessário está a funcionar e estão disponíveis os «meios» necessários?

As entrevistas não devem ser realizadas na casa da vítima nem na sua área de residência.

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Orientação prática

- Alguns serviços de polícia dispõem de salas destinadas à investigação de crimes sexuais. Normalmente, estes locais incluem salas confortáveis e com um ambiente acolhedor, adequando-se à realização de entrevistas.
- Poderá ser necessário realizar as entrevistas em locais que não sejam os ideais. Alguns procedimentos simples podem contribuir para melhorar este tipo de instalações. Poderá alterar a disposição da mobília para que não haja mesas nem secretárias entre a testemunha e o entrevistador e usar as cadeiras mais confortáveis disponíveis. Os papéis e o lixo devem ser recolhidos. Deverá certificar-se de que os participantes da entrevista não serão incomodados durante a mesma, assegurando-se de que há silêncio na sala.

Como será registada a entrevista?

As entrevistas podem ser registadas através de três formas básicas: vídeo, registo áudio e registo escrito.

A decisão sobre qual a forma de registo a utilizar nem sempre é tão simples como possa parecer. Em algumas situações, a escolha é óbvia: se não tiver equipamento de vídeo disponível, é claro que terá de excluir essa opção. Vários fatores poderão influenciar ou

mesmo determinar a forma de registo da entrevista: o equipamento disponível, a escolha da testemunha, a legislação aplicável e aspetos táticos.

É muito importante que, independentemente da forma utilizada, a vítima compreenda totalmente o que irá acontecer, qual a utilização que será dada ao registo, e que preste o seu consentimento informado. Se a testemunha tiver de depor em tribunal para confirmar o seu depoimento anterior, deverá ser informada da necessidade e objetivo do seu depoimento. De igual modo, deve ser-lhe explicada a forma como as declarações feitas aos investigadores serão examinadas em tribunal.

Se for necessário, consulte um especialista sobre a adequação de uma forma de registo. O aconselhamento especializado poderá ser fornecido por médicos, psicólogos e assistentes sociais e justificar-se, por exemplo, quando no início do processo, uma pessoa aparenta estar particularmente vulnerável ou ter alguma forma de deficiência mental. Tenha em atenção que uma situação de vulnerabilidade ou de deficiência pode apenas tornar-se evidente à medida que a entrevista evolui, pelo que poderá ser necessário reavaliar a forma de registo.

As inquirições às vítimas de tráfico podem, por vezes, demorar longos períodos de tempo, pelo que também devem ser ponderados os eventuais custos.

Em algumas circunstâncias, poderá ser necessário registar uma entrevista de uma forma que pode não ser a ideal. Por exemplo, numa situação de urgência na recolha de informações em que não tenha disponível equipamento vídeo ou áudio, o registo escrito poderá ser a única opção.



Orientação prática

Registo vídeo

- O registo de vídeo de entrevista à vítima deverá ser norteado da garantia do seu melhor interesse, na observância dos requisitos legais nacionais.
- O registo em vídeo é a opção mais indicada para as inquirições a vítimas vulneráveis, desde que esteja disponível o material necessário e o ordenamento jurídico do seu país o permita. Esta forma de registo tem a vantagem de demonstrar a condição da testemunha, revelando os sinais não-verbais e ajudando, em muitos casos, a obter um depoimento fluido e natural e reduzindo também o número de entrevistas necessárias. Tudo isto ajuda também a reduzir a “vitimização secundária” do processo de investigação.
- Em algumas jurisdições, o registo vídeo pode ser utilizado em tribunal. Isto pode significar que uma vítima pode ser devolvida ao seu local de origem (com o devido apoio) sem ter de aguardar para testemunhar em tribunal¹, ou que as entrevistas podem ocorrer num país e serem apresentadas em tribunal noutro².
- Apesar de tudo, as entrevistas em vídeo apresentam algumas desvantagens. As vítimas de tráfico podem reagir de formas imprevisíveis: alguns investigadores verificaram que este método pode envolver «humor» inadequado, que as vítimas utilizam como forma

de escape emocional. Se este método for utilizado imediatamente após o resgate de uma situação de exploração sexual, a vítima poderá relacionar-se com os entrevistadores da forma como está habituada a fazê-lo, devido à experiência traumática por que passou. Alguns exemplos são a hostilidade e agressividade para com o entrevistador e a produção de comentários sexualmente inadequados. O registo destes comportamentos em vídeo pode criar mais dificuldades durante o processo judicial.

- Por vários motivos, as vítimas podem não querer ser filmadas. Um receio comum é a possibilidade de os traficantes ou os respetivos cúmplices conseguirem obter o suporte da gravação, identificando assim a testemunha. Algumas objeções podem estar relacionadas com as crenças das vítimas, nomeadamente religiosas.
- Se observados os requisitos legais previstos na legislação do seu país para salvaguardar a admissibilidade do depoimento a ser recolhido, é possível ocultar eletronicamente a identidade da pessoa que está a ser entrevistada, sendo certo que este processo é muitas vezes dispendioso e moroso.
- As entrevistas em vídeo podem ter de ser totalmente transcritas (ou seja, cada uma das perguntas e respostas é passada para suporte escrito) para poderem ser utilizadas como provas em algumas jurisdições. Este procedimento não é, porém, necessário em todas as jurisdições.

Registo áudio

- No caso do registo em áudio da entrevista à vítima, este deverá ser norteado da garantia do seu melhor interesse, na observância dos requisitos legais nacionais.
- O áudio tem as vantagens de estar muito mais disponível do que o vídeo, ser mais portátil, implicar menos custos e utilizar tecnologia simples e resistente. O depoimento da vítima é registado na totalidade e o equipamento possibilita uma entrevista fluida.
- A utilização do registo áudio nas inquirições de tráfico pode ajudar a reduzir as preocupações das vítimas em serem identificadas ou que a respetiva imagem seja utilizada para as prejudicar.
- Obviamente, não captura a condição física visível nem as comunicações não-verbais da vítima. Este método tem assim vantagens em algumas circunstâncias e desvantagens noutras.

¹ No ordenamento jurídico português, esta possibilidade está sujeita aos requisitos previstos nos artigos 271.º e 294.º do Código do Processo Penal. Na fase de julgamento, é igualmente admissível o depoimento por vídeo-conferência.

² No ordenamento jurídico português esta possibilidade não depende da forma de registo das declarações, sendo admissível a expedição de cartas precatórias ou rogatórias para recolha de depoimentos de pessoas que se encontrem fora da área de jurisdição do tribunal e conforme se encontrem no território nacional ou no estrangeiro, respetivamente; cfr. Art.º 318.º e Art.º 356.º, n.º 1 al. c), ambos do CPP.

Registo escrito

- O registo escrito tem a vantagem de ser muito simples e de estar disponível universalmente. Um registo escrito elaborado em conformidade com a legislação e os procedimentos do seu país será aceite pelos tribunais, sendo necessário pouco trabalho adicional.
- As desvantagens para as investigações de tráfico são o tempo necessário para escrever tudo (o que é especialmente importante se considerarmos que as entrevistas a vítimas de tráfico já são bastante morosas), a possibilidade de este processo quebrar o fluxo narrativo necessário durante a fase do depoimento inicial e o facto de ser difícil registar tudo o que é dito. Em muitas destas entrevistas, será necessária a utilização de um intérprete. Este requisito adiciona mais uma complicação, uma vez que as notas tiradas por este podem não registar tudo o que é dito pelo entrevistador, o que possibilita que ocorram dúvidas em tribunal sobre a exatidão das declarações.
- Se proceder ao registo escrito da entrevista, é especialmente importante que utilize dois entrevistadores, um para fazer as perguntas e outro para registar o que for dito. As pessoas têm potenciais diferentes umas das outras: decida quem é mais apto para cada função.

Quem deve entrevistar/inquirir a vítima?

Muitas jurisdições têm uma legislação e práticas estabelecidas que determinam quem deve entrevistar/inquirir as vítimas. Se for permitido pelo seu sistema legal, é uma boa prática usar dois inquiridores, um para desenvolver o depoimento da vítima e colocar as perguntas, e o outro para agir como observador (observando a linguagem corporal, por exemplo) e tirar notas gerais.

No caso de o inquiridor/entrevistador não conseguir estabelecer uma relação de empatia com a vítima, é preferível trocar imediatamente de inquiridor/entrevistador.

Formação de entrevistadores/inquiridores

Nos Países Baixos, é necessário que os inquiridores/entrevistadores de testemunhas vulneráveis tenham uma formação específica, que tem uma duração superior a um ano.

Atualmente, há várias unidades em todo o mundo que têm um mandato específico para investigação do tráfico. Algumas destas unidades incluem inquiridores com uma vasta experiência na inquirição de vítimas de tráfico. Porém, de uma forma mais geral, quando é necessário recorrer a inquiridores especializados, estes são provenientes de unidades não diretamente especializadas em investigações de tráfico, sendo mais comum a experiência em investigações de violência doméstica e de crimes sexuais. Todavia, em muitos casos, os investigadores não têm formação específica na inquirição a vítimas vulneráveis, ou têm uma experiência limitada na realização destas.

Cada um destes grupos pode representar um desafio diferente para uma investigação. No centro desses desafios está a tensão entre as práticas de investigação e de inquirição levadas a cabo pela polícia e as práticas que são adequadas às investigações de tráfico.

Uma equipa especializada em inquirições a vítimas de tráfico de pessoas, dedicada e a funcionar a tempo inteiro, poderá proporcionar a melhor probabilidade de sucesso na inquirição de uma vítima, mas este recurso é provavelmente demasiado dispendioso para a maioria dos serviços de polícia. Existem algumas unidades especializadas que têm alguns dos requisitos necessários, embora não todos.

Os investigadores sem experiência ou formação prévia na inquirição de testemunhas vulneráveis podem tratar a vítima da mesma forma que tratariam qualquer outra testemunha. Foi observado e registado que alguns investigadores questionam a veracidade do depoimento de uma vítima demasiado cedo e em fases inadequadas.

Se for possível, nas entrevistas às vítimas de tráfico, devem ser usados entrevistadores com formação em trabalho com testemunhas vulneráveis. Se em relação às vítimas de tráfico para exploração sexual há provas da sua vulnerabilidade, nas outras formas de tráfico isso não acontece, devendo no entanto todas elas ser consideradas vítimas vulneráveis.

Género dos entrevistadores/inquiridores

Apesar de a legislação de alguns países exigir que as vítimas do sexo feminino de alguns crimes sejam inquiridas por pessoas do mesmo sexo, há provas de que algumas vítimas se relacionam melhor com membros do sexo oposto. Os motivos não são inteiramente claros, mas podem estar relacionados com experiências culturais e individuais.

O género do entrevistador/inquiridor não é uma garantia de qualidades específicas. Tanto os homens como as mulheres podem ser compreensivos, motivados e profissionais. Da mesma forma, tanto os homens como as mulheres podem ser desinteressados, mal-educados e incompetentes.

Fundamentação para a utilização de entrevistadores / inquiridores do sexo masculino

Foi reportado por algumas jurisdições que têm sido usados agentes do sexo masculino para inquirir/entrevistar presumíveis vítimas/testemunhas do sexo feminino em casos de exploração sexual, com o argumento de que esta opção demonstra às vítimas que nem todos os homens são iguais aos que as traficaram.

Esta abordagem tem o perigo de impor valores à vítima e de lhe reduzir a sensação de controlo, além de poder ser demasiado intimidante. Por isso, não parece adequado que, apenas por esta razão, a inquirição/entrevista de uma vítima do sexo feminino seja realizada por um inquiridor/entrevistador masculino.

Sempre que for possível dar à vítima a oportunidade de escolha do género do inquiridor, aquela deve poder decidir livremente.

É igualmente importante avaliar durante a inquirição/entrevista se a relação entre os intervenientes permite salvaguardar os interesses da vítima. O género é apenas um dos possíveis fatores da ineficácia da relação, mas apesar disso deve ser considerado.

Muitas inquirições/entrevistas a vítimas de tráfico requerem a presença de intérprete e, em alguns casos, de um apoio social. A função e a gestão de ambos os grupos requerem um especial cuidado e atenção. Nunca use o mesmo intérprete (ou assistente social) para inquirir/entrevistar presumíveis vítimas e o suspeito.

Recurso a organizações não-governamentais (ONG)

Existem várias políticas para o uso de pessoal de organizações não-governamentais (ONG) e outras instituições.

Em alguns países, agentes das autoridades e representantes de ONG realizam conjuntamente entrevistas a vítimas. Os agentes das autoridades que têm utilizado esta abordagem referem que proporciona uma conjugação eficaz de capacidades e que pode ajudar a criar uma relação de confiança com as presumíveis vítimas.

Alguns países levam este procedimento um pouco mais longe. Nestas jurisdições, as entrevistas iniciais e a avaliação inicial são efetuadas por pessoal de uma ONG. As autoridades competentes apenas iniciam o seu trabalho depois desta avaliação declarar a vítima como preparada.

No outro extremo, existem alguns países que permitem a participação de representantes das ONG em entrevistas realizadas pelas autoridades competentes apenas em circunstâncias muito limitadas e com restrições, podendo ter autorização para estarem presentes mas não para intervirem na entrevista. Em algumas jurisdições, a sua intervenção não é permitida de todo.

Apesar de poder haver vantagens na participação das ONG, há também o risco de a defesa alegar que o entrevistador da ONG não foi imparcial, que fez perguntas direcionadas durante a entrevista ou que preparou as respostas da testemunha.

Os profissionais do sistema de justiça criminal devem estar cientes de que as ONG terão provavelmente termos de referência diferentes dos seus próprios quando lidam com casos de tráfico de pessoas. Muitos destes termos de referência serão compatíveis com as metas e objetivos do sistema de justiça penal, mas podem existir conflitos de interesse em algumas áreas. Um exemplo disso são os casos em que o financiamento de uma ONG possa depender da identificação das vítimas. É possível que esta necessidade de financiamento dê origem a uma avaliação pouco objetiva das declarações da presumível vítima.

Um Estado pode negar um pedido de extradição caso a pessoa objeto desse pedido já tenha sido julgada pelo crime a que se refere o pedido.

Utilização de apoio social / intermediários na entrevista

A função do «apoio social»/ intermediário é provavelmente determinada pela legislação do seu país. Em algumas jurisdições, estes ajudam à compreensão entre inquiridor e testemunha. Não se trata de uma função de tradução, mas sim de apoio na comunicação quando houver possibilidade de uma vítima não conseguir compreender as perguntas devido a diferenças culturais ou porque seja muito jovem. Noutras jurisdições, o apoio que podem prestar é limitado. Seja qual for a função exata que exerçam, não podem interferir na entrevista, mudar aquilo que está a ser dito nem persuadir os entrevistados a alterarem o seu depoimento.

No caso de já conhecer a testemunha, estarão disponíveis informações úteis relativamente aos métodos de comunicação daquela. Se assim for, na fase de planeamento, deverá ser assegurado que o intermediário não interveio nos acontecimentos em causa. Além disso, a fase de planeamento deve ter em conta o tempo adicional à duração da entrevista caso seja usado um intermediário na entrevista.

Se for possível, averigue antes da entrevista se a testemunha pretende ter alguém presente e, em caso afirmativo, quem deverá ser essa pessoa. O inquiridor terá de explicar ao assistente da inquirição que não deverá interpelar a testemunha nem falar em seu nome, especialmente em assuntos relevantes para a investigação.



Orientação prática

- Se for necessária a presença de um intérprete e de uma pessoa para prestar apoio numa entrevista, terá de estar presente uma pessoa diferente para cada função. Uma única pessoa não poderá exercer ambas as funções.
- Em algumas jurisdições, a lei estabelece que a vítima disponha de apoio na inquirição, caso se trate de uma pessoa vulnerável, sendo mesmo obrigatória, em algumas, a presença de um técnico que assegure esse apoio em determinadas circunstâncias (por exemplo, nas entrevistas a menores de idade). Noutros casos, esta presença apenas poderá ter lugar mediante consentimento. Em todos os casos, constitui uma boa prática a explicação clara do que é proposto e, sempre que possível, a obtenção do consentimento da vítima.
- A decisão sobre quem deve prestar apoio nos casos de tráfico deve ser tomada com muito cuidado. É provável que a vítima (especialmente nos casos de exploração sexual) apenas tenha «amigos» e conhecidos ligados de alguma forma ao tráfico. Sempre que usar alguém conhecido da vítima, o inquiridor terá que ser muito cuidadoso. Deve sempre ter presente que um «amigo» da testemunha poderá ter ligações aos suspeitos de tráfico.
- Em circunstância alguma «a pessoa que presta apoio» poderá participar na entrevista se houver suspeitas de que possa estar envolvida nos acontecimentos sob investigação.
- Mesmo quando não há nenhuma ligação entre a pessoa que presta o apoio e o traficante, aquela poderá ser facilmente identificada, ameaçada ou subornada, especialmente se for proveniente de uma comunidade pequena.
- O consentimento da testemunha relativamente ao apoio de outrem na inquirição poderá não ser genuíno, devido à intimidação como consequência da vitimização. Tenha um cuidado especial se alguém oferecer ajuda sem que a tenha pedido.
- O planeamento e a realização de entrevistas que envolvam a presença de assistentes demora mais tempo do que as entrevistas sem a presença destes, dado que terá de os localizar, informá-los sobre o caso e certificar-se de que poderão comparecer na entrevista.
- Os serviços sociais, as ONG e as organizações voluntárias poderão ajudar, mas também é necessário ter cuidado nestes casos. O assistente terá, provavelmente, de dedicar muito tempo à testemunha; para além de que, presenciar os depoimentos das vítimas de tráfico pode ser bastante inquietante e as vítimas podem demonstrar vários sintomas de perturbação. Se o assistente não contar com esta situação ou não conseguir lidar com ela, poderá abandonar a entrevista, podendo deixar a testemunha (e a sua investigação) em pior situação.
- Poderá tentar localizar um profissional ou um membro de uma ONG que conheça a presumível vítima/testemunha e que corresponda ao perfil necessário para servir como assistente/intermediário.

Se considerar que a presença de um assistente numa entrevista não é adequada, ou se a legislação a proibir, considere a sua intervenção noutras fases do processo, como imediatamente antes ou depois da entrevista.

Duração da entrevista

Um aspeto importante é o facto de estas inquirições demorarem muito mais tempo do que as da maioria das investigações. Esta situação deve ser tida em conta na fase de planeamento, particularmente ao decidir quem poderá realizar a entrevista, a disponibilidade dos intérpretes, etc. e a frequência e a duração dos períodos de descanso. Os tópicos «Ritmo» e «Duração» (mais à frente neste módulo) disponibilizam orientação para as questões específicas das inquirições a vítimas/testemunhas de tráfico.

Intimidação

Se houver a suspeita de que o depoimento da testemunha possa ser afetado negativamente por meio de ameaça e intimidação, deverá ser especialmente considerado apoio necessário para lidar com essas intimidações. O módulo 12: «Proteção e apoio a vítimas/testemunhas nos casos de tráfico de pessoas» proporciona uma orientação nesta área.

	Autoavaliação
<p>Quais os aspetos práticos a considerar no planeamento de uma entrevista a uma presumível vítima/testemunha de tráfico de pessoas?</p> <p>Quais os aspetos que devem ser considerados durante o planeamento e a preparação de uma entrevista a uma vítima/testemunha de tráfico?</p>	

Abordagem e explicação

Comportamento do entrevistador

Quando conhecemos pessoas novas, podemos ter um comportamento diferente daquele que normalmente teríamos. As pessoas vulneráveis conseguem, muitas vezes, aperceber-se deste comportamento estranho e podem identificá-lo como sinal de desconforto.

Na maioria dos casos de tráfico, é pouco provável que já tenha conhecido a pessoa que vai entrevistar. Há também uma forte probabilidade de a pessoa ser proveniente de uma cultura diferente da sua e até de uma cultura que conheça mal. A vítima pode falar uma língua diferente da sua e ter poucas vivências em comum consigo. É compreensível se se sentir desconfortável nestas situações.



Orientação prática

- Monitorize o seu comportamento ao longo da inquirição e tente mantê-lo tão normal quanto possível dadas as circunstâncias. Os inquiridores devem considerar especialmente a forma como irão gerir os minutos iniciais da inquirição.
- Os entrevistadores devem evitar parecer desconfortáveis ou inseguros em relação à forma como se devem comportar na presença de pessoas com as quais estiveram poucas vezes. Deve tentar passar uma imagem de confiança e tranquilidade, mas também evitar comportamentos que as testemunhas vulneráveis possam considerar humilhantes, não-sinceros ou paternalistas.
- Para obter informações exactas de uma testemunha vulnerável, terá de ser sensível em relação às necessidades de comunicação da testemunha e ao seu impacto na inquirição. Tente concentrar-se na testemunha como pessoa e não na sua vulnerabilidade nem na sua função de possível fonte de provas.
- Sempre que for possível, explique à testemunha as razões que justificam o tipo de perguntas que lhe faz. Se a vítima compreender melhor o objetivo das perguntas, terá mais facilidade em colaborar consigo e irá sentir-se menos frustrada.
- Algumas testemunhas vulneráveis optam por colocar-se o mais próximo possível ou o mais longe possível do inquiridor do que outras testemunhas. Tenha atenção às suas próprias reações a esta decisão.
- Deve tentar agir de forma amigável e prestável com as testemunhas vulneráveis, mas sem demonstrar sinais de insegurança, ansiedade ou embaraço.
- Algumas testemunhas vulneráveis podem não conseguir comunicar consigo da forma que espera. As testemunhas podem não ter muita experiência em comunicar com estranhos.
- Certifique-se de que não utiliza linguagem ou atitudes sexistas ou discriminatórias ao falar com a vítima.

Há uma grande probabilidade de as vítimas vulneráveis ficarem traumatizadas e perturbadas. As vítimas de tráfico podem ter sido abusadas durante um longo período de tempo, por muitas pessoas. O controlo sobre as respectivas vidas pode ter-lhes sido retirado há meses ou até anos. Esta situação tem um efeito de trauma profundo, forte e prolongado, podendo resultar em vários comportamentos que os investigadores poderão não compreender e com os quais poderão ter dificuldades em lidar.

Apesar de utilizarmos o termo «vítima», devemos ter em conta que as vítimas de tráfico são também sobreviventes. Para sobreviverem, tiveram de desenvolver formas de lidar com a situação na qual se encontravam, uma das quais é provavelmente suspeitarem de tudo o que lhes for dito.

Estas circunstâncias originam um comportamento que pode ser imprevisível, irritado ou agressivo para com o inquiridor e outros profissionais.



Orientação prática

É necessário reconhecer que é difícil lidar com esta situação. A preparação antes da inquirição ajudará a criar um ambiente mais confortável. Considere as seguintes opções:

- Fale com as pessoas que já trabalharam com a vítima no sentido de desenvolver uma ideia do que aconteceu até esse ponto do processo.
- Se a vítima já tiver desenvolvido uma relação positiva com a primeira pessoa a chegar à cena ou com outra, considere encontrar-se com a vítima e essa pessoa antes de realizar a inquirição. Fale sobre assuntos neutros, como confirmar se a vítima não tem fome ou sede, etc. e explique os procedimentos.
- Tente obter informações básicas sobre a cultura de origem da vítima. Poderá solicitar informações no seu serviço, pedir ajuda a uma ONG ou questionar a vítima. Os intérpretes e assistentes sociais também poderão eventualmente ajudar. No entanto, tenha cuidado: a identidade cultural é complexa e, só porque alguém fala o idioma da vítima ou conhece pessoas da cultura da vítima, não está automaticamente qualificado para o poder aconselhar adequadamente.
- Consulte os outros participantes na inquirição (por exemplo, intérprete, pessoa de apoio, assistente social) para conhecer a opinião desses participantes sobre o que a testemunha sente em relação a si. Os outros participantes podem ter notado que a testemunha não está confortável em relação a algo ou a testemunha pode ter-lhes dito que não está contente. Descubra qual é o problema e faça o que puder para o corrigir ou explique-o à vítima.

Ritmo

A vulnerabilidade de muitas testemunhas exige que as inquirições sejam realizadas a um ritmo mais lento do que o normal. Tanto os estudos como as boas práticas permitiram constatar que os investigadores têm de:

- Reduzir a velocidade a que falam;
- Dar mais tempo à testemunha para que esta assimile o que foi dito;
- Dar tempo à testemunha para que esta prepare uma resposta;
- Ser pacientes se a testemunha responder lentamente, especialmente se estiver a ser usado um intermediário;
- Evitar colocar imediatamente a pergunta seguinte;
- Reservar algum tempo para períodos de silêncio, o que também permite preparar melhor a entrevista;
- Evitar interromper a vítima.

A inquirição deve decorrer ao ritmo estabelecido pela testemunha.

Nos casos em que for usado um intérprete, deverá utilizar frases curtas e perguntas concisas.

Dê tempo para que a pergunta e a resposta sejam interpretadas antes de colocar mais perguntas.

Intervalos

Em regra, as inquirições a vítimas vulneráveis não só devem ser realizadas a um ritmo mais lento do que as inquirições a outras testemunhas, mas também ter mais intervalos e pausas. Muitas testemunhas vulneráveis não conseguem concentrar-se durante tanto tempo como as outras e algumas também precisam de intervalos regulares para descanso. O entrevistador deve combinar com a testemunha um sinal simples (por exemplo, o uso de um cartão especial) que a testemunha possa usar para pedir um intervalo. O intervalo pode proporcionar uma pausa para repouso. Estes intervalos nunca devem ser usados para induzir ou influenciar a testemunha.

Intervalos e controlo

As entrevistas a vítimas de tráfico podem continuar durante muitos dias, devido aos elevados níveis de trauma sofridos pela vítima e ao impacto que estes têm sobre o seu processo cognitivo. No planeamento dos intervalos, poderá ter de considerar a necessidade de parar várias vezes ao fim do dia para continuar no dia seguinte.

O acordo entre o entrevistador e a testemunha relativamente aos intervalos é uma forma simples de começar a dar às vítimas de tráfico uma sensação de controlo, o que é especialmente importante para as ajudar a iniciar a recuperação. A recuperação do controlo também aumentará provavelmente a exatidão do depoimento que receberá.

Duração

As inquirições a presumíveis vítimas/testemunhas de tráfico podem demorar mais do que a generalidade dos casos devido aos efeitos do trauma e à complexidade dos casos. É provável que as inquirições prolongadas sejam bastante desgastantes para as vítimas. A necessidade de um depoimento completo e exato deve ser equilibrada com a necessidade que a vítima tem de se restabelecer. Nestas circunstâncias, as entrevistas devem ser o mais curtas possível.

Estabelecer uma relação de empatia

As fases iniciais são decisivas para o sucesso de uma entrevista.

Um período substancial dedicado ao estabelecimento de uma relação dará ao inquiridor tempo para se familiarizar com a forma de comunicação preferida da testemunha e para se tornar mais competente na utilização da mesma. Esta fase também deve permitir que as decisões tomadas durante a fase de planeamento sejam revistas.

Iniciar uma entrevista

- Apresente-se, diga qual é o seu cargo, informe se tem experiência neste tipo de trabalho e, se for o caso, que já conheceu e entrevistou pessoas em situações semelhantes.
- Explique a situação atual à pessoa vítima de tráfico. Explique o objetivo da entrevista e a função das outras pessoas que possam estar presentes na entrevista como, por exemplo, o intérprete, outros agentes da polícia, etc.
- Deve ser dada uma explicação sobre a forma como a entrevista será registada. Esta explicação pode ser tão simples como dizer «Vou falar consigo e o meu colega vai anotar aquilo que nós dissermos», ou pode passar pela explicação do uso do equipamento técnico, como o vídeo. Pergunte ao entrevistado se se sente confortável com a forma como a entrevista será registada.
- Nos casos em que tiver informações muito limitadas, poderá optar por realizar uma entrevista inicial com o objetivo de obter informações que lhe permitam desenvolver um plano para as entrevistas seguintes.

Outro grande objetivo do estabelecimento de uma relação de empatia é ajudar a testemunha e também o inquiridor a relaxar e a sentirem-se o mais confortáveis possível. À medida que os inquiridores se familiarizam com a inquirição a testemunhas vulneráveis, podem sentir-se tentados a encurtar as fases de estabelecimento de relação. O inquiridor deve evitar esta situação porque, apesar de já estar familiarizado com estas inquirições, as testemunhas podem não estar.

Primeiras entrevistas

A primeira entrevista pode ser de carácter genérico, tendo como objetivo principal estabelecer uma relação com o entrevistado. Em alguns casos, poderá ser adequada a realização de uma série de entrevistas dedicadas a este objetivo antes de avançar para a recolha de prova.

Em algumas jurisdições, a realização de diversas entrevistas ao longo de um determinado período de tempo pode ser usada para sugerir que a vítima foi instruída pelos entrevistadores. Fale com os procuradores caso pretenda usar esta abordagem, de forma a permitir-lhes a preparação da resposta às alegações da defesa e a explicação dos motivos ao tribunal.

Na fase do estabelecimento da relação, o entrevistador não deve referir o alegado crime nem quaisquer tópicos relacionados com este. Normalmente, a testemunha é convidada a falar sobre assuntos «neutros» da sua vida (por exemplo, interesses ou hobbies). Seja cuidadoso ao falar sobre a família dos entrevistados em casos de tráfico: é um tema que poderá perturbar a vítima devido à longa separação e aos receios sobre o que a sua família poderá dizer se regressar ou falar sobre a experiência a que foi sujeita.

Num momento oportuno da fase do estabelecimento da relação, se a testemunha ainda não tiver abordado o assunto, o inquiridor deverá falar brevemente com aquela sobre o motivo da inquirição, não referindo diretamente o alegado crime. Os inquiridores devem ter em conta que, apesar de algumas testemunhas tentarem, desde o início, estabelecer claramente os motivos da inquirição, outras não o farão.

Algumas testemunhas poderão sentir que, por terem colaborado, ainda que de forma lícita, com alguém que posteriormente cometeu um crime, poderão ser cúmplices. O entrevistador também deve ter em conta que algumas testemunhas vulneráveis assumirão que estão a ser inquiridas por terem feito algo errado. O entrevistador poderá ter de tranquilizar a testemunha sobre este aspeto, não devendo, no entanto, fazer promessas ou previsões relativamente ao resultado da inquirição. A entrevista deve ser realizada, tanto quanto possível, numa atmosfera «neutra», pelo que o entrevistador deve ter especial cuidado para não expressar a sua opinião relativamente à culpabilidade de determinada pessoa cuja conduta ilegal possa ser o motivo da entrevista.

Além disso, ser entrevistado não é um acontecimento usual para pessoas que provavelmente não estão habituadas a conversar com alguém que questiona a veracidade das suas declarações. Este aspeto é especialmente importante numa entrevista realizada por um estranho que é também uma autoridade. Uma testemunha pode entrar na entrevista confusa relativamente ao objetivo da mesma, ansiosa relativamente ao processo e ao resultado e possivelmente perturbada pelos acontecimentos anteriores. Além disso, algumas testemunhas podem não compreender o motivo pelo qual estão a ser questionadas sobre experiências humilhantes e dolorosas e sobre as quais podem até ter sido proibidas de falar.

Os entrevistadores devem ter em conta que, ao pedirem a alguém que lhes forneça informações sinceras e detalhadas sobre assuntos pessoais (por exemplo, que envolvam relações sexuais) estão a pedir a essa pessoa que fale sobre algo que aprendeu a evitar. O entrevistador deve explicar às testemunhas que não lhes serão feitas perguntas por mera curiosidade mas antes porque é necessário um relato detalhado das circunstâncias do crime. Além disso, os entrevistadores devem ter em conta que, inicialmente, alguns entrevistados podem preferir expressar-se através da escrita ao invés de o fazer oralmente.

Linguagem sexualmente explícita

Os entrevistadores devem familiarizar-se com as palavras explícitas para a atividade sexual e com os respetivos equivalentes em calão. A fase de estabelecimento da relação poderá não ser adequada à clarificação de palavras com conteúdo sexual. Se houver dúvidas sobre o significado das palavras ou frases, estas devem ser anotadas e o inquiridor deve pedir à vítima que explique o respetivo significado numa fase posterior da inquirição, evitando ferir a sua sensibilidade.

É importante que o entrevistador não demonstre embaraço ou repulsa corando, fazendo expressões faciais ou quaisquer outros sinais verbais ou não-verbais.

Algumas testemunhas podem ficar tristes ou sentir vergonha ou ressentimento por serem questionadas, especialmente sobre questões pessoais. Na fase de estabelecimento da relação e ao longo da entrevista, o entrevistador deve demonstrar à testemunha que a respeita, apoia e compreende.

A testemunha pode ficar apreensiva sobre o que poderá acontecer depois da entrevista se optar por prestar um depoimento sobre o que se passou. Tais preocupações deverão ser tidas em conta.

É possível que algumas testemunhas vulneráveis não compreendam a necessidade de produzir depoimentos completos e detalhados das respetivas experiências. Por conseguinte, deverá explicar à testemunha o motivo pelo qual é necessário um depoimento completo, sem a colocar sob pressão. Ao abordar assuntos «neutros» com o entrevistado, poderá, se tal se mostrar adequado, incentivá-lo a fornecer um relato livre e salientar que é ele quem dispõe das informações. Poderá revelar-se problemático tentar avançar com uma entrevista antes de

conseguir estabelecer uma relação, na medida em que algumas testemunhas não estão habituadas a relacionar-se com estranhos. Com efeito, muitas são ensinadas a não o fazer. Se o estabelecimento de uma relação com a testemunha se revelar difícil, poderá ser preferível adiar a entrevista, uma vez que esta pode vir a revelar-se inútil.

Ausência de vivências em comum

O estabelecimento de uma relação com uma vítima de tráfico de pessoas pode ser dificultado pela ausência de experiências ou vivências comuns entre entrevistador e vítima, o que torna difícil iniciar uma conversa sobre assuntos neutros. É provável que ocorra esta dificuldade com muitas vítimas vulneráveis, mas ainda é mais provável que ocorra nos casos de tráfico de pessoas devido às diferenças culturais.

As vítimas de tráfico podem ter opiniões pré-concebidas sobre os agentes de autoridade, diferentes das opiniões das vítimas com as quais estes tenham anteriormente lidado.

Falar sobre sexo pode ser difícil em qualquer cultura. Nos casos de tráfico de pessoas, a vítima pode ser proveniente de uma cultura na qual este tema nunca é abordado. Deverá estar preparado para estes casos..



Autoavaliação

Identifique os elementos necessários para iniciar uma inquirição a uma vítima/testemunha de tráfico.

Quando inicia uma inquirição, o que é necessário explicar à vítima/testemunha?

Em que circunstâncias uma entrevista não deve prosseguir para a fase de Depoimento?

De que forma deve ser desenvolvida a relação entre os profissionais entrevistadores e a vítima?

Depoimento

Relato livre

Se não tiver conseguido estabelecer uma relação com a testemunha, não adiantará continuar a entrevista, pelo que deve terminá-la. Existem outros motivos que o podem levar a concluir a entrevista, como a saúde (física e mental) da vítima, os riscos que identificou para esta e

ou para outras pessoas ou por a vítima não conseguir ou estar relutante em fornecer-lhe informações úteis.

Depois de concluir a entrevista, deverá avaliar o que aconteceu, identificar as medidas que terá de tomar e rever a forma como o caso deverá avançar.

Se decidir que é adequado continuar a entrevista, deverá pedir à testemunha, sempre que possível, que faça um relato do(s) acontecimento(s) relevante(s) usando as suas próprias palavras.

É provável que as testemunhas esperem que o inquiridor, por ser um representante das autoridades, controle a inquirição. Contudo, é necessário que as informações fluam da testemunha para o inquiridor. Algumas testemunhas vulneráveis podem pensar que o inquiridor já sabe muito ou tudo sobre o que aconteceu, e que apenas irão confirmar a sua versão dos acontecimentos.

É crucial que informe as testemunhas, de forma a que compreendam que apenas ficará a saber o que lhes aconteceu se lho contarem.

Nesta fase, apenas deverá colocar questões gerais e abertas. Estas questões devem ser relativas aos aspetos gerais da experiência de vida relevantes para a investigação (por exemplo, «Há alguma coisa que me queira contar?»). Este tipo de pergunta é uma forma de obter informações de modo não-específico.



Orientação prática

- Seja cuidadoso ao colocar questões sobre a família da vítima enquanto falar sobre a sua experiência de vida em geral. Algumas vítimas de tráfico podem gostar de falar sobre as suas famílias, mas outras poderão ficar demasiado ansiosas relativamente à possibilidade de a família descobrir o que lhes aconteceu. Neste assunto, deixe-se guiar pela testemunha.

Se a testemunha responder positivamente a essas questões, poderá encorajá-la a fazer um relato livre dos acontecimentos. Durante esta fase, deverá ajudar a vítima a falar e ouvir o que ela diz. Não interrogue a vítima nem questione o que está a ser dito.

Estudos demonstram que uma abordagem inadequada às pessoas vulneráveis constitui um fator de distorção dos seus depoimentos mais significativo do que o défice de memória. Por este motivo, é essencial colocar perguntas adequadas nas fases iniciais da entrevista. Faça todos os esforços para obter informações espontâneas da testemunha, evitando «contaminar» as respostas.

Na fase de relato livre, o inquiridor deve motivar as testemunhas para que façam o relato com «as suas próprias palavras» através da utilização de questões não específicas como «Aconteceu mais alguma coisa?», «Consegue contar-me mais alguma coisa?», «Consegue

explicar-me de outra forma para me ajudar a compreender melhor?». É provável que verbos como «contar» e «explicar» sejam úteis. Nesta fase, as perguntas não devem incluir detalhes sobre o caso que a testemunha não lhe tenha já contado. Os depoimentos de relato livre prestados pelas testemunhas vulneráveis proporcionam geralmente menos informações do que os depoimentos das testemunhas não-vulneráveis. As informações disponibilizadas pelas testemunhas vulneráveis podem ser tão exatas quanto as informações disponibilizadas pelas testemunhas não-vulneráveis, mas é mais provável que sejam distorcidas devido a perguntas inadequadas/mal-formuladas.

Tenha cuidado para não pressionar uma testemunha vulnerável relativamente a aspetos com os quais ela não se sinta confortável. Se a testemunha tiver de recordar-se de acontecimentos negativos, pode sentir-se mais confortável se começar por falar sobre factos menos significativos e só querer avançar para a abordagem dos factos mais marcantes quando sentir que isso é adequado.

As testemunhas vulneráveis podem fazer pausas e ficar em silêncio, por vezes durante bastante tempo. Resista à tentação de interromper estes momentos. As testemunhas também podem repetir-se e dar informações irrelevantes. Deverá antecipar e tolerar esta situação. Acima de tudo, evite questionar a testemunha num desses momentos.

O inquiridor deve ser ativo na audição do depoimento, demonstrando à testemunha que está a ouvir aquilo que a testemunha diz. Pode fazê-lo resumindo à testemunha aquilo que ela acabou de transmitir. Por exemplo, se a testemunha tiver dito «Não gostei quando ele fez isso», como inquiridor, poderá responder «Não gostou». Tenha cuidado para não demonstrar, subconscientemente ou conscientemente, que aprova ou desaprova as informações que recebeu.

Se a testemunha não tiver dito nada relevante para a investigação, deverá considerar se deverá passar ou não à fase seguinte da inquirição (ou seja, à fase de perguntas). Se tomar esta decisão, deverá considerar tanto os interesses da testemunha como de realização da justiça. Em alguns casos excecionais, poderá optar por concluir a inquirição avançando diretamente para a fase de Conclusão. Depois de concluir a inquirição, deverá avançar para a fase de Avaliação.



Orientação prática

- Muitas testemunhas de casos de tráfico de pessoas são provenientes de culturas nas quais os profissionais do sistema penal são figuras de autoridade poderosas. Isto pode significar que as testemunhas esperam que o inquiridor oriente a inquirição, o que torna especialmente difícil conseguir um relato livre.
- Mais do nunca, deve ter-se muito tato nas fases iniciais de uma inquirição a uma testemunha vulnerável nas investigações dos casos de tráfico de pessoas, dado que o processo de vitimização resultante deste crime pode deixar muitas testemunhas demasiado sugestionáveis. A experiência demonstra que, em muitos destes casos, a defesa explora todos os indicadores de que a testemunha tenha sido direcionada pelo inquiridor.



Orientação prática (cont.)

- Avalie continuamente os riscos. Não tenha medo de decidir não continuar uma entrevista. Se decidir pará-la, considere aquilo que foi dito pela testemunha e a forma como esses dados podem ajudar numa investigação pró-ativa, disruptiva ou na recolha de informações. Em alternativa, poderá decidir que a testemunha pode não conseguir sustentar uma investigação para levar o caso ao tribunal, mas poderá continuar a entrevista para obter mais informações que considere úteis.

Circunstâncias que podem influenciar a colaboração

Algumas testemunhas vulneráveis podem procurar colaborar por entenderem que é isso que delas se espera, especialmente se encaram o entrevistador como figura de autoridade. Além disso, algumas testemunhas podem reçar as autoridades. Não deverá adotar uma postura autoritária.

Muitas pessoas vulneráveis preocupam-se muito com a imagem que dão de si próprias. Apesar de poderem não compreender a pergunta, as testemunhas vulneráveis podem preferir responder do que dizer que não compreendem. Poderão pensar que, caso digam que não compreendem a pergunta, estarão a dar a entender que há uma falha do entrevistador ou da própria testemunha. Algumas pessoas vulneráveis preferem evitar essas observações. Normalmente, as testemunhas que sentem que têm algum controlo sobre as próprias vidas não adotam tanto esta postura quanto as que sentem que não têm controlo. Este é um dos motivos pelos quais permitir que a testemunha tenha algum controlo sobre a inquirição é uma forma de melhorar a qualidade do depoimento.

Os inquiridores devem explicar claramente na Fase de Estabelecimento da Relação que, por não terem presenciado o(s) acontecimento(s), podem fazer perguntas que as testemunhas não compreendam ou às quais não consigam responder. Devem explicar que, caso façam esse tipo de perguntas, gostariam que as testemunhas indicassem que não compreendem, que não se lembram ou que não sabem a resposta. Os entrevistadores também devem tornar claro que, se a testemunha não souber a resposta a uma questão, deverá responder simplesmente «Não sei». Desta forma, também ajudará a evitar que as testemunhas sintam a pressão de preencher as partes do acontecimento que não testemunharam ou das quais não se lembram.

Se a comunicação se tornar difícil, o entrevistador poderá ajudar dizendo «Consegue dizer-me mais alguma coisa?» ou «Consegue explicar-me melhor o que pretende dizer?» ou «Posso ajudá-lo de alguma forma?»

Se a testemunha tiver transmitido algo que o inquiridor considere que deva ser clarificado mas a testemunha parecer relutante ou incapaz de fazê-lo, poderá ser melhor voltar a esse assunto mais tarde em vez de insistir de imediato.

Minimizar o condicionamento de respostas

As testemunhas vulneráveis podem responder sempre «Sim» se lhes for feita uma pergunta de resposta «sim/não», mesmo que lhes seja feita mais tarde uma pergunta quase idêntica mas com o significado oposto. Isto não acontece apenas porque a vítima é vulnerável: se as questões forem complicadas ou feitas de forma autoritária, as testemunhas podem simplesmente considerar mais fácil e menos desgastante continuar a dizer «sim».

Também poderá constatar que a testemunha diz sempre «Não» a uma pergunta de resposta «sim/não». Um motivo comum para esta situação é a colocação de perguntas sobre comportamentos que não sejam aceitáveis na sua cultura.

Apesar de serem usadas muitas perguntas de resposta «sim/não» nas conversas do dia-a-dia, deverá evitar usá-las ao entrevistar vítimas vulneráveis. Muitas vezes, é possível mudar uma pergunta de resposta «sim/não» para uma pergunta de resposta «ou/ou», tendo a experiência demonstrado que este procedimento resulta em respostas mais fiáveis do que uma abordagem «sim/não». Mesmo quando é usada uma pergunta «ou/ou», algumas pessoas concordam sempre com a segunda opção. Uma técnica que pode utilizar para descobrir se isto está a acontecer é pensar sobre qual a opção mais provável e colocá-la em primeiro lugar nalgumas perguntas e em segundo lugar noutras. O mesmo método é uma boa prática no caso de não conseguir evitar usar perguntas «sim/não».

Técnicas de inquirição

Abordagem geral

Durante a fase de relato livre de uma inquirição, a maioria das testemunhas não consegue lembrar-se de todas as informações relevantes que têm na memória. Na fase de relato livre, é pedido à testemunha que tente lembrar-se do que aconteceu e o descreva. Muitas pessoas vulneráveis têm dificuldade em fazê-lo por vários motivos possíveis: podem não conseguir lembrar-se, podem ter feito todos os esforços para esquecer recordações dolorosas ou podem sentir receio ou stress.

Se colocar as perguntas certas que ajudem as testemunhas a recordar os acontecimentos, a qualidade dos depoimentos poderá ser muito superior. Porém, tanto a pesquisa como as boas práticas indicam que as testemunhas vulneráveis podem ter muita dificuldade em responder às perguntas, exceto se:

- Estas forem simples;
- Não incluïrem gíria;
- Não incluïrem palavras e /ou ideias abstratas;
- Incidirem apenas sobre um ponto;

- Não forem demasiado direcionadas ou sugestivas.

É importante compreender que há vários tipos de perguntas que variam no grau de orientação. A fase das perguntas deverá, sempre que for possível, começar com questões abertas e avançar, caso seja necessário, para perguntas específicas e fechadas. As perguntas direcionadas apenas devem ser usadas como último recurso.

Ao inquirir uma testemunha, os inquiridores podem optar por colocar vários tipos de perguntas sobre um assunto antes de avançarem para perguntas sobre outro assunto. É uma boa prática no que diz respeito à organização da memória. Normalmente, a inquirição relativa a cada assunto deve ser iniciada com uma pergunta aberta.

Perguntas abertas

As perguntas abertas são colocadas de forma a permitir que a testemunha responda sem restrições. Também permitem que a testemunha controle o fluxo de informação. Este tipo de inquirição minimiza o risco de os inquiridores imporem as suas perspetivas sobre o que aconteceu. Normalmente, estas perguntas abordam um tópico geral que proporciona à testemunha alguma liberdade na determinação daquilo que deve responder.

As perguntas abertas também podem ser usadas para convidar a testemunha a fornecer mais detalhes sobre informações incompletas já fornecidas na fase do relato livre. Por exemplo, «Já me contou que a pessoa que lhe bateu é um homem. Consegue descrevê-lo?».

Se a testemunha responder a perguntas abertas, evite interrompê-la mesmo que não forneça o(s) tipo(s) de informação esperado(s). Se a interromper, estará a retirar-lhe o controlo e a sugerir que apenas pretende respostas curtas. Se uma testemunha lhe disser algo que não compreende, não a interrompa. Aguarde até que termine e, em seguida, tente clarificar o que foi dito.

Evite colocar perguntas que incluam a palavra «porquê»: pode ser interpretada pelas pessoas vulneráveis como uma forma de o entrevistador as estar a culpabilizar. Não repita uma pergunta depois de a testemunha dar uma resposta (incluindo respostas «Não sei»). Caso contrário, as testemunhas podem considerar que está a criticar a resposta original e dar uma resposta diferente e mais aproximada daquilo que pensam que o entrevistador espera.

Durante a inquirição, algumas testemunhas podem ficar perturbadas. Se isso acontecer, considere mudar de tópico durante algum tempo e, se for necessário, volte a uma fase anterior da entrevista (como a fase de estabelecimento da relação). Poderá ter de fazê-lo várias vezes durante uma entrevista.

Algumas testemunhas podem considerar mais fácil descrever genericamente os acontecimentos antes de se recordarem dos detalhes. Descrever os acontecimentos em linhas gerais poderá ajudar a recordar acontecimentos específicos. Não faça perguntas sobre estes acontecimentos demasiado cedo.

A maioria das testemunhas, quer seja vulnerável ou não, dará informações corretas sobre os acontecimentos, mas possivelmente não por ordem cronológica.

Perguntas específicas

Pode colocar perguntas específicas de forma não-sugestiva para clarificar, desenvolver ou completar as informações que a testemunha lhe deu.

Apesar de algumas testemunhas especialmente vulneráveis poderem não conseguir fornecer informações na fase de relato livre ou não conseguirem responder a perguntas abertas, podem conseguir responder a perguntas específicas. Contudo, tenha em atenção que as perguntas específicas não devem sugerir determinadas respostas.

No caso de algumas testemunhas vulneráveis, as perguntas abertas não ajudarão muito a recordar os acontecimentos, enquanto as perguntas específicas podem fazê-lo. O problema é que quanto mais específicas forem as perguntas mais facilmente se tornarão sugestivas.

Perguntas fechadas

As perguntas fechadas são aquelas que apenas dão ao entrevistado um conjunto limitado de respostas alternativas. Porém, desde que a pergunta proporcione um conjunto razoável e igualmente provável de alternativas de resposta, não é considerada sugestiva. Algumas testemunhas vulneráveis podem considerar as perguntas fechadas especialmente úteis. Contudo, quando começar a usá-las, tente evitar que incluam apenas duas alternativas (especialmente perguntas sim/não), exceto se essas duas alternativas incluírem todas as possibilidades (por exemplo, «Foi durante o dia ou durante a noite?»). Se forem usadas perguntas que apenas tenham duas alternativas de resposta, devem ser colocadas de forma a que, por vezes, resultem na escolha da primeira opção e, noutras, na escolha da segunda.

Algumas testemunhas vulneráveis podem apenas conseguir responder a perguntas fechadas que tenham duas alternativas de resposta. Nestas circunstâncias, deverá ser possível, ainda assim, evitar que uma entrevista de investigação seja constituída sobretudo por perguntas direcionadas. Contudo, tais entrevistas exigem conhecimentos especializados e um planeamento aprofundado das perguntas que serão colocadas.

Se colocar perguntas fechadas, é especialmente importante que diga à testemunha que não há problema em responder «Não sei», «Não compreendo» ou «Não me lembro» e que não sabe o que se passou. Se uma testemunha responder «Não sei» a uma pergunta «ou-ou» (por exemplo, «O carro era grande ou pequeno?»), tente evitar colocar uma pergunta de resposta «sim/não» de compromisso (por exemplo, «Se não era grande nem pequeno, diria que era um carro de tamanho médio?»), com a qual a testemunha poderá limitar-se a concordar.

Perguntas direcionadas

Uma pergunta direcionada é aquela que dá a entender a resposta ou que pressupõe que algo é verdade. Se a pergunta é direcionada ou não depende da sua natureza e daquilo

que a testemunha já disse anteriormente. A defesa pode questionar as provas obtidas por uma pergunta direcionada, havendo a possibilidade de o depoimento não ser admitido em tribunal.

Estudos psicológicos sugerem que as respostas dos entrevistados às perguntas direcionadas são muitas vezes determinadas mais pela forma como a testemunha é questionada do que por aquilo de que se lembra.

Se colocar uma pergunta direcionada relativamente a factos importantes do caso que não tenham já sido descritos pela testemunha, é provável que a entrevista tenha pouco valor num processo em tribunal.

Se uma pergunta direcionada produzir uma resposta que revele factos importantes, não deverá ser seguida de outra do mesmo tipo. Em vez disso, deverá voltar ao tipo de perguntas mais «neutras» descrito anteriormente. Este procedimento é especialmente importante se a informação revelada pela testemunha não estiver relacionada com a pergunta direcionada à qual estava a responder.

Poderá ser aceitável uma pergunta direcionada que consiga que uma testemunha forneça espontaneamente mais informação do que a diretamente visada pela pergunta. Contudo, nunca deverá ser o primeiro a sugerir à testemunha que foi cometido um crime específico, nem que determinada pessoa seja responsável por esse crime, exceto se não houver nenhuma alternativa. Se proceder desta forma, há fortes probabilidades de o suspeito e a defesa argumentarem que a testemunha nunca o teria dito se o entrevistador não lhe tivesse inculcado essa ideia.

Algumas testemunhas podem ser tão vulneráveis que aceitarão tudo o que o entrevistador disser, independentemente do quão absurda for a pergunta. Este procedimento apresenta o entrevistador como incompetente e também proporciona uma base para que a defesa levante dúvidas sobre as provas fornecidas pela testemunha em tribunal.

Ao formular as perguntas, tente usar informações que a testemunha já lhe tenha fornecido e usar palavras/conceitos que a testemunha conheça (como a hora, o local, as pessoas).

Algumas testemunhas vulneráveis terão dificuldades se as perguntas avançarem para um novo tópico sem aviso. Para ajudar as testemunhas, deverá explicar que irá mudar de tópico dizendo, por exemplo, «Agora gostaria de lhe fazer uma pergunta sobre outro assunto».

Como foi já referido, muitas testemunhas vulneráveis terão dificuldades com as perguntas a menos que estas sejam simples, incluam apenas um ponto, não incluam palavras abstratas e não contenham sugestões e gíria. Apesar de o entrevistador poder estar familiarizado com determinadas palavras e termos, a testemunha poderá não estar, pelo que poderá interpretar incorretamente aquilo que o entrevistador disser.

Certifique-se de que a testemunha compreendeu o que lhe foi perguntado, pedindo-lhe que repita a pergunta. Se apenas perguntar à testemunha «Está a compreender?», poderá obter

uma resposta automática com «Sim». Se não compreenderem uma pergunta, algumas pessoas vulneráveis podem tentar responder o melhor que conseguirem tentando adivinhar o que é pretendido e, possivelmente, dando uma resposta inadequada.

Algumas testemunhas vulneráveis não terão consciência de que aquilo que disserem será questionado em tribunal, seja através de contraditório direto, seja com base nas declarações prestadas na polícia. Se os entrevistadores decidirem repetir uma ou mais perguntas numa fase posterior da entrevista, mesmo mudando as palavras usadas na pergunta, também devem explicar que isso não indica necessariamente que não gostaram das respostas iniciais e que apenas pretendem confirmar se compreenderam a testemunha. Caso contrário, algumas testemunhas vulneráveis podem acreditar que as perguntas estão a ser repetidas apenas porque as respostas anteriores não estavam corretas ou não foram adequadas, ou que o entrevistador não acreditou nelas.

A inquirição de testemunhas vulneráveis exige uma série de capacidades e grande compreensão por parte dos inquiridores. Entrevistadores incompetentes podem fazer com que testemunhas vulneráveis prestem depoimentos sem fiabilidade. Contudo, os entrevistadores que consigam colocar em prática as orientações incluídas neste documento estarão a proporcionar às testemunhas muito mais oportunidades de apresentarem os seus próprios relatos sobre o que realmente aconteceu.



Orientação prática

As técnicas de inquirição das vítimas vulneráveis em casos de tráfico são idênticas às utilizadas em qualquer outro caso. A forma como terá de as aplicar numa entrevista de tráfico pode divergir nos seguintes termos:

- A total perda de controlo das vítimas de tráfico sobre as suas vidas pode fazer com que tendencialmente aceitem e concordem com o entrevistador. Como foi já referido várias vezes, poderá ajudar a evitar esta situação permitindo à testemunha tomar as decisões possíveis. Além disso, confirme continuamente que a testemunha se sente à vontade para dizer que não compreende ou não concorda com o entrevistador.
- Também é provável que não haja uma língua comum nos casos de tráfico, o que significa que é possível que haja erros de interpretação daquilo que for dito, do motivo pelo qual faz uma pergunta ou por que motivo está a realizar a entrevista de certa forma. Informe previamente o intérprete e o assistente social sobre a forma como pretende realizar a entrevista, de forma a minimizar este risco.
- As diferenças culturais podem determinar divergências na forma como as pessoas comunicam entre si. Este facto, juntamente com determinadas atitudes perante a autoridade, pode dar origem a equívocos ou a concordâncias viciadas. A resposta das testemunhas a diferentes tipos de perguntas deve ser monitorizada ativamente para identificar o que é mais apropriado a cada testemunha e aos objetivos da entrevista. Mais uma vez, os intérpretes e os elementos de apoio social podem também constituir recursos úteis.



Orientação prática (cont.)

- Pode ser útil colocar perguntas relativamente a determinadas datas que são importantes para a vítima, como o seu aniversário ou outro aniversário importante, no sentido de ajudá-las a situar com maior precisão alguns dos acontecimentos cronológicos relativos à sua vitimização. Estas perguntas ajudam a estabelecer um conjunto de marcos cronológicos para que os eventos possam ser postos no contexto do «antes» ou «depois» de determinadas datas.

Compreender o que a vítima está a tentar transmitir

Algumas testemunhas vulneráveis têm um discurso ou outras formas de comunicação que a maioria das pessoas tem dificuldade em compreender. Em determinados momentos da entrevista e especialmente na fase de conclusão (ver adiante), deverá explicar à testemunha o que acredita que esta lhe transmitiu. Se não perceber aquilo que a testemunha quer dizer, pode pedir-lhe, por exemplo, que «explique de outra forma» ou «consegue contar-me de outra forma?»

Os entrevistadores devem ter em conta que a tendência comum, inerente à condição humana, de ignorar as informações contrárias à sua própria perspetiva pode afetar ainda mais as entrevistas a pessoas vulneráveis. Os entrevistadores têm muitas vezes dificuldade em compreender as testemunhas e/ou podem até mesmo acreditar que estas sejam menos capazes. Estudos sobre as entrevistas constataram consistentemente que os entrevistadores ignoram as informações que não batem certo com as suas suposições sobre o que aconteceu. Uma função importante do segundo entrevistador (se existir) é assegurar que o entrevistador principal não ignora informações importantes fornecidas pela testemunha.

Técnicas especiais de entrevista

É altamente recomendado que as técnicas especiais de entrevista apenas sejam utilizadas por pessoas com formação adequada. Estas técnicas são controversas em algumas jurisdições e podem não ser admissíveis em audiências em tribunal.

Sejam quais forem as técnicas consideradas para utilização numa entrevista, a ênfase deve ser colocada em ajudar as testemunhas a recuperarem a informação das suas memórias e não na sugestão de ideias.

Atualmente, há poucos conhecimentos sobre técnicas diferentes das descritas anteriormente que possam ajudar as testemunhas vulneráveis. Por vezes, as testemunhas que considerem a comunicação verbal difícil podem tirar partido da simulação física ou do desenho das informações que pretendem transmitir. Contudo, nestas situações, é importante que o entrevistador confirme adequadamente com a testemunha que compreendeu aquilo que esta tentou transmitir.

Objetos de referência

O uso de itens semelhantes aos envolvidos no acontecimento em questão pode ajudar a vítima a recordar-se. Contudo, também pode perturbar a testemunha. Além disso, pode não ser certo quais os itens que estiveram envolvidos, e a introdução de itens incorretos pode enganar e/ou confundir a testemunha. Da mesma forma, os modelos ou brinquedos podem ser enganadores se os objetos que representam não tiverem feito parte do acontecimento que está a ser descrito. Algumas testemunhas vulneráveis podem não perceber a ligação entre um brinquedo ou modelo e o objeto da vida real que supostamente representa.

A entrevista cognitiva

O procedimento de entrevista cognitiva (EC) inclui procedimentos baseados nas boas capacidades de comunicação (muitas das quais foram descritas anteriormente), bem como uma série de procedimentos especificamente concebidos para ajudar as testemunhas a recordarem-se dos acontecimentos. Estes procedimentos são normalmente designados como:

- Reintegração de contexto mental (RCM);
- Mudança da ordem de recordação;
- Mudança de perspetiva.

A RCM é baseada na teoria segundo a qual, se alguém for colocado no contexto em que ocorreu um acontecimento, a sua memória desse acontecimento será melhorada. É possível transportar fisicamente as pessoas para um local ou perguntar-lhes se se lembram dos detalhes do local. Um exemplo da colocação «mental» de alguém no local do acontecimento seria dizer «Está sentado na sala. Descreva aquilo que está a ouvir». Este pedido pode ser seguido por «Ouvir música. Descreva a música».

A RCM pode ser eficaz mas também já foi associada à criação de «falsas memórias».

Um exemplo de mudança da ordem de recordação seria pedir a uma pessoa que fizesse um relato desde o acontecimento mais distante até ao mais recente e, em seguida, mudar a ordem do relato, partindo do acontecimento mais recente para o mais distante.

A mudança de perspetiva consiste em pedir a uma pessoa que imagine que está a presenciar um acontecimento a partir de uma posição diferente.

Alguns dos profissionais que têm trabalhado com testemunhas vulneráveis recomendam o uso da EC. Contudo, estudos demonstram que, se a formação dos entrevistadores que tentam usar a EC não for adequada, não conseguirão usar esta técnica eficazmente e podem confundir a testemunha. Além disso, algumas testemunhas podem não conseguir tirar partido de todos os procedimentos da EC (por exemplo, as testemunhas muito jovens podem não

conseguir tirar partido de todos os procedimentos da EC (por exemplo, as testemunhas muito jovens podem não conseguir «mudar de perspetiva»).

Os entrevistadores e os seus superiores hierárquicos devem ter em conta que as técnicas que ajudam as testemunhas a recordar os acontecimentos farão com que as entrevistas demorem mais tempo. Os inquéritos aos utilizadores da EC demonstraram que esta técnica é, muitas vezes, considerada eficaz. Contudo, as suas cargas de trabalho e os respetivos supervisores colocam-nos sob pressão para evitarem entrevistas morosas. Os entrevistadores devem resistir a estas pressões no caso das testemunhas vulneráveis.



Orientação prática

- Nos casos de tráfico, a série de eventos vividos pela vítima pode ser extremamente complexa e ter tido lugar ao longo de um extenso período de tempo e em várias localizações. A EC representa um risco especialmente elevado de provocar mais confusão nas vítimas de tráfico.
- Alguns entrevistadores de testemunhas vulneráveis são relutantes em relação ao uso de técnicas como a mudança da ordem da recordação, mas usam técnicas que pausam uma entrevista enquanto é pedido à vítima que se tente lembrar de tudo o que um sentido específico lhe diz ou o que os outros sentidos lhe dizem.

Outras técnicas

Estão a ser desenvolvidas outras técnicas que ajudem as testemunhas nos depoimentos. Um processo de reconstrução de apoio pode ser muito útil para ajudar as testemunhas com deficiências mentais a recordar situações e a recuperar memórias. Este processo envolve um trabalho de repetição na exploração da memória, refletindo sobre o que foi sedimentado até determinado ponto e incentivando a testemunha a relatar o que se seguiu (a abordagem fenomenológica, ou seja, acontecimentos perceptíveis aos sentidos e relacionados com os fenómenos ou acontecimentos salientados). Se esta técnica for utilizada, é essencial que os entrevistadores sigam (e não orientem) aquilo que a testemunha diz.

Se o relato livre e a inquirição não fornecerem informações relevantes mas a suspeita for elevada, poderá usar alternativamente outro tipo de questionário nas testemunhas que se mostrem especialmente reticentes. Poderá utilizar perguntas sobre coisas agradáveis/desagradáveis, pessoas boas/más, o que a testemunha gostaria de mudar na sua vida, ou outras técnicas semelhantes. No caso das testemunhas que foram pressionadas para não divulgar determinados assuntos, poderá iniciar uma conversa sobre segredos. Estes métodos podem ser bem-sucedidos para quem tem formação nesses tipos de inquirição. Se o entrevistador evitar colocar perguntas sugestivas e conseguir motivar a testemunha a prestar um depoimento, não deverá haver nenhum motivo pelo qual as provas obtidas desta forma

não sejam consideradas pelos tribunais.



Autoavaliação

O que é o «relato livre» numa entrevista?

Que circunstâncias podem influenciar a colaboração no contexto de uma entrevista a uma vítima/testemunha vulnerável?

O que são perguntas abertas, específicas, fechadas e direcionadas?

De que forma a natureza dos casos de tráfico de pessoas poderá afetar as várias técnicas utilizadas nas entrevistas a pessoas vulneráveis?

Indique técnicas especiais de entrevista e explique quem deve (e quem não deve) utilizá-las.

Conclusão da entrevista

Recapitulação

Durante o processo de conclusão da entrevista, o entrevistador pode ter de confirmar com a testemunha que compreendeu corretamente as partes mais importantes (se existirem) do seu depoimento. Deverá fazê-lo usando aquilo que a testemunha disse e não um resumo (que pode estar incorreto mas com o qual a testemunha pode concordar). Deve ter cuidado para não demonstrar que duvida daquilo que a testemunha diz.

Conclusão

O entrevistador deve sempre tentar certificar-se de que a entrevista é concluída adequadamente.

Apesar de nem sempre ser necessário passar por cada uma das fases anteriores antes de avançar para a fase seguinte, deverá haver um bom motivo para não o fazer. Cada entrevista tem de ter uma fase de conclusão. Nesta fase, poderá ser útil abordar novamente alguns dos tópicos «neutros» referidos na fase de estabelecimento de relação.

Nesta fase, independentemente do resultado da entrevista, devem ser aplicados todos os esforços para garantir que a testemunha não fique perturbada e que esteja confiante. Mesmo que a testemunha tenha fornecido poucas ou nenhuma informação, não deverá fazê-la sentir que errou ou que o desiludiu. No entanto, não deverá elogiar ou felicitar a testemunha por fornecer informações.

Deverá agradecer à testemunha pelo seu tempo e esforços e perguntar-lhe se há mais alguma coisa que gostaria de lhe transmitir. Deverá também dar-lhe uma explicação daquilo que poderá acontecer em seguida, se for esse o caso.

Não devem ser feitas promessas acerca de futuros desenvolvimentos que não possam ser cumpridas. Deve ser tido um cuidado especial para evitar fazer promessas relativas ao estatuto de residência, à desnecessidade do seu depoimento em tribunal ou à acusação de alguém em particular.

Deverá perguntar sempre à testemunha se tem alguma dúvida e deverá responder adequadamente às suas perguntas. É considerada uma boa prática dar à testemunha um nome de contacto e um número de telefone que possa usar caso decida mais tarde que tem mais assuntos que gostaria de abordar com o entrevistador.

Não só na conclusão mas também durante a entrevista, o entrevistador deverá estar preparado para ajudar a testemunha a lidar com os efeitos de prestar um depoimento relativo a acontecimentos que podem ter sido extremamente perturbadores (e em relação aos quais a testemunha pode sentir alguma culpa).

Na conclusão da entrevista, e se tal tiver cabimento no seu ordenamento jurídico, deverá ser dada uma oportunidade às testemunhas consideradas vítimas de fazerem uma declaração sobre o impacto que o crime teve nas suas vidas, ajudando assim a identificar a respetiva necessidade de informação e apoio. A declaração, inteiramente voluntária, deve ser registada no mesmo formato que o depoimento da testemunha.

Deve ser fornecida informação às testemunhas sobre como podem obter ajuda e apoio rapidamente. Deverá dispor, para distribuição às testemunhas, de um folheto com os nomes, moradas e números de telefone das pessoas e entidades relevantes. Sempre que for possível, os profissionais do sistema penal devem ajudar a vítima a aceder a esse apoio e estar familiarizados com os processos de encaminhamento assistido.



Autoavaliação

Por que motivo a fase de conclusão é tão importante?

Descrever o que é necessário fazer na fase de conclusão de uma entrevista.

Avaliação

Nesta fase, o entrevistador deve considerar se as metas e os objetivos da entrevista foram alcançados, a forma como o conhecimento obtido na entrevista afeta a investigação, se a entrevista foi bem conduzida e quais os aspetos a melhorar no futuro.



Orientação prática

- Considere e avalie sempre todos os riscos para a vítima, para a respetiva família ou para outras pessoas das quais tenha tido conhecimento durante a entrevista.
- A avaliação deve ser efetuada após cada entrevista, independentemente da duração da mesma. A avaliação propriamente dita pode ser muito rápida: podem ter sido alcançados objetivos muito limitados nas fases iniciais.
- A avaliação nos casos de tráfico de pessoas também deve avaliar a condição mental e física da vítima face àquilo que aconteceu na entrevista. Esta avaliação pode requerer a consulta de especialistas como médicos e psicólogos.
- Use o seu plano escrito para identificar os objetivos que foram ou não alcançados.
- Trabalhe conjuntamente com outros investigadores e com os responsáveis pela gestão da investigação para identificar outras diligências que devam ser efetuadas fora da entrevista e outros aspetos a explorar durante a mesma.

Visitas a locais descritos na entrevista

Após as entrevistas, alguns entrevistados são levados aos locais que descreveram como forma de corroborar o depoimento e identificar outras linhas de investigação. Os investigadores afirmam que esta técnica tem uma taxa de sucesso considerável.

O planeamento desta tática requer algum cuidado. A consideração mais importante é a que se prende com a segurança da testemunha. As testemunhas apenas devem fazer visitas com profissionais do sistema penal não identificados como tal, se possível usando um veículo descaracterizado, e deverá haver pessoal suficiente para proteger a testemunha e para registar tudo o que for dito. Todo o pessoal envolvido deve ser informado sobre os riscos e os objetivos da visita.



Autoavaliação

O que deve fazer ao avaliar uma entrevista?

Por que motivo a fase de avaliação é importante para o processo de entrevista?

Outras entrevistas

Um dos principais objetivos do registo-vídeo das entrevistas iniciais é reduzir o número de vezes que é pedido a uma testemunha que faça o seu relato. Contudo, mesmo com um entrevistador experiente e hábil, uma testemunha pode fornecer inicialmente menos informações do que é capaz de divulgar. Poderá ser necessária uma entrevista suplementar, que também deve ser gravada em vídeo, se possível. Deverá sempre considerar se é do melhor interesse da testemunha realizar a entrevista. Algumas jurisdições exigem que os motivos da realização de entrevistas suplementares devam ser explícitos e reduzidos a escrito.

Com testemunhas especialmente vulneráveis, na fase de planeamento deverá ser tomada uma decisão para dividir a entrevista numa série de sessões que serão realizadas pelo mesmo entrevistador em dias diferentes, ou em alturas diferentes do mesmo dia, sendo realizadas as fases de estabelecimento de relação e de conclusão em cada uma das sessões.

Há sempre a possibilidade de, mais tarde, a vítima poder sentir que o impacto da experiência foi tal que é necessário prestar declarações adicionais. Em algumas jurisdições, é considerada uma boa prática perguntar à testemunha se pretende completar o seu depoimento antes da audiência em tribunal ou entre a audiência e a sentença. Desta forma, o tribunal poderá ter em conta o trauma a longo prazo que a vítima tenha sofrido e evitará que a defesa negue a avaliação do impacto original sugerindo que a vítima já não sentirá o mesmo alguns meses depois.

Resumo

A entrevista à vítima/testemunha é um elemento decisivo para qualquer investigação de tráfico de pessoas. Esta secção apenas resume os aspetos-chave. Não planeie nem realize entrevistas de tráfico apenas com base neste resumo. É essencial que, no mínimo, considere a totalidade do conteúdo deste módulo. Idealmente, as inquirições a vítimas/testemunhas de tráfico devem apenas ser realizadas por inquiridores com a formação adequada.

As vítimas/testemunhas de tráfico são vítimas vulneráveis e devem ser tratadas como tal. O objetivo de qualquer entrevista realizada pelas autoridades competentes é a obtenção de um depoimento preciso.

Como as entrevistas de tráfico de pessoas divergem

As inquirições a vítimas/testemunhas de tráfico divergem das efetuadas nos demais casos em vários aspetos, entre os quais se incluem:

- Mudança de depoimentos – devido aos efeitos psicológicos do processo de tráfico, os depoimentos das vítimas/testemunhas podem mudar ao longo do tempo.
- O tráfico de pessoas é um processo comercial e criminoso. As entrevistas devem ter por

objetivo investigar a atividade criminosa e identificar a forma de dismantelar as redes.

- Língua – em alguns casos, pode ser difícil encontrar intérpretes em virtude de apenas um grupo reduzido de pessoas falar determinadas línguas num determinado local. Nas pequenas comunidades é maior a probabilidade de os intérpretes conhecerem a vítima ou os traficantes.
- Cultura – os investigadores podem ter de lidar com culturas sobre as quais pouco ou nada sabem, o que potencia mal-entendidos.
- Confiança – as vítimas de tráfico podem não confiar nos investigadores devido às experiências por que passaram.
- Vitimização e trauma – as vítimas/testemunhas de tráfico podem sofrer de vários níveis de trauma raramente encontrados noutras vítimas.
- Sistemas de justiça penal – a investigação dos crimes de tráfico de pessoas é normalmente muito complexa, e alguns ordenamentos jurídicos não contemplam quaisquer especificidades da recolha de prova para estes casos.
- Familiares e amigos - os traficantes podem conhecer os familiares da vítima ou ser conhecidos destes. As ameaças diretas e assumidas aos familiares e amigos são comuns nos casos de tráfico.
- Dinheiro – as vítimas de tráfico podem receber uma pequena quantia de dinheiro dos traficantes, sendo que, muitas vezes, essa quantia constitui a única fonte de rendimento das suas famílias.
- Estatuto de imigração – as testemunhas dos casos de tráfico podem encontrar-se em situação irregular, o que dá origem ao receio de serem presas, deportadas, etc.
- Alojamento – nos casos de tráfico de pessoas, é provável que tenha de encontrar alojamento para as vítimas/testemunhas.
- Diplomacia – nos casos de tráfico de pessoas, há a probabilidade de os investigadores terem de considerar questões diplomáticas em torno do entrevistado.
- Idade – as vítimas de tráfico podem não indicar a sua verdadeira idade por vários motivos. Esta situação pode ter consequências, nomeadamente no desencadear dos procedimentos legalmente necessários quando estão envolvidas crianças, etc.
- Crimes sexuais – as vítimas de tráfico para exploração sexual podem ter sido repetidamente violadas e sexualmente abusadas durante um longo período de tempo. Esta situação pode produzir reações psicológicas profundas e complexas, incluindo perturbação de stress pós-traumático. Também pode dificultar a recolha da prova pericial.

Como as entrevistas de tráfico de pessoas divergem

As cinco fases de uma entrevista a uma vítima/testemunha são:

- Planeamento e preparação da entrevista;
- Abordagem da vítima/testemunha, explicação do processo e do conteúdo da entrevista;
- Obtenção do depoimento da vítima/testemunha;
- Conclusão adequada da entrevista;
- Avaliação do conteúdo da entrevista.

Planeamento e preparação

O planeamento das entrevistas é importante porque, quando bem planeadas, produzem melhores resultados e reduzem a probabilidade de ocorrerem erros e incoerências.

Deve ser estabelecido o que é conhecido sobre a pessoa entrevistada e/ou sobre os acontecimentos conhecidos até à data.

Deve ser realizada uma avaliação do risco logo que possível.

Devem ser tomadas outras medidas, como considerar uma avaliação da saúde física e psicológica da pessoa, fornecer-lhe roupas, refeições e alojamento adequados. Devem ser registados os detalhes sobre tudo o que for fornecido à vítima/testemunha. O estatuto de imigração de uma pessoa deve ser definido logo que possível.

Os objetivos devem ser identificados antes do início da entrevista.

Devido à complexidade das entrevistas a vítimas de tráfico, é considerada boa prática ter um plano escrito.

Considere planejar reuniões entre as pessoas que investigam os casos, as que realizam as entrevistas e os titulares da ação penal.

Os investigadores devem ter em conta a avaliação da testemunha para que seja estabelecido se se encontra num estado psicológico adequado à realização da entrevista.

O local de realização da entrevista deve ser limpo e confortável, cumprir os requisitos legais da jurisdição aplicável e ser o mais aceitável possível para a vítima/testemunha. Normalmente, não é adequado realizar as entrevistas nas suas casas.

A entrevista deve ser registada da forma mais adequada, considerando o material disponível e as questões práticas de cada forma de registo.

Sempre que possível, os entrevistadores devem ter formação específica, devem ser utilizados dois entrevistadores e estes não devem ser substituídos durante a realização da entrevista.

O género dos entrevistadores deve ser adequado às particulares condições da vítima. Se for possível, a escolha deve caber às potenciais testemunhas.

Deve ser considerada a necessidade de apoio social/intermediários para a vítima. Deve ser tido um grande cuidado para garantir que os intermediários utilizados não têm ligação aos traficantes.

Abordagem e explicação

Os entrevistadores devem monitorizar o comportamento do entrevistado e adaptar-se às suas circunstâncias.

As entrevistas devem ser realizadas a um ritmo adequado às necessidades da vítima. Devem ser permitidos intervalos frequentes. A vítima/testemunha deve ter algum controlo sobre a frequência das pausas, etc. A duração das entrevistas deve ter em conta as necessidades da vítima/testemunha.

Deve ser estabelecida uma relação com uma vítima.

Deve ser dada uma explicação sobre o processamento da entrevista. Essa explicação deve incluir:

- Quem são os entrevistadores e qual a sua experiência;
- O objetivo da entrevista;
- A função do entrevistador e a das outras pessoas presentes;
- A forma de registo da entrevista.

Considere realizar uma primeira entrevista que aborde tópicos gerais e que não trate diretamente do crime sob investigação.

Se uma entrevista inicial indicar que a vítima está tão severamente traumatizada que a obtenção de um depoimento afetaria seriamente a sua saúde mental, considere concluir a entrevista e avançar com diligências alternativas.

Depoimento

Sempre que for possível, as entrevistas devem ser iniciadas pedindo à vítima que faça um relato livre. Trata-se de um relato ininterrupto dos acontecimentos relevantes com as palavras da própria vítima/testemunha.

A extrema perda de controlo das vítimas de tráfico pode significar uma maior probabilidade de aceitarem ou concordarem com tudo o que o entrevistador disser.

Os depoimentos iniciais devem ser desenvolvidos através de:

- Perguntas abertas (permitindo que o entrevistado dê uma resposta sem restrições).
- Perguntas específicas (pergunta direta que desenvolve, clarifica ou acrescenta informação).

As perguntas fechadas dão ao entrevistado um conjunto limitado de respostas alternativas. As perguntas fechadas podem ajudar a testemunha a dar uma resposta específica, mas devem ser usadas cuidadosamente.

Uma pergunta direcionada dá a entender qual é a resposta ou o pressuposto em que esta se baseia. As perguntas direcionadas apenas devem ser usadas se não houver alternativa.

As técnicas especiais de entrevista apenas devem ser usadas por pessoas com a formação necessária.

Conclusão

Enumere ou resuma os pontos mais importantes da entrevista para verificar se a vítima/testemunha compreendeu corretamente os principais aspetos do depoimento.

Dê à vítima/testemunha uma oportunidade de colocar perguntas sobre a entrevista.

Tente garantir que o entrevistado saia confiante da entrevista.

Aconselhe e oriente a testemunha sobre como poderá aceder à ajuda e apoio disponíveis.

O entrevistado deve ser informado sobre o que irá acontecer em seguida. Considere os riscos introduzidos ou alterados pela entrevista.

Faça a avaliação sempre no final de cada entrevista, independentemente da duração da mesma.

Avalie a condição física e mental do entrevistado depois de cada entrevista e encaminhe-o para o apoio adequado, se necessário.

Consulte novamente os objetivos iniciais para verificar se foram alcançados.

Identifique novas linhas de investigação.

Anexo A – Checklist da entrevista

As seguintes checklists são divididas em três áreas:

- Aspectos gerais – que recomendam o detalhe que deve procurar em todas as respostas relevantes da testemunha.
- Abusos sexuais, físicos e psicológicos: caso haja suspeita de que ocorreram estas formas de abuso, deve ser delineado um modelo de inquirição de acordo com boas práticas.
- Mercados de tráfico e as cinco fases do processo comercial, detalhando a forma como poderá utilizar a inquirição para identificar o modo como uma organização de tráfico ou rede específica funciona.

Cada caso é diferente dos outros, podendo haver alguma sobreposição em algumas das perguntas sugeridas em seguida.

É recomendada a leitura de todas as checklists e a identificação das perguntas mais adequadas ao caso com o qual está a lidar.

Lembre-se que não deverá usar estas checklists apenas para criar perguntas direcionadas. O processo de entrevista deve ser realizado da forma mais adequada possível.

Aspectos gerais

- Deve ser feita uma descrição física completa e detalhada de cada suspeito ainda que não identificado, bem como de todos os veículos e/ou infraestruturas envolvidas.
- É importante que obtenha todos os detalhes possíveis relativamente ao interior de quaisquer infraestruturas e veículos envolvidos no crime. A descrição das entradas, fechaduras, mobiliário, ornamentos, imagens ou quaisquer outros aspetos peculiares das infraestruturas pode ser importante.
- As vítimas de tráfico raramente sabem as matrículas dos veículos nos quais estiveram, pelo que é sempre útil obter descrições detalhadas do exterior e do interior do veículo em questão, tais como a existência de danos, autocolantes nas janelas, padrão dos estofos, objetos suspensos no retrovisor, etc.
- Deve perguntar sempre à vítima se reteve alguma prova documental, como recibos ou cópias de anúncios, etc. Se for o caso, essas provas devem ser imediatamente apreendidas, colocadas em segurança e seladas em sacos de provas. As provas devem ser descritas pormenorizadamente e exibidas pela testemunha durante a declaração.
- Deve ser sempre perguntado às vítimas de tráfico se fizeram algum registo escrito dos acontecimentos, uma vez que muitas vítimas o fazem. Estes registos podem incluir uma descrição detalhada do dinheiro que foi ganho com a prostituição ou outras formas de exploração, bem como outros dados probatórios importantes. O entrevistador terá de abordar o assunto com sensibilidade porque, caso esse registo exista realmente, a

vítima pode não querer divulgá-lo por incluir material que considera íntimo e embaraçoso.

- Se a vítima tiver um registo escrito dos acontecimentos, esse registo deverá ser apreendido, colocado em segurança e exibido da forma habitual, sendo que a vítima poderá ser autorizada a consultá-lo durante as suas declarações.

Abuso sexual, físico e psicológico

Esta checklist define alguns elementos essenciais a apurar relativamente a crimes conexos com o crime de tráfico de pessoas, tais como:

Sequestro

Seguem-se algumas das perguntas que poderá considerar:

- Onde, quando e como?
- Foi usada violência ou houve ameaças do seu uso? Se sim, como foi infligida e quais os ferimentos da vítima?
- Foram usadas armas? Se sim, obtenha uma descrição completa.
- A vítima foi drogada de alguma forma? Se sim, obtenha pormenores, como o método de administração: injeção, líquido ou inalação?
- A vítima foi informada acerca das consequências de tentar fugir? Se sim, obtenha todos os pormenores relativos à natureza da ameaça e por quem foi feita.
- Foi dita alguma coisa? Se sim, o que foi dito, por quem e em que língua, dialeto ou sotaque? Foram usados nomes ou alcunhas?
- Onde foi a vítima levada e de que forma foi levada? Quanto tempo demorou a viajar do local de sequestro até ao local onde foi mantida?
- Obtenha uma descrição completa do local de detenção: o ambiente circundante, se a vítima conseguiu ouvir vozes ou ruídos como comboios ou aviões próximos, qualquer outro detalhe que permita identificá-lo?
- Conforme indicado anteriormente, obtenha descrições completas dos suspeitos, veículos e infraestruturas.

Considere ainda as seguintes perguntas sobre o local de aprisionamento:

- Onde foi mantida a vítima e durante quanto tempo?
- Obtenha uma descrição completa das áreas interiores e circundantes do local.
- De que forma foi a vítima aprisionada? Obtenha detalhes sobre a forma usada (cadeados,

formas de acesso e saída, chaves e quem as detinha).

- Se a vítima estava vigiada, obtenha uma descrição completa dos guardas e de todas as conversas que tiveram lugar.
- Qual a dimensão do local de aprisionamento? A vítima foi confinada a um espaço ou podia deslocar-se livremente numa área especificada?
- A vítima foi informada acerca das consequências de tentar fugir? Se sim, obtenha todos os pormenores relativos à natureza da ameaça e por quem foi feita.
- Relativamente aos aspetos anteriores, houve alguma testemunha de algum dos acontecimentos? Se sim, obtenha todos os detalhes.
- Obtenha descrições completas dos suspeitos, etc.

Agressão física e sexual

Seguem-se algumas das perguntas que poderá considerar:

- Onde, como, quando e com que frequência teve lugar o abuso? Se for possível, obtenha datas exatas. Use acontecimentos importantes para definir o tempo se não conseguir determinar datas exatas (muitas vezes, a vítima comunica que o abuso era tão frequente, por vezes diário, que os acontecimentos isolados se fundem num só).
- Onde é que aconteceu? Obtenha uma descrição completa dos locais conforme indicado anteriormente: esquema do local, cama, sofá, mobiliário, ornamentos, roupas usadas e/ou estragadas, roupa de cama, lençóis, edredão (cor, tipo).
- Qual a natureza exata da agressão? Obtenha uma descrição completa dos ferimentos causados: como foi exercida a violência sexual (violação vaginal ou anal, agressão oral ou manual forçada)? Obtenha uma descrição exata do estado da ereção peniana, da extensão da penetração e se houve ejaculação. Foram usados preservativos? Foi usada alguma arma ou utensílio?
- O que foi dito à vítima durante o abuso ou ameaça de violência, e por quem?
- Qual foi o contexto do abuso: gratificação sexual ou a vítima foi fisicamente ou sexualmente agredida com o intuito de intimidar, coagir ou habituá-la? Foi um castigo por a vítima ter desobedecido a instruções ou tentado escapar?
- A vítima demonstrou física ou verbalmente a sua recusa ou falta de consentimento e, se sim, de que forma o fez? A vítima infligiu algum ferimento no agressor durante a agressão? Se sim, descreva o ferimento.
- As vítimas de tráfico que sofreram agressões sexuais, respondem normalmente que não disseram nem fizeram nada para resistir e que simplesmente se submeteram ao abuso para evitar uma agressão física para além da agressão sexual. É extremamente

importante registrar esta condição, não apenas porque a agressão pode corresponder a violação independentemente da recusa ou da demonstração da falta de consentimento, mas porque ilustra a sujeição completa e a escravidão da vítima.

- Qual era a condição física da vítima após a agressão? Por exemplo, apresentava traumatismos, hemorragias, vômitos e náuseas, etc.?
- A vítima informou mais alguém sobre o que lhe aconteceu? Se sim, obtenha os detalhes completos sobre essa pessoa e sobre o que foi dito.
- A vítima solicitou ou recebeu algum tratamento médico para os ferimentos que sofreu? Se sim, obtenha os detalhes relativos ao médico, à clínica ou hospital, ao registo criado, etc.
- Qual era o estado de espírito da vítima no momento da agressão e como se sentiu depois?
- O que foi dito ou feito depois? A vítima foi ameaçada com mais agressões e, se sim, em que contexto? O agressor ou agressores exprimiram arrependimento?
- Obtenha uma descrição física exata do atacante; todas as peculiaridades, como tatuagens, «piercings», cicatrizes ou marcas, descrição e peculiaridades dos genitais, voz distintiva, língua ou sotaque, odor ou perfume, a condição dos dentes e das unhas, etc.
- Houve alguma testemunha de algum destes acontecimentos? Se sim, obtenha todos os detalhes.

Os mercados de tráfico e os cinco processos comerciais

Origem – recrutamento e partida

Recrutamento

Algumas perguntas que pode considerar relativamente ao local de origem:

- O contacto inicial entre a vítima e o traficante foi voluntário? Se sim, quem é que o iniciou?
- Se não foi voluntário, quais foram os meios coercivos utilizados? A vítima foi ameaçada ou agredida?
- Quais os preparativos feitos, e o que entendeu a vítima em relação a esses preparativos? A vítima sabia no que ia envolver-se?
- Em caso de exploração sexual, estava a vítima ciente de que ia trabalhar como prostituta? Se sim, qual a forma de prostituição: nas ruas, em bordéis ou agências de acompanhantes?

- A vítima foi enganada relativamente ao motivo real da viagem desde a sua origem até ao destino final? Se sim, qual a ocupação profissional que lhe foi indicada (emprego «legítimo», trabalho de escritório, trabalhos periféricos da indústria do sexo, como «lap dancing» ou trabalho como «anfitriã», etc.)?
- A vítima assinou um contrato? Se sim, quais eram os termos do mesmo?
- Foi dito à vítima onde passaria a morar e com quem, no país de destino?
- Os traficantes conhecem a morada da vítima ou outros detalhes respeitantes à sua família ou pessoas próximas? Os traficantes afirmaram que conheciam essas informações antes de a vítima ter sido traficada?
- Os membros da família da vítima ou outras pessoas próximas tinham conhecimento dos preparativos?
- A vítima foi abusada sexual, física ou psicologicamente, ou aprisionada, antes de ter sido traficada? Se sim, obtenha todos os detalhes relativos ao abuso sexual, físico e psicológico.
- Houve alguma testemunha de algum destes acontecimentos? Se sim, obtenha todos os detalhes.
- Qual a idade da vítima? O seu explorador tinha conhecimento dessa idade?
- Obtenha a identidade ou uma descrição completa de cada um dos suspeitos que entrevistaram na fase de recrutamento.

Anúncios

Algumas perguntas que pode considerar relativamente aos locais de origem:

- Anúncios «formais»:
- A vítima respondeu a um anúncio?
- Onde é que a vítima viu o anúncio – num jornal, revista, diretório de contactos, publicação profissional?
- Se sim, foi publicado localmente ou a nível nacional? Em que secção é que surgiu – colunas de anúncios pessoais, anúncios de trabalho, etc.?
- Foi num anúncio de rádio ou televisão – se sim, qual foi o canal, etc.?
- Quais foram as termos exatos usados no anúncio – qual foi a oferta, indicava um contacto individual específico?
- Qual era o conteúdo do anúncio? Por exemplo, trabalho bem pago no estrangeiro, agências de casamento ou acompanhantes, etc.

- De que forma é que seria feito o contacto com o anunciante – através de uma visita pessoal, telefone, fax, correio eletrónico, correspondência para uma morada ou apartado? Se sim, quais eram os números e os detalhes?
- A vítima pode disponibilizar uma cópia do anúncio?
- A vítima sabe se mais alguém respondeu ao anúncio?

Anúncios «informais»:

- Quem lhe falou sobre o «trabalho»?
- Como conheceu essa pessoa?
- Quem lha apresentou?
- O que lhe foi exatamente dito? Quando a conheceu?
- Foi o mesmo dito a mais alguém?
- Conhece os amigos, colegas de trabalho, familiares, etc., dessas pessoas?
- Com quem as viu? Consegue descrevê-las?

Instalações

Seguem-se algumas das perguntas que poderá fazer, relativas às instalações no local de origem:

- A vítima consegue descrever as condições nas quais foi mantida?
- Onde foi presa – descrição completa das instalações, mobiliário, etc?
- Se a vítima tiver sido sequestrada, sabe onde foi mantida e consegue descrever o local e/ou características topográficas periféricas?
- O recrutamento envolveu uma visita às instalações de um escritório ou agência? Se sim, obtenha uma descrição completa desse local.
- O contacto foi feito por um agente de recrutamento num bar ou clube noturno? Se sim, obtenha uma descrição completa do suspeito e das instalações.
- A vítima foi levada para e/ou mantida em locais privados antes de sair do seu país?

Comunicações

Seguem-se algumas das perguntas que poderá fazer, relativamente às comunicações mantidas no local de origem:

- De que forma foi feito o contacto entre a vítima e os traficantes: serviço de correio, apartado, telefone fixo, telemóvel, fax ou correio eletrónico?
- Quais eram os números e/ou endereços?
- A vítima viu alguma correspondência? Se sim, qual era o nome do destinatário?
- Se se tratava de um telemóvel, qual era a marca e o fornecedor de serviço? Chegou a ver essa indicação no ecrã do telemóvel?
- O traficante usou um computador portátil ou uma agenda pessoal? Se sim, qual o modelo? Será que a vítima conhecia alguns detalhes de funcionamento do equipamento, tais como códigos de acesso, fornecedores de serviço de correio eletrónico, etc.?

Transporte

Seguem-se algumas das perguntas que poderá fazer relativamente ao transporte desde o local de origem:

- A vítima foi transportada para fora do país dissimuladamente?
- Se sim, através de que meios – estrada, comboio, barco, etc.? Consegue descrevê-los?
- Sabe indicar a data e o ponto de partida exatos, e onde foi atravessada a fronteira?
- Quais os documentos de identidade que a vítima tinha e qual o nome e nacionalidade com que figurava nos mesmos? Como obteve esses documentos?
- A vítima viajou sozinha ou foi acompanhada por outras vítimas e/ou traficantes?
- Se viajou sem disfarce, quais os documentos de identidade usados? Eram genuínos ou contrafeitos?
- Se foram contrafeitos, qual o nome usado e de que forma e por quem foram obtidos?
- Quem levou a vítima a obter a fotografia para o passaporte/documento de identidade, e onde é que foi tirado?
- Foi exigida a aposição, no passaporte utilizado pela vítima, de um visto de entrada ou saída?
- Se sim, quais as secções da embaixada que foram visitadas? A vítima foi pessoalmente ou foi acompanhada? Se sim, por quem? Em que data e a que horas foi feita a visita? Foi paga alguma despesa? Por quem e de que forma? Foi emitido um recibo e foi carimbado com data e hora? A vítima conhece a identidade do agente de vistos que processou a candidatura? Consegue fornecer uma descrição?
- Foram usados outros documentos para suportar a candidatura à concessão de visto,

tais como cartas de recomendação, matrículas em escolas de línguas, agências de emprego, etc.? Se sim, quais são os detalhes, e será que a vítima tem cópias?

- Onde foram comprados os bilhetes de viagem, e por quem?
- Com que meios (dinheiro, cheque ou cartão de crédito) e em que nome foi comprado o bilhete?
- Quais os detalhes do transportador: empresa de autocarros, comboios, barcos ou transportadora aérea?
- Qual foi a data e o ponto de partida?
- A vítima foi acompanhada até ao local de partida? Se sim, como chegou lá, e com quem?
- A vítima viajou com outras vítimas e/ou traficantes, normalmente designados de «mulas»? Se sim, obtenha todos os detalhes.
- Quem se apresentou a quem, e a que horas? Qual a bagagem transportada? Foi feita alguma compra no ponto de partida e, se sim, com que meios? Quais os lugares emitidos nos bilhetes e quem se sentou ao lado de quem no avião, autocarro, etc.? Foi feita alguma compra isenta de impostos durante a viagem e, se sim, com que meios e por quem?
- Foram feitas verificações de controlo na partida? Foram os documentos e pertences da vítima examinados por algum profissional dos serviços de imigração, da guarda fronteiriça ou da alfândega antes de partir? Foi necessário preencher algum formulário? Se sim, a quem foi esse formulário entregue? E no momento de entrada nos países de trânsito e de destino? Se a vítima viajava acompanhada, foram os documentos e pertences do seu acompanhante examinados por alguns daqueles profissionais? Se sim, foi preenchida alguma documentação?

Aspetos monetários

Seguem-se algumas das perguntas que poderá fazer relativamente à situação e preparativos financeiros realizados no país de origem:

- Quais foram esses preparativos? A vítima pagou algum dinheiro adiantado ou foi assumido algum «compromisso de dívida»? Se sim, qual a quantia fixada e quanto tempo foi dado à vítima para a pagar?
- Como deveriam ser realizados os pagamentos: diretamente aos traficantes? Através de transferência bancária para o país de destino, para o país de origem ou para um terceiro país?
- Foi dito à vítima que poderia ter de pagar outras despesas no país de destino (p.e., relativas ao alojamento, anúncios ou ao aluguer de instalações para bordel, etc.)?

- Qual o montante que foi prometido à vítima pelo seu trabalho? Quem o prometeu?
- Foi trocada por dinheiro ou bens de valor por um membro da família ou por outra pessoa que sobre ela exercesse autoridade?
- Informações sobre bancos, contas e números pessoais ou empresariais e a localização das agências, utilizados nas transações durante o processo de tráfico. Foram usados cartões bancários, cartões de crédito, cheques de viagem ou cartões de carregamento de lojas pelos traficantes? Se sim, onde, quando e por que motivo (p.e., para pagar os bilhetes da viagem, a candidatura ao visto, bens isentos de impostos, etc.)?
- Foi comprado divisa estrangeira antes da partida? Se sim, onde, quando e qual o método de pagamento?
- A vítima chegou a ver recibos de contas relativas a anúncios ou chamadas telefónicas? Se sim, como foram pagas e a quem?

Trânsito - transporte

Exploração durante o trânsito

Algumas perguntas que pode considerar relativamente aos acontecimentos que tiveram lugar no local de trânsito:

- A vítima foi aprisionada durante a fase de trânsito? Foi abusada física, sexual ou psicologicamente nesta fase? Se sim, obtenha todos os detalhes relativos ao abuso sexual, físico e psicológico.
- A vítima foi referenciada pelas autoridades ou por outras entidades? Foi mandada parar pela polícia, procurou algum tratamento médico ou pediu alguma ajuda ao Estado enquanto em trânsito? A vítima preencheu algum documento oficial e, se sim, qual o motivo (em caso afirmativo, obtenha todos os detalhes)?
- Foi exigido à vítima que se prostituísse? Se sim, obtenha todos os detalhes do tipo de prostituição, locais, acordos financeiros, etc. (consulte a secção «País de destino»).
- A vítima foi explorada de alguma outra forma durante o trânsito?
- Descrições com todos os detalhes de quaisquer suspeitos, instalações e veículos adicionais que tenham surgido na fase de trânsito.
- Relativamente aos aspetos anteriores, houve alguma testemunha de algum destes acontecimentos? Se sim, obtenha todos os detalhes.

Nota:

Se a vítima disser que foi explorada, considere colocar as perguntas relativas ao local de destino e às formas de exploração.

Anúncios

Os anúncios raramente são encontrados na fase de trânsito/transporte do tráfico de pessoas.

Instalações

Seguem-se algumas perguntas que pode considerar relativamente às instalações utilizadas na fase de trânsito:

A vítima esteve presa em algum país de trânsito?

- Onde foi mantida a vítima e por quem – obtenha descrições completas.
- Quanto tempo permaneceu a vítima no país de trânsito e qual a natureza das condições em que foi mantida?
- Que locais visitou a vítima durante o trânsito?

Comunicações

Seguem-se algumas perguntas que pode considerar relativamente às comunicações efectuadas nos locais de trânsito:

Considere colocar as perguntas incluídas na secção de origem no contexto do trânsito, bem como:

- Os traficantes usaram telefones novos nos países de trânsito? Se sim, a vítima sabia como e onde obtiveram os telefones e como pagaram pelos telefones e pelas chamadas?
- Os traficantes usaram mais alguma forma de comunicação na fase de trânsito? Se sim, quem fez o quê, onde e quando?

Transporte

Considere colocar as perguntas incluídas na secção de origem no contexto do trânsito, bem como as seguintes:

- Qual a data, o local e a hora de partida do país de origem e da entrada no país de trânsito?
- Quais os documentos de identidade e/ou viagem usados pela vítima? Obtenha todos os detalhes.
- Onde obteve a vítima os documentos?
- Durante a viagem, algum acompanhante da vítima foi examinado nos pontos de partida e de entrada e, se sim, esse acompanhante preencheu algum documento?

- Qual a data, hora e local do ponto de partida, e modo de deslocação do país de trânsito?
- Quem eram as pessoas que acompanharam a vítima? Os seus acompanhantes foram examinados por profissionais do sistema penal do local de partida? Se sim, preencheram algum documento?

Aspetos monetários

Seguem-se algumas perguntas que pode considerar relativamente aos movimentos financeiros realizados nos locais de trânsito:

- Como foram pagos os bilhetes/alojamento?
- Quem pagou?
- A quem foi pago?
- Onde foram pagos os bilhetes, etc.?
- Quem teve acesso ao dinheiro na fase de trânsito?
- Foi retirado dinheiro dos bancos, etc.?
- Foi trocado dinheiro de uma divisa para outra?
- Foram efetuadas algumas transações financeiras que a vítima/testemunha não tenha compreendido? Consegue descrevê-las?
- Quem mais estava presente quando foram efetuadas as transações financeiras?

Locais de destino – acolhimento e exploração

Exploração

Algumas perguntas que pode considerar relativamente aos acontecimentos nos locais de destino:

A todas as vítimas:

- A vítima pôde manter os seus documentos de identidade e/ou de viagem após a chegada ou foram-lhe retirados? Em caso afirmativo, por quem e quando tal foi feito? Onde foram guardados os seus documentos?
- A vítima foi aprisionada ou agredida física, sexual ou psicologicamente nesta fase inicial? Se sim, obtenha todos os detalhes relativos ao abuso sexual, físico e psicológico.
- Qual a forma de exploração: prostituição, trabalho forçado, servidão, etc.? A vítima foi

obrigada a prostituir-se?

A vítimas de exploração sexual:

- Em que altura começou a ser explorada como prostituta? A vítima sabia que iria trabalhar em prostituição?
- Se não sabia, em que altura descobriu a verdade e através de quem?
- Qual o tipo de prostituição foi obrigada a trabalhar: prostituição de rua, num apartamento, em bordéis, saunas ou salões de massagens, bares de alterne e «lap-dancing», ou agências de acompanhantes?
- Se a vítima participava em prostituição de rua: qual a área que costumava frequentar e de que forma lá chegava? Havia algum traficante a supervisionar a vítima enquanto esta trabalhava?
- A vítima foi referenciada pela polícia ou por outras entidades? Foi abordada ou detida e acusada por prática da prostituição (nos países onde esta atividade é criminalizada)? Se sim, quando e onde, e qual a identidade usada?
- Se a vítima tiver trabalhado como prostituta em locais fechados: onde trabalhava e como se deslocava para o local onde se prostituía? Quem a levava até lá? Quais dos traficantes sabiam que a vítima estava a trabalhar como prostituta/prostituto, e como o sabiam? Estavam presentes no bordel ou na rua? O trabalho da vítima era discutido? Se sim, por quem?
- A vítima era supervisionada e, se sim, por quem? Qual o grau de liberdade que a vítima tinha? A vítima tinha liberdade para sair do bordel, bar ou agência sem supervisão?
- A vítima trabalhava com outras prostitutas/outras prostitutas e/ou empregados ou rececionistas? Se sim, consegue indicar os respetivos nomes e descrições?
- O bordel, bar ou agência alguma vez foi visitado por profissionais do sistema penal ou de outras entidades? Se sim, quem o visitou? Foi por estes exigido à vítima que desse o seu nome e outras informações? Se sim, qual o nome e informações forneceu?
- Quer tenha trabalhado como prostituta na rua ou em locais fechados: a que horas a vítima trabalhava e quais os serviços que tinha de prestar aos clientes? Era-lhe permitido fazer alguma opção relativamente aos clientes que tinha de servir ou aos serviços que tinha de prestar? Era obrigada a prestar serviços sexuais sem proteção contracetiva? Se recusasse, quais eram as consequências?
- A vítima falava a língua local? A vítima trabalhava com base numa lista escrita de serviços? Se a sua capacidade linguística era limitada, quem atuava como intérprete junto dela e dos clientes?

Perguntas para as vítimas de outros tipos de exploração:

- Quando começou a exploração?
- Se a vítima tinha de trabalhar, as condições de trabalho eram diferentes daquelas que esperava?
- A vítima vivia e trabalhava no mesmo local?
- Onde trabalhava? Como chegou lá? Quem a levou?
- Trabalhava com mais alguém? Também eram vítimas de tráfico? Consegue fornecer os respetivos nomes e descrições?
- Qual era o seu horário?
- Recebia algum pagamento e, se sim, qual o montante?
- Houve algum acordo relativo a dívidas? Se sim, quanto é que a vítima devia, quais os juros cobrados e com que montantes de amortização? Como foi paga: diretamente no país de destino, ou o dinheiro foi re-enviado para o país de origem? Se sim, por quem e de que forma, e em que conta foi o dinheiro creditado? Foram criados registos dos pagamentos da dívida?
- A vítima foi agredida ou ameaçada por ter feito um mau trabalho ou por trabalhar demasiado lentamente?
- A vítima era supervisionada? Por quem? Qual o grau de liberdade que tinha?
- A vítima foi alguma vez referenciada pela polícia ou outras entidades? Se sim, quando, onde e porquê? Qual a identidade usada pela vítima?
- A vítima falava a língua local?
- Foi-lhe exigido que pagasse despesas adicionais, tais como o arrendamento diário das instalações? Se sim, a vítima foi informada acerca dessas despesas adicionais antes de sair do seu país de origem?
- A vítima foi ameaçada ou sujeita a violência e/ou abuso sexual? Foi ameaçada com represálias contra a sua família ou pessoas próximas? Houve outros mecanismos de controlo, tais como aspetos de coação de natureza cultural ou religiosa?
- Os mecanismos de controlo foram usados para garantir que a vítima obedecesse às instruções que lhe eram dadas pelos traficantes?
- Foi ameaçada com a entrega às autoridades, e com a sua deportação e/ou prisão como resultado?
- Qual era o seu grau de liberdade geral? Podia movimentar-se livremente? Qual era o seu estado mental? A vítima acreditava que os seus traficantes implementariam algum dos

mecanismos de controlo indicados anteriormente?

- Foi permitido à vítima comunicar com os membros da sua família? Com os outros trabalhadores? Foi-lhe permitido ter amigos?
- A vítima perguntou ao traficante se podia ir-se embora? Porquê? Porque não? O que aconteceu?
- A vítima teve oportunidade de escapar ou de procurar ajuda das autoridades competentes? Se sim, tentou fazê-lo? Se não, porque não? Qual era o seu estado de espírito nestes pontos?
- Foram-lhe negados cuidados médicos, comida, roupas ou a satisfação de outras necessidades básicas à vítima?
- Assistiu a abusos perpetrados contra outras pessoas? Se sim, obtenha todos os detalhes.
- A vítima foi sexual, física ou psicologicamente abusada, ou aprisionada ilegalmente em mais alguma ocasião? Se sim, obtenha todos os detalhes.
- Obtenha descrições completas relativas às pessoas, instalações e veículos que tiveram intervenção no processo de tráfico no país de destino, adicionais em relação aos já referidos nas fases de origem e de trânsito.
- Quais as circunstâncias que permitiram ou levaram a que a vítima pudesse prestar as presentes declarações: foi resgatada ou fugiu sozinha?
- Houve alguma testemunha de algum destes acontecimentos? Se sim, obtenha todos os detalhes.

Anúncios

Algumas perguntas que pode considerar:

- A vítima sabe de que forma foi anunciado o seu trabalho ou serviços? Nos casos de exploração sexual em locais fechados, houve algum tipo de anúncio formal (cartazes, Internet, jornais, boca em boca, etc.)?

Instalações

Algumas perguntas que pode considerar:

- Qual foi o primeiro local para onde a vítima foi levada? Quem a levou até esse endereço e de que forma?
- À chegada, estava presente mais alguma pessoa/vítima? Como eram as instalações? Consegue descrevê-las?

- A vítima permaneceu nas mesmas instalações durante a sua estadia no país de destino? Com quem vivia? Para onde foi levada? Mudou de instalações durante a sua estadia?
- Obtenha uma descrição completa de todas as instalações nas quais a vítima se prostituía ou era sujeita a outras formas de exploração – incluindo detalhes acerca da disposição, decoração e quaisquer outras peculiaridades.
- Se a vítima tiver sido levada a quaisquer outros locais, durante o processo de tráfico (tais como as secções de vistos de uma embaixada, outros edifícios do Estado, hospitais, clínicas, escolas de línguas ou agências de arrendamento) – obtenha o máximo de detalhes.

Comunicações

Algumas perguntas que pode considerar:

- Alguma vez teve acesso a um telefone?
- Viu alguém usar algum telefone? Se sim, quem?
- Sabe onde esses telefones estão agora?
- Ouviu alguma conversa que alguém tenha tido através desses telefones?
- Fez alguma chamada, enviou correio eletrónico ou escreveu cartas para a sua família?
- A quem telefonou, escreveu ou contactou? O que disse nesses contactos?
- Se tiver enviado correio eletrónico, onde estava o computador?
- Mais alguém usou este computador? Quem? Por que motivo?

Transporte

Relativamente aos locais de destino, devem ser colocadas as perguntas acima referidas quanto ao local de origem, bem como as seguintes:

Entrada no país:

- Qual a data, hora e local de entrada no país de destino?
- A entrada foi dissimulada?
- Se foi dissimulada, quais os métodos usados? Com quem estava a vítima? Qual foi o método de transporte? O veículo foi mandado parar no ponto de passagem da fronteira? Se a viagem foi feita por barco, qual o ponto de desembarque e quem esperava a vítima?
- Se a entrada não foi dissimulada, qual foi o modo de transporte? Algum profissional do sistema penal examinou a vítima no ponto de passagem da fronteira? A vítima

preencheu alguma documentação, nomeadamente cartões de desembarque, declarações da alfândega, etc.?

- Quais os documentos de identidade e/ou viagem usados pela vítima? Onde estão esses documentos e quais os detalhes dos mesmos?
- O empregador/traficante usou a identidade da vítima com outro objetivo?
- Houve algum acompanhante da vítima na viagem cujos documentos ou bens tenham sido examinados nos pontos de entrada e, se sim, esse acompanhante preencheu algum documento?
- A vítima encontrou-se com alguém no ponto de entrada? Se sim, com quem? Obtenha uma descrição completa.

Durante o período de exploração:

- No fim de cada turno, a vítima era levada para uma «casa segura» ou permanecia nas instalações do bordel? Se a vítima ia para uma «casa segura», como se deslocava para lá e quem é que a levava?

Aspetos monetários

Seguem-se algumas das perguntas que poderá considerar:

- Quais os preços cobrados pelos serviços da vítima? Consegue indicar quanto dinheiro ganhava por dia e calcular a quantia total que ganhou com a prostituição durante o período de exploração? Com quanto desse dinheiro ficou, se é que ficou com algum?
- O que aconteceu ao dinheiro que a vítima ganhou? Era entregue a um traficante/rececionista/«empregada» depois de atender cada cliente, ou entregava todo o dinheiro no final do turno? Foram criados registos?
- A vítima comprou algum item para os seus exploradores com o dinheiro que ganhou com a prostituição, como joias ou roupas? Se sim, onde e quando, qual a sua descrição e custo, existência e localização? Tem algum recibo?
- Houve alguma divisão do dinheiro ganho entre a vítima e o traficante, ou o dinheiro foi todo entregue? Quem instruiu a vítima relativamente aos valores que deveria cobrar?
- Houve algum acordo relativamente à existência e liquidação da dívida? Se sim, quanto é que a vítima devia e com que termos foi obrigada a pagar a dívida? Como foi paga: diretamente no país de destino, ou o dinheiro foi enviado para o país de origem? Se sim, por quem e de que forma? Em que conta foi o dinheiro creditado? Foram criados registos dos pagamentos da dívida?
- Foi exigido à vítima que pagasse os custos adicionais das infraestruturas, como o arrendamento das instalações utilizadas ou o preço dos anúncios que publicitavam os

seus serviços? Se sim, foi informada acerca dessas despesas adicionais antes de sair do seu país de origem?

- Havia algum sistema de multas? Se sim, qual o valor de cada multa e qual o seu motivo? A vítima enviou algum dinheiro para casa?

Anexo B – Informações fornecidas pelas primeiras pessoas a chegar ao local do crime

Sempre que for possível, as informações transmitidas pelas primeiras pessoas a chegar ao local do crime devem incluir:

- A forma como a vítima foi referenciada pela polícia;
- A língua por aquela falada;
- A sua nacionalidade (ou presumível nacionalidade) e o estatuto de imigração;
- Registo do primeiro depoimento prestado;
- Quais os crimes que a primeira pessoa a chegar ao local do crime considera estarem indiciados;
- O nome e idade indicados pela vítima;
- Detalhes de qualquer deficiência que a vítima possa ter, especialmente se isso significar que é necessária a presença de um técnico de apoio antes do julgamento;
- Detalhes relativos ao estado de saúde da vítima ou outros elementos relevantes;
- Registo de todas as ações levadas a cabo, tais como a preparação de exames forenses, realização de buscas e detenções, etc. (leia os comentários apresentados adiante sobre este tipo de ação).

Anexo C – Planeamento estratégico

O planeamento estratégico garante a disponibilidade de recursos adequados, como equipamento, pessoal e meios necessários para formar pessoal, enquanto o planeamento tático é relativo à gestão diária e à realização de entrevistas.

Como planeador estratégico, é de extrema importância a sua capacidade para selecionar as pessoas certas para as entrevistas, para as motivar e inspirar e disponibilizar formação e supervisão.

Se tiver a responsabilidade de planear as investigações relativas ao tráfico de pessoas ao nível estratégico, é recomendado que desenvolva as suas estruturas e que aplique os recursos

disponíveis o mais cedo possível. Poderá optar pelas sugestões que são apresentadas adiante. É importante que tenha em atenção que as opções disponíveis aqui abrangem todos os níveis de desenvolvimento e de recursos.

A regra geral é utilizar os melhores recursos que conseguir.

Quando tiver os recursos necessários para a criação de uma equipa completa, deverá recrutar pessoal com formação em entrevistas a pessoas vulneráveis. Se não estiver disponível pessoal com tal formação, tente encontrar pessoas que tenham experiência neste tipo de entrevistas.

Se já existir um curso relativo a testemunhas vulneráveis, considere a sua frequência pelo seu pessoal. Estes cursos podem não ser completamente aplicáveis aos casos de tráfico, mas muitas das capacidades usadas nas entrevistas de investigação sexual, por exemplo, são relevantes nas entrevistas de tráfico. Considere a opção de contactar o Departamento de Formação no sentido de explorar a possibilidade de incluir os aspetos relativos ao tráfico no curso de entrevistas eventualmente existente.

Se não existir nenhum curso, considere a opção de colaborar com o Departamento de Formação no sentido de desenvolver um. Use este manual UNODC para o ajudar a desenvolvê-lo. Adapte-o à realidade do seu contexto nacional ou local.

Se não for possível realizar formação adicional, use este manual para familiarizar o seu pessoal com as técnicas apresentadas.

Diligencie a obtenção das necessárias autorizações para que determinados entrevistadores possam colaborar na investigação. Use este manual para informar os decisores sobre a problemática do tráfico de pessoas, salientando a importância da investigação e da perseguição penal do mesmo. Procure discutir com aqueles os aspectos mais relevantes daquela colaboração, designadamente os relativos à sua eventual duração, e discuta procedimentos e estratégias comuns de actuação.

Considere se vai usar ONG como apoio nas entrevistas. Verifique se a sua legislação permite este tipo de envolvimento.

Se decidir usar ONG, estabeleça protocolos e acordos, definindo funções, responsabilidades e restrições nas entrevistas.

Considere os recursos técnicos que pode implementar para apoiar as entrevistas de tráfico de pessoas. Seja criativo: algumas ONG e outras entidades podem fornecer-lhe equipamento que a sua unidade pode não ter. Descubra qual o equipamento que lhe podem disponibilizar.

Capacidades sugeridas para os entrevistadores

Se estiver a criar uma equipa de investigação de tráfico de pessoas e a procurar investigadores para a integrar, o seguinte resumo breve das capacidades necessárias poderá ajudá-lo na seleção do pessoal adequado:

- Capacidades de inquirição (especialmente capacidade para interagir com vítimas/testemunhas particularmente vulneráveis);
- Capacidades de escuta ativa;
- Capacidades de observação: capacidade de reconhecer e responder a casos de perturbação, ansiedade, medo, etc.;
- Capacidade para desenvolver uma relação de empatia com a vítima, mantendo um comportamento profissional (por exemplo, demonstrando compreensão, reconhecendo a violência, sendo paciente, etc.);
- Capacidade para adotar uma atitude imparcial, sem fazer juízos ou atribuir culpas (por exemplo, preconceitos contra classes, migrantes, trabalhadores do sexo, mulheres, homens);
- Capacidade para tranquilizar a vítima relativamente ao facto de esta não ter de sentir vergonha, não ter culpa, etc.;
- Competência cultural: vontade e capacidade para se preparar culturalmente/ser competente para trabalhar com pessoas de meios sociais diferentes;
- Preparação psicológica para lidar com crimes altamente perturbadores;
- Profissionalismo: manter um tom e um estilo profissionais mas compreensivo. Não recorrer a gíria nem a palavrões, mas tentar usar palavras e termos que a vítima escolha e compreenda. Não ter comportamentos inadequados (por exemplo, não ter contacto físico, mesmo com boas intenções).



Módulo 9

ESCRITÓRIO DAS NAÇÕES UNIDAS
SOBRE DROGAS E CRIME
Viena

Manual contra o tráfico de pessoas para profissionais do sistema de justiça penal

Módulo 9:

Entrevistas a crianças vítimas de tráfico
de pessoas

Tradução não oficial financiada por



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Módulo 9:

Entrevistas a crianças vítimas de tráfico de pessoas

Objetivos

No final deste módulo, os utilizadores deverão ser capazes de:

- Apresentar algumas das razões pelas quais as crianças sinalizadas como presumíveis vítimas e eventuais testemunhas do crime de tráfico de pessoas poderão ser mais vulneráveis do que as vítimas adultas nas mesmas condições;
- Explicar as diferenças entre a entrevista a uma criança presumível vítima de tráfico e a entrevista a um adulto nas mesmas condições, em cada uma das suas etapas.

Introdução

Este módulo tem como objetivo chamar a atenção para os principais problemas levantados pelas entrevistas a crianças vítimas de tráfico de pessoas.

Não pretende, todavia, ser um curso de formação geral sobre a realização de entrevistas a crianças enquanto vítimas e testemunhas vulneráveis. As crianças, por princípio e na prática, devem ser sempre entrevistadas por pessoas com formação específica para o efeito. Reconhece-se, no entanto, que em algumas situações poderão não estar disponíveis profissionais devidamente habilitados ou poderá não haver possibilidade de os formar. Tendo em atenção esta possibilidade, são dadas algumas sugestões básicas que poderão ajudar o profissional do sistema de justiça penal a conduzir uma entrevista bem-sucedida a crianças vítimas de tráfico. Deve realçar-se no entanto que, sempre que possível, devem ser formados profissionais nesta matéria e que deverão ser utilizados os melhores recursos disponíveis.

A Convenção das Nações Unidas sobre os Direitos da Criança define criança como qualquer pessoa com idade inferior a dezoito anos. Alguns adolescentes podem ter um comportamento e uma fisionomia de adultos. No entanto, enquanto tiverem uma idade inferior a dezoito anos,

são considerados crianças e devem ser tratados como tal.

Nos casos em que existam dúvidas sobre a idade da vítima e razões para acreditar que esta pode ser ainda criança, deverá ser tratada como tal até a sua idade ser confirmada.

A resolução 20/2005 do Conselho Económico e Social das Nações Unidas, designada «Linhas de Orientação Judicial em Questões Relativas a Crianças Vítimas e Testemunhas de Crime», define os direitos de todas as crianças que são vítimas e testemunhas de crimes.

Princípio básico: Em cada uma das etapas do processo, é necessário ter em atenção os superiores interesses da criança. Todas as ações têm de se basear nos princípios da proteção e respeito dos direitos humanos consagrados na Convenção das Nações Unidas sobre os Direitos da Criança e noutros instrumentos internacionais.

Muitos dos princípios básicos relativos às entrevistas a testemunhas vulneráveis também se aplicam às entrevistas a crianças. Porém, tenha presente que as crianças vítimas de tráfico de pessoas poderão ser ainda mais vulneráveis do que as vítimas adultas.

Algumas das razões que explicam este facto são as seguintes:

- As crianças vítimas de tráfico poderão ser naturalmente submissas: uma instrução de um adulto poderá ser seguida sem ser questionada;
- Sem experiência de vida, as crianças poderão considerar normal uma conduta anómala. Da mesma forma, poderão não conhecer as palavras necessárias para descrever o que lhes aconteceu;
- A criança poderá não ter casa ou familiares que a acolham. Muitas crianças vítimas de tráfico estão sozinhas quando são encontradas pelas autoridades. Poderá ser impossível localizar os familiares ou estes poderão estar mortos ou deslocados;
- Mesmo quando são localizados, os pais poderão não querer receber a criança. Esta poderá ser considerada um fardo por pais muito pobres ou os pais poderão estar doentes. Em alguns locais, o insucesso de um migrante é encarado como motivo de vergonha e a criança poderá sentir e/ou saber que não é desejada em casa;
- A criança poderá não querer regressar para a sua família. Nalguns casos, as crianças sofreram uma das mais profundas traições à sua confiança: a traição cometida por um membro da sua própria família, por vezes os seus próprios pais, quando a deram aos traficantes.

Estas questões têm implicações em todas as fases da entrevista.

As sugestões adiante apresentadas seguem o mesmo modelo do módulo 8: «Entrevistas a vítimas de tráfico de pessoas que constituem potenciais testemunhas». O módulo realça as semelhanças e diferenças entre as entrevistas a crianças e as entrevistas a adultos vítimas de tráfico.



Autoavaliação

Até que idade se considera que alguém é criança?

Quais as razões pelas quais as crianças sinalizadas como presumíveis vítimas de tráfico de pessoas poderão ser mais vulneráveis do que os adultos nas mesmas condições?

Planeamento e preparação

Princípios básicos

Em que fase está o caso? Objetivo, plano escrito e reunião de planeamento

As considerações apresentadas no módulo 8, «Entrevistas a vítimas de tráfico de pessoas que constituem potenciais testemunhas», são igualmente importantes no planeamento e preparação das entrevistas a crianças consideradas potenciais vítimas de tráfico. Complementarmente, deverão ser consideradas a utilização de técnicas específicas de entrevista e a orientação adicional que a seguir se oferece.

Outros indivíduos que não clientes também já «salvaram» vítimas, sinalizando-as às autoridades ou outras instituições.

Local da entrevista

Os conselhos gerais sobre o local a utilizar para a realização das entrevistas a adultos aplicam-se igualmente às entrevistas a crianças. As crianças não devem (como regra) ser entrevistadas no local onde vivem, quer se trate da sua casa, um lar de infância ou de um abrigo para crianças. A exceção a esta regra são os casos dos abrigos de crianças que dispõem de uma sala separada para entrevistas. É o que acontece em vários países.

Da mesma forma, as entrevistas nunca devem ser realizadas no local onde a exploração teve lugar ou onde a criança foi encontrada.

As salas devem ser o mais adequadas possível às crianças. Isto começa por coisas simples, tal como a remoção de perigos físicos e a prevenção de perturbações externas, como chamadas telefónicas ou visitantes inoportunos.

A decoração e mobília da sala de entrevistas devem ser o mais acolhedoras possível, o que pode incluir cores quentes, alcatifas macias, brinquedos apropriados à idade e sexo da criança e lápis coloridos e papel. Não disponibilize demasiados brinquedos à criança, pois pode distraí-la.

Os entrevistadores devem ponderar cuidadosamente as vantagens e desvantagens da utilização de brinquedos durante a entrevista — por um lado, o risco de distração e, por outro, a probabilidade de melhorar a situação e resposta da criança. O entrevistador deverá, de preferência, referir que outras crianças estiveram naquela sala anteriormente. O equipamento técnico deve limitar-se ao necessário para a realização da entrevista, por exemplo, equipamento de gravação.

Devem ser feitos preparativos para transportar a criança e o(s) seu(s) acompanhante(s) até ao local de entrevista e no regresso ao local de origem.

Momento da entrevista

De preferência, as crianças deverão ser entrevistadas o mais cedo possível após serem sinalizadas como possíveis vítimas de tráfico.

No entanto, as entrevistas não deverão ter lugar antes das necessidades básicas da criança terem sido satisfeitas, designadamente no que se refere à saúde, ao sono e à alimentação. Esta condição não só constitui um direito da criança, mas também ajudará o profissional do sistema de justiça penal a obter o melhor depoimento possível.

A duração da entrevista, e possíveis intervalos, deverão ser ditados pelo ritmo da criança e adaptados em conformidade. Se necessário, os entrevistadores deverão marcar vários dias para realizar a entrevista.

Avaliação da vítima

A capacidade da criança para ser entrevistada deve ser avaliada por uma pessoa com formação e competências específicas, tal como um assistente social ou um psicólogo infantil.

Em alguns países, a legislação proíbe os depoimentos em tribunal de menores de 14 anos, podendo permitir no entanto a utilização de entrevistas gravadas como prova. Mesmo nos casos em que esta disposição não se aplica, o superior interesse da criança deve ser a preocupação fundamental. A avaliação da aptidão da criança para ser testemunha requer a ponderação das suas necessidades e capacidades individuais, incluindo a linguagem, a saúde, a maturidade e a sua capacidade pessoal para lidar com os acontecimentos.

Poderá considerar a presença de um especialista durante a entrevista, para observar a comunicação não-verbal da criança.

Como será registada a entrevista?

Aplicam-se formas semelhantes de registo nas entrevistas a adultos e crianças vítimas do crime de tráfico de pessoas. Nalgumas jurisdições, poderá existir um requisito legal que exija que as entrevistas a crianças, vulneráveis enquanto testemunhas, sejam registadas em vídeo.

Mesmo que não constitua um requisito legal, o vídeo é ainda assim a melhor opção, pois não é intrusivo, ajuda as testemunhas a descontraírem e pode reduzir a necessidade de repetição do depoimento.

Confirme que todo o equipamento técnico está a funcionar corretamente antes de dar início à entrevista.

Nos casos em que seja exigido um relatório escrito, poderá ser aconselhável que alguém colocado noutra sala registre a entrevista por escrito ou registo áudio.

Nunca se esqueça de informar plenamente a criança sobre o que está a fazer, porquê, e o

modo como a gravação vai ser utilizada.

Transcreva o depoimento na linguagem da criança.

Quem deve entrevistar a vítima?

Se em todos os casos de tráfico é aconselhável que as entrevistas sejam feitas por profissionais com formação específica para entrevistarem pessoas vulneráveis, no caso das vítimas menores este aspeto assume especial importância.

Procure que a criança estabeleça uma relação de confiança com um ou dois entrevistadores e intérpretes. Não os mude a menos que seja absolutamente necessário. As mudanças podem confundir ou assustar a criança.

Esteja atento a sinais que possam indicar que a criança sente desconfiança ou medo em relação ao entrevistador/intérprete. É uma boa prática utilizar entrevistadores e intérpretes de um meio cultural igual ou semelhante ao da criança, mas tenha sempre em atenção as reações desta e os seus interesses.

Tenha em consideração o sexo da criança e, na escolha do entrevistador, o sexo mais adequado para realizar a tarefa.

Os entrevistadores deverão estar familiarizados com o nome da criança, idade, língua, meio cultural e estado de saúde. As entrevistas a crianças exigem uma grande preparação e cuidado.

A presença de uma pessoa da rede social de apoio da criança durante a entrevista constitui um requisito legal em vários países do mundo. Em regra, o apoio social é prestado pelos pais ou tutores da vítima. Todavia, nas entrevistas a crianças vítimas de tráfico de pessoas, é pouco provável que a presença dos seus pais ou tutores seja possível.

A escolha da pessoa que irá dar apoio social à vítima deve ser rodeada das maiores cautelas. Ninguém que esteja ou possa estar ligado ao crime de tráfico de pessoas poderá desempenhar essa função e, por isso, a escolha também não poderá recair automaticamente em alguém que se apresente como familiar da criança. Precisa de lidar de forma refletida e cautelosa com esse tipo de ofertas tendo presente que as pessoas em causa poderão ter estado envolvidas no crime. Confirme todas as informações antes de recorrer a essas pessoas.

No que diz respeito à utilização de intérpretes, aplicam-se às entrevistas a crianças vítimas de tráfico de pessoas considerações análogas às entrevistas a adultos vulneráveis. O Módulo 10: «Intérpretes nos casos de tráfico de pessoas», poderá fornecer orientação adicional sobre este tópico.

Consulte a legislação do seu país. Da mesma forma que as vítimas com necessidades especiais apenas deverão ser entrevistadas por especialistas, recorde-se que as crianças vítimas de tráfico de pessoas são vulneráveis, pelo que também só deverão ser entrevistadas por especialistas. Mesmo que a legislação do seu país não imponha a utilização de especialistas nas entrevistas a crianças, recorra a estes sempre que puder. Se não dispuser de entrevistadores

com formação adequada, deverá tentar providenciá-lo.

Nos casos em que não estejam disponíveis ações de formação neste âmbito para as autoridades competentes, coloque a hipótese de obter apoio de organizações de apoio à vítima, incluindo ONG. Muitas ONG que trabalham na luta contra o tráfico de pessoas oferecem aos seus funcionários formação sobre o modo de entrevistar as vítimas. Poderá não ser o ideal para os profissionais do sistema de justiça penal, mas pode ser uma ajuda.

Sempre que abordar uma ONG, faça-o de acordo com as práticas vigentes no seu país.

Nos casos em que não disponha de profissionais especializados em entrevistar crianças, procure usar um membro da sua equipa que tenha anteriormente entrevistado com sucesso testemunhas deste grupo etário. Utilize este módulo para sensibilizar a sua equipa em relação a este assunto.

Duração e intervalos da entrevista

Normalmente, as crianças precisam de mais intervalos do que os adultos e este fator deve ser incluído no planeamento da entrevista.

	Autoavaliação
<p>Quais são as diferenças entre a entrevista a uma criança presumível vítima de tráfico de pessoas e a entrevista a um adulto nas mesmas condições, na etapa de «Planeamento e preparação da entrevista»?</p>	
	Exemplo
<p>Em 2006, um cidadão de um país da Europa Ocidental, que tinha sido anteriormente condenado por crimes sexuais contra crianças no seu país, foi condenado por abuso sexual de menores no Sudeste Asiático. O homem foi encontrado num albergue com um rapaz de 13 anos de quem abusava sexualmente há quase três anos em troca de apoio financeiro à família do rapaz. O caso podia ter sido julgado na Europa Ocidental, mas foi julgado no Sudeste Asiático de acordo com a lei do país em causa, poupando assim à criança vitimizada, cujo depoimento em tribunal poderia ser necessário, o desconforto e sofrimento adicionais causados por uma viagem ao estrangeiro, ao mesmo tempo que o país do Sudeste Asiático dava um sinal aos potenciais autores de crimes similares de que estava a aplicar de forma apertada a legislação nacional contra a exploração sexual de crianças. A pessoa em causa foi condenada a uma pena de prisão de 18 anos – a pena mais longa aplicada até à data por este crime.</p> <p style="text-align: right;"><i>Combating Child Sex Tourism: Questions & Answers 2008, ECPAT.</i></p>	

Abordagem e explicação

Uma diferença essencial entre as entrevistas a adultos e as realizadas a crianças consiste no facto de a linguagem usada necessitar de ser adaptada à idade da criança.

Utilize gestos abertos e amigáveis, apropriados à cultura da criança, logo a partir do primeiro encontro. As pessoas que fazem parte da rede social de apoio da vítima poderão ser capazes de o aconselhar em alguns casos.

Os entrevistadores deverão explicar a razão da entrevista e qual o seu objetivo numa linguagem adequada àquela criança em particular. Não informar a criança daquilo que se está a passar poderá causar-lhe tensão e afetar a qualidade da sua cooperação.

A informação dada deverá incluir igualmente tudo o que for relevante sobre: o local, a razão pela qual a entrevista é necessária, o motivo da presença do equipamento técnico, como funciona e como será utilizado o registo da entrevista.

Seja honesto com a criança e não faça promessas que não possa cumprir. Inclua informação sobre os riscos e as vantagens realistas de prestar depoimento. Certifique-se, no entanto, de que a criança sabe que tudo é feito no seu interesse e que serão tomadas todas as medidas possíveis para impedir que sofra algum mal.

Faça a criança sentir que detém o controlo, dando-lhe informação abrangente e permitindo-lhe fazer pequenas escolhas, mas não sobrecarregue a criança com responsabilidade. Explique que a entrevista não é um interrogatório.

Se possível, os entrevistadores não devem usar farda na entrevista. Tal aplica-se a todas as entrevistas a vítimas vulneráveis, mas especialmente a entrevistas a crianças.

Apresente de forma clara todas as pessoas presentes na sala e explique a razão por que se encontram ali. Trata-se, de novo, de uma questão geral de boas práticas, mas que é particularmente importante para uma criança.

Confirme que a criança compreendeu tudo o que lhe disse. Não se limite a transformar o significado das palavras da criança em palavras suas. Utilize frases e palavras simples tanto quanto possível. No entanto, evite usar linguagem infantilizada.

Pondere cuidadosamente a utilização de perguntas direcionadas. E, se as usar, procure não condicionar as respostas.

Não pergunte demasiadas coisas ao mesmo tempo. Faça as perguntas uma de cada vez.

Não pressione a criança: explique que não há respostas «certas» ou «erradas» e que não há pressa em terminar a entrevista.

Se existe uma pessoa da rede social de apoio da vítima com formação ou experiência nas entrevistas a crianças ou habituada a falar com este grupo etário, pergunte-lhe qual a linguagem mais adequada para a criança que pretende entrevistar. Ao longo da entrevista,

consulte estas pessoas e os colegas que o assistem sobre a forma como a mesma está a decorrer.

	Autoavaliação
Quais são as diferenças entre a entrevista a uma criança presumível vítima de tráfico de pessoas e a entrevista a um adulto nas mesmas condições, na etapa «Abordagem e Explicação» da entrevista?	

Depoimento

A entrevista de uma vítima vulnerável, quer se trate de uma criança ou de um adulto, não deverá ser encarada como um interrogatório. O objetivo da entrevista é ajudar a criança a revelar informação que contribua para a investigação.

Sempre que possível não se deve pedir às crianças que repitam o seu depoimento. Até certo ponto, tal pode entrar em conflito com o processo do relato livre, em que se fazem perguntas para aprofundar as respostas.

Em alguns casos, o depoimento, particularmente o relato livre, poderá ser muito breve e descrever os acontecimentos de uma forma que não deixe claro aquilo que sucedeu.

Embora um relato livre inicial possa ser muito breve, o desenvolvimento desse relato pode fornecer informação que, em conjunto com outros elementos de prova, poderá sustentar um procedimento penal.

As crianças podem também ser particularmente influenciáveis, suscetíveis de sentirem-se compelidas a colaborar e/ou a conformar-se com o que lhes for dito. Tal pode ser particularmente verdade nos casos de tráfico de pessoas em que as crianças tiveram de colaborar durante um longo período de tempo com os traficantes para conseguirem sobreviver.

O desejo de que gostem dela pode levar a criança a dar apenas as respostas que pensa serem as que irão agradar ao entrevistador. Deverá realçar o facto de que todas as respostas que correspondem à memória que a criança tem dos acontecimentos, incluindo «Não sei», são apropriadas.

Utilize o registo vídeo (ver acima) sempre que possível, para reduzir a necessidade de repetir algumas perguntas.

O registo vídeo apenas irá reduzir até certo ponto a necessidade de repetir o depoimento; poderá continuar a precisar de aprofundar o relato. Tomar apontamentos de qualidade durante o relato livre irá ajudar a planear as perguntas a aprofundar de forma eficaz, para que apenas

seja necessário abordar cada tópico uma vez.

Se estiver a utilizar o registo vídeo, poderá optar por fazer um intervalo na entrevista para o rever e planear as perguntas de aprofundamento. Poderá também ponderar rever o registo para interpretar a comunicação não-verbal da criança, porventura com a ajuda de um perito.



Exemplo

O seguinte exemplo poderá ser perturbador. No entanto, ilustra o tipo de relato que poderá ouvir durante a entrevista a uma criança que foi sujeita a exploração sexual. Embora neste caso a criança tenha sido vitimizada pelo pai, é ainda assim relevante para os casos de tráfico de pessoas com fins de exploração sexual.

A polícia indiana recebeu a informação de que uma menina de seis anos tinha sido objeto de abuso sexual pelo próprio pai. Ao ser entrevistada, tornou-se notório que tinha sido sujeita a atos sexuais orais. No entanto, a criança apenas conseguia descrever o ato a que tinha sido sujeita como tendo sido alimentada pelo pai.

Os entrevistadores aprofundaram o depoimento da menina, mas esta nunca descreveu explicitamente quais os atos que o pai tinha praticado. A menina estava gravemente traumatizada, não sabia as palavras usadas para descrever o ato, e o pai tinha-lhe dito que a estava a alimentar.

As autoridades judiciárias defrontaram-se com o problema do significado do depoimento da criança e manifestaram a opinião de que seria difícil obter uma condenação em tribunal baseada apenas naquele testemunho.

Os procuradores e investigadores recorreram então a um psicólogo infantil para explicar o depoimento da vítima em tribunal. Em consequência, o pai foi declarado culpado e condenado a uma pena de prisão perpétua.

Nos casos em que o depoimento é muito curto, tenha cuidado em não pressionar demasiado a criança para obter detalhes adicionais. Corre o risco de traumatizar ainda mais a criança e assim anular quaisquer hipóteses de obter informação.

Mesmo um depoimento muito curto ou que utiliza a linguagem particular da criança para descrever os atos pode constituir uma prova valiosa. Reflita sobre o modo como poderá utilizar peritos para interpretar estas provas. O exemplo acima descrito ilustra uma utilização bem-sucedida desta abordagem.

Nos casos em que os depoimentos são muito curtos ou em que a informação é reduzida,

pondere a possibilidade de interromper a entrevista. Poderá ser necessário rever a posição no futuro, juntamente com as pessoas responsáveis por cuidar da criança, como uma ONG ou um assistente social.

Circunstâncias que podem influenciar a colaboração

A possibilidade de as crianças vítimas de tráfico de pessoas se sentirem compelidas a colaborar é ainda maior do que no caso de vítimas adultas.

Aceitação e conformismo

À semelhança dos comentários que fizemos na secção «Circunstâncias que podem influenciar a colaboração», existe um maior risco de a criança aceitar aquilo que o profissional do sistema de justiça penal lhe diz e de se conformar com o que lhe for dito.

Técnicas de entrevista

Uma série de técnicas especializadas de entrevista, também conhecidas por técnicas de entrevista cognitiva, tem sido usada nas entrevistas a crianças em todo o mundo. Estas técnicas utilizam conceitos tais como a mudança de perspetiva e a utilização de objetos para ajudar a criança a fazer o seu depoimento.

As técnicas especializadas de entrevista apenas deverão ser utilizadas por profissionais devidamente formados para o efeito. Não deverão ser utilizadas a não ser que o procurador (nos casos em que existe uma separação entre investigador e procurador) tenha conhecimento e concorde com a sua utilização.

Algumas abordagens implicam pedir às testemunhas que repitam o seu depoimento de trás para a frente, ou que pensem naquilo que veriam caso observassem a cena a partir de uma posição diferente: estes métodos só são aceitáveis se o entrevistador tiver recebido formação adequada.

A utilização da técnica de mudança de perspetiva poderá ser aceitável quando estiver a aprofundar o depoimento da testemunha, pedindo à criança para relatar o que poderia ver a partir de determinada perspetiva ou de determinado sentido do corpo (por exemplo, o que poderia ver, ouvir, cheirar, se estivesse no outro lado da sala), para obter um depoimento.

As seguintes perguntas ilustram a forma como poderá pedir a uma testemunha para lhe contar mais sobre aquilo que determinado sentido do corpo lhe transmitia durante os acontecimentos:

«Disseste que viste o homem a bater no rapaz. Que mais conseguias ver na altura em que isso estava a acontecer?»

Pode aprofundar as respostas mediante perguntas como:

«Quem é que conseguias ver quando o homem estava a bater no rapaz?»

«O que é que essas pessoas estavam a fazer enquanto isso acontecia?»

«Disseste que viste o homem bater no rapaz. O que ouvias enquanto isso acontecia?»

As respostas podem ser aprofundadas mediante perguntas como:

«O rapaz estava a gritar. Conseguias ouvir alguma palavra?» «Que palavras?»

Não utilize brinquedos ou outros adereços para demonstrar o que aconteceu, a não ser que tenha tido formação neste método. Mesmo nos casos em que o método é utilizado por profissionais devidamente qualificados, trata-se de uma técnica controversa.

Permita às crianças ter um brinquedo se isso as confortar, mas não tente interpretar aquilo que as crianças fazem com o brinquedo.

Nalguns casos de exploração sexual, poderá ser apropriado utilizar um desenho anatómico para ajudar a criança a indicar o que lhe aconteceu.

Em circunstância alguma deverá pedir à criança para demonstrar ou indicar o que aconteceu utilizando o seu próprio corpo, o do entrevistador ou o de qualquer outra pessoa que esteja presente.

Se, de facto, utilizar diagramas, ou desenhos feitos pela criança, deverá registar a forma como foram introduzidos na entrevista e aquilo que aconteceu. Guarde qualquer material produzido e exiba-o de acordo com os procedimentos em vigor na sua jurisdição.



Autoavaliação

Quais são as diferenças entre a entrevista a uma criança presumível vítima de tráfico de pessoas e a entrevista a um adulto nas mesmas condições na etapa «Depoimento» da entrevista?

Conclusão

Utilize a linguagem da criança (tanto quanto possível) para resumir os principais elementos de prova constantes do seu depoimento. Confirme que percebeu o que aquela lhe disse.

Caso esteja presente um segundo entrevistador, verifique se o mesmo deseja fazer perguntas adicionais ou clarificar algum ponto.

Pergunte à criança se tem alguma coisa a perguntar ou a acrescentar ao depoimento.

Diga à criança o que vai acontecer a seguir. Responda a quaisquer perguntas numa linguagem adequada, de forma honesta e realista. Não faça promessas que não possa cumprir.

Agradeça à criança pelo seu tempo e esforço. Demonstre-lhe que levou a sério o seu depoimento mas não lhe agradeça por qualquer revelação em particular que tenha feito.

Informe a criança da eventualidade de ter que fazer-lhe mais perguntas, se considera provável que tal venha a acontecer.

Deixe a criança descontraír durante algum tempo depois de a entrevista ter acabado. A criança deverá deixar a entrevista a sentir-se o melhor possível. Pondere a discussão de tópicos neutros, mencionados na fase «Abordagem e Explicação» ou referidos pela criança durante a entrevista.



Autoavaliação

Quais são as diferenças entre a entrevista a uma criança presumível vítima de tráfico de pessoas e a entrevista a um adulto nas mesmas condições, na etapa «Conclusão» da entrevista?

Avaliação

A avaliação não deve ser vista como algo que apenas tem lugar no momento da conclusão da entrevista. Poderá haver vários momentos durante esta em que é adequado e útil fazer uma pausa e avaliar o que se conseguiu até então.

Os princípios gerais de avaliação de uma entrevista são semelhantes, quer se trate da entrevista a uma criança ou a um adulto. Deverá equacionar o envolvimento da pessoa que dirige a investigação, bem como de outros investigadores e serviços relevantes (tais como serviços sociais e ONG).

Em alguns casos, poderá necessitar de obter a cooperação de um especialista para o ajudar a avaliar a informação, como por exemplo, um psicólogo infantil.

Uma possível diferença entre as entrevistas a testemunhas vulneráveis em casos de tráfico e noutros casos reside no facto de, nos casos de tráfico, devido à sua complexidade, se verificar uma maior probabilidade de serem necessárias entrevistas posteriores. A fase de avaliação deve ser utilizada para ponderar se tal é necessário no caso em investigação. A avaliação do profissional do sistema de justiça penal deverá incluir pormenores sobre a informação obtida, a necessidade de entrevistas adicionais, etc.

Guarde um registo da sessão de avaliação e de todas as decisões tomadas.



Autoavaliação

Quais são as diferenças entre a entrevista a uma criança presumível vítima de tráfico de pessoas e a entrevista a um adulto nas mesmas condições, na etapa «Avaliação» da entrevista?

Resumo

Uma criança é qualquer pessoa com idade inferior a 18 anos.

Muitos dos aspetos das entrevistas a crianças que são vítimas e/ou testemunhas de tráfico são semelhantes às entrevistas a adultos vulneráveis que são vítimas e/ou testemunhas do mesmo crime.

As crianças poderão ser mais vulneráveis nas entrevistas porque:

- Poderão sentir-se compelidas a colaborar;
- Poderão considerar normal uma conduta anómala;
- Desconhecem as palavras para descrever o que aconteceu;
- Poderão não ter familiares, os familiares não os quiserem aceitar ou elas mesmas não quiserem voltar para estes.

Planeamento e preparação

- As salas devem ser o mais adequadas possível para as entrevistas às crianças;
- A duração da entrevista e possíveis intervalos deverão ser ditados pelo ritmo a que a criança se sente confortável;
- As crianças poderão precisar de intervalos adicionais;
- Sempre que possível, a aptidão das crianças para serem sujeitas a entrevista deverá ser avaliada por uma pessoa devidamente qualificada;
- Transcreva o depoimento na linguagem da criança;
- Sempre que possível, as crianças deverão ser entrevistadas por profissionais devidamente qualificados para o efeito; e
- Sempre que possível, deverá recorrer-se a pessoas da rede social de apoio da criança.

Abordagem e explicação

- A linguagem usada deve ser adaptada à idade da criança;
- As explicações devem ser claras e simples, mas deve evitar-se a utilização de linguagem infantilizada.

Depoimento

- O relato livre no depoimento de uma criança pode ser muito breve e vago. Um depoimento, ainda que breve, pode constituir a base de um procedimento penal bem-sucedido, desde que bem explorado;
- As crianças podem também ser particularmente influenciáveis, suscetíveis de sentirem-se compelidas a colaborar e/ou a conformar-se com o que lhes for dito;
- As perguntas fechadas e as perguntas direcionadas apenas deverão ser usadas nestas entrevistas após cuidadosa reflexão;
- As técnicas especializadas de entrevista apenas devem ser usadas por pessoas devidamente qualificadas;
- Nunca devem utilizar-se brinquedos e outros adereços caso o profissional do sistema de justiça penal não tenha recebido formação adequada para o efeito. Mesmo que esteja devidamente qualificado, trata-se de um método controverso.

Conclusão

- Quaisquer comentários feitos durante a conclusão da entrevista deverão ser feitos numa linguagem que a criança compreenda.

Avaliação

- Pondere envolver na avaliação psicólogos infantis ou outros especialistas.



Acórdãos relevantes do TEDH

- Case of Breukhoven v. The Czech Republic
- Case of Rantsev v. Cyprus and Russia
- Case of Siliadin v. France

Case of Breukhoven v. The Czech Republic

FIFTH SECTION

CASE OF BREUKHOVEN v. THE CZECH REPUBLIC

(Application no. 44438/06)

JUDGMENT

STRASBOURG

21 July 2011

FINAL

21/10/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Breukhoven v. the Czech Republic,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Dean Spielmann, *President*,
Elisabet Fura,
Karel Jungwiert,
Boštjan M. Zupančič,
Mark Villiger,
Ganna Yudkivska,
Angelika Nußberger, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 28 June 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 44438/06) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Dutch national, Mr Johan Breukhoven (“the applicant”), on 24 October 2006.
2. The applicant was represented by Mr L. Petříček, a lawyer practising in Prague. The Czech Government (“the Government”) were represented by their Agent, Mr V. A. Schorm, of the Ministry of Justice.
3. The applicant alleged, in particular, a violation of his right to cross-examine witnesses under Article 6 § 1 and 3 (d) of the Convention.
4. On 15 March 2010 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1). On 17 March 2010 he decided to give notice of the application to the Government of the Netherlands in order to enable them to exercise their right to intervene in the proceedings (Article 36 § 1 and Rule 44). On 30 June 2010 the Government of the Netherlands informed the Court that it did not wish to exercise their right to intervene.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1952 and currently lives in Valcea, Romania.
6. The applicant was the owner of a night club in Dolní Dvořiště, Czech Republic. On an unspecified date the police started investigating the club, on the suspicion that women working there were being forced to prostitute themselves. On an unspecified date the applicant left the Czech Republic. His whereabouts were unknown to the Czech authorities.
7. During the initial stage of the investigation five women, all Romanian nationals who worked in the club, were questioned. The interviews were conducted in the presence of a judge under Article 158a of the Code of Criminal

Procedure as an urgent measure (*neodkladný úkon*) because the women said that they wished to return to Romania and never come back to the Czech Republic. Under the same procedure, two customers of the club were also questioned. Neither the applicant nor his lawyer were present at these interviews and the applicant did not even know about them as they were carried out before he was charged.

8. Witnesses F.D., N.D and V.D. testified that the applicant had met them in Romania and had lured them to the Czech Republic with the promise of work as bartenders or cleaning ladies. However, after their arrival, he had forced them to prostitute themselves under the threat of killing their families. The applicant had also taken their passports so that they would not be able to leave. They had had to give the applicant one half of the money they earned from their customers.

9. Witnesses D.C.C. and A.T.V. testified that they had worked as prostitutes in the club voluntarily and that they had been required to give the applicant one half of what they earned from their customers.

10. On 25 February 2005 a judge of the Český Krumlov District Court (*okresní soud*) ordered a search of the club, which the police carried out on the same day.

11. On 3 May 2005 the applicant was charged with trafficking in human beings and procuring prostitution.

12. The applicant was represented by a lawyer of his own choosing until 31 August 2005, when the latter stopped representing him because he had not paid his fees. On 7 September 2005 the České Budějovice District Court appointed a lawyer to represent the applicant in the proceedings. He defended the applicant until 19 April 2007, when the judgment in his case became final. Subsequently the applicant was represented by another lawyer in the proceedings before the Supreme Court (*Nejvyšší soud*) and the Constitutional Court (*Ústavní soud*).

13. On 27 September 2005 a sixth witness, a certain I.M., was interviewed by the police. She testified that in Romania she had been promised by the applicant's wife that she would work in a kitchen in the Czech Republic. When she arrived at the applicant's club, however, she was told that she would work as a prostitute, which she agreed to do as she was afraid of the applicant. She further testified that there were other prostitutes at the club, namely F.D., N.D. and a certain M. at that time. She did not elaborate any further, however, as to how these girls had arrived at the club or whether they were there voluntarily or not. Neither did she know whether other girls had been threatened by the applicant. She further described the situation in the club: the customers paid the applicant directly who then gave money to the girls working there; the girls could leave the premises but had to stay in town; and their passports had been taken away from them. The applicant's lawyer was present at the interview but did not ask any questions.

14. After the applicant was arrested in Bulgaria and extradited to the Czech Republic, the District Court ordered his pre-trial detention on 31 January 2006. On 17 October 2006 the České Budějovice Regional Court (*krajský soud*) extended the applicant's pre-trial detention because of a danger of his absconding. The applicant was heard in person on this occasion but in his lawyer's absence, the latter being on holiday.

15. During his pre-trial detention, the applicant was allegedly held in deplorable conditions: the cell that he shared with another prisoner measured only five square metres; there was a bright light on in the cell for twenty-four hours a day; he was

not allowed to speak with other prisoners; he could not work; he had only one hour per day of outdoor exercise and during the rest of the day he could not take part in any other activities and could only sit in his cell.

16. The applicant was tried at the Regional Court and seven witnesses were heard during the trial.

L.K. testified that he had leased a flat and an office in Dolní Dvořiště to the applicant.

J.B. stated that he had been a taxi driver and in 2003, on the applicant's request, he had picked up a girl at Prague Airport and had brought her to the club.

L.B. testified that the applicant had been the owner of the night club where he had had girls of Romanian or Hungarian origin. According to him, the applicant had also had some girls in another night club in Dolní Dvořiště.

S.M. said that he was the husband of I.M., who had worked as a prostitute in the club. His wife had had some problems with the applicant and had wished to leave the club. However, she did not have her passport like the other girls in the club. She had nevertheless left the club and only when she had threatened the applicant that she would inform the police had he returned her passport to her. He also said that his wife had only come to the club because the applicant's wife had allegedly promised her that she would work in the club as a cleaning lady.

K.W. gave evidence that the applicant had rented the building in which the club had been. He believed that prostitutes had been working in the club.

A.Š. said that she had been the caretaker of the building in which the club had been. Several girls had been living in the building. She had never been in the club in the evening but she thought that the girls had worked as prostitutes.

Lastly, W.E. stated that the applicant had owned the club where he had had some girls. He said that it had been a night club and in these places prostitution usually took place.

17. The court also heard the applicant, who testified as follows:

“He admitted that he ran the club HOT CAT in Dolní Dvořiště. ... All the girls living in the club ... stayed there entirely voluntarily. ... They could move freely and leave the club whenever they wanted. ... They worked as companions, dancers and strippers. For that they received a commission. Besides that, they could go with the guests to a room where they could sit, even naked, for example. That had to be paid for by the customer. The price was set by the girls. The company then charged fifty euros for one hour and thirty euros for half an hour.

The building was locked for security reasons. All the girls had a key and they could leave at any time. ... He did absolutely not lure anybody to the club under a false pretext or force anybody to have sex. Nor did he take their passports. The girls even had to sign an oath in which they were expressly forbidden to prostitute themselves. To the extent that the passports were stored behind the bar, that was similar to any other hotel in the Czech Republic.”

18. The Regional Court further read out several documents, including a police report on the search of the club of 25 February 2005. During the search signed declarations of all the women working in the club had been found, in which they had pledged not to prostitute themselves.

19. Another report by the policemen who had conducted an inspection of the club on 22 February 2005 was also read out at court. It stated that when the police had approached the club in the evening it had been locked, but a certain R.G. had opened the door. When they had sought to check the identity of all those who had been present, the applicant had unlocked a drawer behind the bar where he had kept the passports of all the prostitutes.

20. The court further read out the testimony of the six women working at the club as prostitutes and their two customers that had been taken at the pre-trial stage. It refused the applicant's request to summon the women to court on the grounds that it was unnecessary, holding that their testimonies had been taken in full compliance with the law as an urgent measure and thus, in accordance with the Code of Criminal Procedure, they could be read out at the trial without reservation. The applicant was allowed to comment on these testimonies.

21. The court found that the applicant had run a club where prostitution had taken place. Based on the statements of witnesses F.D., N.D. and V.D., it found that they had been lured to the Czech Republic under the pretext of working as bartenders but when they had arrived, the applicant had taken their passports and forced them to prostitute themselves under threats of violence against their families, and that he had benefited from the prostitution. Based on the witness statements of I.M., D.C.C. and A.T.V., the applicant's own testimony and his bank account statement, the court held that he had benefited from the prostitution of these three girls.

22. In the light of these conclusions, the court found the applicant guilty of the crime of trafficking in human beings as regards F.D. and N.D. under Article 246 (2)(d) of the Criminal Code and of trafficking in human beings as regards V.D. under Article 232a(3)(d) of the Criminal Code and of the crime of procuring prostitution as regards I.M., D.C.C. and A.T.V. and benefiting from it under Article 204(1) of the Criminal Code. The court sentenced him to five and a half years' imprisonment. The sentence was calculated solely on the basis of the crime of trafficking in human beings, which attracted the higher sentence between these two crimes.

23. The applicant appealed, arguing, *inter alia*, that he had been found guilty exclusively on the basis of the testimony of witnesses who had not appeared at the trial and whom he had never had an opportunity to question.

24. On 19 April 2007 the Prague High Court (*Vrchní soud*) dismissed the applicant's appeal. It held, *inter alia*, that the testimonies of the witnesses who had not appeared in person had been read out at the trial in compliance with the law and that the Regional Court had not based its decision solely on these testimonies, holding that:

“... during the pre-trial investigation, and in particular in the proceedings before the court, a number of other pieces of evidence were adduced, in particular witness testimonies, to which the Regional Court referred and which confirmed that the situation in the club was the same as that described by witnesses questioned under Article 158a of the Code of Criminal Procedure. Therefore it is not true that the Regional Court found the defendant guilty solely on the basis of evidence adduced in the way suggested above.”¹

25. On 10 July 2007 the applicant lodged an appeal on points of law (*dovolání*). He argued that the case should have been decided by a Romanian court, that he

should have had a lawyer with knowledge of Romanian law, that he had not been allowed to be represented by a lawyer of his own choosing and that he had not been given the opportunity to examine witnesses against him.

26. On 29 November 2007 the Supreme Court dismissed the applicant's appeal on points of law, stating that the applicant's conduct had occurred mostly within the territory of the Czech Republic and that therefore the Czech courts had jurisdiction over it. He had been legally represented throughout the whole proceedings by his appointed lawyer and at no point had he tried to choose another lawyer. There was no need for a lawyer with knowledge of Romanian law. Regarding the last complaint, the court held that the testimonies of the witnesses who had not appeared in person had been read out at the trial in accordance with the law and that they had not been the only evidence on which the applicant's guilt had been determined.

27. Since 2007 the applicant has sent several letters and complaints to the Ministry of Justice asking the Minister to lodge a complaint on his behalf, alleging a breach of the law (*stížnost pro porušení zákona*). On 20 February 2009 the Ministry of Justice informed him that there was no reason to lodge such a complaint.

28. On 29 April 2008 the applicant lodged a constitutional appeal (*ústavní stížnost*). He argued, with references to the Convention and the Court's case-law, that he had not been able to cross-examine the witnesses against him and that the only purported proof of the crimes of which he was found guilty was the testimony given by those same witnesses. He also argued that there had been no reason not to summon the witnesses as their addresses had been known. Furthermore, he argued that the Czech courts had had no jurisdiction to hear the case because it should have been decided by the Romanian courts. He further complained that he should have been assigned a lawyer who had some knowledge of Romanian law and that as a result his right to an effective defence had been violated. Lastly, he complained that the search of his club had been conducted without a warrant, which had violated his right to privacy.

29. On 26 June 2008 the Constitutional Court rejected the applicant's constitutional appeal as manifestly ill-founded. It held that his conviction had not been based solely on the testimony of the witnesses whom he had not been able to examine, referring mainly to the testimony of S.M; that it was not possible to determine the whereabouts of the witnesses; and that the positive obligations of the State to protect the rights of victims of trafficking in human beings had to be taken into account. The court considered the rest of the applicant's complaints to be manifestly ill-founded and agreed with the findings of the ordinary courts.

II. RELEVANT DOMESTIC LAW

A. Code of Criminal Procedure (Act no. 141/1961)

30. Under Article 158a, if it is necessary to question a witness as an urgent or unrepeatable measure during an investigation at a time before anybody has been charged, such an interview can be conducted on the request of a prosecutor and in the presence of a judge.

31. Article 211 § 2 provides that the statement of a witness given during pre-trial proceedings may be read out at the trial if the witness

- a) has died or gone missing, is staying abroad and is thus unreachable, or has become ill and is not, therefore, in a position to be heard, or
- b) has been questioned as an urgent or unrepeatabe measure under Article 158a.

B. Criminal Code in force at the material time (Act no. 140/1961)

32. Under Article 204 § 1, a person who procured or seduced another for the purpose of involving that person in prostitution, or who exploited the prostitution of another person, had to be sentenced to a term of imprisonment of up to three years.

33. Article 246, in force until 22 October 2004, contained a crime of human trafficking for the purpose of sexual intercourse:

“(1) Whoever lures, hires or transports a person from or to a foreign country with the intent of using him or her for sexual intercourse shall be sentenced to a term of imprisonment of between one and five years.

(2) An offender shall be sentenced to a term of imprisonment of between three and eight years if

...

(d) he or she commits such an act with the intent of having another person used for prostitution.”

34. With effect from 23 October 2004, Article 246 was repealed and a new Article 232a on Trade in Human Beings introduced:

“...

(2) [A term of imprisonment of between two and ten years] shall be imposed on a person who induces, procures, hires, lures, transports, hides, retains or exposes another person by the use of violence, the threat of violence or by deception or by taking advantage of another’s mistaken belief, distress or dependence, with the purpose of using such a person:

a) for sexual intercourse or other forms of sexual harassment or abuse;

b) for slavery or servitude, or;

c) for forced labour or other forms of exploitation.

(3) An offender shall be sentenced to a term of imprisonment of between five and twelve years if

...

(d) he or she commits [an act under paragraph 2] with the intent of having another person used for prostitution.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 3 (d) OF THE CONVENTION

35. The applicant complained that he had not been able to cross-examine several witnesses against him as guaranteed under Article 6 § 3 (d) of the Convention. The relevant parts of Article 6 §§ 1 and 3 (d) provide as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ...”

36. The Government contested that argument.

A. Admissibility

37. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

38. The applicant considered that his right to a fair trial had been breached because he had been convicted solely on the testimony of the witnesses whom he had had no opportunity to question at any stage of the proceedings.

39. The Government admitted that the applicant could not have questioned witnesses F.D., N.D., V.D., D.C.C. and A.T.V. at any stage of the proceedings but maintained that his guilt had been proved by other evidence. It could not therefore be said that his conviction had been based solely or to a decisive extent on these witnesses' statements. In that connection, they referred to the judgment of the High Court that had cited a number of other pieces of evidence that had been adduced and relied on, in particular the witness testimonies which had corroborated the account given by the witnesses questioned under Article 158a of the Code of Criminal Procedure as regards the situation in the club. The Government also referred to the decision of the Constitutional Court that had made reference to several other witnesses who had testified that the applicant had run a brothel.

40. The Government further stated that the content of the testimonies of F.D., N.D., V.D., D.C.C. and A.T.V. had been confirmed by the statement of I.M. and later by S.M. Moreover, a number of other witnesses had given their statements at the trial and the Regional Court had read out the documents adduced before it.

41. Lastly, the Government maintained that in assessing whether the applicant's right to a fair trial had been observed it was also necessary to take into account the public interest in penalising the very serious offence with which he had been charged and the significant interference with the victims' human rights and fundamental freedoms resulting from his criminal activity.

2. The Court's assessment

42. The Court reiterates that as the guarantees of Article 6 § 3 (d) are specific aspects of the right to a fair trial set forth in the first paragraph of that Article, the

complaint must be examined under the two provisions taken together (see, among many other authorities, *Bonev v. Bulgaria*, no. 60018/00, § 40, 8 June 2006).

43. Under the Court's established case-law all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage. In particular, the rights of the defence are restricted to an extent that is incompatible with the requirements of Article 6 if the conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial (see *A.M. v. Italy*, no. 37019/97, § 25, ECHR 1999-IX).

44. Article 6 § 1 taken together with 6 § 3 also requires the Contracting States to take positive steps to enable the accused to examine or have examined witnesses against him (see *Sadak and Others v. Turkey*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 67, ECHR 2001-VIII). In the event that the impossibility to examine the witnesses or have them examined is due to the fact that they are missing, the authorities must make a reasonable effort to secure their presence (see *Bonev v. Bulgaria*, no. 60018/00, § 43, 8 June 2006).

45. The Court has also acknowledged that criminal proceedings concerning sexual offences are often perceived as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. In the assessment of whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the alleged victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse, certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence. In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours (see *D. v. Finland*, no. 30542/04, § 43, 7 July 2009).

46. Turning to the present case, the Court first notes that the applicant was convicted of trafficking in human beings as regards F.D., N.D. and V.D. This criminal offence was constituted by the following elements: in the case of F.D. and N.D., their being lured from abroad for prostitution and, in the case of V.D., forcing her into prostitution by the use of violence, the threat of violence or by deception or by taking advantage of her mistaken belief, distress or dependence. The Regional Court found that these three victims had been lured from Romania under the false pretext of work as bartenders in the Czech Republic and that the applicant had subsequently forced them to prostitute themselves by threatening violence against their families.

47. The Court further notes that the applicant was only sentenced for the crime of trafficking in human beings because the crime of procuring prostitution attracted a lower sentence that was subsumed by the higher sentence for trafficking. The Court therefore limits its analysis to the applicant's conviction for trafficking. It must first determine whether the domestic courts relied on any other evidence, apart from the witness statements of the women who had been interviewed under Article 158a of the Code of Criminal Procedure before the applicant was charged

and whom he was not able to have cross-examined at any stage of the proceedings, in order to establish the applicant's guilt regarding this crime.

48. The Court observes that the Regional Court heard a number of witnesses who described the situation in the club and testified that sexual services had been offered there by women from Romania. With the exception of S.M., none of them, however, expressed any opinion as to whether the women had been forced into prostitution by threats or lured from Romania under a false pretext, which were the constituent elements of the criminal offence of trafficking found by the Regional Court in the instant case.

49. The Court also notes that the Regional Court considered the applicant's request that certain witnesses be summoned from Romania to be unnecessary and thus made no efforts in this regard. It confined itself to pointing out that under the applicable domestic law their testimonies could be read out at the trial. It did not, however, consider whether the applicant's right to a fair trial would be violated as a consequence of the domestic law's application.

50. It further notes that the High Court took the view that a number of other pieces of evidence had been adduced, in particular the witness testimonies to which the Regional Court had referred and which had confirmed the situation in the club as described by the witnesses who had not appeared at the trial. The Court observes, however, that the High Court referred to the situation in the club, which might be important for the crime of procuring prostitution but is insufficient to prove all the elements of the criminal offence of trafficking in human beings found by the Regional Court, in particular the threats allegedly made by the applicant.

51. As for S.M., who appeared at the trial, the Court observes that his testimony contained only information as to the possible trafficking of his wife, I.M. However, the applicant was not found guilty of trafficking I.M., and S.M. did not provide any specific information regarding the trafficking of F.D., N.D. or V.D. as found by the Regional Court. The Court is therefore of the opinion that it cannot be said that S.M.'s testimony constituted the basis for the applicant's conviction for the trafficking of F.D., N.D. and V.D.

52. The same conclusion applies to the testimony of I.M., who was questioned at the pre-trial stage but in the presence of the applicant's lawyer. From the transcript of her interview, it is clear that she provided no information about the trafficking of F.D., N.D. or V.D. and explicitly said that she did not know whether other women in the club had been threatened by the applicant.

53. Similarly, the Court considers that the documents read out at the trial contained only information relevant to the situation in the club and whether prostitution was carried out there but not about the particular elements of trafficking found by the Regional Court.

54. The Court thus concludes that the domestic courts based the applicant's conviction for trafficking only on the testimony of the witnesses who did not appear at the trial and whom neither the applicant nor his lawyer had the opportunity of questioning at any other stage of the proceedings.

55. Admittedly, both the Government and the Constitutional Court stressed the serious nature of the applicant's crimes which seriously interfered with the victims' human rights. They referred, in this connection, to the positive obligation of States to combat trafficking in human beings, recently confirmed by the Court

in its judgment in the case of *Rantsev v. Cyprus and Russia* (no. 25965/04, § 285, ECHR 2010-...). The Court notes, however, that the *Rantsev* judgment did not indicate that the positive obligation of States to prosecute traffickers go as far as infringing the defence rights of persons charged with trafficking.

56. The Court is mindful of the vulnerability of the victims of trafficking and does not wish to underestimate their plight. It is understandable that the victims in the present case wanted to return home to Romania as soon as possible. On the other hand, the domestic courts made no effort at all to secure their presence at the trial or to interview them in their home country (see, *a contrario*, *Scheper v. the Netherlands* (dec.), no. 39209/02, 5 April 2005, and *Berisha v. the Netherlands* (dec.), no. 42965/98, 4 May 2000, where victims of trafficking were questioned in their home country in the presence of the applicant's lawyer). The Court therefore does not consider that the domestic authorities fulfilled their obligation to take positive steps to enable the accused to examine or have examined the witnesses against him. Moreover, no measures were taken by the domestic authorities to counterbalance the handicaps under which the defence laboured (see, *a contrario*, *S.N. v. Sweden*, no. 34209/96, § 50, ECHR 2002-V, where the applicant's lawyer was able to put questions, at least indirectly, to a child victim of sexual abuse).

57. The Court concludes that the applicant's conviction for trafficking in human beings was based solely on the testimony of the witnesses who did not appear at trial and whom he had no opportunity to question at any time during the proceedings and that this procedural failure cannot be justified by the particular context of the present case, which is a serious crime of sexual exploitation. This is all the more true since the domestic courts made no effort to secure the attendance of the witnesses concerned at the trial or to counterbalance the handicaps under which the defence laboured.

58. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 3 (c) OF THE CONVENTION

59. The applicant complained that he had to pay the fees of the State-appointed lawyer, that he had not been informed about his right to have a lawyer of his own choosing and that his appointed lawyer had no knowledge of either Romanian law or international law. He relied on Article 6 § 3 (c) of the Convention, which provides, in its relevant part, as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; ...”

60. The Court reiterates that Article 6 § 3 (c) guarantees that proceedings against an accused will not take place without adequate representation for the defence, but does not give the accused the right to decide himself in what manner his defence

should be assured. The decision as to which of the two alternatives mentioned in the provision should be chosen, namely the applicant's right to defend himself in person or to be represented by a lawyer of his own choosing, or in certain circumstances one appointed by the court, depends upon the applicable legislation or rules of court. Notwithstanding, the importance of a relationship of confidence between lawyer and client, the right to choose one's own counsel cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant's wishes. However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice (see *Mayzit v. Russia*, no. 63378/00, § 65-66, 20 January 2005).

61. The Court observes that the applicant was legally represented throughout all the domestic proceedings from the moment when he was charged. It notes that he did not at any point complain of the performance of his lawyer. The Court does not see why the applicant would need a lawyer with knowledge of Romanian law when he was tried exclusively under Czech criminal law. As regards international law, the Court observes that the applicant's lawyers submitted qualified arguments concerning the alleged violations of his rights to a fair trial under the Convention including references to the Court's case-law.

62. Furthermore, it does not seem that the applicant was at any time denied his right to choose his own lawyer and the applicant does not even make that allegation. It rather seems, as stated by the Supreme Court, that he did not choose his own lawyer and that the State, in securing his adequate defence, provided him with a lawyer. In addition, the applicant did not substantiate his claim that he lacked sufficient means to pay for his lawyer.

63. Accordingly, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

64. The applicant complained that the night club was searched without a search warrant. He relied on Article 8 of the Convention, which reads:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

65. The Court observes that the search was conducted on the basis of the search warrant issued by the judge at the District Court. Moreover, it has no reason to doubt the legality of the search on any other ground.

66. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

67. The applicant, relying on Article 5 § 1 (a) of the Convention, complained that his detention had been unlawful because the criminal proceedings against him had been unlawful. Relying on Articles 3 and 6 § 2 of the Convention, he further complained about the conditions of his detention. Lastly, relying on Article 6 § 3 (d) of the Convention, he complained that he had not been legally represented at the hearing on his pre-trial detention on 17 October 2006.

68. The Court observes that the applicant failed to raise these issues before the Constitutional Court, which thus did not review these complaints. Consequently, the Court considers that these complaints must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

70. The applicant claimed 52,000 euros (EUR) in respect of pecuniary damage. He based his claim on the loss of profits during his allegedly illegal detention and the damage to his car that was seized for a certain period by the police. He further claimed EUR 520,000 in respect of non-pecuniary damage.

71. The Government argued that there was no causal link between a possible violation of the applicant’s rights under Article 6 § 1 and 3 (d) of the Convention and the alleged pecuniary damage. As regards non-pecuniary damage, they maintained that the finding of a violation would constitute in itself sufficient just satisfaction.

72. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim (see *Krasniki v. the Czech Republic*, no. 51277/99, § 91-92, 28 February 2006).

73. Regarding non-pecuniary damage, the Court notes that in several cases where it has found similar violations as in the present case it has held that a finding of a violation constituted sufficient just satisfaction because the applicants had the possibility of requesting the reopening of the proceedings at the domestic level (see, for example, *Krasniki*, cited above, § 93; *Melich and Beck v. the Czech Republic*, no. 35450/04, § 59, 24 July 2008; *Rachdad v. France*, no. 71846/01, § 29, 13 November 2003; and *Kaste and Mathisen v. Norway*, nos. 18885/04; and 21166/04, § 61, ECHR 2006-XIII).

74. The Court notes that under the Constitutional Court Act, anyone who has been involved in domestic criminal proceedings and is successful in proceedings before an international judicial authority which finds that his or her human rights or fundamental freedoms guaranteed by an international treaty have been violated

by a public authority, may file a request for the reopening of the proceedings previously brought in the Constitutional Court.

75. Accordingly, the Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

B. Costs and expenses

76. The applicant also claimed EUR 4,200 for the costs and expenses incurred before the Court.

77. The Government maintained that no award should be made under this head because the applicant had not submitted any documents in support of his claims.

78. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Given the absence of any supporting documents, the Court does not award the applicant any amount under this head (see *Melich and Beck*, cited above).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning Article 6 §§ 1 and 3 (d) that he had not been able to cross-examine several witnesses admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention;
3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 July 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek Dean Spielmann
Registrar President

¹ Emphasis in the original.

BREUKHOVEN v. THE CZECH REPUBLIC JUDGMENT

BREUKHOVEN v. THE CZECH REPUBLIC JUDGMENT



Case of Rantsev v. Cyprus and Russia

FIRST SECTION

CASE OF RANTSEV v. CYPRUS AND RUSSIA

(Application no. 25965/04)

JUDGMENT

STRASBOURG

7 January 2010

FINAL

10/05/2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Rantsev v. Cyprus and Russia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Christos Rozakis, *President*,
Anatoly Kovler,
Elisabeth Steiner,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni,
George Nicolaou, *judges*,
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 10 December 2009,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 25965/04) against the Republic of Cyprus and the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Mr Nikolay Mikhaylovich Rantsev (“the applicant”), on 26 May 2004.

2. The applicant, who had been granted legal aid, was represented by Ms L. Churkina, a lawyer practising in Yekaterinburg. The Cypriot Government were represented by their Agent, Mr P. Clerides, Attorney-General of the Republic of Cyprus. The Russian Government were represented by their Agent, Mr G. Matyushkin.

3. The applicant complained under Articles 2, 3, 4, 5 and 8 of the Convention about the lack of sufficient investigation into the circumstances of the death of his daughter, the lack of adequate protection of his daughter by the Cypriot police while she was still alive and the failure of the Cypriot authorities to take steps to punish those responsible for his daughter’s death and ill-treatment. He also complained under Articles 2 and 4 about the failure of the Russian authorities to investigate his daughter’s alleged trafficking and subsequent death and to take steps to protect her from the risk of trafficking. Finally, he complained under Article 6 of the Convention about the inquest proceedings and an alleged lack of access to court in Cyprus.

4. On 19 October 2007 the Cypriot and Russian Governments were requested to submit the entire investigation file together with all

correspondence between the two Governments on this matter. On 17 December 2007 and 17 March 2008, the Cypriot and Russian Governments respectively submitted a number of documents.

5. On 20 May 2008 the President of the First Section decided to accord the case priority treatment in accordance with Rule 41 of the Rules of Court.

6. On 27 June 2008 the President of the First Section decided to give notice of the application to each of the respondent Governments. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

7. On 27 and 28 October 2008 respectively, the Cypriot and Russian Governments submitted their written observations on the admissibility and merits of the application. In addition, third-party comments were received from two London-based non-governmental organisations, Interights and the AIRE Centre, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

8. On 12 December 2008, the President of the First Section decided that legal aid should be granted to the applicant for his representation before the Court.

9. On 16 December 2008 the applicant lodged written observations in reply together with his claims for just satisfaction.

10. The Cypriot and Russian Governments lodged observations on the applicant's just satisfaction submissions.

11. By letter of 10 April 2009, the Cypriot Government requested the Court to strike the case out of its list and enclosed the text of a unilateral declaration with a view to resolving the issues raised by the applicant. The applicant filed written observations on the Cypriot Government's request on 21 May 2009.

12. The applicant requested an oral hearing but prior to adopting the present judgment the Court decided that it was not necessary to hold one.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

13. The applicant, Mr Nikolay Mikhaylovich Rantsev, is a Russian national who was born in 1938 and lives in Svetlogorsk, Russia. He is the father of Ms Oxana Rantseva, also a Russian national, born in 1980.

14. The facts of the case, as established by the submissions of the parties and the material submitted by them, in particular the witness statements taken by the Cypriot police, may be summarised as follows.

A. The background facts

15. Oxana Rantseva arrived in Cyprus on 5 March 2001. On 13 February 2001, X.A., the owner of a cabaret in Limassol, had applied for an "artiste" visa and work permit for Ms Rantseva to allow her to work as an artiste in his cabaret (see further paragraph 115 below). The application was accompanied by a copy of Ms Rantseva's passport, a medical certificate, a copy of an employment contract (apparently not yet signed by Ms Rantseva) and a bond, signed by [X.A.] Agencies, in the following terms (original in English):

"KNOW ALL MEN BY THESE PRESENTS that I [X.A.] of L/SSOL Am bound to the Minister of the Interior of the Republic of Cyprus in the sum of £150 to be paid to the said

Minister of the Interior or other the [sic] Minister of Interior for the time being or his attorney or attorneys.

Sealed with my seal.

Dated the 13th day of February 2001

WHEREAS Ms Oxana RANTSEVA of RUSSIA

Hereinafter called the immigrant, (which expression shall where the context so admits be deemed to include his heirs, executors, administrators and assigns) is entering Cyprus and I have undertaken that the immigrant shall not become in need of relief in Cyprus during a period of five years from the date hereof and I have undertaken to repay [sic] to the Republic of Cyprus any sum which the Republic of Cyprus may pay for the relief or support of the immigrant (the necessity for which relief and support the Minister shall be the sole judge) or for the expenses [sic] of repatriating the immigrant from Cyprus within a period of five years from the date hereof.

NOW THE CONDITION OF THE ABOVE WRITTEN BOND is such that if the immigrant or myself, my heirs, executors, administrators and assigns shall repay to the Republic of Cyprus on demand any sum which the Republic of Cyprus may have paid as aforesaid for the relief or Support of the immigrant or for the expenses of repatriation of the immigrant from Cyprus then the above written bond shall be void but otherwise shall remain in full force.”

16. Ms Rantseva was granted a temporary residence permit as a visitor until 9 March 2001. She stayed in an apartment with other young women working in X.A.’s cabaret. On 12 March 2001 she was granted a permit to work until 8 June 2001 as an artiste in a cabaret owned by X.A. and managed by his brother, M.A. She began work on 16 March 2001.

17. On 19 March 2001, at around 11a.m., M.A. was informed by the other women living with Ms Rantseva that she had left the apartment and taken all her belongings with her. The women told him that she had left a note in Russian saying that she was tired and wanted to return to Russia. On the same date M.A. informed the Immigration Office in Limassol that Ms Rantseva had abandoned her place of work and residence. According to M.A.’s subsequent witness statement, he wanted Ms Rantseva to be arrested and expelled from Cyprus so that he could bring another girl to work in the cabaret. However, Ms Rantseva’s name was not entered on the list of persons wanted by the police.

B. The events of 28 March 2001

18. On 28 March 2001, at around 4 a.m., Ms Rantseva was seen in a discotheque in Limassol by another cabaret artiste. Upon being advised by the cabaret artiste that Ms Rantseva was in the discotheque, M.A. called the police and asked them to arrest her. He then went to the discotheque together with a security guard from his cabaret. An employee of the discotheque brought Ms Rantseva to him. In his subsequent witness statement, M.A. said (translation):

“When [Ms Rantseva] got in to my car, she did not complain at all or do anything else. She looked drunk and I just told her to come with me. Because of the fact that she looked drunk, we didn’t have a conversation and she didn’t talk to me at all.”

19. M.A. took Ms Rantseva to Limassol Central Police Station, where two police officers were on duty. He made a brief statement in which he set out the circumstances of Ms Rantseva’s arrival in Cyprus, her employment and her subsequent disappearance from the apartment on 19 March 2001. According to the statement of the police officer in charge when they arrived (translation):

“On 28 March 2001, slightly before 4a.m., [M.A.] found [Ms Rantseva] in the nightclub Titanic ... he took her and led her to the police station stating that Ms Rantseva was illegal and that we should place her in the cells. He ([M.A.]) then left the place (police station).”

20. The police officers then contacted the duty passport officer at his home and asked him to look into whether Ms Rantseva was illegal. After investigating, he advised them that her name was not in the database of wanted persons. He further advised that there was no record of M.A.’s complaint of 19 March 2001 and that, in any case, a person did not become illegal until 15 days after a complaint was made. The passport officer contacted the person in charge of the AIS (Police Aliens and Immigration Service), who gave instructions that Ms Rantseva was not to be detained and that her employer, who was responsible for her, was to pick her up and take her to their Limassol Office for further investigation at 7 a.m. that day. The police officers contacted M.A. to ask him to collect Ms Rantseva. M.A. was upset that the police would not detain her and refused to come and collect her. The police officers told him that their instructions were that if he did not take her they were to allow her to leave. M.A. became angry and asked to speak to their superior. The police officers provided a telephone number to M.A. The officers were subsequently advised by their superior that M.A. would come and collect Ms Rantseva. Both officers, in their witness statements, said that Ms Rantseva did not appear drunk. The officer in charge said (translation):

“Ms Rantseva remained with us ... She was applying her make-up and did not look drunk ... At around 5.20a.m. ... I was ... informed that [M.A.] had come and picked her up...”

21. According to M.A.’s witness statement, when he collected Ms Rantseva from the police station, he also collected her passport and the other documents which he had handed to the police when they had arrived. He then took Ms Rantseva to the apartment of M.P., a male employee at his cabaret. The apartment M.P. lived in with his wife, D.P., was a split-level apartment with the entrance located on the fifth floor of a block of flats. According to M.A., they placed Ms Rantseva in a room on the second floor of the apartment. In his police statement, he said:

“She just looked drunk and did not seem to have any intention to do anything. I did not do anything to prevent her from leaving the room in [the] flat where I had taken her.”

22. M.A. said that M.P. and his wife went to sleep in their bedroom on the second floor and that he stayed in the living room of the apartment where he fell asleep. The apartment was arranged in such a way that in order to leave the apartment by the front door, it would be necessary to pass through the living room.

23. M.P. stated that he left his work at the cabaret “Zygos” in Limassol at around 3.30 a.m. and went to the “Titanic” discotheque for a drink. Upon his arrival there he was informed that the girl they had been looking for, of Russian origin, was in the discotheque. Then M.A. arrived, accompanied by a security guard from the cabaret, and asked the employees of “Titanic” to bring the girl to the entrance. M.A., Ms Rantseva and the security guard then all got into M.A.’s car and left. At around 4.30 a.m. M.P. returned to his house and went to sleep. At around 6 a.m. his wife woke him up and informed him that M.A. had arrived together with Ms Rantseva and that they would stay until the Immigration Office opened. He then fell asleep.

24. D.P. stated that M.A. brought Ms Rantseva to the apartment at around 5.45 a.m.. She made coffee and M.A. spoke with her husband in the living room. M.A. then asked D.P. to provide Ms Rantseva with a bedroom so that she could get some rest. D.P. stated that Ms Rantseva looked drunk and did not want to drink or eat anything. According to D.P., she and her husband went to sleep at around 6

a.m. while M.A. stayed in the living room. Having made her statement, D.P. revised her initial description of events, now asserting that her husband had been asleep when M.A. arrived at their apartment with Ms Rantseva. She stated that she had been scared to admit that she had opened the door of the apartment on her own and had had coffee with M.A..

25. At around 6.30 a.m. on 28 March 2001, Ms Rantseva was found dead on the street below the apartment. Her handbag was over her shoulder. The police found a bedspread looped through the railing of the smaller balcony adjoining the room in which Ms Rantseva had been staying on the upper floor of the apartment, below which the larger balcony on the fifth floor was located.

26. M.A. claimed that he woke at 7 a.m. in order to take Ms Rantseva to the Immigration Office. He called to D.P. and M.P. and heard D.P. saying that the police were in the street in front of the apartment building. They looked in the bedroom but Ms Rantseva was not there. They looked out from the balcony and saw a body in the street. He later discovered that it was Ms Rantseva.

27. D.P. claimed that she was woken by M.A. knocking on her door to tell her that Ms Rantseva was not in her room and that they should look for her. She looked for her all over the apartment and then noticed that the balcony door in the bedroom was open. She went out onto the balcony and saw the bedspread and realised what Ms Rantseva had done. She went onto another balcony and saw a body lying on the street, covered by a white sheet and surrounded by police officers.

28. M.P. stated that he was woken up by noise at around 7 a.m. and saw his wife in a state of shock; she told him that Ms Rantseva had fallen from the balcony. He went into the living room where he saw M.A. and some police officers.

29. In his testimony of 28 March 2001, G.A. stated that on 28 March 2001, around 6.30 a.m., he was smoking on his balcony, located on the first floor of M.P. and D.P.'s building. He said:

“I saw something resembling a shadow fall from above and pass directly in front of me. Immediately afterwards I heard a noise like something was breaking ... I told my wife to call the police ... I had heard nothing before the fall and immediately afterwards I did not hear any voices. She did not scream during the fall. She just fell as if she were unconscious ... Even if there had been a fight (in the apartment on the fifth floor) I would not have been able to hear it.”

C. The investigation and inquest in Cyprus

30. The Cypriot Government advised the Court that the original investigation file had been destroyed in light of the internal policy to destroy files after a period of five years in cases where it was concluded that death was not attributable to a criminal act. A duplicate file, containing all the relevant documents with the exception of memo sheets, has been provided to the Court by the Government.

31. The file contains a report by the officer in charge of the investigation. The report sets out the background facts, as ascertained by forensic and crime scene evidence, and identifies 17 witnesses: M.A., M.P., D.P., G.A., the two police officers on duty at Limassol Police Station, the duty passport officer, eight police officers who attended the scene after Ms Rantseva's fall, the forensic examiner and the laboratory technician who analysed blood and urine samples.

32. The report indicates that minutes after receiving the call from G.A.'s wife, shortly after 6.30 a.m., the police arrived at the apartment building. They sealed off the scene at 6.40 a.m. and began an investigation into the cause of Ms Rantseva's fall. They took photographs of the scene, including photographs of the room in the apartment where Ms Rantseva had stayed and photographs of the

balconies. The forensic examiner arrived at 9.30 a.m. and certified death. An initial forensic examination took place at the scene

33. On the same day, the police interviewed M.A., M.P. and D.P. as well as G.A.. They also interviewed the two police officers who had seen M.A. and Ms Rantseva at Limassol Police Station shortly before Ms Rantseva's death and the duty passport officer (relevant extracts and summaries of the statements given is included in the facts set out above at paragraphs 17 to 29). Of the eight police officers who attended the scene, the investigation file includes statements made by six of them, including the officer placed in charge of the investigation. There is no record of any statements being taken either from other employees of the cabaret where Ms Rantseva worked or from the women with whom she briefly shared an apartment.

34. When he made his witness statement on 28 March 2001, M.A. handed Ms Rantseva's passport and other documents to the police. After the conclusion and signature of his statement, he added a clarification regarding the passport, indicating that Ms Rantseva had taken her passport and documents when she left the apartment on 19 March 2001.

35. On 29 March 2001 an autopsy was carried out by the Cypriot authorities. The autopsy found a number of injuries on Ms Rantseva's body and to her internal organs. It concluded that these injuries resulted from her fall and that the fall was the cause of her death. It is not clear when the applicant was informed of the results of the autopsy. According to the applicant, he was not provided with a copy of the autopsy report and it is unclear whether he was informed in any detail of the conclusions of the report, which were briefly summarised in the findings of the subsequent inquest.

36. On 5 August 2001 the applicant visited Limassol Police Station together with a lawyer and spoke to the police officer who had received Ms Rantseva and M.A. on 28 March 2001. The applicant asked to attend the inquest. According to a later statement by the police officer, dated 8 July 2002, the applicant was told by the police during the visit that his lawyer would be informed of the date of the inquest hearing before the District Court of Limassol.

37. On 10 October 2001 the applicant sent an application to the District Court of Limassol, copied to the General Procurator's Office of the Republic of Cyprus and the Russian Consulate in the Republic of Cyprus. He referred to a request of 8 October 2001 of the Procurator's Office of the Chelyabinsk region concerning legal assistance (see paragraph 48 below) and asked to exercise his right to familiarise himself with the materials of the case before the inquest hearing, to be present at the hearing and to be notified in due time of the date of the hearing. He also advised that he wished to present additional documents to the court in due course.

38. The inquest proceedings were fixed for 30 October 2001 and, according to the police officer's statement of 8 July 2002 (see paragraph 36 above), the applicant's lawyer was promptly informed. However, neither she nor the applicant appeared before the District Court. The case was adjourned to 11 December 2001 and an order was made that the Russian Embassy be notified of the new date so as to inform the applicant.

39. In a facsimile dated 20 October 2001 and sent on 31 October 2001 to the District Court of Limassol, copied to the General Procurator's Office of the Republic of Cyprus and the Russian Consulate in the Republic of Cyprus, the applicant asked for information regarding the inquest date to be sent to his new place of residence.

40. On 11 December 2001 the applicant did not appear before the District Court and the inquest was adjourned until 27 December 2001.

41. On 27 December 2001 the inquest took place before the Limassol District Court in the absence of the applicant. The court's verdict of the same date stated, *inter alia* (translation):

“At around 6.30 a.m. on [28 March 2001] the deceased, in an attempt to escape from the afore-mentioned apartment and in strange circumstances, jumped into the void as a result of which she was fatally injured...

My verdict is that MS OXANA RANTSEVA died on 28 March 2001, in circumstances resembling an accident, in an attempt to escape from the apartment in which she was a guest (*εφιλοζεύειτο*).

There is no evidence before me that suggests criminal liability of a third person for her death”.

D. Subsequent proceedings in Cyprus and Russia

42. Ms Rantseva's body was transferred to Russia on 8 April 2001.

43. On 9 April 2001 the applicant requested the Chelyabinsk Regional Bureau of Medical Examinations (“the Chelyabinsk Bureau”) to perform an autopsy of the body. He further requested the Federal Security Service of the Russian Federation and the General Prosecutor's Office to investigate Ms Rantseva's death in Cyprus. On 10 May 2001 the Chelyabinsk Bureau issued its report on the autopsy.

44. In particular the following was reported in the forensic diagnosis (translation provided):

“It is a trauma from falling down from a large height, the falling on a plane of various levels, politrauma of the body, open cranial trauma: multiple fragmentary comminuted fracture of the facial and brain skull, multiple breaches of the brain membrane on the side of the brain vault and the base of the skull in the front brain pit, haemorrhages under the soft brain membranes, haemorrhages into the soft tissues, multiple bruises, large bruises and wounds on the skin, expressed deformation of the head in the front-to-back direction, closed dull trauma of the thorax with injuries of the thorax organs..., contusion of the lungs along the back surface, fracture of the spine in the thorax section with the complete breach of the marrow and its displacement along and across ...

Alcohol intoxication of the medium degree: the presence of ethyl alcohol in the blood 1,8%, in the urine -2,5%.”

45. The report's conclusions included the following:

“The color and the look of bruises, breaches and wounds as well as hemorrhages with the morphological changes of the same type in the injured tissues indicates, without any doubt, that the traumas happened while she was alive, as well as the fact, that they happened not very long before death, within a very short time period, one after another.

During the forensic examination of the corpse of Rantseva O.N. no injuries resulting from external violence, connected with the use of various firearms, various sharp objects and weapons, influence of physical and chemical reagents or natural factors have been established. ... During the forensic chemical examination of the blood and urine, internal organs of the corpse no narcotic, strong or toxic substances are found. Said circumstances exclude the possibility of the death of Rantseva O.N. from firearms, cold steel, physical, chemical and natural factors as well as poisoning and diseases of various organs and systems. ...

Considering the location of the injuries, their morphological peculiarities, as well as certain differences, discovered during the morphological and histological analysis and the response of the injured tissues we believe that in this particular case a trauma from falling down from the great height took place, and it was the result of the so-called staged/bi-moment fall on the planes of various levels during which the primary contact of the body with an obstacle in the final phase of the fall from the great height was by the back surface of the body with a possible sliding and secondary contact by the front surface of the body, mainly the face with

the expressed deformation of the head in the front-to-back direction due to shock-compressive impact...

During the forensic chemical examination of the corpse of Rantseva O.N. in her blood and urine we found ethyl spirits 1,8 and 2,5 correspondingly, which during her life might correspond to medium alcohol intoxication which is clinically characterized by a considerable emotional instability, breaches in mentality and orientation in space in time.”

46. On 9 August 2001 the Russian Embassy in Cyprus requested from the chief of Limassol police station copies of the investigation files relating to Ms Rantseva’s death.

47. On 13 September 2001 the applicant applied to the Public Prosecutor of the Chelyabinsk region requesting the Prosecutor to apply on his behalf to the Public Prosecutor of Cyprus for legal assistance free of charge as well as an exemption from court expenses for additional investigation into the death of his daughter on the territory of Cyprus.

48. By letter dated 11 December 2001 the Deputy General Prosecutor of the Russian Federation advised the Minister of Justice of the Republic of Cyprus that the Public Prosecutor’s Office of the Chelyabinsk region had conducted an examination in respect of Ms Rantseva’s death, including a forensic medical examination. He forwarded a request, dated 8 October 2001, under the European Convention on Mutual Assistance in Criminal Matters (“the Mutual Assistance Convention” – see paragraphs 175 to 178 below) and the Treaty between the USSR and the Republic of Cyprus on Civil and Criminal Matters 1984 (“the Legal Assistance Treaty” – see paragraphs 179 to 185 below), for legal assistance for the purposes of establishing all the circumstances of Ms Rantseva’s death and bringing to justice guilty parties, under Cypriot legislation. The request included the findings of the Russian authorities as to the background circumstances; it is not clear how the findings were reached and what, if any, investigation was conducted independently by the Russian authorities.

49. The findings stated, *inter alia*, as follows (translation provided):

“The police officers refused to arrest Rantseva O.N. due to her right to stay on the territory of Cyprus without the right to work for 14 days, i.e. until April 2, 2001. Then Mr [M.A.] suggested to detain Rantseva O.N. till the morning as a drunken person. He was refused, since, following the explanations provided by the police officers Rantseva O.N. looked like a sober person, behaved decently, was calm, was laying make-up. M.A., together with an unestablished person, at 5.30a.m. on March 28, 2001 took Rantseva O.N. from the regional police precinct and brought her to the apartment of [D.P.] ... where [they] organised a meal, and then, at 6.30a.m. locked Rantseva O.N. in a room of the attic of the 7th floor of said house.”

50. The request highlighted the conclusion of the experts at the Chelyabinsk Bureau of Forensic Medicine that there had been two stages in Ms Rantseva’s fall, first on her back and then on her front. The request noted that this conclusion contradicted the findings made in the Cypriot forensic examination that Ms Rantseva’s death had resulted from a fall face-down. It further noted:

“It is possible to suppose, that at the moment of her falling down the victim could cry from horror. However, it contradicts the materials of the investigation, which contain the evidence of an inhabitant of the 2nd floor of this row of loggias, saying that a silent body fell down on the asphalt ...”

51. The report concluded:

“Judging by the report of the investigator to Mr Rantsev N.M., the investigation ends with the conclusion that the death of Rantseva O.N. took place under strange and un-established circumstances, demanding additional investigation.”

52. The Prosecutor of the Chelyabinsk region therefore requested, in accordance with the Legal Assistance Treaty, that further investigation be carried

out into the circumstances of Ms Rantseva's death in order to identify the cause of death and eliminate the contradictions in the available evidence; that persons having any information concerning the circumstances of the death be identified and interviewed; that the conduct of the various parties be considered from the perspective of bringing murder and/or kidnapping and unlawful deprivation of freedom charges, and in particular that M.A. be investigated; that the applicant be informed of the materials of the investigation; that the Russian authorities be provided with a copy of the final decisions of judicial authorities as regards Ms Rantseva's death; and that the applicant be granted legal assistance free of charge and be exempted from paying court expenses.

53. On 27 December 2001 the Russian Federation wrote to the Cypriot Ministry of Justice requesting, on behalf of the applicant, that criminal proceedings be instituted in respect of Ms Rantseva's death, that the applicant be joined as a victim in the proceedings and that he be granted free legal assistance.

54. On 16 April 2002 the Russian Embassy in Cyprus conveyed to the Cypriot Ministry of Justice and Public Order the requests dated 11 December and 27 December 2001 of the General Prosecutor's Office of the Russian Federation, made under the Legal Assistance Treaty, for legal assistance concerning Ms Rantseva's death.

55. On 25 April 2002 the Office of the Prosecutor General of the Russian Federation reiterated its request for the institution of criminal proceedings in connection with Ms Rantseva's death and the applicant's request to be added as a victim to the proceedings in order to submit his further evidence, as well as his request for legal aid. It requested the Cypriot Government to provide an update and advise of any decisions that had been taken.

56. On 25 November 2002, the applicant applied to the Russian authorities to be recognised as a victim in the proceedings concerning his daughter's death and reiterated his request for legal assistance. The request was forwarded by the Office of the Prosecutor General of the Russian Federation to the Cypriot Ministry of Justice.

57. By letter of 27 December 2002 the Assistant to the Prosecutor General of the Russian Federation wrote to the Cypriot Ministry of Justice referring to the detailed request made by the applicant for the initiation of criminal proceedings in connection with the death of his daughter and for legal aid in Cyprus, which had previously been forwarded to the Cypriot authorities pursuant to the Mutual Assistance Convention and the Legal Assistance Treaty. The letter noted that no information had been received and requested that a response be provided.

58. On 13 January 2003 the Russian Embassy wrote to the Cypriot Ministry of Foreign Affairs requesting an expedited response to its request for legal assistance in respect of Ms Rantseva's death.

59. By letters of 17 and 31 January 2003 the Office of the Prosecutor General of the Russian Federation noted that it had received no response from the Cypriot authorities in relation to its requests for legal assistance, the contents of which it repeated.

60. On 4 March 2003 the Cypriot Ministry of Justice informed the Prosecutor General of the Russian Federation that its request had been duly executed by the Cypriot police. A letter from the Chief of Police, and the police report of 8 July 2002 recording the applicant's visit to Limassol Police Station in August 2001 were enclosed.

61. On 19 May 2003 the Russian Embassy wrote to the Cypriot Ministry of Foreign Affairs requesting an expedited response to its request for legal assistance in respect of Ms Rantseva's death.

62. On 5 June 2003 the Office of the Prosecutor General of the Russian Federation submitted a further request pursuant to the Legal Assistance Treaty. It requested that a further investigation be conducted into the circumstances of Ms Rantseva's death as the verdict of 27 December 2001 was unsatisfactory. In particular, it noted that despite the strange circumstances of the incident and the acknowledgment that Ms Rantseva was trying to escape from the flat where she was held, the verdict did not make any reference to the inconsistent testimonies of the relevant witnesses or contain any detailed description of the findings of the autopsy carried out by the Cypriot authorities.

63. On 8 July 2003 the Russian Embassy wrote to the Cypriot Ministry of Foreign Affairs requesting a reply to its previous requests as a matter of urgency.

64. On 4 December 2003 the Commissioner for Human Rights of the Russian Federation forwarded the applicant's complaint about the inadequate reply from the Cypriot authorities to the Cypriot Ombudsman.

65. On 17 December 2003, in reply to the Russian authorities' request (see paragraph 52 above), the Cypriot Ministry of Justice forwarded to the Prosecutor General of the Russian Federation a further report prepared by the Cypriot police and dated 17 November 2003. The report was prepared by one of the officers who had attended the scene on 28 March 2001 and provided brief responses to the questions posed by the Russian authorities. The report reiterated that witnesses had been interviewed and statements taken. It emphasised that all the evidence was taken into consideration by the inquest. It continued as follows (translation):

“At about 6.30a.m. on 28 March 2001 the deceased went out onto the balcony of her room through the balcony door, climbed down to the balcony of the first floor of the apartment with the assistance of a bedspread which she tied to the protective railing of the balcony. She carried on her shoulder her personal bag. From that point, she clung to the aluminium protective railing of the balcony so as to climb down to the balcony of the apartment on the floor below in order to escape. Under unknown circumstances, she fell into the street, as a result of which she was fatally injured.”

66. The report observed that it was not known why Ms Rantseva left the apartment on 19 March 2001 but on the basis of the investigation (translation):

“... it is concluded that the deceased did not want to be expelled from Cyprus and because her employer was at the entrance of the flat where she was a guest, she decided to take the risk of trying to climb over the balcony, as a result of which she fell to the ground and died instantaneously.”

67. As to the criticism of the Cypriot autopsy and alleged inconsistencies in the forensic evidence between the Cypriot and Russian authorities, the report advised that these remarks had been forwarded to the Cypriot forensic examiner who had carried out the autopsy. His response was that his own conclusions were sufficient and that no supplementary information was required. Finally, the report reiterated that the inquest had concluded that there was no indication of any criminal liability for Ms Rantseva's death.

68. By letter of 17 August 2005 the Russian Ambassador to Cyprus requested further information about a hearing concerning the case apparently scheduled for 14 October 2005 and reiterated the applicant's request for free legal assistance. The Cypriot Ministry of Justice responded by facsimile of 21 September 2005 indicating that Limassol District Court had been unable to find any reference to a hearing in the case fixed for 14 October 2005 and requesting clarification from the Russian authorities.

69. On 28 October 2005 the applicant asked the Russian authorities to obtain testimonies from two young Russian women, now resident in Russia, who had been working with Ms Rantseva at the cabaret in Limassol and could testify about sexual exploitation taking place there. He reiterated his request on 11 November

2005. The Russian authorities replied that they could only obtain such testimonies upon receipt of a request by the Cypriot authorities.

70. By letter of 22 December 2005 the Office of the Prosecutor General of the Russian Federation wrote to the Cypriot Ministry of Justice seeking an update on the new inquest into Ms Rantseva's death and requesting information on how to appeal Cypriot court decisions. The letter indicated that, according to information available, the hearing set for 14 October 2005 had been suspended due to the absence of evidence from the Russian nationals who had worked in the cabaret with Ms Rantseva. The letter concluded with an undertaking to assist in any request for legal assistance by Cyprus aimed at the collection of further evidence.

71. In January 2006, according to the applicant, the Attorney-General of Cyprus confirmed to the applicant's lawyer that he was willing to order the re-opening of the investigation upon receipt of further evidence showing any criminal activity.

72. On 26 January 2006 the Russian Embassy wrote to the Cypriot Ministry of Justice requesting an update on the suspended hearing of 14 October 2005. The Ministry of Justice replied by facsimile on 30 January 2006 confirming that neither the District Court of Limassol nor the Supreme Court of Cyprus had any record of such a hearing and requesting further clarification of the details of the alleged hearing.

73. On 11 April 2006 the Office of the Prosecutor General of the Russian Federation wrote to the Cypriot Ministry of Justice requesting an update on the suspended hearing and reiterating its query regarding the appeals procedure in Cyprus.

74. On 14 April 2006, by letter to the Russian authorities, the Attorney-General of Cyprus advised that he saw no reason to request the Russian authorities to obtain the testimonies of the two Russian citizens identified by the applicant. If the said persons were in the Republic of Cyprus their testimonies could be obtained by the Cypriot police and if they were in Russia, the Russian authorities did not need the consent of the Cypriot authorities to obtain their statements.

75. On 26 April 2006 the Cypriot Ministry of Justice replied to the Office of the Prosecutor General of the Russian Federation reiterating its request for more information about the alleged suspended hearing.

76. On 17 June 2006 the Office of the Prosecutor General of the Russian Federation wrote to the Attorney-General of Cyprus reminding him of the outstanding requests for renewal of investigations into Ms Rantseva's death and for information on the progress of judicial proceedings.

77. On 22 June and 15 August 2006 the applicant reiterated his request to the Russian authorities that statements be taken from the two Russian women.

78. On 17 October 2006 the Cypriot Ministry of Justice confirmed to the Office of the Prosecutor General of the Russian Federation that the inquest into Ms Rantseva's death was completed on 27 December 2001 and that it found that her death was the result of an accident. The letter noted:

"No appeal was filed against the decision, because of the lack of additional evidence".

79. On 25 October 2006, 27 October 2006, 3 October 2007 and 6 November 2007 the applicant reiterated his request to the Russian authorities that statements be taken from the two Russian women.

II. REPORTS ON THE SITUATION OF "ARTISTES" IN CYPRUS

A. *Ex Officio* report of the Cypriot Ombudsman on the regime regarding entry and employment of alien women as artistes in entertainment places in Cyprus, 24 November 2003

80. In November 2003, the Cypriot Ombudsman published a report on “artistes” in Cyprus. In her introduction, she explained the reasons for her report as follows (all quotes are from a translation of the report provided by the Cypriot Government):

“Given the circumstances under which [Oxana] Rantseva had lost her life and in the light of similar cases which have been brought into publicity regarding violence or demises of alien women who arrives in Cyprus to work as ‘artistes’, I have decided to undertake an *ex officio* investigation ...”

81. As to the particular facts of Ms Rantseva’s case, she noted the following:

“After formal immigration procedures, she started working on 16 March 2001. Three days later she abandoned the cabaret and the place where she had been staying for reasons which have never been clarified. The employer reported the fact to the Aliens and Immigration Department in Limassol. However, [Oxana] Rantseva’s name was not inserted on the list comprising people wanted by the Police, for unknown reasons, as well.”

82. She further noted that:

“The reason for which [Oxana] Rantseva was surrendered by the police to her employer, instead of setting her free, since there were [neither] arrest warrant [nor] expulsion decree against her, remained unknown.”

83. The Ombudsman’s report considered the history of the employment of young foreign women as cabaret artistes, noting that the word “artiste” in Cyprus has become synonymous with “prostitute”. Her report explained that since the mid-1970s, thousands of young women had legally entered Cyprus to work as artistes but had in fact worked as prostitutes in one of the many cabarets in Cyprus. Since the beginning of the 1980s, efforts had been made by the authorities to introduce a stricter regime in order to guarantee effective immigration monitoring and to limit the “well-known and commonly acknowledged phenomenon of women who arrived in Cyprus to work as artistes”. However, a number of the measures proposed had not been implemented due to objections from cabaret managers and artistic agents.

84. The Ombudsman’s report noted that in the 1990s, the prostitution market in Cyprus started to be served by women coming mainly from former States of the Soviet Union. She concluded that:

“During the same period, one could observe a certain improvement regarding the implementation of those measures and the policy being adopted. However, there was not improvement regarding sexual exploitation, trafficking and mobility of women under a regime of modern slavery.”

85. As regards the living and working conditions of artistes, the report stated:

“The majority of the women entering the country to work as artistes come from poor families of the post socialist countries. Most of them are educated ... Few are the real artistes. Usually they are aware that they will be compelled to prostitute themselves. However, they do not always know about the working conditions under which they will exercise this job. There are also cases of alien women who come to Cyprus, having the impression that they will work as waitresses or dancers and that they will only have drinks with clients (‘consomation’). They are made by force and threats to comply with the real terms of their work ...

Alien women who do not succumb to this pressure are forced by their employers to appear at the District Aliens and Immigration Branch to declare their wish to terminate their contract and to leave Cyprus on ostensible grounds ... Consequently, the employers can replace them quickly with other artistes ...

The alien artistes from the moment of their entry into the Republic of Cyprus to their departure are under constant surveillance and guard of their employers. After finishing their work, they are not allowed to go wherever they want. There are serious complaints even about cases of artistes who remain locked in their residence place. Moreover, their passports and other personal documents are retained by their employers or artistic agents. Those who refuse to obey are punished by means of violence or by being imposed fees which usually consist in deducting percentages of drinks, 'consommation' or commercial sex. Of course these amounts are included in the contracts signed by the artistes.

...

Generally, artistes stay at one or zero star hotels, flats or guest-houses situated near or above the cabarets, whose owners are the artistic agents or the cabaret owners. These places are constantly guarded. Three or four women sleep in each room. According to reports given by the Police, many of these buildings are inappropriate and lack sufficient sanitation facilities.

...Finally, it is noted that at the point of their arrival in Cyprus alien artistes are charged with debts, for instance with traveling expenses, commissions deducted by the artistic agent who brought them in Cyprus or with commissions deducted by the agent who located them in their country etc. Therefore, they are obliged to work under whichever conditions to pay off at least their debts." (*footnotes omitted*)

86. Concerning the recruitment of women in their countries of origin, the report noted:

"Locating women who come to work in Cyprus is usually undertaken by local artistic agents in cooperation with their homologues in different countries and arrangements are made between both of them. After having worked for six months maximum in Cyprus, a number of these artistes are sent to Lebanon, Syria, Greece or Germany." (*footnotes omitted*)

87. The Ombudsman observed that the police received few complaints from trafficking victims:

"The police explain that the small number of complaints filed is due to the fear that artistes feel, since they receive threats against their lives on the part of their procurer."

88. She further noted that protection measures for victims who had filed complaints were insufficient. Although they were permitted to work elsewhere, they were required to continue working in similar employment. They could therefore be easily located by their former employers.

89. The Ombudsman concluded:

"The phenomenon of trafficking in person has so tremendously grown worldwide. Trafficking in persons concerns not only sexual exploitation of others but also exploitation of their employment under conditions of slavery and servitude ...

From the data of this report it is observed that over the last two decades Cyprus has not been only a destination country but a transit country where women are systematically promoted to the prostitution market. It follows also that this is also due to a great extent to the tolerance on the part of the immigration authorities, which are fully aware of what really happens.

On the basis of the policy followed as for the issue of entry and employment permits to entertainment and show places, thousands of alien women, with no safety valve, have entered by law the country to work as artistes unlawfully. In various forms of pressure and coercion most of these women are forced by their employers to prostitution under cruel conditions, which infringe upon the fundamental human rights, such as individual freedom and human dignity." (*footnotes omitted*)

90. Although she considered the existing legislative framework to combat trafficking and sexual exploitation satisfactory, she noted that no practical measures had been taken to implement the policies outlined, observing that:

“...The various departments and services dealing with this problem, are often unaware of the matter and have not been properly trained or ignore those obligations enshrined in the Law ...”

B. Extracts of report of 12 February 2004 by the Council of Europe Commissioner for Human Rights on his visit to Cyprus in June 2003 (CommDH(2004)2)

91. The Council of Europe Commissioner for Human Rights visited Cyprus in June 2003 and in his subsequent report of 12 February 2004, he referred to issues in Cyprus regarding trafficking of women. The report noted, *inter alia*, that:

“29. It is not at all difficult to understand how Cyprus, given its remarkable economic and tourist development, has come to be a major destination for this traffic in the Eastern Mediterranean region. The absence of an immigration policy and the legislative shortcomings in that respect have merely encouraged the phenomenon.”

92. As regards the legal framework in place in Cyprus (see paragraphs 127 to 131 below), the Commissioner observed:

“30. The authorities have responded at the normative level. The Act of 2000 (number 3(I), 2000) has established a suitable framework for suppression of trafficking in human beings and sexual exploitation of children. Under the Act, any action identifiable as trafficking in human beings in the light of the Convention for the Suppression of Trafficking in Persons and of the Exploitation and Prostitution of Others, together with other acts of a similar nature specified by law, are an offence punishable by 10 years’ imprisonment, the penalty being increased to 15 years where the victim is under 18 years of age. The offence of sexual exploitation carries a 15 year prison sentence. If committed by persons in the victim’s entourage or persons wielding authority or influence over the victim, the penalty is 20 years in prison. According to the provisions of Article 4, using children for the production and sale of pornographic material is an offence. Article 7 grants State aid, within reasonable limits, to victims of exploitation; such aid comprises subsistence allowance, temporary accommodation, medical care and psychiatric support. Article 8 reaffirms the right to redress by stressing the power of the court to award punitive damages justified by the degree of exploitation or the degree of the accused person’s constraint over the victim. A foreign worker lawfully present in Cyprus who is a victim of exploitation can approach the authorities to find other employment up until the expiry of the initial work permit (Article 9). Lastly, the Council of Ministers, under Article 10, appoints a guardian for victims with the principal duties of counselling and assisting them, examining complaints of exploitation, and having the culprits prosecuted, as well as for pinpointing any deficiency or loophole in the law and for making recommendations with a view to their removal.”

93. Concerning practical measures, the Commissioner noted:

“31. At a practical level, the Government has made efforts to protect women who have laid a complaint against their employers by permitting them to remain in the country in order to substantiate the charges. In certain cases, the women have remained in Cyprus at government expense during the investigation.”

94. However, he criticised the failure of the authorities to tackle the problem of the excessive number of young foreign women coming to work in Cypriot cabarets:

“32. However, apart from punitive procedures, preventive control measures could be introduced. By the authorities’ own admission, the number of young women migrating to Cyprus as nightclub artistes is well out of proportion to the population of the island.”

C. Extracts of follow-up report of 26 March 2006 by the Council of Europe Commissioner for Human Rights on the progress made in implementing his recommendations (CommDH(2006)12)

95. On 26 March 2006, the Council of Europe Commissioner for Human Rights published a follow-up report in which he assessed the progress of the Cypriot Government in implementing the recommendations of his previous report. As regards the issue of trafficking, the report observed that:

“48. The Commissioner noted in his 2003 report that the number of young women migrating to Cyprus as nightclub artistes was well out of proportion to the population of the island, and that the authorities should consider introducing preventive control measures to deal with this phenomenon, in conjunction with legislative safeguards. In particular, the Commissioner recommended that the authorities adopt and implement a plan of action against trafficking in human beings.”

96. The report continued:

“49. The so called ‘cabaret artiste’ visas are in fact permits to enter and work in nightclubs and bars. These permits are valid for 3 months and can be extended for a further 3 months. The permit is applied for by the establishment owner on behalf of the woman in question. Approximately 4,000 permits are issued each year, with 1,200 women working at a given time and most women originating from Eastern Europe. A special information leaflet has been prepared by the Migration Service and translated into four languages. The leaflet is given to women entering the country on such permits, is also available on the website of the Ministry of the Interior and the Ministry of Foreign Affairs and copies of the leaflet are sent to the consulates in Russia, Bulgaria, the Ukraine and Romania in order for women to be informed before they enter Cyprus. The leaflet sets out the rights of the women and the responsibilities of their employers. The authorities are aware that many of the women who enter Cyprus on these artistes visas will in fact work in prostitution.”

97. The Commissioner’s report highlighted recent and pending developments in Cyprus:

“50. A new Law on Trafficking in Human Beings is currently being discussed. The new law will include other forms of exploitation such as labour trafficking as well as trafficking for sexual exploitation. Cyprus has signed but not ratified the Council of Europe Convention on Action Against Trafficking in Human Beings.

51. The Attorney General’s Office has prepared a National Action Plan for the Combating of Human Trafficking. The Action Plan was presented and approved by the Council of Ministers in April 2005. Some NGOs complained of their lack of involvement in the consultation process. The Ministry of the Interior is responsible for the implementation of the Action Plan. According to the Action Plan, women involved in cases of sexual exploitation or procuring are not arrested or charged with any offence, but are considered as victims and are under the care of the Ministry of Labour and Social Security. Victims who will act as witnesses in court trials can reside in Cyprus until the end of the case. They have the possibility of working, or if they do not wish to work, the Ministry will cover all their residential, health and other needs. A special procedures manual has been drafted for the treatment of victims of trafficking, and has been circulated to all ministries and government departments, as well as NGOs for consultation.

52. There is no specific shelter for victims of trafficking at present, although victims may be accommodated by the authorities in two rooms in state-owned retirement homes, which are available in each major town. A shelter in Limassol is due to be opened soon, which will provide accommodation for 15 women, as well as providing the services of a social worker, lawyer, and vocational advisor.”

98. As regards steps taken to improve information collection and research into trafficking, he noted:

“53. An Office for the Prevention and Combating of Human Trafficking was set up by the police in April 2004. The office’s role is to collect and evaluate intelligence regarding trafficking in human beings, to co-ordinate operations of all police divisions and departments, to organise and participate in operations, and to follow-up on cases that are under investigation, pending trial or presented to the courts. The office also prepares reports on trafficking and investigates child pornography on the Internet. In addition, the office organises educational seminars carried out at the Cyprus Police Academy.

54. According to statistical information provided by the police from 2000 to 2005, there is a clear increase in the number of cases reported concerning offences of sexual exploitation, procuring, and living on the earnings of prostitution, etc. NGOs confirm that awareness about issues relating to trafficking has increased.”

99. Finally, in respect of preventative measures, the Commissioner highlighted recent positive developments:

“55. Preventive and suppressive measures are also undertaken by the police, such as raids in cabarets, inspections, interviews with women, co-operation with mass media, and control of advertisements found in different newspapers. The police provide an anonymous toll-free hotline where anybody can call to seek help or give information. Cabarets which are under investigation are put on a black list and are unable to apply for new visas.

56. Some efforts have been made by the Cypriot authorities to improve victim identification and referral, and in particular, 150 police officers have been trained on this issue. However, according to NGOs a culture still prevails in which women are seen by the police to have ‘consented’ to their predicament and victim identification remains inadequate.”

100. The report reached the following conclusions:

“57. Trafficking in human beings is one of the most pressing and complex Human Rights issues faced by Council of Europe member states, including Cyprus. There is obviously a risk that the young women who enter Cyprus on artiste visas may be victims of trafficking in human beings or later become victims of abuse or coercion. These women are officially recruited as cabaret dancers but are nevertheless often expected also to work as prostitutes. They are usually from countries with inferior income levels to those in Cyprus and may find themselves in a vulnerable position to refuse demands from their employers or clients. The system itself, whereby the establishment owner applies for the permit on behalf of the woman, often renders the woman dependent on her employer or agent, and increases the risk of her falling into the hands of trafficking networks.

58. The Commissioner urges the Cypriot authorities to be especially vigilant about monitoring the situation and ensuring that the system of artiste visas is not used for facilitating trafficking or forced prostitution. In this context, the Commissioner recalls the exemplary reaction of the Luxembourg authorities to similar concerns expressed in his report on the country and their withdrawal of the cabaret artiste visa regime. Changes to the current practice might, at the very least, include women having to apply for the visa themselves, and the information leaflet being given to the women, if possible, before they enter the country.

59. The Commissioner welcomes the new National Action Plan for the Combating of Human Trafficking as a first step in addressing this issue and encourages the Ministry of the Interior to ensure its full implementation. The new law on trafficking, once enacted, will also play an important role. The variety of police activities in response to this phenomenon, such as the setting up of the Office for the Prevention and Combating of Human Trafficking, should also be welcomed.

60. In order to respect the human rights of trafficked persons, the authorities need to be able to identify victims and refer them to specialised agencies which can offer shelter and protection, as well as support services. The Commissioner urges the Cypriot authorities to continue with the training of police officers in victim identification and referral, and encourages the authorities to include women police officers in this area. More effective partnerships with NGOs and other civil society actors should also be developed. The Commissioner expresses his hope that the shelter in Limassol will be put into operation as soon as possible.”

D. Extracts of report of 12 December 2008 by the Council of Europe Commissioner for Human Rights on his visit to Cyprus on 7-10 July 2008 (CommDH(2008)36)

101. The Commissioner of Human Rights has recently published a further report following a visit to Cyprus in July 2008. The report comments on the developments in respect of issues relating to trafficking of human beings, emphasising at the outset that trafficking of women for exploitation was a major problem in many European countries, including Cyprus. The report continued as follows:

“33. Already in 2003, the Commissioner for Administration (Ombudswoman) stated that Cyprus had been associated with trafficking both as a country of destination and transit, the majority of women being blackmailed and forced to provide sexual services. In 2008, the

island still is a destination country for a large number of women trafficked from the Philippines, Russia, Moldova, Hungary, Ukraine, Greece, Vietnam, Uzbekistan and the Dominican Republic for the purpose of commercial sexual exploitation ... Women are reportedly denied part or all of their salaries, forced to surrender their passports, and pressed into providing sexual services for clients. Most of these women are unable to move freely, are forced to work far above normal working hours, and live in desperate conditions, isolated and under strict surveillance.

34. Victims of trafficking are recruited to Cyprus mainly on three-month so-called 'artiste' or 'entertainment' visas to work in the cabaret industry including night clubs and bars or on tourist visas to work in massage parlours disguised as private apartments ... The permit is sought by the owner of the establishment, in most cases so-called 'cabarets', for the women in question.

35. The study conducted by the Mediterranean Institute of Gender Studies (MIGS) led to a report on trafficking in human beings published in October 2007. It shows that an estimated 2 000 foreign women enter the island every year with short term 'artiste' or 'entertainment' work permits. Over the 20-year period 1982-2002, there was a dramatic increase of 111% in the number of cabarets operating on the island ...

36. During his visit the Commissioner learned that there are now approximately 120 cabaret establishments in the Republic of Cyprus, each of them employing around 10 to 15 women ...” (*footnotes omitted*)

102. The Commissioner noted that the Government had passed comprehensive anti-trafficking legislation criminalising all forms of trafficking, prescribing up to 20 years' imprisonment for sexual exploitation and providing for protection and support measures for victims (see paragraphs 127 to 131 below). He also visited the new government-run shelter in operation since November 2007 and was impressed by the facility and the commitment shown by staff. As regards allegations of corruption in the police force, and the report noted as follows:

“42. The Commissioner was assured that allegations of trafficking-related corruption within the police force were isolated cases. The authorities informed the Commissioner that so far, three disciplinary cases involving human trafficking/prostitution have been investigated: one resulted in an acquittal and two are still under investigation. In addition, in 2006, a member of the police force was sentenced to 14 months imprisonment and was subsequently dismissed from service following trafficking related charges.”

103. The report drew the following conclusions in respect of the artiste permit regime in Cyprus:

“45. The Commissioner reiterates that trafficking in women for the purposes of sexual exploitation is a pressing and complex human rights issues faced by a number of Council of Europe member States, including Cyprus. A paradox certainly exists that while the Cypriot government has made legislative efforts to fight trafficking in human beings and expressed its willingness through their National Action Plan 2005, it continues to issue work permits for so-called cabaret artistes and licences for the cabaret establishments. While on paper the permits are issued to those women who will engage in some type of artistic performance, the reality is that many, if not most, of these women are expected to work as prostitutes.

46. The existence of the 'artiste' work permit leads to a situation which makes it very difficult for law enforcement authorities to prove coercion and trafficking and effectively combat it. This type of permit could thus be perceived as contradicting the measures taken against trafficking or at least as rendering them ineffective.

47. For these reasons, the Commissioner regrets that the 'artiste' work permit is still in place today despite the fact that the government has previously expressed its commitment to abolish it. It seems that the special information leaflet given to women entering the country on such a permit is of little effect, even though the woman needs to have read and signed the leaflet in the presence of an official.

48. The Commissioner calls upon the Cypriot authorities to abolish the current scheme of cabaret 'artistes' work permits ...”

104. The Commissioner also reiterated the importance of a well-trained and motivated police force in the fight against trafficking in human beings and encouraged the authorities to ensure adequate and timely victim identification.

E. Trafficking in Persons Report, U.S. State Department, June 2008

105. In its 2008 report on trafficking, the U.S. State Department noted that:

“Cyprus is a destination country for a large number of women trafficked from the Philippines, Russia, Moldova, Hungary, Ukraine, Greece, Vietnam, Uzbekistan, and the Dominican Republic for the purpose of commercial sexual exploitation ... Most victims of trafficking are fraudulently recruited to Cyprus on three-month ‘artiste’ work permits to work in the cabaret industry or on tourist visas to work in massage parlors disguised as private apartments.”

106. The report found that Cyprus had failed to provide evidence that it had increased its efforts to combat severe forms of trafficking in persons from the previous year.

107. The report recommended that the Cypriot Government:

“Follow through with plans to abolish, or greatly restrict use of the artiste work permit—a well-known conduit for trafficking; establish standard operating procedures to protect and assist victims in its new trafficking shelter; develop and launch a comprehensive demand reduction campaign specifically aimed at clients and the larger public to reduce wide-spread misconceptions about trafficking and the cabaret industry; dedicate more resources to its anti-trafficking unit; and improve the quality of trafficking prosecutions to secure convictions and appropriate punishments for traffickers.”

III. RELEVANT DOMESTIC LAW AND PRACTICE

A. Cyprus

1. Extracts of the Constitution

108. Under the Cypriot Constitution the right to life and corporal integrity is protected by Article 7.

109. Article 8 provides that no person shall be subjected to torture or to inhuman or degrading punishment or treatment.

110. Article 9 guarantees that:

“Every person has the right to a decent existence and to social security. A law shall provide for the protection of the workers, assistance to the poor and for a system of social insurance.”

111. Article 10 provides, in so far as relevant, that:

“1. No person shall be held in slavery or servitude.

2. No person shall be required to perform forced or compulsory labour ...”

112. Article 11(1) provides that every person has the right to liberty and security of person. Article 11(2) prohibits deprivation of liberty except in cases permitted under Article 5 § 1 of the Convention and as provided by law.

2. Applications for entrance, residence and work permits for artistes

a. The procedure at the relevant time

113. In 2000, the Civil Registry and Migration Department defined “artiste” as:

“any alien who wishes to enter Cyprus in order to work in a cabaret, musical-dancing place or other night entertainment place and has attained the age of 18 years.”

114. Under Article 20 of the Aliens and Immigration Law, Cap. 105, the Council of Ministers has jurisdiction to issue regulations concerning entry requirements for aliens, monitoring the immigration and movements of aliens, regulating warranties in respect of aliens holding permits and determining any relevant fees. Notwithstanding the existence of these powers, at the material time the entry procedures for those entering Cyprus to work as cabaret artistes were regulated by decisions or instructions of the Minister of Interior, immigration officers and the general directors of the Ministry.

115. In line with a procedure introduced in 1987, applications for entry, temporary residence and work permits had to be submitted by the prospective employer (the cabaret manager) and the artistic agent, accompanied by an employment contract recording the exact terms agreed between the parties and photocopies of relevant pages of the artiste's passport. Artistic agents were also required to deposit a bank letter guarantee in the sum of 10,000 Cypriot pounds (CYP) (approximately EUR 17,000) to cover possible repatriation expenses. Cabaret managers were required to deposit a bank warranty in the sum of CYP 2,500 (approximately EUR 4,200) to cover a repatriation for which the manager was responsible.

116. If all the conditions were fulfilled, an entry and temporary resident permit valid for five days was granted. Upon arrival, the artiste was required to undergo various medical tests for AIDS and other infectious or contagious diseases. Upon submission of satisfactory results, a temporary residence and work permit valid for three months was granted. The permit could be renewed for a further three months. The number of artistes who could be employed in a single cabaret was limited.

117. In an effort to prevent artistes from being forced to leave the cabaret with clients, artistes were required to be present on the cabaret premises between 9 p.m. and 3 a.m., even if their own performance lasted for only one hour. Absence due to illness had to be certified by a doctor's letter. Cabaret managers were required to advise the Immigration Office if an artiste failed to show up for work or otherwise breached her contract. Failure to do so would result in the artiste being expelled, with her repatriation expenses covered by the bank guarantee deposited by the cabaret manager. If an artistic agent had been convicted of offences linked to prostitution, he would not be granted entry permits for artistes.

b. Other relevant developments

118. In 1986, following reports of prostitution of artistes, the Police Director proposed establishing an *ad hoc* committee responsible for assessing whether artistes seeking to enter Cyprus held the necessary qualifications for the grant of an artiste visa. However, the measure was never implemented. A committee with a more limited remit was set up but, over time, was gradually weakened.

119. Under the procedure introduced in 1987, an application for an entry permit had to be accompanied by evidence of artistic competency. However, this measure was indefinitely suspended in December 1987 on the instructions of the then General Director of the Ministry of the Interior.

120. In 1990, following concerns about the fact that artistic agents also owned or managed cabarets or owned the accommodation in which their artistes resided, the Civil Registry and Immigration Department notified all artistic agents that from 30 June 1990 cabaret owners were not permitted to work also as artistic agents. They were requested to advise the authorities which of the two professions they intended to exercise. Further, the level of the bank guarantees was increased, from CYP 10,000 to CYP 15,000 in respect of artistic agents and from CYP 2,500 to CYP 10,000 in respect of cabaret managers. However, these measures were

never implemented following objections from artistic agents and cabaret managers. The only change which was made was an increase in the level of the bank guarantee by cabaret managers from CYP 2,500 to CYP 3,750 (approximately EUR 6,400).

3. *Law on inquests*

121. The holding of inquests in Cyprus is governed by the Coroners Law of 1959, Cap. 153. Under section 3, every district judge and magistrate may hold inquests within the local limits of his jurisdiction. Section 3(3) provides that any inquest commenced by a coroner may be continued, resumed, or reopened in the manner provided by the Law.

122. Section 14 sets out the procedure at the inquest and provides as follows (all quotes to Cypriot legislation are translated):

“At every inquest–

(a) the coroner shall take on oath such evidence as is procurable as to the identity of the deceased, and the time, place and manner of his death;

(b) every interested party may appear either by advocate or in person and examine, cross-examine or re-examine, as the case may be, any witness.”

123. Section 16 governs the extent of the coroner’s powers and provides that:

“(1) A coroner holding an inquest shall have and may exercise all the powers of a district judge or magistrate with regard to summoning and compelling the attendance of witnesses and requiring them to give evidence, and with regard to the production of any document or thing at such inquest.”

124. Under section 24, where the coroner is of the opinion that sufficient grounds are disclosed for making a charge against any person in connection with the death, he may issue a summons or warrant to secure the attendance of such person before any court having jurisdiction.

125. Section 25 provides that following the hearing of evidence, the coroner shall give his verdict and certify it in writing, showing, so far as such particulars have been proved to him, who the deceased was, and how, when and where the deceased came by his death. Under section 26, if at the close of the inquest the coroner is of the opinion that there are grounds for suspecting that some person is guilty of an offence in respect of the matter inquired into, but cannot ascertain who such person is, he shall certify his opinion to that effect and transmit a copy of the proceedings to the police officer in charge of the district in which the inquest is held.

126. Section 30 allows the President of the District Court, upon the application of the Attorney-General, to order the holding, re-opening or quashing of an inquest or verdict. It provides that:

“(1) Where the President, District Court, upon application made by or under the authority of the Attorney-General, is satisfied that it is necessary or desirable to do so, he may–

(a) order an inquest to be held touching the death of any person;

(b) direct any inquest to be reopened for the taking of further evidence, or for the inclusion in the proceedings thereof and consideration with the evidence already taken, of any evidence taken in any judicial proceedings which may be relevant to any issue determinable at such inquest, and the recording of a fresh verdict upon the proceedings as a whole;

(c) quash the verdict in any inquest substituting therefor some other verdict which appears to be lawful and in accordance with the evidence recorded or included as hereinbefore in this section provided; or

(d) quash any inquest, with or without ordering a new inquest to be held.”

4. *Trafficking in human beings*

127. Legislation on human trafficking was introduced in Cyprus under Law No. 3(1) of 2000 on the Combating of Trafficking in Persons and Sexual Exploitation of Children. Section 3(1) prohibits:

“a. The sexual exploitation of adult persons for profit if:

i. it is done by the use of force, violence or threats; or

ii. there is fraud; or

iii. it is done through abuse of power or other kind of pressure to such an extent so that the particular person would have no substantial and reasonable choice but to succumb to pressure or ill-treatment;

b. the trafficking of adult persons for profit and for sexual exploitation purposes in the circumstances referred to in subsection (a) above;

c. the sexual exploitation or the ill-treatment of minors;

d. the trafficking of minors for the purpose of their sexual exploitation or ill-treatment.”

128. Section 6 provides that the consent of the victim is not a defence to the offence of trafficking.

129. Under section 5(1), persons found guilty of trafficking adults for the purposes of sexual exploitation may be imprisoned for up to ten years or fined CYP 10,000, or both. In the case of a child, the potential prison sentence is increased to fifteen years and the fine to CYP 15,000. Section 3(2) provides for a greater penalty in certain cases:

“For the purposes of this section, blood relationship or relationship by affinity up to the third degree with the victim and any other relation of the victim with the person, who by reason of his position exercises influence and authority over the victim and includes relations with guardian, educators, hostel administration, rehabilitation home, prisons or other similar institutions and other persons holding similar position or capacity that constitutes abuse of power or other kind of coercion:

a. a person acting contrary to the provisions of section 1(a) and (b) commits an offence and upon conviction is liable to imprisonment for fifteen years;

b. a person acting contrary to the provisions of section 1(c) and (d) commits an offence and upon conviction is liable to imprisonment for twenty years.”

130. Section 7 imposes a duty on the State to protect victims of trafficking by providing them with support, including accommodation, medical care and psychiatric support.

131. Under sections 10 and 11, the Council of Ministers may appoint a “guardian of victims” to advise, counsel, and guide victims of exploitation; to hear and investigate complaints of exploitation; to provide victims with treatment and safe residence; to take the necessary steps to prosecute offenders; to take measures aimed at rehabilitating, re-employing or repatriating victims; and to identify any deficiencies in the law to combat trafficking. Although a custodian was appointed, at the time of the Cypriot Ombudsman’s 2003 Report (see paragraphs 80 to 90 above), the role remained theoretical and no programme to ensure protection of victims had been prepared.

B. Russia

1. Jurisdiction under the Russian Criminal Code

132. Articles 11 and 12 of the Criminal Code of the Russian Federation set out the territorial application of Russian criminal law. Article 11 establishes Russian jurisdiction over crimes committed in the territory of the Russian Federation. Article 12(3) provides for limited jurisdiction in respect of non-Russian nationals who commit crimes outside Russian territory where the crimes run counter to the interests of the Russian Federation and in cases provided for by international agreement.

2. General offences under the Criminal Code

133. Article 105 of the Russian Criminal Code provides that murder shall be punishable with a prison term.

134. Article 125 of the Russian Criminal Code provides that deliberate abandonment and failure to provide assistance to a person in danger is punishable by a fine, community service, corrective labour or a prison term.

135. Articles 126 and 127 make abduction and illegal deprivation of liberty punishable by prison terms.

3. Trafficking in human beings

136. In December 2003, an amendment was made to the Russian Criminal Code by the insertion of a new Article 127.1 in the following terms:

“1. Human beings’ trafficking, that is, a human being’s purchase and sale or his recruiting, transportation, transfer, harbouring or receiving for the purpose of his exploitation ... shall be punishable by deprivation of liberty for a term of up to five years.

2. The same deed committed:

a) in respect of two or more persons;

...

d) moving the victim across the State Border of the Russian Federation or illegally keeping him abroad;

...

f) with application of force or with the threat of applying it;

...

shall be punishable by deprivation of liberty for a term from three to 10 years.

3. The deeds provided for by Parts One and Two of this Article:

a) which have entailed the victim’s death by negligence, the infliction of major damage to the victim’s health or other grave consequences;

b) committed in a way posing danger to the life or health of many people;

c) committed by an organized group–

shall be punishable by deprivation of liberty for a term from eight to 15 years.”

IV. RELEVANT INTERNATIONAL TREATIES AND OTHER MATERIALS

A. Slavery

1. Slavery Convention 1926

137. The Slavery Convention, signed in Geneva in 1926, entered into force on 7 July 1955. Russia acceded to the Slavery Convention on 8 August 1956 and Cyprus on 21 April 1986. In the recitals, the Contracting Parties stated as follows:

“Desiring to ... find a means of giving practical effect throughout the world to such intentions as were expressed in regard to slave trade and slavery by the signatories of the Convention of Saint-Germain-en-Laye, and recognising that it is necessary to conclude to that end more detailed arrangements than are contained in that Convention,

Considering, moreover, that it is necessary to prevent forced labour from developing into conditions analogous to slavery ...”

138. Article 1 defines slavery as:

“the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”.

139. Under Article 2, the parties undertake to prevent and suppress the slave trade and to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.

140. Article 5 deals with forced or compulsory labour and provides, *inter alia*, that:

“The High Contracting Parties recognise that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.”

141. Article 6 requires States whose laws do not make adequate provision for the punishment of infractions of laws enacted with a view to giving effect to the purposes of the Slavery Convention to adopt the necessary measures in order that severe penalties can be imposed in respect of such infractions.

2. Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia

142. In the first case to deal with the definition of enslavement as a crime against humanity for sexual exploitation, *Prosecutor v. Kunarac, Vukovic and Kovac*, 12 June 2002, the International Criminal Tribunal for the Former Yugoslavia observed that:

“117. ...the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as ‘chattel slavery’ has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with ‘chattel slavery’, but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of ‘chattel slavery’ but the difference is one of degree ...”

143. It concluded that:

“119. ... the question whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement [including] the ‘control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour’. Consequently, it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea ...”

3. *The Rome Statute*

144. The Statute of the International Criminal Court (“the Rome Statute”), which entered into force on 1 July 2002, provides that “enslavement” under Article 7(1)(c) of the Rome Statute:

“means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.”

145. Cyprus signed the Rome Statute on 15 October 1998 and ratified it on 7 March 2002. Russia signed the Statute on 13 September 2000. It has not ratified the Statute.

B. Trafficking

1. *Early trafficking agreements*

146. The first international instrument to address trafficking of persons, the International Agreement for the Suppression of White Slave Traffic, was adopted in 1904. It was followed in 1910 by the International Convention for the Suppression of White Slave Traffic. Subsequently, in 1921, the League of Nations adopted a Convention for the Suppression of Trafficking in Women and Children, affirmed in the later International Convention for the Suppression of Traffic in Women of Full Age of 1933. The 1949 Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others brought the former instruments under the auspices of the United Nations.

2. *The Convention on the Elimination of All Forms of Discrimination Against Women*

147. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted in 1979 by the UN General Assembly. Russia ratified CEDAW on 23 January 1981 and Cyprus acceded to it on 23 July 1985.

148. Article 6 CEDAW provides that:

“States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”

3. *The Palermo Protocol*

149. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (“the Palermo Protocol”), supplementing the United Nations Convention against Transnational Organised Crime 2000 was signed by Cyprus on 12 December 2000 and by Russia on 16 December 2000. It was ratified by them on 26 May 2004 and 6 August 2003 respectively. Its preamble notes:

“Declaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights.”

150. Article 3(a) defines “trafficking in persons” as:

“the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the

purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

151. Article 3(b) provides that the consent of a victim of trafficking to the intended exploitation is irrelevant where any of the means set out in Article 3(a) have been used.

152. Article 5 obliges States to:

“adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.”

153. Assistance and protection for victims of trafficking is dealt with in Article 6, which provides, in so far as relevant:

“2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

(a) Information on relevant court and administrative proceedings;

(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons ...

...

5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

...”

154. Article 9, on the prevention of trafficking in persons, provides that:

“1. States Parties shall establish comprehensive policies, programmes and other measures:

(a) To prevent and combat trafficking in persons; and

(b) To protect victims of trafficking in persons, especially women and children, from revictimization.

2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.”

155. Article 10 emphasises the need for effective exchange of information between relevant authorities and training of law enforcement and immigration officials. It provides, in so far as relevant:

“1. Law enforcement, immigration or other relevant authorities of States Parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine:

...

(c) The means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.

2. States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

...”

4. European Union action to combat trafficking

156. The Council of the European Union has adopted a Framework Decision on combating trafficking in human beings (Framework Decision 2002/JHA/629 of 19 July 2002). It provides for measures aimed at ensuring approximation of the criminal law of the Member States as regards the definition of offences, penalties, jurisdiction and prosecution, protection and assistance to victims.

157. In 2005, the Council adopted an action plan on best practices, standards and procedures for combating and preventing trafficking in human beings (OJ C 311/1 of 9.12.2005). The action plan proposes steps to be taken by Member States, by the Commission and by other EU bodies involving coordination of EU action, scoping the problem, preventing trafficking, reducing demand, investigating and prosecuting trafficking, protecting and supporting victims of trafficking, returns and reintegration and external relations.

5. Council of Europe general action on trafficking

158. In recent years, the Committee of Ministers of the Council of Europe has adopted three legal texts addressing trafficking in human beings for sexual exploitation: Recommendation No. R (2000) 11 of the Committee of Ministers to member states on action against trafficking in human beings for the purpose of sexual exploitation; Recommendation Rec (2001) 16 of the Committee of Ministers to member states on the protection of children against sexual exploitation; and Recommendation Rec (2002) 5 of the Committee of Ministers to member states on the protection of women against violence. These texts propose, *inter alia*, a pan-European strategy encompassing definitions, general measures, a methodological and action framework, prevention, victim assistance and protection, criminal measures, judicial cooperation and arrangements for international cooperation and coordination.

159. The Parliamentary Assembly of the Council of Europe has also adopted a number of texts in this area, including: Recommendation 1325 (1997) on traffic in women and forced prostitution in Council of Europe member States; Recommendation 1450 (2000) on violence against women in Europe; Recommendation 1523 (2001) on domestic slavery; Recommendation 1526 (2001) on the campaign against trafficking in minors to put a stop to the east European route: the example of Moldova; Recommendation 1545 (2002) on the

campaign against trafficking in women; Recommendation 1610 (2003) on migration connected with trafficking in women and prostitution; and Recommendation 1663 (2004) on domestic slavery: servitude, au pairs and “mail-order brides”.

6 The Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005

160. The Council of Europe Convention on Action against Trafficking in Human Beings (“the Anti-Trafficking Convention”) was signed by Cyprus on 16 May 2005 and ratified on 24 October 2007. It entered into force in respect of Cyprus on 1 February 2008. Russia has yet to sign the Convention. A total of 41 member States of the Council of Europe have signed the Anti-Trafficking Convention and 26 have also ratified it.

161. The explanatory report accompanying the Anti-Trafficking Convention emphasises that trafficking in human beings is a major problem in Europe today which threatens the human rights and fundamental values of democratic societies. The report continues as follows:

“Trafficking in human beings, with the entrapment of its victims, is the modern form of the old worldwide slave trade. It treats human beings as a commodity to be bought and sold, and to be put to forced labour, usually in the sex industry but also, for example, in the agricultural sector, declared or undeclared sweatshops, for a pittance or nothing at all. Most identified victims of trafficking are women but men also are sometimes victims of trafficking in human beings. Furthermore, many of the victims are young, sometimes children. All are desperate to make a meagre living, only to have their lives ruined by exploitation and rapacity.

To be effective, a strategy for combating trafficking in human beings must adopt a multi-disciplinary approach incorporating prevention, protection of human rights of victims and prosecution of traffickers, while at the same time seeking to harmonise relevant national laws and ensure that these laws are applied uniformly and effectively.”

162. In its preamble, the Anti-Trafficking Convention asserts, *inter alia*, that:

“Considering that trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being;

Considering that trafficking in human beings may result in slavery for victims;

Considering that respect for victims’ rights, protection of victims and action to combat trafficking in human beings must be the paramount objectives;

...”

163. Article 1 provides that the purposes of the Anti-Trafficking Convention are to prevent and combat trafficking in human beings, to protect the human rights of the victims of trafficking, to design a comprehensive framework for the protection and assistance of victims and witnesses and to ensure effective investigation and prosecution of trafficking.

164. Article 4(a) adopts the Palermo Protocol definition of trafficking and Article 4(b) replicates the provision in the Palermo Protocol on the irrelevance of the consent of a victim of trafficking to the exploitation (see paragraphs 150 to 151 above).

165. Article 5 requires States to take measures to prevent trafficking and provides, *inter alia*, as follows:

“1. Each Party shall take measures to establish or strengthen national co-ordination between the various bodies responsible for preventing and combating trafficking in human beings.

2. Each Party shall establish and/or strengthen effective policies and programmes to prevent trafficking in human beings, by such means as: research, information, awareness raising and education campaigns, social and economic initiatives and training programmes, in particular for persons vulnerable to trafficking and for professionals concerned with trafficking in human beings.

...”

166. Article 6 requires States to take measures to discourage the demand that fosters trafficking and provides, in so far as relevant, as follows:

“To discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking, each Party shall adopt or strengthen legislative, administrative, educational, social, cultural or other measures including:

- a. research on best practices, methods and strategies;
- b. raising awareness of the responsibility and important role of media and civil society in identifying the demand as one of the root causes of trafficking in human beings;
- c. target information campaigns involving, as appropriate, inter alia, public authorities and policy makers;

...”

167. Article 10 sets out measures regarding training and cooperation and provides that:

“1. Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims ...

2. Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2.

...”

168. Article 12 provides that:

1. Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery....
2. Each Party shall take due account of the victim’s safety and protection needs.

...”

169. Articles 18 to 21 require States to criminalise specified types of conduct:

“18. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct contained in article 4 of this Convention, when committed intentionally.

19. Each Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences under its internal law, the use of services which are the object of exploitation as referred to in Article 4 paragraph a of this Convention, with the knowledge that the person is a victim of trafficking in human beings.

20. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the following conducts, when committed intentionally and for the purpose of enabling the trafficking in human beings:

- a. forging a travel or identity document;
- b. procuring or providing such a document;
- c. retaining, removing, concealing, damaging or destroying a travel or identity document of another person.

21(1). Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences when committed intentionally, aiding or abetting the commission of any of the offences established in accordance with Articles 18 and 20 of the present Convention.

(2). Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences when committed intentionally, an attempt to commit the offences established in accordance with Articles 18 and 20, paragraph a, of this Convention.”

170. Article 23 requires States to adopt such legislative and other measures as may be necessary to ensure that the criminal offences established in accordance with Articles 18 to 21 are punishable by effective, proportionate and dissuasive sanctions. For criminal offences established in accordance with Article 18, such sanctions are to include penalties involving deprivation of liberty which can give rise to extradition.

171. Article 27 provides that States must ensure that investigations into and prosecution of offences under the Anti-Trafficking Convention are not dependent on a report or accusation made by a victim, at least when the offence was committed in whole or in part on its territory. States must further ensure that victims of an offence in the territory of a State other than their State of residence may make a complaint before the competent authorities of their State of residence. The latter State must transmit the complaint without delay to the competent authority of the State in the territory in which the offence was committed, where the complaint must be dealt with in accordance with the internal law of the State in which the offence was committed.

172. Article 31(1) deals with jurisdiction, and requires States to adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with the Anti-Trafficking Convention when the offence is committed:

“a. in its territory; or

...

d. by one of its nationals or by a stateless person who has his or her habitual residence in its territory, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State;

e. against one of its nationals.”

173. States may reserve the right not to apply, or to apply only in specific cases or conditions, the jurisdiction rules in Article 31(1)(d) and (e).

174. Article 32 requires States to co-operate with each other, in accordance with the provisions of the Convention, and through application of relevant applicable international and regional instruments, to the widest extent possible, for the purpose of:

“– preventing and combating trafficking in human beings;

- protecting and providing assistance to victims;
- investigations or proceedings concerning criminal offences established in accordance with this Convention.”

C. Mutual legal assistance

1. European Convention on Mutual Assistance in Criminal Matters, CETS No. 30, 20 May 1959 (“Mutual Assistance Convention”)

175. The Mutual Assistance Convention was signed by Cyprus on 27 March 1996. It was ratified on 24 February 2000 and entered into force on 24 May 2000. The Russian Federation signed the Convention on 7 November 1996 and ratified it on 10 December 1999. It entered into force in respect of Russia on 9 March 2000.

176. Article 1 establishes an obligation on contracting parties to:

“afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party”.

177. Article 3 provides that:

“1. The requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.

2. If the requesting Party desires witnesses or experts to give evidence on oath, it shall expressly so request, and the requested Party shall comply with the request if the law of its country does not prohibit it.”

178. Article 26 allows States to enter into bilateral agreements on mutual legal assistance to supplement the provisions of the Mutual Assistance Convention.

2. Treaty between the USSR and the Republic of Cyprus on Legal Assistance in civil, family and criminal law matters of 19 January 1984 (“Legal Assistance Treaty”)

179. Article 2 of the Legal Assistance Treaty (ratified by Russia following the dissolution of the USSR) establishes a general obligation for both parties to provide each other with legal assistance in civil and criminal matters in accordance with the provisions of the Treaty.

180. Article 3 sets out the extent of the legal assistance required under the Treaty and provides as follows:

“Legal assistance in civil and criminal matters shall include service and sending of documents, supply of information on the law in force and the judicial practice and performance of specific procedural acts provided by the law of the requested Contracting Party and in particular the taking of evidence from litigants, accused persons, defendants, witnesses and experts as well as recognition and enforcement of judgments in civil matters, institution of criminal prosecutions and extradition of offenders.”

181. The procedure for making a request is detailed in Article 5(1), which provides, in so far as relevant, that:

“A request for legal assistance shall be in writing and shall contain the following:-

- (1) The designation of the requesting authority.
- (2) The designation of the requested authority.

(3) The specification of the case in relation to which legal assistance is requested and the content of the request.

(4) Names and surnames of the persons to whom the request relates, their citizenship, occupation and permanent or temporary residence.

...

(6) If necessary, the facts to be elucidated as well as the list of the required documents and any other evidence.

(7) In criminal matters, in addition to the above, particulars of the offence and its legal definition.

182. Article 6 sets out the procedure for executing a request:

“1. The requested authority shall provide legal assistance in the manner provided by the procedural laws and rules of its own State. However, it may execute the request in a manner specified therein if not in conflict with the law of its own State.

2. If the requested authority is not competent to execute the request for legal assistance it shall forward the request to the competent authority and shall advise the requesting authority accordingly.

3. The requested authority shall, upon request, in due time notify the requesting authority of the place and time of the execution of the request.

4. The requested authority shall notify the requesting authority in writing of the execution of the request. If the request cannot be executed the requested authority shall forthwith notify in writing the requesting authority giving the reasons for failure to execute it and shall return the documents.”

183. Under Article 18 Contracting Parties are obliged to ensure that citizens of one State are exempted in the territory of the other State from payment of fees and costs and are afforded facilities and free legal assistance under the same conditions and to the same extent as citizens of the other State. Article 20 provides that a person requesting free legal assistance may submit a relevant application to the competent authority of the State in the territory of which he has his permanent or temporary residence. This authority will then transmit the application to the other State.

184. Chapter VI of the Treaty contains special provisions on criminal matters concerning, in particular, the institution of criminal proceedings. Article 35(1) provides that:

“Each Contracting Party shall institute, at the request of the other Contracting Party, in accordance with and subject to the provisions of its own law, criminal proceedings against its own citizens who are alleged to have committed an offence in the territory of the other Contracting Party.

185. Article 36 sets out the procedure for the making of a request to institute criminal proceedings:

“1. A request for institution of criminal proceedings shall be made in writing and contain the following:-

(1) The designation of the requesting authority.

(2) The description of the acts constituting the offence in connection with which the institution of criminal proceedings is requested.

(3) The time and place of the committed act as precisely as possible.

(4) The text of the law of the requesting Contracting Party under which the act is defined as an offence.

(5) The name and surname of the suspected person, particulars regarding his citizenship, permanent or temporary residence and other information concerning him as well as, if possible, the description of the person's appearance, his photograph and fingerprints.

(6) Complaints, if any, by the victim of the criminal offence including any claim for damages.

(7) Available information on the extent of the material damage resulting from the offence.”

V. THE CYPRIOT GOVERNMENT'S UNILATERAL DECLARATION

186. By letter of 10 April 2009 the Attorney-General of the Republic of Cyprus advised the Court as follows:

“Please note that the Government wishes to make a unilateral declaration with a view to resolving the issues raised by the application. By the Unilateral Declaration the Government requests the Court to strike out the application in accordance with Article 37 of the Convention.”

187. The relevant parts of the appended a unilateral declaration read as follows:

“... (a) The Government regrets the decision taken by the police officers on 28 March 2001 not to release the applicant's daughter but to hand her over to [M.A.], from whom she sought to escape. The Government acknowledges that the above decision violated its positive obligation towards the applicant and his daughter arising from Article 2 of the Convention to take preventive measures to protect the applicant's daughter from the criminal acts of another individual.

(b) The Government acknowledges that the police investigation in the present case was ineffective as to whether the applicant's daughter was subjected to inhuman or degrading treatment prior to her death. As such the Government acknowledges that it violated the procedural obligation of Article 3 of the Convention in respect of the failure to carry out an adequate and effective investigation as to whether the applicant's daughter was subjected to inhuman or degrading treatment prior to her death.

(c) The Government acknowledges that it violated its positive obligations towards the applicant and his daughter arising out of Article 4 of the Convention in that it did not take any measures to ascertain whether the applicant's daughter had been a victim of trafficking in human beings and/or been subjected to sexual or any other kind of exploitation.

(d) The Government acknowledges that the treatment of applicant's daughter at the police station on 28 March 2001 in deciding not to release her but to hand her over to [M.A.] although there was not any basis for her deprivation of liberty, was not consistent with Article 5(1) of the Convention.

(e) The Government acknowledges that it violated the applicant's right to an effective access to court in failing to establish any real and effective communication between its organs (i.e. the Ministry of Justice and Public Order and the police) and the applicant, regarding the inquest proceedings and any other possible legal remedies that the applicant could resort to.

3. In regard to the above issues, the Government recalls that the Council of Ministers has followed the advice of the Attorney General – Government Agent, and has thus appointed on 5 February 2009 three independent criminal investigators whose mandate is to investigate:

(a) The circumstances of death of applicant's daughter and into any criminal responsibility by any person, authority of the Republic, or member of the police concerning her death,

(b) the circumstances concerning her employment and stay in Cyprus in conjunction with the possibility of her subjection to inhuman or degrading treatment or punishment and/or trafficking and/or sexual or other exploitation, (by members of the police, authorities of the

Republic or third persons) contrary to relevant laws of the Republic applicable at the material time, and

(c) into the commission of any other unlawful act against her, (by members of the police, authorities of the Republic or third persons) contrary to relevant laws of the Republic applicable at the material time.

4. The Government recalls that the investigators are independent from the police (the first investigator is the President of the Independent Authority for the Investigation of Allegations and Complaints Against the Police, the second is a Member of the said Authority, and the third is a practicing advocate with experience in criminal law). The Government recalls that the investigators have already commenced their investigation.

5. In these circumstances and having regard to the particular facts of the case the Government is prepared to pay the applicant a global amount of 37,300 (thirty seven thousand and three hundred) EUR (covering pecuniary and non pecuniary damage and costs and expenses). In its view, this amount would constitute adequate redress and sufficient compensation for the impugned violations, and thus an acceptable sum as to quantum in the present case. If, the Court however considers that the above amount does not constitute adequate redress and sufficient compensation, the Government is ready to pay the applicant by way of just satisfaction such other amount of compensation as is suggested by the Court ...”

THE LAW

I. APPLICATION OF ARTICLE 37 § 1 OF THE CONVENTION

188. Article 37 § 1 of the Convention allows the Court to strike an application out of its list of cases and provides, in so far as relevant, as follows:

“1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

...

(b) the matter has been resolved; or

(c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

...”

A. Submissions to the Court

1. The Cypriot Government

189. The Cypriot Government submitted that where efforts with a view to securing a friendly settlement of the case had been unsuccessful, the Court could strike an application out of the list on the basis of a unilateral declaration on the ground that there existed “any other reason”, as referred to in Article 37 § 1 (c) of the Convention, justifying a decision by the Court to discontinue the examination of the application. On the basis of the contents of the unilateral declaration and the ongoing domestic investigation into the circumstances of Ms Rantseva’s death

(see paragraph 187 above), the Cypriot Government considered that the requirements of Article 37 § 1 (c) were fully met.

2. *The applicant*

190. The applicant requested the Court to reject the request of the Cypriot Government to strike the application out of the list of cases on the basis of the unilateral declaration. He argued that the proposals contained in the declaration did not guarantee that the responsible persons would be punished; that the declaration did not contain any general measures to prevent similar violations from taking place in the future, even though trafficking for sexual exploitation was a recognised problem in Cyprus; and that if the Court declined to deliver a judgment in the present case, the Committee of Ministers would be unable to supervise the terms proposed by the Cypriot Government.

3. *Third party submissions by the AIRE Centre*

191. The AIRE Centre submitted that the extent of human trafficking in Council of Europe member States and the present inadequate response of States to the problem meant that respect for human rights as defined in the Convention required continued examination of cases that raised trafficking issues where they might otherwise be struck out of the list in accordance with Article 37 § 1.

192. In its submissions, the AIRE Centre referred to the factors taken into consideration by the Court when taking a decision under Article 37 § 1 as to whether a case merits continued examination, highlighting that one such factor was “whether the issues raised are comparable to issues already determined by the Court in previous cases”. The AIRE Centre highlighted the uncertainty surrounding the extent of member States’ obligations to protect victims of trafficking, in particular as regards protection measures not directly related to the investigation and prosecution of criminal acts of trafficking and exploitation.

B. The Court’s assessment

1. *General principles*

193. The Court observes at the outset that the unilateral declaration relates to the Republic of Cyprus only. No unilateral declaration has been submitted by the Russian Federation. Accordingly, the Court will consider whether it is justified to strike out the application in respect of complaints directed towards the Cypriot authorities only.

194. The Court recalls that it may be appropriate in certain circumstances to strike out an application, or part thereof, under Article 37 § 1 on the basis of a unilateral declaration by the respondent Government even where the applicant wishes the examination of the case to be continued. Whether this is appropriate in a particular case depends on whether the unilateral declaration offers a sufficient basis for finding that respect for human rights as defined in the Convention does not require the Court to continue its examination of the case (Article 37 § 1 *in fine*; see also, *inter alia*, *Tahsin Acar v. Turkey* (preliminary objection) [GC], no. 26307/95, § 75, ECHR 2003-VI; and *Radoszewska-Zakościelna v. Poland*, no. 858/08, § 50, 20 October 2009).

195. Relevant factors in this respect include the nature of the complaints made, whether the issues raised are comparable to issues already determined by the Court in previous cases, the nature and scope of any measures taken by the respondent Government in the context of the execution of judgments delivered by the Court in any such previous cases, and the impact of these measures on the case

at issue. It may also be material whether the facts are in dispute between the parties, and, if so, to what extent, and what *prima facie* evidentiary value is to be attributed to the parties' submissions on the facts. Other relevant factors may include whether in their unilateral declaration the respondent Government have made any admissions in relation to the alleged violations of the Convention and, if so, the scope of such admissions and the manner in which the Government intend to provide redress to the applicant. As to the last-mentioned point, in cases in which it is possible to eliminate the effects of an alleged violation and the respondent Government declare their readiness to do so, the intended redress is more likely to be regarded as appropriate for the purposes of striking out the application, the Court, as always, retaining its power to restore the application to its list as provided in Article 37 § 2 of the Convention and Rule 44 § 5 of the Rules of Court (see *Tahsin Acar*, cited above, § 76).

196. The foregoing factors are not intended to constitute an exhaustive list of relevant factors. Depending on the particular facts of each case, it is conceivable that further considerations may come into play in the assessment of a unilateral declaration for the purposes of Article 37 § 1 of the Convention (see *Tahsin Acar*, cited above, § 77).

197. Finally, the Court reiterates that its judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (see *Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25; *Guzzardi v. Italy*, 6 November 1980, § 86, Series A no. 39; and *Karner v. Austria*, no. 40016/98, § 26, ECHR 2003-IX). Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (see *Karner*, cited above, § 26; and *Capital Bank AD v. Bulgaria*, no. 49429/99, §§ 78 to 79, ECHR 2005-XII (extracts)).

2. *Application of the general principles to the present case*

198. In considering whether it would be appropriate to strike out the present application in so far as it concerns complaints directed against the Republic of Cyprus on the basis of the Cypriot unilateral declaration, the Court makes the following observations.

199. First, the Court emphasises the serious nature of the allegations of trafficking in human beings made in the present case, which raise issues under Articles 2, 3, 4 and 5 of the Convention. In this regard, it is noted that awareness of the problem of trafficking of human beings and the need to take action to combat it has grown in recent years, as demonstrated by the adoption of measures at international level as well as the introduction of relevant domestic legislation in a number of States (see also paragraphs 264 and 269 below). The reports of the Council of Europe's Commissioner for Human Rights and the report of the Cypriot Ombudsman highlight the acute nature of the problem in Cyprus, where it is widely acknowledged that trafficking and sexual exploitation of cabaret artistes is of particular concern (see paragraphs 83, 89, 91, 94, 100 to 101 and 103 above).

200. Second, the Court draws attention to the paucity of case-law on the interpretation and application of Article 4 of the Convention in the context of trafficking cases. It is particularly significant that the Court has yet to rule on whether, and if so to what extent, Article 4 requires member States to take

positive steps to protect potential victims of trafficking outside the framework of criminal investigations and prosecutions.

201. The Cypriot Government have admitted that violations of the Convention occurred in the period leading up to and following Ms Rantseva's death. They have taken additional recent steps to investigate the circumstances of Ms Rantseva's death and have proposed a sum in respect of just satisfaction. However, in light of the Court's duty to elucidate, safeguard and develop the rules instituted by the Convention, this is insufficient to allow the Court to conclude that it is no longer justified to continue the examination of the application. In view of the observations outlined above, there is a need for continued examination of cases which raise trafficking issues.

202. In conclusion, the Court finds that respect for human rights as defined in the Convention requires the continuation of the examination of the case. Accordingly, it rejects the Cypriot Government's request to strike the application out under Article 37 § 1 of the Convention.

II. THE ADMISSIBILITY OF THE COMPLAINTS UNDER ARTICLES 2, 3, 4 AND 5 OF THE CONVENTION

A. The Russian Government's objection *ratione loci*

1. The parties' submissions

203. The Russian Government argued that the events forming the basis of the application having taken place outside its territory, the application was inadmissible *ratione loci* in so far as it was directed against the Russian Federation. They submitted that they had no "actual authority" over the territory of the Republic of Cyprus and that the actions of the Russian Federation were limited by the sovereignty of the Republic of Cyprus.

204. The applicant rejected this submission. He argued that in accordance with the Court's judgment in *Drozd and Janousek v. France and Spain*, 26 June 1992, Series A no. 240, the Russian Federation could be held responsible where acts and omissions of its authorities produced effects outside its own territory.

2. The Court's assessment

205. Article 1 of the Convention provides that:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

206. As the Court has previously emphasised, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. Accordingly, a State's competence to exercise jurisdiction over its own nationals abroad is subordinate to the other State's territorial competence and a State may not generally exercise jurisdiction on the territory of another State without the latter's consent, invitation or acquiescence. Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction (see *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], no. 52207/99, §§ 59-61, ECHR 2001-XII).

207. The applicant's complaints against Russia in the present case concern the latter's alleged failure to take the necessary measures to protect Ms Rantseva from the risk of trafficking and exploitation and to conduct an investigation into the circumstances of her arrival in Cyprus, her employment there and her subsequent death. The Court observes that such complaints are not predicated on the assertion

that Russia was responsible for acts committed in Cyprus or by the Cypriot authorities. In light of the fact that the alleged trafficking commenced in Russia and in view of the obligations undertaken by Russia to combat trafficking, it is not outside the Court's competence to examine whether Russia complied with any obligation it may have had to take measures within the limits of its own jurisdiction and powers to protect Ms Rantseva from trafficking and to investigate the possibility that she had been trafficked. Similarly, the applicant's Article 2 complaint against the Russian authorities concerns their failure to take investigative measures, including securing evidence from witnesses resident in Russia. It is for the Court to assess in its examination of the merits of the applicant's Article 2 complaint the extent of any procedural obligation incumbent on the Russian authorities and whether any such obligation was discharged in the circumstances of the present case.

208. In conclusion, the Court is competent to examine the extent to which Russia could have taken steps within the limits of its own territorial sovereignty to protect the applicant's daughter from trafficking, to investigate allegations of trafficking and to investigate the circumstances leading to her death. Whether the matters complained of give rise to State responsibility in the circumstances of the present case is a question which falls to be determined by the Court in its examination of the merits of the application below.

B. The Russian Government's objection *ratione materiae*

1. The parties' submissions

209. The Russian Government argued that the complaint under Article 4 of the Convention was inadmissible *ratione materiae* as there was no slavery, servitude or forced or compulsory labour in the present case. They pointed to the fact that Ms Rantseva had entered the Republic of Cyprus voluntarily, having voluntarily obtained a work permit to allow her to work in accordance with an employment contract which she had concluded. There was no evidence that Ms Rantseva had been in servitude and unable to change her condition or that she was forced to work. The Russian Government further highlighted that Ms Rantseva had left, unimpeded, the apartment where she was residing with the other cabaret artistes. They therefore contended that there were insufficient grounds to assert that the cabaret artistes were being kept in the apartment against their will. The Russian Government added that the fact that Ms Rantseva left the police station with M.A. was insufficient to support the conclusion that Ms Rantseva was in servitude and forced to work. Had she feared for her life or safety, she could have informed the police officers while she was at the police station.

210. The applicant insisted that the treatment to which Ms Rantseva had been subjected fell within the scope of Article 4.

2. The Court's assessment

211. The Court finds that the question whether the treatment about which the applicant complains falls within the scope of Article 4 is inextricably linked to the merits of this complaint. Accordingly, the Court holds that the objection *ratione materiae* should be joined to the merits.

C. Conclusion

212. The complaints under Articles 2, 3, 4 and 5 cannot be rejected as incompatible *ratione loci* or *ratione materiae* with the provisions of the Convention concerning Russia. The Court notes, in addition, that they are not

manifestly ill-founded within the meaning of Article 35 § 3. It further notes they are not inadmissible on any other grounds. They must therefore be declared admissible.

III. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

213. The applicant contended that there had been a violation of Article 2 of the Convention by both the Russian and Cypriot authorities on account of the failure of the Cypriot authorities to take steps to protect the life of his daughter and the failure of the authorities of both States to conduct an effective investigation into her death. Article 2 provides, *inter alia*, that:

“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

....”

A. Alleged failure to take measures to protect against a risk to life

1. *Submissions of the parties*

a. The applicant

214. Relying on *Osman v. the United Kingdom*, 28 October 1998, *Reports* 1998-VIII, the applicant referred to the positive obligations arising under Article 2 which required States to take preventative operational measures to protect an individual whose life was at risk from the criminal acts of another private individual where the State knew or ought to have known of a real and immediate threat to life. The applicant argued that in failing to release Ms Rantseva and handing her over instead to M.A., the Cypriot authorities had failed to take reasonable measures within their powers to avoid a real and immediate threat to Ms Rantseva’s life.

b. The Cypriot Government

215. The Cypriot Government did not dispute that Article 2 § 1 imposed a positive obligation on the relevant authorities to take preventative operational measures to protect an individual whose life was at risk from the criminal acts of another individual. However, for such an obligation to arise, it had to be established that the authorities knew, or ought to have known, of a real and immediate risk to the life of an identified individual and that they had failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (citing *Osman*, above).

216. In their written submissions, the Cypriot Government argued that there was no failure to protect the life of the applicant’s daughter. On the information available to the police officers who had contact with Ms Rantseva on 28 March 2001, there was no reason to suspect a real or immediate risk to Ms Rantseva’s life. The testimony of the police officers revealed that Ms Rantseva was calmly applying her make-up and that the behaviour of M.A. towards her appeared normal (see paragraphs 20 and 49 above). Although Ms Rantseva had left her employment at the cabaret, she had not submitted any complaint regarding her employer or the conditions of her work. She did not make a complaint to the police officers while at the station and she did not refuse to leave with M.A.. The

decision not to release Ms Rantseva but to hand her over to M.A. did not violate any obligation incumbent on the Cypriot authorities to protect her life.

217. In their subsequent unilateral declaration, the Cypriot Government acknowledged that the decision of the police officers to hand Ms Rantseva over to M.A. was in violation of the positive obligation incumbent on Cyprus under Article 2 to take preventative measures to protect Ms Rantseva from the criminal acts of another individual (see paragraph 187 above).

2. *The Court's assessment*

a. **General principles**

218. It is clear that Article 2 enjoins the State not only to refrain from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports* 1998-III; and *Paul and Audrey Edwards*, cited above, § 54). In the first place, this obligation requires the State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. However, it also implies, in appropriate circumstances, a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see *Osman*, cited above, § 115; *Medova v. Russia*, no. 25385/04, § 95, 15 January 2009; *Opuz v. Turkey*, no. 33401/02, § 128, 9 June 2009).

219. The Court reiterates that the scope of any positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. Not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For the Court to find a violation of the positive obligation to protect life, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (*Osman*, cited above, § 116; *Paul and Audrey Edwards*, cited above, § 55; and *Medova*, cited above, § 96).

b. **Application of the general principles to the present case**

220. The Court must examine whether the Cypriot authorities could have foreseen that in releasing Ms Rantseva into the custody of M.A., her life would be at real and immediate risk.

221. The Court observes that in *Opuz*, the responsibility of the State was engaged because the person who subsequently went on to shoot and kill the applicant's mother had previously made death threats and committed acts of violence against the applicant and her mother, of which the authorities were aware (*Opuz*, cited above, §§ 133 to 136). Conversely, in *Osman*, the Court found that there was no violation of Article 2 as the applicant had failed to point to any stage in the sequence of events leading to the shooting of her husband where it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk (*Osman*, cited above, § 121).

222. Although it is undisputed that victims of trafficking and exploitation are often forced to live and work in cruel conditions and may suffer violence and ill-treatment at the hands of their employers (see paragraphs 85, 87 to 88 and 101 above), in the absence of any specific indications in a particular case, the general risk of ill-treatment and violence cannot constitute a real and immediate risk to life. In the present case, even if the police ought to have been aware that Ms Rantseva might have been a victim of trafficking (a matter to be examined in the context of the applicant's Article 4 complaint, below), there were no indications during the time spent at the police station that Ms Rantseva's life was at real and immediate risk. The Court considers that particular chain of events leading to Ms Rantseva's death could not have been foreseeable to the police officers when they released her into M.A.'s custody. Accordingly, the Court concludes that no obligation to take operational measures to prevent a risk to life arose in the present case.

223. For the above reasons, the Court concludes that there has been no violation of the Cypriot authorities' positive obligation to protect Ms Rantseva's right to life under Article 2 of the Convention.

B. The procedural obligation to carry out an effective investigation

1. Submissions of the parties

a. The applicant

224. The applicant claimed that Cyprus and Russia had violated their obligations under Article 2 of the Convention to conduct an effective investigation into the circumstances of Ms Rantseva's death. He pointed to alleged contradictions between the autopsies of the Cypriot and Russian authorities (see paragraph 50 above) and his requests to Cyprus, via the relevant Russian authorities, for further investigation of apparent anomalies, requests which were not followed up by the Cypriot authorities (see paragraphs 52 and 62 above). He also complained about the limited number of witness statements taken by the police (see paragraphs 31 and 33 above), highlighting that five of the seven relevant statements were either from the police officers on duty at Limassol Police Station or those present in the apartment at the time of his daughter's death, persons who, in his view, had an interest in presenting a particular version of events. The applicant further argued that any investigation should not depend on an official complaint or claim from the victim's relatives. He contended that his daughter clearly died in strange circumstances requiring elaboration and that an Article 2-compliant investigation was accordingly required. The Cypriot investigation did not comply with Article 2 due to the inadequacies outlined above, as well as the fact that it was not accessible to him, as a relative of the victim.

225. Specifically, as regards the inquest, the applicant complained that he was not advised of the date of the final inquest hearing, which prevented his participation in it. He was not informed of the progress of the case or of other remedies available to him. He alleged that he only received the District Court's conclusion in the inquest proceedings on 16 April 2003, some 15 months after the proceedings had ended. Furthermore, the Cypriot authorities failed to provide him with free legal assistance, when the cost of legal representation in Cyprus was prohibitive for him.

226. As regards the Russian Federation, the applicant argued that the fact that his daughter was a citizen of the Russian Federation meant that even though she was temporarily resident in Cyprus and her death occurred there, the Russian

Federation also had an obligation under Article 2 to investigate the circumstances of her arrival in Cyprus, her employment there and her subsequent death. He submitted that the Russian authorities should have applied to the Cypriot authorities under the Legal Assistance Treaty to initiate criminal proceedings in accordance with Articles 5 and 36 (see paragraphs 181 and 207 above), as he had requested. Instead, the Russian authorities merely sought information concerning the circumstances of Ms Rantseva's death. The applicant's subsequent application to the relevant authorities in Russia to initiate criminal proceedings was refused by the Chelyabinsk Prosecutor's Office as Ms Rantseva died outside Russia. His repeated requests that Russian authorities take statements from two Russian nationals resident in Russia were refused as the Russian authorities considered that they were unable to take the action requested without a legal assistance request from the Cypriot authorities. The applicant concluded that these failures meant that the Russian authorities had not conducted an effective investigation into the death of his daughter, as required by Article 2 of the Convention.

b. The Cypriot Government

227. In their written submissions, the Cypriot Government conceded that an obligation to conduct an effective investigation arose under Article 2 where State agents were involved in events leading to an individual's death, but contended that not every tragic death required that special steps by way of inquiry should be taken. In the present case, the Cypriot authorities did not have an obligation to conduct an investigation into the circumstances of Ms Rantseva's death but nonetheless did so. Although the exact circumstances leading to Ms Rantseva's death remained unclear, the Cypriot Government contested the allegation that there were failures in the investigation. The investigation was carried out by the police and was capable of leading to the identification and punishment of those responsible. Reasonable steps were taken to secure relevant evidence and an inquest was held.

228. As far as the inquest was concerned, the Cypriot Government submitted that the applicant was advised by the Cypriot authorities of the date of the inquest hearing. Moreover, the inquest was adjourned twice because the applicant was not present. The Cypriot Government pointed to the delay of the Russian authorities in advising the Cypriot authorities of the applicant's request for adjournment: the request only arrived four months after the inquest had been concluded. Had the court been aware of the applicant's request, it might have adjourned the hearing again. All other requests by the applicant had been addressed and relevant Cypriot authorities had sought to assist the applicant where possible. In respect of the applicant's complaint regarding legal aid, the Cypriot Government pointed out that the applicant did not apply through the correct procedures. He should have applied under the Law on Legal Aid; the Legal Assistance Treaty, invoked by the applicant, did not provide for legal aid but for free legal assistance, which was quite different.

229. In their unilateral declaration (see paragraph 187 above), the Cypriot Government confirmed that three independent criminal investigators had recently been appointed to investigate the circumstances of Ms Rantseva's death and the extent of any criminal responsibility of any person or authority for her death.

c. The Russian Government

230. The Russian Government accepted that at the relevant time, Russian criminal law did not provide for the possibility of bringing criminal proceedings in Russia against non-Russian nationals in respect of a crime committed outside Russian territory against a Russian national, although the law had since been

changed. In any event, the applicant did not request the Russian authorities to institute criminal proceedings themselves but merely requested assistance in establishing the circumstances leading to his daughter's death in Cyprus. Accordingly, no preliminary investigation into Ms Rantseva's death was conducted in Russia and no evidence was obtained. Although the applicant requested on a number of occasions that the Russian authorities take evidence from two young Russian women who had worked with Ms Rantseva, as he was advised, the Russian authorities were unable to take the action requested in the absence of a legal assistance request from the Cypriot authorities. The Russian authorities informed the Cypriot authorities that they were ready to execute any such request but no request was forthcoming.

231. The Russian Government contended that the Russian authorities took all possible measures to establish the circumstances of Ms Rantseva's death, to render assistance to the Cypriot authorities in their investigations and to protect and reinstate the applicant's rights. Accordingly, they argued, Russia had fulfilled any procedural obligations incumbent on it under Article 2 of the Convention.

2. *The Court's assessment*

a. **General principles**

232. As the Court has consistently held, the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 161, Series A no. 324; *Kaya v. Turkey*, 19 February 1998, § 86, *Reports* 1998-I; *Medova v. Russia*, cited above, § 103). The obligation to conduct an effective official investigation also arises where death occurs in suspicious circumstances not imputable to State agents (see *Menson v. the United Kingdom* (dec.), no. 47916/99, ECHR 2003-V). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. The authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see, for example, *İlhan v. Turkey* [GC], no. 22277/93, § 63, ECHR 2000-VII; *Paul and Audrey Edwards*, cited above, § 69).

233. For an investigation to be effective, the persons responsible for carrying it out must be independent from those implicated in the events. This requires not only hierarchical or institutional independence but also practical independence (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 120, ECHR 2001-III (extracts); and *Kelly and Others v. the United Kingdom*, no. 30054/96, § 114, 4 May 2001). The investigation must be capable of leading to the identification and punishment of those responsible (see *Paul and Audrey Edwards*, cited above, § 71). A requirement of promptness and reasonable expedition is implicit in the context of an effective investigation within the meaning of Article 2 of the Convention (see *Yaşa v. Turkey*, 2 September 1998, §§ 102-104, *Reports* 1998-VI; *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 80-87 and 106, ECHR 1999-IV; and *Kelly and Others*, cited above, § 97). In all cases, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his legitimate interests (see, for example, *Güleç v. Turkey*, 27 July 1998, § 82,

Reports of Judgments and Decisions 1998-IV; and *Kelly and Others*, cited above, § 98).

b. Application of the general principles to the present case

i. Cyprus

234. The Court acknowledges at the outset that there is no evidence that Ms Rantseva died as a direct result of the use of force. However, as noted above (see paragraph 232 above), this does not preclude the existence of an obligation to investigate her death under Article 2 (see also *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, §§ 48 to 50, ECHR 2002-I; and *Öneryıldız v. Turkey* [GC], no. 48939/99, §§ 70 to 74, ECHR 2004-XII). In light of the ambiguous and unexplained circumstances surrounding Ms Rantseva's death and the allegations of trafficking, ill-treatment and unlawful detention in the period leading up to her death, the Court considers that a procedural obligation did arise in respect of the Cypriot authorities to investigate the circumstances of Ms Rantseva's death. By necessity, the investigation was required to consider not only the immediate context of Ms Rantseva's fall from the balcony but also the broader context of Ms Rantseva's arrival and stay in Cyprus, in order to assess whether there was a link between the allegations of trafficking and Ms Rantseva's subsequent death.

235. As to the adequacy of the investigation, the Court notes that the police arrived quickly and sealed off the scene within minutes. Photographs were taken and a forensic examination was carried out (see paragraph 32 above). That same morning, the police took statements from those present in the apartment when Ms Rantseva died and from the neighbour who had witnessed the fall. The police officers on duty at Limassol Police Station also made statements (see paragraph 33 above). An autopsy was carried out and an inquest was held (see paragraphs 35 to 41 above). However, there are a number of elements of the investigation which were unsatisfactory.

236. First, there was conflicting testimony from those present in the apartment which the Cypriot investigating authorities appear to have taken no steps to resolve (see paragraphs 22 to 24 and 26 to 28 above). Similarly, inconsistencies emerge from the evidence taken as to Ms Rantseva's physical condition, and in particular as to the extent of the effects of alcohol on her conduct (see paragraphs 18, 20 to 21 and 24 above). There are other apparent anomalies, such as the alleged inconsistencies between the forensic reports of the Cypriot and Russian authorities and the fact that Ms Rantseva made no noise as she fell from the balcony, for which no satisfactory explanation has been provided (see paragraphs 29, 50 to 52 and 67 above).

237. Second, the verdict at the inquest recorded that Ms Rantseva had died in "strange circumstances" in an attempt to escape from the apartment in which she was a "guest" (see paragraph 41 above). Despite the lack of clarity surrounding the circumstances of her death, no effort was made by the Cypriot police to question those who lived with Ms Rantseva or worked with her in the cabaret. Further, notwithstanding the striking conclusion of the inquest that Ms Rantseva was trying to escape from the apartment, no attempt was made to establish why she was trying to escape or to clarify whether she had been detained in the apartment against her will.

238. Third, aside from the initial statements of the two police officers and passport officer on duty made on 28 and 29 March 2001, there was apparently no investigation into what had occurred at the police station, and in particular why the police had handed Ms Rantseva into the custody of M.A.. It is clear from the witness statements that the AIS considered M.A. to be responsible for Ms

Rantseva but the reasons for, and the appropriateness of, this conclusion have never been fully investigated. Further, the statements of the police officers do not refer to any statement being taken from Ms Rantseva and there is nothing in the investigation file to explain why this was not done; a statement was made by M.A. (see paragraph 19 above). The Court recalls that the Council of Europe Commissioner reported in 2008 that he was assured that allegations of trafficking-related corruption within the police force were isolated cases (see paragraph 102 above). However, in light of the facts of the present case, the Court considers that the authorities were under an obligation to investigate whether there was any indication of corruption within the police force in respect of the events leading to Ms Rantseva's death.

239. Fourth, despite his clear request to the Cypriot authorities, the applicant was not personally advised of the date of the inquest and as a consequence was not present when the verdict was handed down. The Cypriot Government do not dispute the applicant's claim that he was only advised of the inquest finding 15 months after the hearing had taken place. Accordingly, the Cypriot authorities failed to ensure that the applicant was able to participate effectively in the proceedings, despite his strenuous efforts to remain involved.

240. Fifth, the applicant's continued requests for investigation, via the Russian authorities, appear to have gone unheeded by the Cypriot authorities. In particular, his requests for information as to further remedies open to him within the Cypriot legal order, as well as requests for free legal assistance from the Cypriot authorities, were ignored. The Cypriot Government's response in their written observations before the Court that the request for legal assistance had been made under the wrong instrument is unsatisfactory. Given the applicant's repeated requests and the gravity of the case in question, the Cypriot Government ought, at the very least, to have advised the applicant of the appropriate procedure for making a request for free legal assistance.

241. Finally, for an investigation into a death to be effective, member States must take such steps as are necessary and available in order to secure relevant evidence, whether or not it is located in the territory of the investigating State. The Court observes that both Cyprus and Russia are parties to the Mutual Assistance Convention and have, in addition, concluded the bilateral Legal Assistance Treaty (see paragraphs 175 to 185 above). These instruments set out a clear procedure by which the Cypriot authorities could have sought assistance from Russia in investigating the circumstances of Ms Rantseva's stay in Cyprus and her subsequent death. The Prosecutor General of the Russian Federation provided an unsolicited undertaking that Russia would assist in any request for legal assistance by Cyprus aimed at the collection of further evidence (see paragraph 70 above). However, there is no evidence that the Cypriot authorities sought any legal assistance from Russia in the context of their investigation. In the circumstances, the Court finds the Cypriot authorities' refusal to make a legal assistance request to obtain the testimony of the two Russian women who worked with Ms Rantseva at the cabaret particularly unfortunate given the value of such testimony in helping to clarify matters which were central to the investigation. Although Ms Rantseva died in 2001, the applicant is still waiting for a satisfactory explanation of the circumstances leading to her death.

242. The Court accordingly finds that there has been a procedural violation of Article 2 of the Convention as regards the failure of the Cypriot authorities to conduct an effective investigation into Ms Rantseva's death.

ii. Russia

243. The Court recalls that Ms Rantseva's death took place in Cyprus. Accordingly, unless it can be shown that there are special features in the present case which require a departure from the general approach, the obligation to ensure an effective official investigation applies to Cyprus alone (see, *mutatis mutandis*, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 38, ECHR 2001-XI).

244. As to the existence of special features, the applicant relies on the fact that Ms Rantseva was a Russian national. However, the Court does not consider that Article 2 requires member States' criminal laws to provide for universal jurisdiction in cases involving the death of one of their nationals. There are no other special features which would support the imposition of a duty on Russia to conduct its own investigation. Accordingly, the Court concludes that there was no free-standing obligation incumbent on the Russian authorities under Article 2 of the Convention to investigate Ms Rantseva's death.

245. However, the corollary of the obligation on an investigating State to secure evidence located in other jurisdictions is a duty on the State where evidence is located to render any assistance within its competence and means sought under a legal assistance request. In the present case, as noted above, the Prosecutor General of the Russian Federation, referring to the evidence of the two Russian women, expressed willingness to comply with any mutual legal assistance request forwarded to the Russian authorities and to organise the taking of the witness testimony, but no such request was forthcoming (see paragraph 241 above). The applicant argued that the Russian authorities should have proceeded to interview the two women notwithstanding the absence of any request from the Cypriot authorities. However, the Court recalls that the responsibility for investigating Ms Rantseva's death lay with Cyprus. In the absence of a legal assistance request, the Russian authorities were not required under Article 2 to secure the evidence themselves.

246. As to the applicant's complaint that the Russian authorities failed to request the initiation of criminal proceedings, the Court observes that the Russian authorities made extensive use of the opportunities presented by mutual legal assistance agreements to press for action by the Cypriot authorities (see, for example, paragraphs 48, 52, 55, 57 and 61 to 62 above). In particular, by letter dated 11 December 2001, they requested that further investigation be conducted into Ms Rantseva's death, that relevant witnesses be interviewed and that the Cypriot authorities bring charges of murder, kidnapping or unlawful deprivation of freedom in respect of Ms Rantseva's death (see paragraph 52 above). By letter dated 27 December 2001, a specific request was made to institute criminal proceedings (see paragraph 53 above). The request was reiterated on several occasions.

247. In conclusion, the Court finds that there has been no procedural violation of Article 2 by the Russian Federation.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

248. The applicant alleged a violation of Article 3 of the Convention by the Cypriot authorities in respect of their failure to take steps to protect Ms Rantseva from ill-treatment and to investigate whether Ms Rantseva was subject to inhuman or degrading treatment in the period leading up to her death. Article 3 provides that:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. The parties' submissions

1. The applicant

249. The applicant argued that a positive obligation arose in the present case to protect Ms Rantseva from ill-treatment from private individuals. He contended that the two forensic reports conducted following Ms Rantseva's death revealed that the explanation of her death did not accord with the injuries recorded. He argued that the witness testimony gathered did not provide a satisfactory response to the question whether there were injuries present on Ms Rantseva's body prior to her death. Despite this, no investigation was conducted by the Cypriot authorities into whether Ms Rantseva had been subjected to inhuman or degrading treatment. Further, no steps were taken to avoid the risk of ill treatment to Ms Rantseva in circumstances where the authorities knew or ought to have known of a real and immediate risk. Accordingly, in the applicant's submission, there was a breach of Article 3 of the Convention.

2. The Cypriot Government

250. In their written submissions, the Cypriot Government denied that any violation of Article 3 had occurred. They pointed out that nothing in the investigation file suggested that Ms Rantseva had been subjected to inhuman or degrading treatment prior to her death. In any event, a thorough investigation, capable of leading to the identification and punishment of those responsible, was conducted into the circumstances of Ms Rantseva's death. The investigation therefore complied with Article 3.

251. In their subsequent unilateral declaration (see paragraph 187 above), the Cypriot Government acknowledged that there had been a breach of the procedural obligation arising under Article 3 of the Convention in so far as the police investigation into whether Ms Rantseva was subjected to inhuman or degrading treatment prior to her death was ineffective. They also confirmed that three independent investigators had been appointed to investigate the circumstances of Ms Rantseva's employment and stay in Cyprus and whether she had been subjected to inhuman or degrading treatment.

B. The Court's assessment

252. The Court notes that there is no evidence that Ms Rantseva was subjected to ill-treatment prior to her death. However, it is clear that the use of violence and the ill-treatment of victims are common features of trafficking (see paragraphs 85, 87 to 88 and 101 above). The Court therefore considers that, in the absence of any specific allegations of ill-treatment, any inhuman or degrading treatment suffered by Ms Rantseva prior to her death was inherently linked to the alleged trafficking and exploitation. Accordingly, the Court concludes that it is not necessary to consider separately the applicant's Article 3 complaint and will deal with the general issues raised in the context of its examination of the applicant's complaint under Article 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 4 OF THE CONVENTION

253. The applicant alleged a violation of Article 4 of the Convention by both the Russian and Cypriot authorities in light of their failure to protect his daughter from being trafficked and their failure to conduct an effective investigation into the circumstances of her arrival in Cyprus and the nature of her employment there. Article 4 provides, in so far as relevant, that:

“1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

...”

A. Submissions of the parties

1. The applicant

254. Referring to *Siliadin v. France*, no. 73316/01, ECHR 2005-VII, and the Anti-Trafficking Convention (see paragraphs 162 to 174, above), the applicant contended that the Cypriot authorities were under an obligation to adopt laws to combat trafficking and to establish and strengthen policies and programmes to combat trafficking. He pointed to the reports of the Council of Europe’s Commissioner on Human Rights (see paragraphs 91 to 104 above), which he said demonstrated that there had been a deterioration in the situation of young foreign women moving to Cyprus to work as cabaret artistes. He concluded that the obligations incumbent on Cyprus to combat trafficking had not been met. In particular, the applicant pointed out that the Cypriot authorities were unable to explain why they had handed Ms Rantseva over to her former employer at the police station instead of releasing her (see paragraph 82 above). He contended that in so doing, the Cypriot authorities had failed to take measures to protect his daughter from trafficking. They had also failed to conduct any investigation into whether his daughter had been a victim of trafficking or had been subjected to sexual or other exploitation. Although Ms Rantseva had entered Cyprus voluntarily to work in the cabaret, the Court had established that prior consent, without more, does not negate a finding of compulsory labour (referring to *Van der Musselle v. Belgium*, 23 November 1983, § 36, Series A no. 70).

255. In respect of Russia, the applicant pointed out that at the relevant time, the Russian Criminal Code did not contain provisions which expressly addressed trafficking in human beings. He argued that the Russian authorities were aware of the particular problem of young women being trafficked to Cyprus to work in the sex industry. Accordingly, the Russian Federation was under an obligation to adopt measures to prevent the trafficking and exploitation of Russian women but had failed to do so. In the present case, it was under a specific obligation to investigate the circumstances of Ms Rantseva’s arrival in Cyprus and the nature of her employment there, but no such investigation had been carried out.

2. The Cypriot Government

256. In their written observations, the Cypriot Government confirmed that no measures were taken in the period prior to or following Ms Rantseva’s death to ascertain whether she had been a victim of trafficking in human beings or whether she had been subjected to sexual or other forms of exploitation. However they denied that there had been a violation of Article 4 of the Convention. They conceded that there were positive obligations on the State which required the penalisation and effective prosecution of any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour. However, they argued by analogy with Articles 2 and 3 that positive obligations only arose where the authorities knew or ought to have known of a real and immediate risk that an identified individual was being held in such a situation. These positive obligations would only be violated where the authorities subsequently failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

257. In the present case, there was nothing in the investigation file, nor was there any other evidence, to indicate that Ms Rantseva was held in slavery or

servitude or was required to perform forced or compulsory labour. The Cypriot Government further pointed to the fact that no complaint had been lodged with the domestic authorities by the applicant that his daughter had been a victim of trafficking or exploitation and that none of the correspondence from the Russian authorities made any reference to such a complaint. Ms Rantseva herself had made no allegations of that nature prior to her death and the note she left in her apartment saying she was tired and was going back to Russia (see paragraph 17 above) was inadequate to support any such allegations. The Government claimed that the first time that any complaint of this nature was made to the authorities was on 13 April 2006, by a Russian Orthodox priest in Limassol. They argued that the Russian authorities had failed to cooperate with the Cypriot authorities and take witness statements from two Russian women who had worked with Ms Rantseva at the cabaret.

258. In their subsequent unilateral declaration (see paragraph 187 above), the Cypriot Government accepted that they had violated their positive obligations under Article 4 in failing to take any measures to ascertain whether Ms Rantseva had been a victim of trafficking in human beings or had been subjected to sexual or any other kind of exploitation. They also confirmed that three independent investigators had been appointed to investigate the circumstances of Ms Rantseva's employment and stay in Cyprus and whether there was any evidence that she was a victim of trafficking or exploitation.

3. The Russian Government

259. As noted above, the Russian Government contested that Ms Rantseva's treatment in the present case fell within the scope of Article 4 (see paragraph 209 above).

260. On the merits, the Russian Government agreed that the positive obligations arising under Article 4 required member States to ensure that residents were not being kept in slavery or servitude or being forced to work. Where such a case did occur, member States were required to put in place an effective framework for the protection and reinstatement of victims' rights and for the prosecution of guilty persons. However, in so far as the applicant's complaint was directed against Russia, his argument was that the Russian authorities ought to have put in place a system of preventative measures to protect citizens going abroad. The Russian Government pointed out that any such measures would have had to strike a balance between Article 4 and the right to free movement guaranteed by Article 2 of Protocol No. 4 of the Convention, which provides that "[e]veryone shall be free to leave any country, including his own". They also argued that the scope of any such measures was significantly restricted by the need to respect the sovereignty of the State to which the citizen wished to travel.

261. According to the Russian Government, there was a wealth of measures set out in Russian criminal law to prevent violations of Article 4, to protect victims and to prosecute perpetrators. Although at the relevant time Russian criminal law did not contain provisions on human trafficking and slave labour, such conduct would nonetheless have fallen within the definitions of other crimes such as threats to kill or cause grave harm to health, abduction, unlawful deprivation of liberty and sexual crimes (see paragraphs 133 to 135). The Russian Government also pointed to various international treaties ratified by the Russian Federation, including the Slavery Convention 1926 (see paragraphs 137 to 141 above) and the Palermo Protocol 2000 (see paragraphs 149 to 155 above), and highlighted that Russia had signed up to a number of mutual legal assistance agreements (see paragraphs 175 to 185 above). In the present case, they had taken active measures to press for the identification and punishment of guilty persons

within the framework of mutual legal assistance treaties. They further explained that on 27 July 2006, the application of the Criminal Code was extended to allow the prosecution of non-nationals who had committed crimes against Russian nationals outside Russian territory. However, the exercise of this power depended on the consent of the State in whose territory the offence was committed.

262. As regards the departure of Ms Rantseva for Cyprus, the Russian authorities pointed out that they only became aware of a citizen leaving Russia at the point at which an individual crossed the border. Where entry requirements of the State of destination were complied with, and in the absence of any circumstances preventing the exit, the Russian authorities were not permitted to prohibit a person from exercising his right of free movement. Accordingly, the Russian authorities could only make recommendations and warn its citizens against possible dangers. They did provide warnings, via the media, as well as more detailed information regarding the risk factors.

263. The Russian Government also requested the Court to consider that there had been no previous findings of a violation of Article 4 against Cyprus. They submitted that they were entitled to take this into consideration in the development of their relations with Cyprus.

4. *Third party submissions*

a. **Interights**

264. Interights highlighted the growing awareness of human trafficking and the adoption of a number of international and regional instruments seeking to combat it. However, they considered national policies and measures in the field to be at times inadequate and ineffective. They argued that the paramount requirement for any legal system effectively to address human trafficking was recognition of the need for a multidisciplinary approach; cooperation among States; and a legal framework with an integrated human rights approach.

265. Interights emphasised that a distinctive element of human trafficking was the irrelevance of the victim's consent to the intended exploitation where any of the means of coercion listed in the Palermo Protocol had been used (see paragraph 151 above). Accordingly, a person who was aware that she was to work in the sex industry was not excluded by virtue of that awareness from being a victim of trafficking. Of further importance was the distinction between smuggling, which concerned primarily the protection of the State against illegal migration, and trafficking, which was a crime against individuals and did not necessarily involve a cross-border element.

266. Asserting that human trafficking was a form of modern-day slavery, Interights highlighted the conclusions of the International Criminal Tribunal for the Former Yugoslavia in the case of *Prosecutor v Kunarac et al* (see paragraphs 142 to 143 above) and argued that the necessary consequence of that judgment was that the definition of slavery did not require a right of ownership over a person to exist but merely that one or more of the powers attached to such a right be present. Thus the modern-day understanding of the term "slavery" could include situations where the victim was subject to violence and coercion thereby giving the perpetrator total control over the victim.

267. Interights addressed the positive obligations of member States under the Convention in the context of trafficking in human beings. In particular, there was, Interights contended, an obligation to enact appropriate legislation on trafficking in human beings, as set out in the Anti-Trafficking Convention (see paragraphs 160 to 174 above) and supported by the case-law of the Court. Such legislation was required to criminalise trafficking in human beings, establishing liability of

legal as well as natural persons; to introduce review procedures in respect of the licensing and operation of businesses often used as a cover for human trafficking; and to establish appropriate penalties. Other positive obligations included obligations to discourage demand for human trafficking, to ensure an adequate law enforcement response to identify and eradicate any involvement of law enforcement officials in human trafficking offences and build victims' confidence in the police and judicial systems and to ensure that the identification of victims of trafficking took place efficiently and effectively by introducing relevant training. Research on best practices, methods and strategies, raising awareness in the media and civil society, information campaigns involving public authorities and policy makers, educational programmes and targeting sex tourism were also areas of possible State action identified by Interights.

268. Finally, Interights argued that there was an implied positive obligation on States to carry out an effective and diligent investigation into allegations of trafficking. Such investigation should comply with the conditions of investigations required under Article 2 of the Convention.

b. The AIRE Centre

269. The AIRE Centre highlighted the increasing number of people, the majority of whom were women and children, who fell victim to trafficking for the purposes of sexual or other exploitation each year. They pointed to the severe physical and psychological consequences for victims, which frequently rendered them too traumatised to present themselves as victims of trafficking to the relevant authorities. They referred in particular to the conclusions of a report by the U.S. State Department in 2008, *Trafficking in Persons Report*, which found that Cyprus had failed to provide evidence that it had increased its efforts to combat severe forms of trafficking in persons from the previous year (see paragraph 106 above).

270. More generally, the AIRE Centre highlighted their concern that the rights of victims of human trafficking were often subordinated to other goals in the fight against trafficking. International and regional instruments on human trafficking often lacked practical and effective rights for the protection of victims. Apart from requirements regarding the investigation and prosecution of trafficking offences, the provisions of the Palermo Protocol on protection of victims were, the AIRE Centre argued, "generally either hortatory or aspirational", obliging States to "consider" or "endeavour to" introduce certain measures.

271. Finally, the AIRE Centre noted that the jurisprudence of supervisory bodies for international instruments against trafficking had yet to address fully the extent and content of positive obligations owed by States in the circumstances arising in the present application. As regards the jurisprudence of this Court, the AIRE Centre noted that although the Court had already been called upon to consider the extent of the application of Article 4 in a trafficking case (*Siliadin*, cited above), that case had dealt exclusively with the failure of the State to put in place adequate criminal law provisions to prevent and punish the perpetrators. Referring to the case-law developed in the context of Articles 2, 3 and 8 of the Convention, the AIRE Centre argued that States had a positive obligation to provide protection where they knew or ought to have known that an individual was, or was at risk of being, a victim of human trafficking. The particular measures required would depend on the circumstances but States were not permitted to leave such an individual unprotected or to return her to a situation of trafficking and exploitation.

B. The Court's assessment

1. Application of Article 4 of the Convention

272. The first question which arises is whether the present case falls within the ambit of Article 4. The Court recalls that Article 4 makes no mention of trafficking, proscribing “slavery”, “servitude” and “forced and compulsory labour”.

273. The Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein (*Demir and Baykara v. Turkey* [GC], no. 34503/97, § 67, 12 November 2008). It has long stated that one of the main principles of the application of the Convention provisions is that it does not apply them in a vacuum (see *Loizidou v. Turkey*, 18 December 1996, *Reports of Judgments and Decisions* 1996-VI; and *Öcalan v. Turkey* [GC], no. 46221/99, § 163, ECHR 2005-IV). As an international treaty, the Convention must be interpreted in the light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties.

274. Under that Convention, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn (see *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18; *Loizidou*, cited above, § 43; and Article 31 § 1 of the Vienna Convention). The Court must have regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (*Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X). Account must also be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties and the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; *Demir and Baykara*, cited above, § 67; *Saadi v. the United Kingdom* [GC], no. 13229/03, § 62, ECHR 2008-...; and Article 31 para. 3 (c) of the Vienna Convention).

275. Finally, the Court emphasises that the object and purpose of the Convention, as an instrument for the protection of individual human beings, requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, *inter alia*, *Soering v. the United Kingdom*, 7 July 1989, § 87, Series A no. 161; and *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37).

276. In *Siliadin*, considering the scope of “slavery” under Article 4, the Court referred to the classic definition of slavery contained in the 1926 Slavery Convention, which required the exercise of a genuine right of ownership and reduction of the status of the individual concerned to an “object” (*Siliadin*, cited above, § 122). With regard to the concept of “servitude”, the Court has held that what is prohibited is a “particularly serious form of denial of freedom” (see *Van Droogenbroeck v. Belgium*, Commission’s report of 9 July 1980, §§ 78-80, Series B no. 44). The concept of “servitude” entails an obligation, under coercion, to provide one’s services, and is linked with the concept of “slavery” (see *Seguin v. France* (dec.), no. 42400/98, 7 March 2000; and *Siliadin*, cited above, § 124). For “forced or compulsory labour” to arise, the Court has held that there must be some physical or mental constraint, as well as some overriding of the person’s will (*Van der Musselle v. Belgium*, 23 November 1983, § 34, Series A no. 70; *Siliadin*, cited above, § 117).

277. The absence of an express reference to trafficking in the Convention is unsurprising. The Convention was inspired by the Universal Declaration of

Human Rights, proclaimed by the General Assembly of the United Nations in 1948, which itself made no express mention of trafficking. In its Article 4, the Declaration prohibited “slavery and the slave trade in all their forms”. However, in assessing the scope of Article 4 of the Convention, sight should not be lost of the Convention’s special features or of the fact that it is a living instrument which must be interpreted in the light of present-day conditions. The increasingly high standards required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably require greater firmness in assessing breaches of the fundamental values of democratic societies (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 101, ECHR 1999-V; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 71, ECHR 2002-VI; and *Siliadin*, cited above, § 121).

278. The Court notes that trafficking in human beings as a global phenomenon has increased significantly in recent years (see paragraphs 89, 100, 103 and 269 above). In Europe, its growth has been facilitated in part by the collapse of former Communist blocs. The conclusion of the Palermo Protocol in 2000 and the Anti-Trafficking Convention in 2005 demonstrate the increasing recognition at international level of the prevalence of trafficking and the need for measures to combat it.

279. The Court is not regularly called upon to consider the application of Article 4 and, in particular, has had only one occasion to date to consider the extent to which treatment associated with trafficking fell within the scope of that Article (*Siliadin*, cited above). In that case, the Court concluded that the treatment suffered by the applicant amounted to servitude and forced and compulsory labour, although it fell short of slavery. In light of the proliferation of both trafficking itself and of measures taken to combat it, the Court considers it appropriate in the present case to examine the extent to which trafficking itself may be considered to run counter to the spirit and purpose of Article 4 of the Convention such as to fall within the scope of the guarantees offered by that Article without the need to assess which of the three types of proscribed conduct are engaged by the particular treatment in the case in question.

280. The Court observes that the International Criminal Tribunal for the Former Yugoslavia concluded that the traditional concept of “slavery” has evolved to encompass various contemporary forms of slavery based on the exercise of any or all of the powers attaching to the right of ownership (see paragraph 142 above). In assessing whether a situation amounts to a contemporary form of slavery, the Tribunal held that relevant factors included whether there was control of a person’s movement or physical environment, whether there was an element of psychological control, whether measures were taken to prevent or deter escape and whether there was control of sexuality and forced labour (see paragraph 143 above).

281. The Court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere (see paragraphs 101 and 161 above). It implies close surveillance of the activities of victims, whose movements are often circumscribed (see paragraphs 85 and 101 above). It involves the use of violence and threats against victims, who live and work under poor conditions (see paragraphs 85, 87 to 88 and 101 above). It is described by Interights and in the explanatory report accompanying the Anti-Trafficking Convention as the modern form of the old worldwide slave trade (see paragraphs 161 and 266 above). The Cypriot

Ombudsman referred to sexual exploitation and trafficking taking place “under a regime of modern slavery” (see paragraph 84 above).

282. There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes “slavery”, “servitude” or “forced and compulsory labour”. Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention. The Russian Government’s objection of incompatibility *ratione materiae* is accordingly dismissed.

2. General principles of Article 4

283. The Court reiterates that, together with Articles 2 and 3, Article 4 enshrines one of the basic values of the democratic societies making up the Council of Europe (*Siliadin*, cited above, § 82). Unlike most of the substantive clauses of the Convention, Article 4 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation.

284. In assessing whether there has been a violation of Article 4, the relevant legal or regulatory framework in place must be taken into account (see, *mutatis mutandis*, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 93, ECHR 2005-VII). The Court considers that the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking. Accordingly, in addition to criminal law measures to punish traffickers, Article 4 requires member States to put in place adequate measures regulating businesses often used as a cover for human trafficking. Furthermore, a State’s immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking (see, *mutatis mutandis*, *Guerra and Others v. Italy*, 19 February 1998, §§ 58 to 60, *Reports of Judgments and Decisions* 1998-I; *Z and Others v. the United Kingdom* [GC], no. 29392/95, §§ 73 to 74, ECHR 2001-V; and *Nachova and Others*, cited above, §§ 96 to 97 and 99-102).

285. In its *Siliadin* judgment, the Court confirmed that Article 4 entailed a specific positive obligation on member States to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour (cited above, §§ 89 and 112). In order to comply with this obligation, member States are required to put in place a legislative and administrative framework to prohibit and punish trafficking. The Court observes that the Palermo Protocol and the Anti-Trafficking Convention refer to the need for a comprehensive approach to combat trafficking which includes measures to prevent trafficking and to protect victims, in addition to measures to punish traffickers (see paragraphs 149 and 163 above). It is clear from the provisions of these two instruments that the Contracting States, including almost all of the member States of the Council of Europe, have formed the view that only a combination of measures addressing all three aspects can be effective in the fight against trafficking (see also the submissions of Interights and the AIRE Centre at paragraphs 267 and 271 above). Accordingly, the duty to penalise and prosecute trafficking is only one aspect of member States’ general undertaking to combat trafficking. The extent of the positive obligations arising under Article 4 must be considered within this broader context.

286. As with Articles 2 and 3 of the Convention, Article 4 may, in certain circumstances, require a State to take operational measures to protect victims, or potential victims, of trafficking (see, *mutatis mutandis*, *Osman*, cited above, § 115; and *Mahmut Kaya v. Turkey*, no. 22535/93, § 115, ECHR 2000-III). In order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention. In the case of an answer in the affirmative, there will be a violation of Article 4 of the Convention where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk (see, *mutatis mutandis*, *Osman*, cited above, §§116 to 117; and *Mahmut Kaya*, cited above, §§ 115 to 116).

287. Bearing in mind the difficulties involved in policing modern societies and the operational choices which must be made in terms of priorities and resources, the obligation to take operational measures must, however, be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities (see, *mutatis mutandis*, *Osman*, cited above, § 116). It is relevant to the consideration of the proportionality of any positive obligation arising in the present case that the Palermo Protocol, signed by both Cyprus and the Russian Federation in 2000, requires States to endeavour to provide for the physical safety of victims of trafficking while in their territories and to establish comprehensive policies and programmes to prevent and combat trafficking (see paragraphs 153 to 154 above). States are also required to provide relevant training for law enforcement and immigration officials (see paragraph 155 above).

288. Like Articles 2 and 3, Article 4 also entails a procedural obligation to investigate situations of potential trafficking. The requirement to investigate does not depend on a complaint from the victim or next-of-kin: once the matter has come to the attention of the authorities they must act of their own motion (see, *mutatis mutandis*, *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 69, ECHR 2002-II). For an investigation to be effective, it must be independent from those implicated in the events. It must also be capable of leading to the identification and punishment of individuals responsible, an obligation not of result but of means. A requirement of promptness and reasonable expedition is implicit in all cases but where the possibility of removing the individual from the harmful situation is available, the investigation must be undertaken as a matter of urgency. The victim or the next-of-kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests (see, *mutatis mutandis*, *Paul and Audrey Edwards*, cited above, §§ 70 to 73).

289. Finally, the Court reiterates that trafficking is a problem which is often not confined to the domestic arena. When a person is trafficked from one State to another, trafficking offences may occur in the State of origin, any State of transit and the State of destination. Relevant evidence and witnesses may be located in all States. Although the Palermo Protocol is silent on the question of jurisdiction, the Anti-Trafficking Convention explicitly requires each member State to establish jurisdiction over any trafficking offence committed in its territory (see paragraph 172 above). Such an approach is, in the Court's view, only logical in light of the general obligation, outlined above, incumbent on all States under Article 4 of the Convention to investigate alleged trafficking offences. In addition to the obligation to conduct a domestic investigation into events occurring on their own territories, member States are also subject to a duty in cross-border

trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories. Such a duty is in keeping with the objectives of the member States, as expressed in the preamble to the Palermo Protocol, to adopt a comprehensive international approach to trafficking in the countries of origin, transit and destination (see paragraph 149 above). It is also consistent with international agreements on mutual legal assistance in which the respondent States participate in the present case (see paragraphs 175 to 185 above).

3. *Application of the general principles to the present case*

a. **Cyprus**

i. Positive obligation to put in place an appropriate legislative and administrative framework

290. The Court observes that in Cyprus legislation prohibiting trafficking and sexual exploitation was adopted in 2000 (see paragraphs 127 to 131 above). The law reflects the provisions of the Palermo Protocol and prohibits trafficking and sexual exploitation, with consent providing no defence to the offence. Severe penalties are set out in the legislation. The law also provides for a duty to protect victims, *inter alia* through the appointment of a guardian of victims. Although the Ombudsman criticised the failure of the authorities to adopt practical implementing measures, she considered the law itself to be satisfactory (see paragraph 90 above). The Council of Europe Commissioner also found the legal framework established by Law 3(1) 2000 to be “suitable” (see paragraph 92 above). Notwithstanding the applicant’s complaint as to the inadequacy of Cypriot trafficking legislation, the Court does not consider that the circumstances of the present case give rise to any concern in this regard.

291. However, as regards the general legal and administrative framework and the adequacy of Cypriot immigration policy, a number of weaknesses can be identified. The Council of Europe Commissioner for Human Rights noted in his 2003 report that the absence of an immigration policy and legislative shortcomings in this respect have encouraged the trafficking of women to Cyprus (see paragraph 91 above). He called for preventive control measures to be adopted to stem the flow of young women entering Cyprus to work as cabaret artistes (see paragraph 94 above). In subsequent reports, the Commissioner reiterated his concerns regarding the legislative framework, and in particular criticised the system whereby cabaret managers were required to make the application for an entry permit for the artiste as rendering the artiste dependent on her employer or agent and increasing her risk of falling into the hands of traffickers (see paragraph 100 above). In his 2008 report, the Commissioner criticised the artiste visa regime as making it very difficult for law enforcement authorities to take the necessary steps to combat trafficking, noting that the artiste permit could be perceived as contradicting the measures taken against trafficking or at least as rendering them ineffective (see also the report of the U.S. State Department at paragraphs 105 and 107 above). The Commissioner expressed regret that, despite concerns raised in previous reports and the Government’s commitment to abolish it, the artiste work permit was still in place (see paragraph 103 above). Similarly, the Ombudsman, in her 2003 report, blamed the artiste visa regime for the entry of thousands of young foreign women into Cyprus, where they were exploited by their employers under cruel living and working conditions (see paragraph 89 above).

292. Further, the Court emphasises that while an obligation on employers to notify the authorities when an artiste leaves her employment (see paragraph 117

above) is a legitimate measure to allow the authorities to monitor the compliance of immigrants with their immigration obligations, responsibility for ensuring compliance and for taking steps in cases of non-compliance must remain with the authorities themselves. Measures which encourage cabaret owners and managers to track down missing artistes or in some other way to take personal responsibility for the conduct of artistes are unacceptable in the broader context of trafficking concerns regarding artistes in Cyprus. Against this backdrop, the Court considers that the practice of requiring cabaret owners and managers to lodge a bank guarantee to cover potential future costs associated with artistes which they have employed (see paragraph 115 above) particularly troubling. The separate bond signed in Ms Rantseva's case is of equal concern (see paragraph 15 above), as is the unexplained conclusion of the AIS that M.A. was responsible for Ms Rantseva and was therefore required to come and collect her from the police station (see paragraph 20 above).

293. In the circumstances, the Court concludes that the regime of artiste visas in Cyprus did not afford to Ms Rantseva practical and effective protection against trafficking and exploitation. There has accordingly been a violation of Article 4 in this regard.

ii. Positive obligation to take protective measures

294. In assessing whether a positive obligation to take measures to protect Ms Rantseva arose in the present case, the Court considers the following to be significant. First, it is clear from the Ombudsman's 2003 report that there has been a serious problem in Cyprus since the 1970s involving young foreign women being forced to work in the sex industry (see paragraph 83 above). The report further noted the significant increase in artistes coming from former Soviet countries following the collapse of the USSR (see paragraph 84 above). In her conclusions, the Ombudsman highlighted that trafficking was able to flourish in Cyprus due to the tolerance of the immigration authorities (see paragraph 89 above). In his 2006 report, the Council of Europe's Commissioner for Human Rights also noted that the authorities were aware that many of the women who entered Cyprus on artiste's visas would work in prostitution (see paragraph 96 above). There can therefore be no doubt that the Cypriot authorities were aware that a substantial number of foreign women, particularly from the ex-USSR, were being trafficked to Cyprus on artistes visas and, upon arrival, were being sexually exploited by cabaret owners and managers.

295. Second, the Court emphasises that Ms Rantseva was taken by her employer to Limassol police station. Upon arrival at the police station, M.A. told the police that Ms Rantseva was a Russian national and was employed as a cabaret artiste. Further, he explained that she had only recently arrived in Cyprus, had left her employment without warning and had also moved out of the accommodation provided to her (see paragraph 19 above). He handed to them her passport and other documents (see paragraph 21 above).

296. The Court recalls the obligations undertaken by the Cypriot authorities in the context of the Palermo Protocol and, subsequently, the Anti-Trafficking Convention to ensure adequate training to those working in relevant fields to enable them to identify potential trafficking victims (see paragraphs 155 and 167 above). In particular, under Article 10 of the Palermo Protocol, States undertake to provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. In the Court's opinion, there were sufficient indicators available to the police authorities, against the general backdrop of trafficking issues in Cyprus, for them to have been aware of circumstances giving rise to a credible suspicion that Ms Rantseva was, or was

at real and immediate risk of being, a victim of trafficking or exploitation. Accordingly, a positive obligation arose to investigate without delay and to take any necessary operational measures to protect Ms Rantseva.

297. However, in the present case, it appears that the police did not even question Ms Rantseva when she arrived at the police station. No statement was taken from her. The police made no further inquiries into the background facts. They simply checked whether Ms Rantseva's name was on a list of persons wanted by the police and, on finding that it was not, called her employer and asked him to return and collect her. When he refused and insisted that she be detained, the police officer dealing with the case put M.A. in contact with his superior (see paragraph 20 above). The details of what was said during M.A.'s conversation with the officer's superior are unknown, but the result of the conversation was that M.A. agreed to come and collect Ms Rantseva and subsequently did so.

298. In the present case, the failures of the police authorities were multiple. First, they failed to make immediate further inquiries into whether Ms Rantseva had been trafficked. Second, they did not release her but decided to confide her to the custody of M.A.. Third, no attempt was made to comply with the provisions of Law 3(1) of 2000 and to take any of the measures in section 7 of that law (see paragraph 130 above) to protect her. The Court accordingly concludes that these deficiencies, in circumstances which gave rise to a credible suspicion that Ms Rantseva might have been trafficked or exploited, resulted in a failure by the Cypriot authorities to take measures to protect Ms Rantseva. There has accordingly been a violation of Article 4 in this respect also.

iii. Procedural obligation to investigate trafficking

299. A further question arises as to whether there has been a procedural breach as a result of the continuing failure of the Cypriot authorities to conduct any effective investigation into the applicant's allegations that his daughter was trafficked.

300. In light of the circumstances of Ms Rantseva's subsequent death, the Court considers that the requirement incumbent on the Cypriot authorities to conduct an effective investigation into the trafficking allegations is subsumed by the general obligation arising under Article 2 in the present case to conduct an effective investigation into Ms Rantseva's death (see paragraph 234 above). The question of the effectiveness of the investigation into her death has been considered above in the context of the Court's examination of the applicant's complaint under Article 2 and a violation has been found. There is therefore no need to examine separately the procedural complaint against Cyprus under Article 4.

b. Russia

i. Positive obligation to put in place an appropriate legislative and administrative framework

301. The Court recalls that the responsibility of Russia in the present case is limited to the acts which fell within its jurisdiction (see paragraphs 207 to 208 above). Although the criminal law did not specifically provide for the offence of trafficking at the material time, the Russian Government argued that the conduct about which the applicant complained fell within the definitions of other offences.

302. The Court observes that the applicant does not point to any particular failing in the Russian criminal law provisions. Further, as regards the wider administrative and legal framework, the Court emphasises the efforts of the

Russian authorities to publicise the risks of trafficking through an information campaign conducted through the media (see paragraph 262 above).

303. On the basis of the evidence before it, the Court does not consider that the legal and administrative framework in place in Russia at the material time failed to ensure Ms Rantseva's practical and effective protection in the circumstances of the present case.

ii. Positive obligation to take protective measures

304. The Court recalls that any positive obligation incumbent on Russia to take operational measures can only arise in respect of acts which occurred on Russian territory (see, *mutatis mutandis*, *Al-Adsani*, cited above, §§ 38 to 39).

305. The Court notes that although the Russian authorities appear to have been aware of the general problem of young women being trafficked to work in the sex industry in foreign States, there is no evidence that they were aware of circumstances giving rise to a credible suspicion of a real and immediate risk to Ms Rantseva herself prior to her departure for Cyprus. It is insufficient, in order for an obligation to take urgent operational measures to arise, merely to show that there was a general risk in respect of young women travelling to Cyprus on artistes' visas. Insofar as this general risk was concerned, the Court recalls that the Russian authorities took steps to warn citizens of trafficking risks (see paragraph 262 above).

306. In conclusion, the Court does not consider that the circumstances of the case were such as to give rise to a positive obligation on the part of the Russian authorities to take operational measures to protect Ms Rantseva. There has accordingly been no violation of Article 4 by the Russian authorities in this regard.

iii. Procedural obligation to investigate potential trafficking

307. The Court recalls that, in cases involving cross-border trafficking, trafficking offences may take place in the country of origin as well as in the country of destination (see paragraph 289 above). In the case of Cyprus, as the Ombudsman pointed out in her report (see paragraph 86 above), the recruitment of victims is usually undertaken by artistic agents in Cyprus working with agents in other countries. The failure to investigate the recruitment aspect of alleged trafficking would allow an important part of the trafficking chain to act with impunity. In this regard, the Court highlights that the definition of trafficking adopted in both the Palermo Protocol and the Anti-Trafficking Convention expressly includes the recruitment of victims (see paragraphs 150 and 164 above). The need for a full and effective investigation covering all aspects of trafficking allegations from recruitment to exploitation is indisputable. The Russian authorities therefore had an obligation to investigate the possibility that individual agents or networks operating in Russia were involved in trafficking Ms Rantseva to Cyprus.

308. However, the Court observes that the Russian authorities undertook no investigation into how and where Ms Rantseva was recruited. In particular, the authorities took no steps to identify those involved in Ms Rantseva's recruitment or the methods of recruitment used. The recruitment having occurred on Russian territory, the Russian authorities were best placed to conduct an effective investigation into Ms Rantseva's recruitment. The failure to do so in the present case was all the more serious in light of Ms Rantseva's subsequent death and the resulting mystery surrounding the circumstances of her departure from Russia.

309. There has accordingly been a violation by the Russian authorities of their procedural obligation under Article 4 to investigate alleged trafficking.

VI. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

310. The applicant complained that there was a violation of Article 5 § 1 of the Convention by the Cypriot authorities in so far as his daughter was detained at the police station, released into the custody of M.A. and subsequently detained in the apartment of M.A.'s employee. Article 5 § 1 provides, *inter alia*, that:

“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:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (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.”

A. The parties' submissions

1. *The applicant*

311. The applicant submitted that his daughter's treatment at the police station and subsequent confinement to the apartment of M.A.'s employee violated Article 5 § 1 of the Convention. He emphasised the importance of Article 5 in protecting individuals from arbitrary detention and abuse of power. Ms Rantseva was legally on the territory of the Republic of Cyprus and was, the applicant contended, unreasonably and unlawfully detained by M.A., escorted to the police station, released into M.A.'s custody and detained in the apartment of M.A.'s employee. He further observed that no document had been produced by the Cypriot authorities setting out the grounds on which Ms Rantseva had been detained and subsequently handed over to M.A..

2. *The Cypriot Government*

312. In their written submissions, the Cypriot Government denied that there had been a violation of Article 5 in the present case. They argued that it was not clear from the established facts of the case whether the police had exercised any power over Ms Rantseva. Nor was it clear what would have happened had Ms Rantseva refused to leave with M.A..

313. In their unilateral declaration (see paragraph 187 above), the Government accepted that Ms Rantseva's treatment at the police station and the decision not to release her but to hand her over to M.A., even though there was no legal basis for her deprivation of liberty, was not consistent with the requirements of Article 5.

B. The Court's assessment

1. *The existence of a deprivation of liberty in the present case*

314. The Court reiterates that in proclaiming the “right to liberty”, Article 5 § 1 aims to ensure that no-one should be dispossessed of his physical liberty in an arbitrary fashion. The difference between restrictions on movement serious enough to fall within the ambit of a deprivation of liberty under Article 5 § 1 and mere restrictions of liberty which are subject only to Article 2 of Protocol No. 4 is one of degree or intensity, and not one of nature or substance (*Guzzardi v. Italy*, 6 November 1980, § 93, Series A no. 39). In order to determine whether someone has been “deprived of his liberty” within the meaning of Article 5, the starting point must be 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 *Engel and Others v. the Netherlands*, 8 June 1976, §§ 58-59, Series A no. 22; *Guzzardi*, cited above, § 92; and *Riera Blume and Others v. Spain*, no. 37680/97, § 28, ECHR 1999-VII).

315. In the present case, the Court observes that the applicant was taken by M.A. to the police station where she was detained for about an hour. There is no evidence that Ms Rantseva was informed of the reason for her detention; indeed, as the Court has noted above (see paragraph 297) there is no record that she was interviewed by the police at all during her time at the police station. Despite the fact that the police concluded that Ms Rantseva’s immigration status was not irregular and that there were no grounds for her continued detention, she was not immediately released. Instead, at the request of the person in charge of the Aliens and Immigration Service (“AIS”), the police telephoned M.A. and requested that he collect her and take her to the AIS office at 7 a.m. for further investigation. M.A. was advised that if he did not collect her, she would be allowed to leave. Ms Rantseva was detained at the police station until M.A.’s arrival, when she was released into his custody (see paragraph 20 above).

316. The facts surrounding Ms Rantseva’s subsequent stay in M.P.’s apartment are unclear. In his witness statement to the police, M.A. denied that Ms Rantseva was held in the apartment against her will and insists that she was free to leave (see paragraph 21 above). The applicant alleges that Ms Rantseva was locked in the bedroom and was thus forced to attempt an escape via the balcony. The Court notes that Ms Rantseva died after falling from the balcony of the apartment in an apparent attempt to escape (see paragraph 41 above). It is reasonable to assume that had she been a guest in the apartment and was free to leave at any time, she would simply have left via the front door (see *Storck v. Germany*, no. 61603/00, §§ 76-78, ECHR 2005-V). Accordingly, the Court considers that Ms Rantseva did not remain in the apartment of her own free will.

317. In all, the alleged detention lasted about two hours. Although of short duration, the Court emphasises the serious nature and consequences of the detention and recalls that where the facts indicate a deprivation of liberty within the meaning of Article 5 § 1, the relatively short duration of the detention does not affect this conclusion (see *Järvinen v. Finland*, no. 30408/96, Commission decision of 15 January 1998; and *Novotka v. Slovakia* (dec.), no. 47244/99, 4 November 2003, where the transportation to the police station, search and temporary confinement in a cell lasting around one hour was considered to constitute a deprivation of liberty for the purposes of Article 5).

318. Accordingly, the Court finds that the detention of Ms Rantseva at the police station and her subsequent transfer and confinement to the apartment amounted to a deprivation of liberty within the meaning of Article 5 of the Convention.

2. *Responsibility of Cyprus for the deprivation of liberty*

319. In so far as Ms Rantseva was detained by private individuals, the Court must examine the part played by the police officers and determine whether the deprivation of liberty in the apartment engaged the responsibility of the Cypriot authorities, in particular in light of their positive obligation to protect individuals from arbitrary detention (see *Riera Blume*, cited above, §§ 32-35).

320. The Court has already expressed concern that the police chose to hand Ms Rantseva into M.A.'s custody rather than simply allowing her to leave (see paragraph 298 above). Ms Rantseva was not a minor. According to the evidence of the police officers on duty, she displayed no signs of drunkenness (see paragraph 20 above). It is insufficient for the Cypriot authorities to argue that there is no evidence that Ms Rantseva did not consent to leaving with M.A.: as the AIRE Centre pointed out (see paragraph 269 above), victims of trafficking often suffer severe physical and psychological consequences which render them too traumatised to present themselves as victims. Similarly, in her 2003 report the Ombudsman noted that fear of repercussions and inadequate protection measures resulted in a limited number of complaints being made by victims to the Cypriot police (see paragraphs 87 to 88 above).

321. Taken in the context of the general living and working conditions of cabaret artistes in Cyprus, as well as in light of the particular circumstances of Ms Rantseva's case, the Court considers that it is not open to the police to claim that they were acting in good faith and that they bore no responsibility for Ms Rantseva's subsequent deprivation of liberty in M.P.'s apartment. It is clear that without the active cooperation of the Cypriot police in the present case, the deprivation of liberty could not have occurred. The Court therefore considers that the national authorities acquiesced in Ms Rantseva's loss of liberty.

3. *Compatibility of the deprivation of liberty with Article 5 § 1*

322. It remains to be determined whether the deprivation of liberty fell within one of the categories of permitted detention exhaustively listed in Article 5 § 1. The Court reiterates that Article 5 § 1 refers essentially to national law and lays down an obligation to comply with its substantive and procedural rules. It also requires, however, 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 (see *Riera Blume*, cited above, § 31).

323. By laying down that any deprivation of liberty should be "in accordance with a procedure prescribed by law", Article 5 § 1 requires, first, that any arrest or detention should have a legal basis in domestic law. The Cypriot Government did not point to any legal basis for the deprivation of liberty but it can be inferred that Ms Rantseva's initial detention at the police station was effected in order to investigate whether she had failed to comply with immigration requirements. However, having ascertained that Ms Rantseva's name was not included on the relevant list, no explanation has been provided by the Cypriot authorities as to the reasons and legal basis for the decision not to allow Ms Rantseva to leave the police station but to release her into the custody of M.A.. As noted above, the police found that Ms Rantseva did not exhibit signs of drunkenness and did not pose any threat to herself or others (see paragraphs 20 and 320 above). There is no indication, and it has not been suggested, that Ms Rantseva requested that M.A. come to collect her. The decision of the police authorities to detain Ms Rantseva until M.A.'s arrival and, subsequently, to consign her to his custody had no basis in domestic law.

324. It has not been argued that Ms Rantseva's detention in the apartment was lawful. The Court finds that this deprivation of liberty was both arbitrary and unlawful.

325. The Court therefore concludes that there has been a violation of Article 5 § 1 on account of Ms Rantseva's unlawful and arbitrary detention.

VII. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

326. The applicant contended that the Cypriot authorities violated his right of access to court under Article 6 of the Convention by failing to ensure his participation in the inquest proceedings, by failing to grant him free legal aid and by failing to provide him with information on available legal remedies in Cyprus. Article 6 provides, in so far as relevant, as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

A. The parties' submissions

1. The applicant

327. The applicant highlighted the importance of the right of access to court in a democratic society. Such a right entailed an opportunity for an individual to have a clear, practical opportunity to challenge an act which interfered with his rights. The applicant pointed out that there had been no trial in respect of his daughter's death. He further complained about the failure of the Cypriot authorities to ensure his effective participation in the inquest proceedings and to provide free legal assistance. Accordingly, he submitted, the Cypriot authorities had violated his right of access to court guaranteed under Article 6 of the Convention.

2. The Cypriot Government

328. In their written observations, the Cypriot Government submitted that Article 6 did not apply to inquest proceedings as they were not proceedings that determined civil rights and obligations. Accordingly, the applicant could not claim a right of access to the proceedings in respect of his daughter's death.

329. If, on the other hand, inquest proceedings did engage Article 6, the Cypriot Government contended that the applicant's right of access to court was ensured in the present case.

330. In their subsequent unilateral declaration (see paragraph 187 above), the Cypriot Government acknowledged a violation of the applicant's right to an effective access to court by the failure of the Cypriot authorities to establish any real and effective communication between them and the applicant as regards the inquest and any other possible legal remedies available to the applicant.

B. Admissibility

331. The Court observes at the outset that Article 6 does not give rise to a right to have criminal proceedings instituted in a particular case or to have third parties prosecuted or sentenced for a criminal offence (see, for example, *Rampogna and Murgia v. Italy* (dec.), no. 40753/98, 11 May 1999; *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I; and *Dinchev v. Bulgaria*, no. 23057/03, § 39, 22 January 2009). To the extent that the applicant complains under Article 6 § 1 about the failure of the Cypriot authorities to bring criminal proceedings in respect of his daughter's death, his complaint is therefore inadmissible *ratione materiae* and must be rejected under Article 35 §§ 3 and 4 of the Convention.

332. As regards the complaint regarding participation in the inquest proceedings, the Court observes that procedural guarantees in inquest proceedings

are inherent in Article 2 of the Convention and the applicant's complaints have already been examined in that context (see paragraph 239 above). As to the applicability of Article 6 to inquest proceedings, the Court considers there is no criminal charge or civil right at stake for the applicant in the context of such proceedings. Accordingly, this part of the complaint is also inadmissible *ratione materiae* and must be rejected under Article 35 §§ 3 and 4 of the Convention.

333. Finally, as regards the applicant's complaints that he was not informed of other remedies available to him and was not provided with free legal assistance, when the cost of legal representation in Cyprus was prohibitive, the Court considers that these complaints are inherently linked to the applicant's complaint under Article 2 of the Convention and recalls that they have been addressed in that context (see paragraph 240 above). It is therefore not necessary to consider the extent to which any separate issue may arise under Article 6 in such circumstances.

334. Accordingly, the complaints under Article 6 § 1 must be declared inadmissible and rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

VIII. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

335. The applicant also invoked Article 8 of the Convention, which provides as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

336. The applicant has provided no further details of the nature of his complaint under this Article. In the light of all the material in its possession, and in so far as the matters complained of were within its competence, the Court finds no appearance of a violation of the rights and freedoms set out in the Convention or its Protocols arising from this complaint. The complaint must therefore be declared inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention.

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

337. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

1. *The parties' submissions*

338. The applicant sought EUR 100,000 in respect of non-pecuniary damage resulting from the death of his daughter. He pointed to the serious nature of the alleged violations in the present case and the fact that his daughter was the sole provider for the family. He also highlighted the emotional anguish occasioned by

his daughter's death and his subsequent efforts to bring those responsible to justice.

339. The Cypriot Government argued that the sum claimed was excessive, having regard to the Court's case-law. They further pointed out that the applicant had provided no evidence that he was financially dependent upon his daughter. In their unilateral declaration (see paragraph 187 above), they offered to pay the applicant EUR 37,300 in respect of pecuniary and non-pecuniary damage and costs and expenses, or such other sum as suggested by the Court.

340. The Russian Government submitted that any non-pecuniary damages should be paid by the State which failed to ensure the safety of the applicant's daughter and failed to perform an effective investigation into her death. They noted that they were not the respondent State as far as the applicant's substantive Article 2 complaint was concerned.

2. The Court's assessment

341. The Court notes that a claim for loss of economic support is more appropriately considered as a claim for pecuniary loss. In this respect, the Court reiterates that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in the appropriate case, include compensation in respect of loss of earnings (see, *inter alia*, *Aktaş v. Turkey*, no. 24351/94, § 352, ECHR 2003-V (extracts)). In the present case the Court has not found Cyprus responsible for Mr Rantseva's death, holding that there was a procedural, and not a substantive, violation of Article 2 in the present case. Accordingly, the Court does not consider it appropriate to make any award to the applicant in respect of pecuniary damage arising from Ms Rantseva's death.

342. As regards non-pecuniary damage, the Court has found that the Cypriot authorities failed to take steps to protect Ms Rantseva from trafficking and to investigate whether she had been trafficked. It has further found that the Cypriot authorities failed to conduct an effective investigation into Ms Rantseva's death. Accordingly, the Court is satisfied that the applicant must be regarded as having suffered anguish and distress as a result of the unexplained circumstances of Ms Rantseva's death and the failure of the Cypriot authorities to take steps to protect her from trafficking and exploitation and to investigate effectively the circumstances of her arrival and stay in Cyprus. Ruling on an equitable basis, the Court awards the sum of EUR 40,000 in respect of the damage sustained by the applicant as a result of the conduct of the Cypriot authorities, plus any tax that may be chargeable on that amount.

343. The Court recalls that it has found a procedural violation of Article 4 in respect of Russia. Ruling on an equitable basis, it awards the applicant EUR 2,000 in non-pecuniary damage in respect of the damage sustained by him by the conduct of the Russian authorities, plus any tax that may be chargeable on that amount.

B. Costs and expenses

1. The parties' submissions

344. The applicant requested reimbursement of costs and expenses incurred in the sum of around 485,480 Russian roubles (RUB) (approximately EUR 11,240), including travel, photocopying, translation and services of a notary. The sum also included the sum of RUB 233,600 in respect of the sale of his home in Russia, which he claimed was necessary in order to obtain necessary funds; funeral costs

in the sum of about RUB 46,310; and RUB 26,661 spent on attending a conference on trafficking in Cyprus in 2008. Relevant receipts were provided.

345. The Cypriot Government argued that the applicant could only claim for costs which were necessarily incurred to prevent or redress a breach of the Convention, reasonable as to quantum and causally linked to the violation in question. As such, they contested the applicant's claim of RUB 233,600 in respect of the sale of his flat, the sums expended on attending the 2008 conference and any costs and expenses not substantiated by receipts or not reasonable as to quantum.

346. The Russian Government contended that the applicant had failed to substantiate his allegation that he was required to sell his flat and travel to Cyprus. In particular, they submitted that the applicant could have applied to relevant law enforcement authorities in Russia to request necessary documents and evidence from the Cypriot authorities and could have instructed a lawyer in Cyprus. The Russian Government also contested the applicant's claim for the costs of the 2008 conference on the ground that it was not directly linked to the investigation of Ms Rantseva's death.

2. *The Court's assessment*

347. The Court recalls that the applicant is entitled to the reimbursement of costs and expenses in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the applicant is not entitled to claim the proceeds of the sale of his house or for the expenses of travelling to the conference in Cyprus in 2008, such conference not being directly linked to the investigation of Ms Rantseva's death. Further, the Court recalls that it found only a procedural breach of Article 2. Accordingly, the applicant is not entitled to reimbursement of funeral expenses.

348. Having regard to the above, the Court considers it reasonable to award the sum of EUR 4,000 in respect of costs and expenses plus any tax that may be chargeable to the applicant on that amount, less EUR 850 received by way of legal aid from the Council of Europe. In the circumstances of this case the Court considers it appropriate that the costs and expenses are awarded against Cyprus.

C. **Default interest**

349. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Rejects* the Cypriot Government's request to strike the application out of the list;
2. *Decides* to join to the merits the Russian Government's objection *ratione materiae* as to Article 4 of the Convention, and rejects it;
3. *Declares* the complaints under Articles 2, 3, 4 and 5 admissible and the remainder of the application inadmissible.
4. *Holds* that there has been no violation of the Cypriot authorities' positive obligation to protect Ms Rantseva's right to life under Article 2 of the Convention;

5. *Holds* that there has been a procedural violation of Article 2 of the Convention by Cyprus because of the failure to conduct an effective investigation into Ms Rantseva's death;
6. *Holds* that there has been no violation of Article 2 of the Convention by Russia;
7. *Holds* that it is not necessary to consider separately the applicant's complaint under Article 3 of the Convention;
8. *Holds* that there has been a violation of Article 4 of the Convention by Cyprus by not affording to Ms Rantseva practical and effective protection against trafficking and exploitation in general and by not taking the necessary specific measures to protect her;
9. *Holds* that there is no need to examine separately the alleged breach of Article 4 concerning the continuing failure of the Cypriot authorities to conduct an effective investigation;
10. *Holds* that there has been no breach by Russia of its positive obligations under Article 4 of the Convention to take operational measures to protect Ms Rantseva against trafficking;
11. *Holds* that there has been a violation of Article 4 of the Convention by Russia of its procedural obligations to investigate the alleged trafficking;
12. *Holds* that there has been a violation of Article 5 of the Convention by Cyprus;
13. *Holds*
 - (a) that the Cypriot Government is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 40,000 (forty thousand euros) in respect of non-pecuniary damage and EUR 3,150 (three thousand one hundred and fifty euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant on these amounts;
 - (b) that the Russian Government is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros) in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicant on this amount;
 - (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
14. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 7 January 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Christos Rozakis
Registrar President

RANTSEV v. CYPRUS AND RUSSIA JUDGMENT

RANTSEV v. CYPRUS AND RUSSIA JUDGMENT



Case of Siliadin v. France

SECOND SECTION

CASE OF SILIADIN v. FRANCE

(Application no. 73316/01)

JUDGMENT

STRASBOURG

26 July 2005

FINAL

26/10/2005

In the case of Siliadin v. France,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr I. Cabral Barreto, *President*,

Mr J.-P. Costa,

Mr R. Türmen,

Mr K. Jungwiert,

Mr V. Butkevych,

Mrs A. Mularoni,

Mrs E. Fura-Sandström, *judges*,

and Mr S. Naismith, *Deputy Section Registrar*,

Having deliberated in private on 3 May and 28 June 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 73316/01) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Togolese national, Ms Siwa-Akofa Siliadin (“the applicant”), on 17 April 2001.

2. The applicant, who had been granted legal aid, was represented by Ms H. Clément, of the Paris Bar. The French Government (“the Government”) were represented by their Agent, Mrs E. Belliard, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. Relying on Article 4 of the Convention, the applicant alleged that the criminal-law provisions applicable in France did not afford her sufficient and effective protection against the “servitude” in which she had been held, or at the very least against the “forced or compulsory” labour she had been required to perform.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

6. By a decision of 1 February 2005, the Chamber declared the application admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 3 May 2005 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mrs E. Belliard, Director of Legal Affairs,

Ministry of Foreign Affairs, *Agent*,

Mr G. Dutertre, *magistrat* on secondment to the

Human Rights Division, Legal Affairs Department,

Ministry of Foreign Affairs,

Mrs J. Vaill e, Drafting Secretary, Department of European and

International Affairs, Ministry of Justice,

Mrs E. Puren, Department of Criminal Affairs

and Pardons, Ministry of Justice, *Counsel*;

(b) *for the applicant*

Ms H. CL MENT, of the Paris Bar, *Counsel*,

Ms B. BOURGEOIS, lawyer for the Committee

against Modern Slavery, *Assistant*.

The Court heard addresses by Mrs Belliard and Ms Cl ment.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1978 and lives in Paris.

10. She arrived in France on 26 January 1994, aged 15 years and 7 months, with Mrs D., a French national of Togolese origin. She had a passport and a tourist visa.

11. It had been agreed that she would work at Mrs D.'s home until the cost of her air ticket had been reimbursed and that Mrs D. would attend to her immigration status and find her a place at school. In reality, the applicant became an unpaid housemaid for Mr and Mrs D. and her passport was taken from her.

12. In the second half of 1994, Mrs D. "lent" the applicant to Mr and Mrs B., who had two small children, so that she could assist the pregnant Mrs B. with household work. Mrs B. also had another daughter from a first marriage who stayed with her during the holidays and at weekends. The applicant lived at Mr and Mrs B.'s home, her father having given his consent.

13. On her return from the maternity hospital, Mrs B. told the applicant that she had decided to keep her.

14. The applicant subsequently became a general housemaid for Mr and Mrs B. She worked seven days a week, without a day off, and was occasionally and exceptionally authorised to go out on Sundays to attend mass. Her working day began at 7.30 a.m., when she had to get up and prepare breakfast, dress the children, take them to nursery school or their recreational activities, look after the baby, do the housework and wash and iron clothes.

In the evening she prepared dinner, looked after the older children, did the washing up and went to bed at about 10.30 p.m. In addition, she had to clean a studio flat, in the same building, which Mr B. had made into an office.

The applicant slept on a mattress on the floor in the baby's room; she had to look after him if he woke up.

15. She was never paid, except by Mrs B.'s mother, who gave her one or two 500 French franc (FRF) notes.

16. In December 1995 the applicant was able to escape with the help of a Haitian national who took her in for five or six months. She looked after the latter's two children, was given appropriate accommodation and food, and received FRF 2,500 per month.

17. Subsequently, in obedience to her paternal uncle, who had been in contact with Mr and Mrs B., she returned to the couple, who had undertaken to put her immigration status in order. However, the situation remained unchanged: the applicant continued to carry out household tasks and look after the couple's children. She slept on a mattress on the floor of the children's bedroom, then on a folding bed, and wore second-hand clothes. Her immigration status had still not been regularised, she was not paid and did not attend school.

18. On an unspecified date, the applicant managed to recover her passport, which she entrusted to an acquaintance of Mr and Mrs B. She also confided in a neighbour, who alerted the Committee against Modern Slavery (*Comité contre l'esclavage moderne*), which in turn filed a complaint with the prosecutor's office concerning the applicant's case.

19. On 28 July 1998 the police raided Mr and Mrs B.'s home.

20. The couple were prosecuted on charges of having obtained from July 1995 to July 1998 the performance of services without payment or in exchange for payment that was manifestly disproportionate to the work carried out, by taking advantage of that person's vulnerability or state of dependence; with having subjected an individual to working and living conditions that were incompatible with human dignity by taking advantage of her vulnerability or state of dependence; and with having employed and maintained in their service an alien who was not in possession of a work permit.

21. On 10 June 1999 the Paris *tribunal de grande instance* delivered its judgment.

22. It found that the applicant's vulnerability and dependence in her relationship with Mr and Mrs B. was proved by the fact that she was unlawfully resident in France, was aware of that fact and feared arrest, that Mr and Mrs B. nurtured that fear while promising to secure her leave to remain – a claim that was confirmed by her uncle and her father – and by the fact that she had no resources, no friends and almost no family to help her.

23. As to the failure to provide any or adequate remuneration, the court noted that it had been established that the young woman had remained with Mr and Mrs B. for several years, was not a member of their family, could not be regarded as a foreign au pair who had to be registered and given free time in order to improve her language skills, was kept busy all day with housework, did not go to school and was not training for a profession and that, had she not been in their service, Mr and Mrs B. would have been obliged to employ another person, given the amount of work created by the presence of four children in the home.

It therefore concluded that the offence laid down in Article 225-13 of the Criminal Code (see paragraph 46 below) was made out.

24. The court also found it established that Mr and Mrs B. were employing an alien who was not in possession of a work permit.

25. The court noted that the parties had submitted differing accounts concerning the allegations that the working and living conditions were incompatible with human dignity.

It found that the applicant clearly worked long hours and did not enjoy a day off as such, although she was given permission to attend mass. It noted that a person who remained at home with four children necessarily began his or her work early in the morning and finished late at night, but had moments of respite

during the day; however, the scale of Mrs B.'s involvement in this work had not been established.

26. The court concluded that, while it seemed established that employment regulations had not been observed in respect of working hours and rest time, this did not suffice to consider that the working conditions were incompatible with human dignity, which would have implied, for example, a furious pace, frequent insults and harassment, the need for particular physical strength that was disproportionate to the employee's constitution and having to work in unhealthy premises, which had not been the case in this instance.

27. As to the applicant's accommodation, the court noted that Mr and Mrs B., who were well-off, had not seen fit to set aside an area for the applicant's personal use and that, although this situation was regrettable and indicated their lack of consideration for her, her living conditions could not be held to infringe human dignity, given that a number of people, especially in the Paris region, did not have their own rooms. Accommodation which infringed human dignity implied an unhygienic, unheated room, with no possibility of looking after one's basic hygiene, or premises which were so far below the applicable norms that occupation would be dangerous.

28. Accordingly, the court found that the offence laid down in Article 225-14 of the Criminal Code (see paragraph 46 below) had not been made out.

Nonetheless, the judges concluded that the offences of which Mr and Mrs B. were convicted were incontestably serious and were to be severely punished, particularly as the couple considered that they had treated the applicant quite properly.

Accordingly, they sentenced them to twelve months' imprisonment each, of which seven months were suspended, imposed a fine of FRF 100,000 and ordered them to pay, jointly and severally, FRF 100,000 to the applicant in damages. In addition, Mr and Mrs B. forfeited their civic, civil and family rights for three years.

29. Mr and Mrs B. appealed against this decision.

30. On 20 April 2000 the Paris Court of Appeal gave an interlocutory judgment ordering further investigations.

31. On 19 October 2000 it delivered its judgment on the merits.

32. The Court of Appeal found that the additional investigation had made it possible to confirm that the applicant had arrived in France aged 15 years and 7 months, in possession of a passport and a three-month tourist visa. During the period that she lived with Mrs D., from January to October 1994, she had been employed by the latter, firstly, to do housework, cook and look after her child, and, secondly, in the latter's clothing business, where she also did the cleaning and returned to the rails clothes that customers had tried on, without remuneration.

33. Around October 1994 the applicant had spent a few days at Mr and Mrs B.'s home, shortly before Mrs B. gave birth to her fourth child. She travelled by underground to Mr and Mrs B.'s home every day and returned to Mrs D.'s house in the evening to sleep.

34. In July/August 1994 she was "lent" to Mr and Mrs B., and stayed in their home until December 1995, when she left for Mrs G.'s home, where she was remunerated for her work and given accommodation. She had returned to Mr and Mrs B. in May/June 1996 on her uncle's advice.

35. The Court of Appeal noted that it had been established that the applicant was an illegal immigrant and had not received any real remuneration.

Further, it noted that it appeared that the applicant was proficient in French, which she had learnt in her own country.

In addition, she had learnt to find her way around Paris in order, initially, to go from Mrs D.'s home to the latter's business premises, and later to travel to Maisons-Alfort, where Mrs G. lived, and finally to return to Mr and Mrs B.'s home.

36. She had a degree of independence, since she took the children to the locations where their educational and sports activities were held, and subsequently collected them. She was also able to attend a Catholic service in a church near Mr and Mrs B.'s home. In addition, she left the house to go shopping, since it was on one of those occasions that she had met Mrs G. and agreed with her to go to the latter's home.

37. The Court of Appeal further noted that the applicant had had an opportunity to contact her uncle by telephone outside Mr and Mrs B.'s home and to pay for calls from a telephone box. She had met her father and her uncle and had never complained about her situation.

38. Furthermore, Mrs B.'s mother confirmed that the applicant spoke good French and that she was in the habit of giving her small sums of money for family celebrations. She had frequently had the applicant and her grandchildren to stay in her country house and had never heard her complain of ill-treatment or contempt, although she had been free to express her views.

39. The applicant's uncle stated that she was free, among other things, to leave the house and call him from a telephone box, that she was appropriately dressed, in good health and always had some money, which could not have come from anyone but Mr and Mrs B. He had offered to give her money, but she had never asked for any. He added that he had raised this question with Mrs B., who had told him that a certain amount was set aside every month in order to build up a nest egg for the applicant, which would be given to her when she left, and that the girl was aware of this arrangement.

He stated that, on the basis of what he had been able to observe and conclude from his conversations with the applicant and with Mrs B., the girl had not been kept as a slave in the home in which she lived.

40. The Court of Appeal ruled that the additional investigations and hearings had shown that, while it did appear that the applicant had not been paid or that the payment was clearly disproportionate to the amount of work carried out (although the defendants' intention to create a nest egg that would be handed over to her on departure had not been seriously disputed), in contrast, the existence of working or living conditions that were incompatible with human dignity had not been established.

It also considered that it had not been established that the applicant was in a state of vulnerability or dependence since, by taking advantage of her ability to come and go at will, contacting her family at any time, leaving Mr and Mrs B.'s home for a considerable period and returning without coercion, the girl had, in spite of her youth, shown an undeniable form of independence, and vulnerability could not be established merely on the basis that she was an alien.

Accordingly, the Court of Appeal acquitted the defendants on all the charges against them.

41. The applicant appealed on points of law against that judgment. No appeal was lodged by the Principal Public Prosecutor's Office.

42. In a letter of 27 October 2000 to the Chair of the Committee against Modern Slavery, the public prosecutor attached to the Paris Court of Appeal wrote:

“In your letter of 23 October 2000 you asked me to inform you whether the public prosecution office under my direction has lodged an appeal on points of law against the judgment delivered on 19 October 2000 by the Twelfth Division of the court which heard the appeal in the criminal proceedings against Mr and Mrs B.

The Court of Appeal's decision to acquit the defendants of the two offences of insufficiently remunerating a person in a vulnerable position and subjecting a person in a vulnerable or dependent state to demeaning working conditions was based on an assessment of elements of pure fact.

Since the Court of Cassation considers that such assessments come within the unfettered discretion of the trial courts, an appeal on points of law could not be effectively argued.

That is why I have not made use of that remedy.”

43. The Court of Cassation delivered its judgment on 11 December 2001. It ruled as follows:

“All judgments must contain reasons justifying the decision reached; giving inadequate or contradictory reasons is tantamount to giving no reasons.

After an investigation into the situation of [the applicant], a young Togolese national whom they had employed and lodged in their home since she was 16, V. and A.B. were directly summoned before the criminal court for, firstly, taking advantage of a person's vulnerability or dependent state to obtain services without payment or any adequate payment, contrary to Article 225-13 of the Criminal Code and, secondly, for subjecting that person to working or living conditions incompatible with human dignity, contrary to Article 225-14 of the same Code.

In acquitting the defendants of the two above-mentioned offences and dismissing the civil party's claims in connection therewith, the appeal court, having noted that [the applicant] was a foreign minor, without a residence or work permit and without resources, nonetheless stated that her state of vulnerability and dependence, a common constituent element of the alleged offences, had not been established, given that the girl enjoyed a certain freedom of movement and that vulnerability could not be established merely on the basis that she was an alien.

Furthermore, in finding that the offence defined in Article 225-13 of the Criminal Code had not been made out, the court added that 'it does appear that the applicant has not been paid or that the payment was clearly disproportionate to the amount of work carried out (although the defendants' intention to build up a nest egg that would be handed over to her on departure has not been seriously disputed)'.

Finally, in acquitting the defendants of the offence set out in Article 225-14 of the Criminal Code, the courts found that subjection to working or living conditions incompatible with human dignity 'had not been established'.

However, in ruling in this way, with reasons that were inadequate and ineffective with regard to the victim's state of vulnerability and dependence and contradictory with regard to her remuneration, and without specifying the factual elements which established that her working conditions were compatible with human dignity, the Court of Appeal failed to draw from its findings the legal conclusions that were required in the light of Article 225-13 of the Criminal Code and did not justify its decision in the light of Article 225-14 of that Code.

The judgment must therefore be quashed.

For these reasons,

[The Court of Cassation] quashes the above-mentioned judgment of the Paris Court of Appeal dated 19 October 2000 but only in respect of the provisions dismissing the civil party's requests for compensation in respect of the offences provided for in Articles 225-13 and 225-14 of the Criminal Code, all other provisions being expressly maintained, and instructs that the case be remitted, in accordance with the law, for a rehearing of the matters in respect of which this appeal has been allowed. ...”

44. The Versailles Court of Appeal, to which the case was subsequently referred, delivered its judgment on 15 May 2003. It ruled, *inter alia*, as follows:

“As was correctly noted at first instance, the evidence shows that [the applicant], an alien who arrived in France at the age of 16, worked for several years for Mr and Mrs B., carrying out household tasks and looking after their three, and subsequently four, children for seven

days a week, from 7 a.m. to 10 p.m., without receiving any remuneration whatsoever; contrary to the defendants' claims, she was not considered a family friend, since she was obliged to follow Mrs B.'s instructions regarding her working hours and the work to be done, and was not free to come and go as she pleased.

In addition, there is no evidence to show that a nest egg has been built up for her, since the list of payments allegedly made by the defendants is in Mrs B.'s name.

It was only at the hearing before the *tribunal de grande instance* that the defendants gave the victim the sum of 50,000 francs.

Finally, far from showing that [the applicant] was happy to return to Mr and Mrs B.'s home, the conditions in which she did so after an absence of several months are, on the contrary, indicative of the pressure she had been subjected to by her family and of her state of resignation and emotional disarray.

With regard to the victim's state of dependence and vulnerability during the period under examination, it should be noted that this young girl was a minor, of Togolese nationality, an illegal immigrant in France, without a passport, more often than not without money, and that she was able to move about only under Mrs B.'s supervision for the purposes of the children's educational and sports activities.

Accordingly, it was on appropriate grounds, to which this court subscribes, that the court at first instance found that the constituent elements of the offence punishable under Article 225-13 of the Criminal Code were established in respect of the defendants.

With regard to the offence of subjecting a person in a vulnerable or dependent position to working or living conditions that are incompatible with human dignity:

As the court of first instance correctly noted, carrying out household tasks and looking after children throughout the day could not by themselves constitute working conditions incompatible with human dignity, this being the lot of many mothers; in addition, the civil party's allegations of humiliating treatment or harassment have not been proved.

Equally, the fact that [the applicant] did not have an area reserved for her personal use does not mean that the accommodation was incompatible with human dignity, given that Mr and Mrs B's own children shared the same room, which was in no way unhygienic.

Accordingly, the constituent elements of this second offence have not been established in respect of Mr and Mrs B.

Independently of the sums due to [the applicant] in wages and the payment of 50,000 francs in a belated gesture of partial remuneration, Mr B., whose intellectual and cultural level was such as to enable him to grasp fully the unlawfulness of his conduct, but who allowed the situation to continue, probably through cowardice, has, together with Mrs B., caused [the applicant] considerable psychological trauma, for which should be awarded 15,245 euros in compensation, as assessed by the court of first instance.”

45. On 3 October 2003 the Paris industrial tribunal delivered judgment following an application submitted by the applicant. It awarded her 31,238 euros (EUR) in respect of arrears of salary, EUR 1,647 in respect of the notice period and EUR 164 in respect of holiday leave.

II. RELEVANT LAW

46. The Criminal Code as worded at the material time

Article 225-13

“It shall be an offence punishable by two years' imprisonment and a fine of 500,000 francs to obtain from an individual the performance of services without payment or in exchange for

payment that is manifestly disproportionate to the amount of work carried out, by taking advantage of that person's vulnerability or state of dependence.”

Article 225-14

“It shall be an offence punishable by two years' imprisonment and a fine of 500,000 francs to subject an individual to working or living conditions which are incompatible with human dignity by taking advantage of that individual's vulnerability or state of dependence.”

47. The Criminal Code as amended by the Law of 18 March 2003

Article 225-13

“It shall be an offence punishable by five years' imprisonment and a fine of 150,000 euros to obtain from an individual whose vulnerability or state of dependence is apparent or of which the offender is aware, the performance of services without payment or in exchange for payment which is manifestly disproportionate to the amount of work carried out.”

Article 225-14

“It shall be an offence punishable by five years' imprisonment and a fine of 150,000 euros to subject an individual whose vulnerability or state of dependence is apparent or of which the offender is aware to working or living conditions which are incompatible with human dignity.”

Article 225-15

“The offences set out in Articles 225-13 and 225-14 shall be punishable by seven years' imprisonment and a fine of 200,000 euros if they are committed against more than one person.

If they are committed against a minor, they shall be punishable by seven years' imprisonment and a fine of 200,000 euros.

If they are committed against more than one person, including one or more minors, they shall be punishable by ten years' imprisonment and a fine of 300,000 euros.”

48. Information report by the French National Assembly's joint fact-finding taskforce on the various forms of modern slavery, tabled on 12 December 2001 (extracts)

“The situation of minors, who are more vulnerable and ought to receive special protection on account of their age, strikes the taskforce as highly worrying: ..., children doomed to work as domestic servants or in illegal workshops ... represent easy prey for traffickers of all kinds ...

What solutions can be proposed in view of the growth in these forms of slavery? Some already exist, of course. We have available a not inconsiderable arsenal of punitive measures. However, these are not always used in full and are proving an insufficient deterrent when put to the test. The police and the justice system are obtaining only limited results.

...

The determination of the drafters of the new Criminal Code to produce a text imbued with the concept of human rights is particularly clear from the provisions of Articles 225-13 and 225-14 of the Code, which created new offences making it unlawful to impose working and living conditions that are contrary to human dignity. As demonstrated by the explanatory memorandum to the initial 1996 bill, the purpose of those provisions was primarily to combat 'slum landlords' or other unscrupulous entrepreneurs who shamelessly exploit foreign workers who are in the country illegally.

...

The concept, found in both Articles 225-13 and 225-14 of the Criminal Code, of the abuse of an individual's vulnerability or state of dependence contains ambiguities that could be prejudicial to their application.

...

Thus, by failing on the one hand to specify the possible categories of individuals defined as vulnerable and, further, by failing to require that the vulnerability be of a 'particular' nature, the legislature has conferred on Articles 225-13 and 225-14 an extremely wide, or even vague, scope, one that is likely to cover circumstances of vulnerability or dependence that are 'social or cultural in nature'.

...

The current wording of the Criminal Code, especially that of Article 225-14, is highly ambiguous, since it requires, on the one hand, that the victim has been subjected to working or living conditions that are incompatible with human dignity and, on the other, that those conditions have been imposed through the 'abuse' of his or her vulnerability or state of dependency.

It may therefore logically be concluded, as Mr Guy Meyer, deputy public prosecutor at the Paris public prosecutor's office, stated before the taskforce, that, 'by converse implication... provided one has not taken advantage of [an individual's] vulnerability, it is alright to undermine human dignity [...] Undermining human dignity ought to be an offence in itself and, possibly, abuse of [an individual's] vulnerability or status as a minor an aggravating factor'.

That said, and since the law is silent, it is up to the court to determine where the scope of those provisions ends. In this connection, analysis of the case-law reveals differences in evaluation that impede the uniform application of the law throughout France, since, as Ms Françoise Favaro rightly noted when addressing the taskforce: 'We are in a sort of ephemeral haze in which everything is left to the judge's assessment.'

...

Even more surprisingly, on 19 October 2000 the same court of appeal refused in another case to apply the provisions of Articles 225-13 and 225-14 in favour of a young woman, a domestic slave, despite the fact that she was a minor at the relevant time. In its judgment, the court noted, *inter alia*: 'It has not been established that the young girl was in a position of vulnerability or dependence as, by taking advantage of the possibility of coming and going at will, contacting her family at any time, leaving Mr and Mrs X's home for a considerable period and returning without coercion, she has, in spite of her youth, shown an undeniable form of independence, and vulnerability cannot be established merely on the basis that she was an alien.'

It is therefore apparent that, in the absence of legal criteria enabling the courts to determine whether there has been abuse of [an individual's] vulnerability or state of dependence, the provisions of Articles 225-13 and 225-14 of the Criminal Code are open to interpretation in different ways, some more restrictive than others.

...

Whether with regard to actual or potential sentences, the shortcomings of the provisions are clearly visible, in view of the seriousness of the factual elements characteristic of modern slavery.

...

Bearing in mind, on the one hand, the constitutional status of the values protected by Articles 225-13 and 225-14 of the Criminal Code and, on the other, the seriousness of the offences in such cases, the inconsequential nature of the penalties faced by those guilty of them is surprising, and raises questions about the priorities of the French criminal justice system.

...

The minors whose cases the taskforce has had to examine are minors caught up or at risk of being caught up in slavery, whether for the provision of sex or labour. More often than not they are illegal immigrants.”

49. Documents of the Parliamentary Assembly of the Council of Europe

(a) Report by the Committee on Equal Opportunities for Women and Men, dated 17 May 2001 (extract)

“In France, since its foundation in 1994, the Committee against Modern Slavery (CEM) has taken up the cases of over 200 domestic slavery victims, mostly originating from West Africa (Ivory Coast, Togo, Benin) but also from Madagascar, Morocco, India, Sri Lanka and the Philippines. The majority of victims were women (95%). One-third arrived in France before they came of age and most of them suffered physical violence or sexual abuse.

The employers mostly came from West Africa or the Middle East. 20% are French nationals. 20% enjoyed immunity from prosecution, among them one diplomat from Italy and five French diplomats in post abroad. Victims working for diplomats mainly come from India, Indonesia, the Philippines and Sri Lanka. It has been estimated that there are several thousand victims of domestic slavery in France.”

(b) Recommendation 1523 (2001), adopted on 26 June 2001

“1. In the last few years a new form of slavery has appeared in Europe, namely domestic slavery. It has been established that over 4 million women are sold each year in the world.

2. In this connection the Assembly recalls and reaffirms Article 4, paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which prohibits slavery and servitude, and also the definition of slavery derived from the opinions and judgments of the European Commission of Human Rights and the European Court of Human Rights.

3. The Assembly also recalls Article 3 of the ECHR, which provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment, and Article 6, which proclaims the right of access to a court in civil and criminal matters, including cases where the employer enjoys immunity from jurisdiction.

...

5. It notes that the victims' passports are systematically confiscated, leaving them in a situation of total vulnerability with regard to their employers, and sometimes in a situation bordering on imprisonment, where they are subjected to physical and/or sexual violence.

6. Most of the victims of this new form of slavery are in an illegal situation, having been recruited by agencies and having borrowed money to pay for their journey.

7. The physical and emotional isolation in which the victims find themselves, coupled with fear of the outside world, causes psychological problems which persist after their release and leave them completely disoriented.

...

9. It regrets that none of the Council of Europe member States expressly make domestic slavery an offence in their criminal codes.

10. It accordingly recommends that the Committee of Ministers ask the governments of member States to:

i. make slavery and trafficking in human beings, and also forced marriage, offences in their criminal codes;

ii. strengthen border controls and harmonise policies for police cooperation, especially with respect to minors;

...

vi. protect the rights of victims of domestic slavery by:

a. generalising the issuing of temporary and renewable residence permits on humanitarian grounds;

b. taking steps to provide them with protection and with social, administrative and legal assistance;

c. taking steps for their rehabilitation and their reintegration, including the creation of centres to assist, among others, victims of domestic slavery;

d. developing specific programmes for their protection;

e. increasing victims' time limits for bringing proceedings for offences of slavery;

f. establishing compensation funds for the victims of slavery;

...”

(c) Recommendation 1663 (2004), adopted on 22 June 2004

“1. The Parliamentary Assembly is dismayed that slavery continues to exist in Europe in the twenty-first century. Although, officially, slavery was abolished over 150 years ago, thousands of people are still held as slaves in Europe, treated as objects, humiliated and abused. Modern slaves, like their counterparts of old, are forced to work (through mental or physical threat) with no or little financial reward. They are physically constrained or have other limits placed on their freedom of movement and are treated in a degrading and inhumane manner.

2. Today's slaves are predominantly female and usually work in private households, starting out as migrant domestic workers, au pairs or 'mail-order brides'. Most have come voluntarily, seeking to improve their situation or escaping poverty and hardship, but some have been deceived by their employers, agencies or other intermediaries, have been debt-bonded and even trafficked. Once working (or married to a 'consumer husband'), however, they are vulnerable and isolated. This creates ample opportunity for abusive employers or husbands to force them into domestic slavery.

...

5. The Council of Europe must have zero tolerance for slavery. As an international organisation defending human rights, it is the Council of Europe's duty to lead the fight against all forms of slavery and trafficking in human beings. The Organisation and its member States must promote and protect the human rights of the victim and ensure that the perpetrators of the crime of domestic slavery are brought to justice so that slavery can finally be eliminated from Europe.

6. The Assembly thus recommends that the Committee of Ministers:

i. *in general*:

a. bring the negotiations on the Council of Europe draft convention on action against trafficking in human beings to a rapid conclusion;

b. encourage member States to combat domestic slavery in all its forms as a matter of urgency, ensuring that holding a person in any form of slavery is a criminal offence in all member States;

c. ensure that the relevant authorities in the member States thoroughly, promptly and impartially investigate all allegations of any form of slavery and prosecute those responsible;

...

ii. *as concerns domestic servitude:*

a. elaborate a charter of rights for domestic workers, as already recommended in Recommendation 1523 (2001) on domestic slavery. Such a charter, which could take the form of a Committee of Ministers' recommendation or even of a convention, should guarantee at least the following rights to domestic workers:

- the recognition of domestic work in private households as 'real work', that is, to which full employment rights and social protection apply, including the minimum wage (where it exists), sickness and maternity pay as well as pension rights;

- the right to a legally enforceable contract of employment setting out minimum wages, maximum hours and responsibilities;

- the right to health insurance;

- the right to family life, including health, education and social rights for the children of domestic workers;

- the right to leisure and personal time;

- the right for migrant domestic workers to an immigration status independent of any employer, the right to change employer and to travel within the host country and between all countries of the European Union and the right to the recognition of qualifications, training and experience obtained in the home country;

...”

50. Council of Europe Convention on Action against Trafficking in Human Beings, opened for signature on 16 May 2005 (extracts)

Preamble

“...

Considering that trafficking in human beings may result in slavery for victims;

Considering that respect for victims' rights, protection of victims and action to combat trafficking in human beings must be the paramount objectives;

Considering that all actions or initiatives against trafficking in human beings must be non-discriminatory, take gender equality into account as well as a child-rights approach;

...

Bearing in mind the following recommendations of the Parliamentary Assembly of the Council of Europe: ... 1663 (2004) Domestic slavery: servitude, au pairs and mail-order brides;

...”

Article 1 – Purposes of the Convention

“1. The purposes of this Convention are:

(a) to prevent and combat trafficking in human beings, while guaranteeing gender equality;

(b) to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution;

...”

Article 4 – Definitions

“For the purposes of this Convention:

(a) 'Trafficking in human beings' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of 'trafficking in human beings' to the intended exploitation set forth in sub-paragraph (a) of this Article shall be irrelevant where any of the means set forth in sub-paragraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in human beings' even if this does not involve any of the means set forth in sub-paragraph (a) of this Article;

(d) 'Child' shall mean any person under eighteen years of age;

(e) 'Victim' shall mean any natural person who is subject to trafficking in human beings as defined in this Article.”

Article 19 – Criminalisation of the use of services of a victim

“Each Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences under its internal law, the use of services which are the object of exploitation as referred to in Article 4 paragraph (a) of this Convention, with the knowledge that the person is a victim of trafficking in human beings.”

51. Other international conventions

(a) Forced Labour Convention, adopted on 28 June 1930 by the General Conference of the International Labour Organisation (ratified by France on 24 June 1937)

Article 2

“1. For the purposes of this Convention the term 'forced or compulsory labour' shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.

2. Nevertheless, for the purposes of this Convention the term 'forced or compulsory labour' shall not include:

(a) Any work or service exacted in virtue of compulsory military service laws for work of a purely military character;

(b) Any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;

(c) Any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;

(d) Any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;

(e) Minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.”

Article 3

“For the purposes of this Convention the term 'competent authority' shall mean either an authority of the metropolitan country or the highest central authority in the territory concerned.”

Article 4

“1. The competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations.

2. Where such forced or compulsory labour for the benefit of private individuals, companies or associations exists at the date on which a Member's ratification of this Convention is registered by the Director-General of the International Labour Office, the Member shall completely suppress such forced or compulsory labour from the date on which this Convention comes into force for that Member.”

(b) Slavery Convention, signed in Geneva on 25 September 1926, which came into force on 9 March 1927, in accordance with the provisions of Article 12

Article 1

“For the purpose of the present Convention, the following definitions are agreed upon:

1. Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised;

2. The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.”

Article 4

“The High Contracting Parties shall give to one another every assistance with the object of securing the abolition of slavery and the slave trade.”

Article 5

“The High Contracting Parties recognise that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.

It is agreed that:

1. Subject to the transitional provisions laid down in paragraph 2 below, compulsory or forced labour may only be exacted for public purposes;

2. In territories in which compulsory or forced labour for other than public purposes still survives, the High Contracting Parties shall endeavour progressively and as soon as possible to put an end to the practice. So long as such forced or compulsory labour exists, this labour shall invariably be of an exceptional character, shall always receive adequate remuneration, and shall not involve the removal of the labourers from their usual place of residence;

3. In all cases, the responsibility for any recourse to compulsory or forced labour shall rest with the competent central authorities of the territory concerned.”

(c) Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted on 30 April 1956 and which came into force in respect of France on 26 May 1964

Section I. Institutions and practices similar to slavery

Article 1

“Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in Article 1 of the Slavery Convention signed at Geneva on 25 September 1926:

(a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;

(b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;

...

(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.”

(d) International Convention on the Rights of the Child, dated 20 November 1989, which came into force in respect of France on 6 September 1990

Article 19

“1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”

Article 32

“1. States Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present Article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

- (a) Provide for a minimum age or minimum ages for admission to employment;
- (b) Provide for appropriate regulation of the hours and conditions of employment;
- (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present Article.”

Article 36

“States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 4 OF THE CONVENTION

52. The applicant complained that there had been a violation of Article 4 of the Convention. This provision states, *inter alia*:

- “1. No one shall be held in slavery or servitude.
- 2. No one shall be required to perform forced or compulsory labour.
- ...”

A. Whether the applicant had “victim” status

53. The Government contended by way of primary submission that the applicant could no longer claim to be the victim of a violation of the Convention within the meaning of Article 34.

They stated at the outset that they did not contest that the applicant had been the victim of particularly reprehensible conduct on the part of the couple who had

taken her in, or that the Paris Court of Appeal's judgment of 19 October 2000 had failed to acknowledge the reality of that situation as a matter of law. However, they noted that the applicant had not appealed against the first-instance judgment which had convicted her "employers" solely on the basis of Article 225-13 of the Criminal Code and that it should be concluded from this that she had accepted their conviction under that Article alone.

Accordingly, the applicant could not use the absence of a conviction under Article 225-14 of the Criminal Code to argue that she still had victim status.

54. Furthermore, the Government noted that the applicant's appeal on points of law had still been pending when her application was lodged with the Court. However, following the Court of Cassation's judgment quashing the ruling by the Paris Court of Appeal, the court of appeal to which the case was subsequently remitted had recognised the applicant's state of dependence and vulnerability within the meaning of Article 225-13 of the Criminal Code, as well as the exploitation to which she had been subjected, although it had been required only to examine the civil claims. They emphasised that, in line with the case-law, a decision or measure favourable to an applicant was sufficient to deprive him or her of "victim" status, provided that the national authorities had acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention.

55. The Government concluded that the sanction imposed by the Versailles Court of Appeal was to be considered as having afforded redress for the violation alleged by the applicant before the Court, especially as she had not appealed on points of law against its judgment. In addition, they pointed out that the Paris industrial tribunal had made awards in respect of unpaid wages and benefits.

56. Finally, the applicant's immigration status had been regularised and she had received a residence permit enabling her to reside in France lawfully and to pursue her studies. In conclusion, the Government considered that the applicant could no longer claim to be the victim of a violation of the Convention within the meaning of Article 34.

57. The applicant did not dispute that certain measures and decisions had been taken which were favourable to her.

58. However, she stressed that the national authorities had never acknowledged, expressly or in substance, her complaint that the State had failed to comply with its positive obligation, inherent in Article 4, to secure tangible and effective protection against the practices prohibited by this Article and to which she had been subjected by Mr and Mrs B. Only a civil remedy had been provided.

59. She alleged that Articles 225-13 and 225-14 of the Criminal Code, as worded at the material time, were too open and elusive, and in such divergence with the European and international criteria for defining servitude and forced or compulsory labour that she had not been secured effective and sufficient protection against the practices to which she had been subjected.

60. Article 34 of the Convention provides that "[t]he Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto ...".

61. The Court reiterates that it falls first to the national authorities to redress any alleged violation of the Convention. In this regard, the question whether an applicant can claim to be the victim of the violation alleged is relevant at all stages of the proceedings under the Convention (see *Karahalios v. Greece*, no. 62503/00, § 21, 11 December 2003, and *Malama v. Greece* (dec.), no. 43622/98, 25 November 1999).

62. It is the settled case-law of the Court that the word “victim” in the context of Article 34 of the Convention denotes the person directly affected by the act or omission in issue, the existence of a violation of the Convention being conceivable even in the absence of prejudice; prejudice is relevant only in the context of Article 41. Consequently, a decision or measure favourable to an applicant is not in principle sufficient to deprive him of his status as a “victim” unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, among other authorities, *Amuur v. France*, judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 846, § 36; *Brumărescu v. Romania* [GC], no. 28342/95, § 50, ECHR 1999-VII; and *Association Ekin v. France* (dec.), no. 39288/98, 18 January 2000).

63. The Court considers that the Government's argument alleging that the applicant had lost her status as a victim raises questions about the French criminal law's provisions on slavery, servitude and forced or compulsory labour and the manner in which those provisions are interpreted by the domestic courts. Those questions are closely linked to the merits of the applicant's complaint. The Court consequently considers that they should be examined under the substantive provision of the Convention relied on by the applicant (see, in particular, *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32; *Gnahoré v. France*, no. 40031/98, § 26, ECHR 2000-IX; and *Isayeva v. Russia*, no. 57950/00, § 161, 24 February 2005).

B. The merits

1. Applicability of Article 4 and the positive obligations

64. The Court notes that the Government do not dispute that Article 4 is applicable in the instant case.

65. The applicant considered that the exploitation to which she had been subjected while a minor amounted to a failure by the State to comply with its positive obligation under Articles 1 and 4 of the Convention, taken together, to put in place adequate criminal-law provisions to prevent and effectively punish the perpetrators of those acts.

66. In the absence of rulings on this matter in respect of Article 4, she referred in detail to the Court's case-law on States' positive obligations with regard to Articles 3 and 8 (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91; *A. v. the United Kingdom*, judgment of 23 September 1998, *Reports* 1998-VI; and *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII).

67. She added that, in the various cases in question, the respondent States had been held to be responsible on account of their failure, in application of Article 1 of the Convention, to set up a system of criminal prosecution and punishment that would ensure tangible and effective protection of the rights guaranteed by Articles 3 and/or 8 against the actions of private individuals.

68. She emphasised that this obligation covered situations where the State authorities were criticised for not having taken adequate measures to prevent the existence of the impugned situation or to limit its effects. In addition, the scope of the State's positive obligation to protect could vary on account of shortcomings in its legal system, depending on factors such as the aspect of law in issue, the seriousness of the offence committed by the private individual concerned or particular vulnerability on the part of the victim. This was precisely the subject of her application, in the specific context of protection of a minor's rights under Article 4.

69. The applicant added that, in the absence of any appropriate criminal-law machinery to prevent and punish the direct perpetrators of alleged ill-treatment, it could not be maintained that civil proceedings to afford reparation of the damage suffered were sufficient to provide her with adequate protection against possible assaults on her integrity.

70. She considered that the right not to be held in servitude laid down in Article 4 § 1 of the Convention was an absolute right, permitting of no exception in any circumstances. She noted that the practices prohibited under Article 4 were also the subject of specific international conventions which applied to both children and adults.

71. Accordingly, the applicant considered that the States had a positive obligation, inherent in Article 4 of the Convention, to adopt tangible criminal-law provisions that would deter such offences, backed up by law-enforcement machinery for the prevention, detection and punishment of breaches of such provisions.

72. She further observed that, as the public prosecutor's office had not considered it necessary to appeal on points of law on the grounds of public interest, the acquittal of Mr and Mrs B. of the offences set out in Articles 225-13 and 225-14 of the Criminal Code had become final. Consequently, the court of appeal to which the case had been remitted after the initial judgment was quashed could not return a guilty verdict nor, *a fortiori*, impose a sentence, but could only decide whether to award civil damages. She considered that a mere finding that the constituent elements of the offence set out in Article 225-13 of the Criminal Code had been established and the imposition of a fine and damages could not be regarded as an acknowledgment, whether express or in substance, of a breach of Article 4 of the Convention.

73. With regard to possible positive obligations, the Government conceded that, if the line taken by the European Commission of Human Rights in *X and Y v. the Netherlands* (cited above) were to be applied to the present case, then it appeared that they did indeed exist. They pointed out, however, that States had a certain margin of appreciation when it came to intervening in the sphere of relations between individuals.

74. In this respect, they referred to the Court's case-law, and especially *Calvelli and Ciglio v. Italy* ([GC], no. 32967/96, ECHR 2002-I); *A. v. the United Kingdom*, cited above; and *Z and Others v. the United Kingdom* ([GC], no. 29392/95, § 109, ECHR 2001-V), as well as the decision in *G.G. v. Italy* ((dec.), no. 34574/97, 10 October 2002) in which the Court had noted in connection with Article 3 that "criminal proceedings did not represent the only effective remedy in cases of this kind, but civil proceedings, making it possible to obtain redress for the damage suffered must in principle be open to children who have been subjected to ill-treatment".

75. On that basis, the Government argued that, in the instant case, the proceedings before the criminal courts which led to the payment of damages were sufficient under Article 4 in order to comply with any positive obligation arising from the Convention.

76. In the alternative, the Government considered that in any event French criminal law fulfilled any positive obligations arising under Article 4 of the Convention. They submitted that the wording of Articles 225-13 and 225-14 of the Criminal Code made it possible to fight against all forms of exploitation through labour for the purposes of Article 4. They stressed that these criminal-law provisions had, at the time of the events complained of by the applicant, already resulted in several criminal-court rulings, thus establishing a case-law, and that, since then, they had given rise to various other decisions to the same effect.

77. The Court points out that it has already been established that, with regard to certain Convention provisions, the fact that a State refrains from infringing the guaranteed rights does not suffice to conclude that it has complied with its obligations under Article 1 of the Convention.

78. Thus, with regard to Article 8 of the Convention, it held as long ago as 1979:

“... Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life.

This means, amongst other things, that when the State determines in its domestic legal system the regime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life. As envisaged by Article 8, respect for family life implies in particular, in the Court's view, the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family. In this connection, the State has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of Article 8 without there being any call to examine it under paragraph 2. ...” (*Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, pp. 14-15, § 31)

79. It subsequently clarified this concept:

“Positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection.” (*X and Y v. the Netherlands*, cited above, pp. 11-13, §§ 23, 24 and 27; *August v. the United Kingdom* (dec.), no. 36505/02, 21 January 2003; and *M.C. v. Bulgaria*, cited above, § 150)

80. As regards Article 3 of the Convention, the Court has found on numerous occasions that

“... the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals.” (see *A. v. the United Kingdom*, cited above, p. 2699, § 22; *Z and Others v. the United Kingdom*, cited above, §§ 73-75; *E. and Others v. the United Kingdom*, no. 33218/96, 26 November 2002; and *M.C. v. Bulgaria*, cited above, § 149)

81. It has also found that:

“Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.” (see, *mutatis mutandis*, *X and Y v. the Netherlands*, cited above, pp. 11-13, §§ 21-27; *Stubbings and Others v. the United Kingdom*, 22 October 1996, *Reports* 1996-IV, p. 1505, §§ 62-64; and *A. v. the United Kingdom*, cited above, as well as the United Nations Convention on the Rights of the Child, Articles 19 and 37)

82. The Court considers that, together with Articles 2 and 3, Article 4 of the Convention enshrines one of the basic values of the democratic societies making up the Council of Europe.

83. It notes that the Commission had proposed in 1983 that it could be argued that a Government's responsibility was engaged to the extent that it was their duty to ensure that the rules adopted by a private association did not run contrary to the provisions of the Convention, in particular where the domestic courts had

jurisdiction to examine their application (see *X v. the Netherlands*, no. 9327/81, Commission decision of 3 May 1983, Decisions and Reports (DR) 32, p. 180).

84. The Court notes that, in referring to the above-mentioned case, the Government accepted at the hearing that positive obligations did appear to exist in respect of Article 4.

85. In this connection, it notes that Article 4 § 1 of the Forced Labour Convention, adopted by the International Labour Organisation (ILO) on 28 June 1930 and ratified by France on 24 June 1937, provides:

“The competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations.”

86. Furthermore, Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted on 30 April 1956, which came into force in respect of France on 26 May 1964, states:

“Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in Article 1 of the Slavery Convention signed at Geneva on 25 September 1926: ... [d]ebt bondage, ... [a]ny institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.”

87. In addition, with particular regard to children, Article 19 § 1 of the International Convention on the Rights of the Child of 20 November 1989, which came into force in respect of France on 6 September 1990, provides:

“States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, ..., maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”

Article 32 provides:

“1. States Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present Article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

- (a) Provide for a minimum age or minimum ages for admission to employment;
- (b) Provide for appropriate regulation of the hours and conditions of employment;
- (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present Article.”

88. Finally, the Court notes that it appears from the Parliamentary Assembly's findings (see “Relevant law” above) that “today's slaves are predominantly female and usually work in private households, starting out as migrant domestic workers ...”.

89. In those circumstances, the Court considers that limiting compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective. Accordingly, it necessarily

follows from this provision that States have positive obligations, in the same way as under Article 3 for example, to adopt criminal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice (see *M.C. v. Bulgaria*, cited above, § 153).

2. *Alleged violation of Article 4 of the Convention*

90. With regard to the violation of Article 4 of the Convention, the applicant noted from the outset that the right not to be held in servitude laid down in this provision was an absolute one, in the same way as the right not to be compelled to perform forced or compulsory labour.

91. She said that, although the Convention did not define the terms servitude or “forced or compulsory labour”, reference should be made to the relevant international conventions in this field to determine the meaning of these concepts, while importance had to be attached in the instant case to the criteria laid down by both the United Nations and the Council of Europe for identifying modern forms of slavery and servitude, which were closely linked to trafficking in human beings, and to the internationally recognised necessity of affording children special protection on account of their age and vulnerability.

92. She pointed out that her situation had corresponded to three of the four servile institutions or practices referred to in Article 1 of the Supplementary Geneva Convention of 30 April 1956, namely debt bondage, the delivery of a child or adolescent to a third person, whether for reward or not, with a view to the exploitation of his or her labour, and serfdom. She noted that she had not come to France in order to work as a domestic servant but had been obliged to do so as a result of the trafficking to which she had been subjected by Mrs B., who had obtained her parents' agreement through false promises.

She concluded that such “delivery” of a child by her father, with a view to the exploitation of her labour, was similar to the practice, analogous to slavery, referred to in Article 1 (d) of the United Nations Supplementary Convention of 1956.

93. The applicant also referred to the documentation published by the Council of Europe on domestic slavery and pointed out that the criteria used included confiscation of the individual's passport, the absence of remuneration or remuneration that was disproportionate to the services provided, deprivation of liberty or self-imposed imprisonment, and cultural, physical and emotional isolation.

94. She added that it was clear from the facts that her situation was not temporary or occasional in nature, as was normally the case with “forced or compulsory labour”. Her freedom to come and go had been limited, her passport had been taken away from her, her immigration status had been precarious before becoming illegal, and she had also been kept by Mr and Mrs B. in a state of fear that she would be arrested and expelled. She considered that this was equivalent to the concept of self-imposed imprisonment described above.

95. Referring to her working and living conditions at Mr and Mrs B.'s home, she concluded that her exploitation at their hands had compromised her education and social integration, as well as the development and free expression of her personality. Her identity as a whole had been involved, which was a characteristic of servitude but not, in general, of forced or compulsory labour.

96. She added that in addition to the unremunerated exploitation of another's work, the characteristic feature of modern slavery was a change in the individual's state or condition, on account of the level of constraint or control to which his or her person, life, personal effects, right to come and go at will or to take decisions was subjected.

She explained that, although she had not described her situation as “forced labour” in the proceedings before the Versailles Court of Appeal, the civil party had claimed in its submissions that “the exploitation to which Ms Siliadin was subjected ... had, at the very least, the characteristics of 'forced labour' within the meaning of Article 4 § 2 of the Convention ...; in reality, she was a domestic slave who had been recruited in Africa”.

97. As to the definition of “forced or compulsory labour”, the applicant drew attention to the case-law of the Commission and the Court, and emphasised that developments in international law favoured granting special protection to children.

98. She noted that French criminal law did not contain specific offences of slavery, servitude or forced or compulsory labour, still less a definition of those three concepts that was sufficiently specific and flexible to be adapted to the forms those practices now took. In addition, prior to the enactment of the Law of 18 March 2003, there had been no legislation that directly made it an offence to traffic in human beings.

99. Accordingly, the offences to which she had been subjected fell within the provisions of Articles 225-13 and 225-14 of the Criminal Code as worded at the material time. These were non-specific texts of a more general nature, which both required that the victim be in a state of vulnerability or dependence. Those concepts were as vague as that of the offender's “taking advantage”, which was also part of the definition of the two offences. In this connection, she emphasised that both legal commentators and the National Assembly's taskforce on the various forms of modern slavery had highlighted the lack of legal criteria enabling the courts to determine whether such a situation obtained, which had led in practice to unduly restrictive interpretations.

100. Thus, Article 225-13 of the Criminal Code made it an offence to obtain another person's labour by taking advantage of him or her. In assessing whether the victim was vulnerable or in a state of dependence, the courts were entitled to take into account, among other circumstances, certain signs of constraint or control of the individual. However, those were relevant only as the prerequisites for a finding of exploitation, not as constituent elements of the particular form of the offence that was modern slavery. In addition, this article made no distinction between employers who took advantage of the illegal position of immigrant workers who were already in France and those who deliberately placed them in such a position by resorting to trafficking in human beings.

101. She added that, contrary to Article 225-13, Article 225-14 required, and continued to require, an infringement of human dignity for the offence to be established. That was a particularly vague concept, and one subject to random interpretation. It was for this reason that neither her working nor living conditions had been found by the court to be incompatible with human dignity.

102. The applicant said in conclusion that the criminal-law provisions in force at the material time had not afforded her adequate protection from servitude or from forced or compulsory labour in their contemporary forms, which were contrary to Article 4 of the Convention. As to the fact that the criminal proceedings had resulted in an award of compensation, she considered that this could not suffice to absolve the State of its obligation to establish a criminal-law machinery which penalised effectively those guilty of such conduct and deterred others.

103. With regard to the alleged violation of Article 4, the Government first observed that the Convention did not define the term “servitude”. They submitted that, according to the case-law, “servitude” was close to “slavery”, which was at the extreme end of the scale. However, servitude reflected a situation of

exploitation which did not require that the victim be objectified to the point of becoming merely another person's property.

104. As to the difference between “servitude” and “forced or compulsory labour”, they concluded from the case-law of the Commission and the Court that servitude appeared to characterise situations in which denial of the individual's freedom was not limited to the compulsory provision of labour, but also extended to his or her living conditions, and that there was no potential for improvement, an element which was absent from the concept of “forced or compulsory labour”.

105. With regard to the difference between “forced labour” and “compulsory labour”, the Government noted that, while the case-law's definition of “forced labour” as labour performed under the influence of “physical or psychological force” seemed relatively clear, the situation was less so with regard to “compulsory labour”.

106. The Government did not deny that the applicant's situation fell within Article 4 of the Convention and emphasised that she herself had specifically described her situation as “forced labour” within the meaning of that provision.

107. However, they submitted that the domestic judicial authorities had undisputedly remedied the violation of the Convention by ruling that the elements constituting the offence set out in Article 225-13 of the Criminal Code had been established.

108. Finally, the Government pointed out that the wording of Articles 225-13 and 225-14 of the Criminal Code made it possible to combat all forms of exploitation of an individual through labour falling within Article 4 of the Convention.

109. The Court notes that the applicant arrived in France from Togo at the age of 15 years and 7 months with a person who had agreed with her father that she would work until her air ticket had been reimbursed, that her immigration status would be regularised and that she would be sent to school.

110. In reality, the applicant worked for this person for a few months before being “lent” to Mr and Mrs B. It appears from the evidence that she worked in their house without respite for approximately fifteen hours per day, with no day off, for several years, without ever receiving wages or being sent to school, without identity papers and without her immigration status being regularised. She was accommodated in their home and slept in the children's bedroom.

111. The Court also notes that, in addition to the Convention, numerous international conventions have as their objective the protection of human beings from slavery, servitude and forced or compulsory labour (see “Relevant law” above). As the Parliamentary Assembly of the Council of Europe has pointed out, although slavery was officially abolished more than 150 years ago, “domestic slavery” persists in Europe and concerns thousands of people, the majority of whom are women.

112. The Court reiterates that Article 4 enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 4 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see, with regard to Article 3, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 163; *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, pp. 34-35, § 88; *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, p. 1855, § 79; and *Selmouni v. France* [GC], no. 25803/94, § 79, ECHR 1999-V).

In those circumstances, the Court considers that, in accordance with contemporary norms and trends in this field, the member States' positive

obligations under Article 4 of the Convention must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in such a situation (see, *mutatis mutandis*, *M.C. v. Bulgaria*, cited above, § 166).

113. Accordingly, the Court must determine whether the applicant's situation falls within Article 4 of the Convention.

114. It is not disputed that she worked for years for Mr and Mrs B., without respite and against her will.

It has also been established that the applicant has received no remuneration from Mr and Mrs B. for her work.

115. In interpreting Article 4 of the European Convention, the Court has in a previous case already taken into account the ILO conventions, which are binding on almost all of the Council of Europe's member States, including France, and especially the 1930 Forced Labour Convention (see *Van der Mussele v. Belgium*, judgment of 23 November 1983, Series A no. 70, p. 16, § 32).

116. It considers that there is in fact a striking similarity, which is not accidental, between paragraph 3 of Article 4 of the European Convention and paragraph 2 of Article 2 of Convention No. 29. Paragraph 1 of the last-mentioned Article provides that “for the purposes” of the latter convention, the term “forced or compulsory labour” shall mean “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.

117. It remains to be ascertained whether there was “forced or compulsory” labour. This brings to mind the idea of physical or mental constraint. What there has to be is work “exacted ... under the menace of any penalty” and also performed against the will of the person concerned, that is work for which he “has not offered himself voluntarily” (see *Van der Mussele*, cited above, p. 17, § 34).

118. The Court notes that, in the instant case, although the applicant was not threatened by a “penalty”, the fact remains that she was in an equivalent situation in terms of the perceived seriousness of the threat.

She was an adolescent girl in a foreign land, unlawfully present on French territory and in fear of arrest by the police. Indeed, Mr and Mrs B. nurtured that fear and led her to believe that her status would be regularised (see paragraph 22 above).

Accordingly, the Court considers that the first criterion was met, especially since the applicant was a minor at the relevant time, a point which the Court emphasises.

119. As to whether she performed this work of her own free will, it is clear from the facts of the case that it cannot seriously be maintained that she did. On the contrary, it is evident that she was not given any choice.

120. In these circumstances, the Court considers that the applicant was, at the least, subjected to forced labour within the meaning of Article 4 of the Convention at a time when she was a minor.

121. It remains for the Court to determine whether the applicant was also held in servitude or slavery.

Sight should not be lost of the Convention's special features or of the fact that it is a living instrument which must be interpreted in the light of present-day conditions, and that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies (see, among many other authorities, *Selmouni*, cited above, § 101).

122. The Court notes at the outset that, according to the 1927 Slavery Convention, “slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”.

It notes that this definition corresponds to the “classic” meaning of slavery as it was practised for centuries. Although the applicant was, in the instant case, clearly deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr and Mrs B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an “object”.

123. With regard to the concept of “servitude”, what is prohibited is a “particularly serious form of denial of freedom” (see *Van Droogenbroeck v. Belgium*, Commission's report of 9 July 1980, Series B no. 44, p. 30, §§ 78-80). It includes, “in addition to the obligation to perform certain services for others ... the obligation for the 'serf' to live on another person's property and the impossibility of altering his condition”. In this connection, in examining a complaint under this paragraph of Article 4, the Commission paid particular attention to the Abolition of Slavery Convention (see also *Van Droogenbroeck v. Belgium*, no. 7906/77, Commission decision of 5 July 1979, DR 17, p. 59).

124. It follows in the light of the case-law on this issue that for Convention purposes “servitude” means an obligation to provide one's services that is imposed by the use of coercion, and is to be linked with the concept of “slavery” described above (see *Seguin v. France* (dec.), no. 42400/98, 7 March 2000).

125. Furthermore, under the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, each of the States Parties to the convention must take all practicable and necessary legislative and other measures to bring about the complete abolition or abandonment of the following institutions and practices:

“(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.”

126. In addition to the fact that the applicant was required to perform forced labour, the Court notes that this labour lasted almost fifteen hours a day, seven days per week.

She had been brought to France by a relative of her father's, and had not chosen to work for Mr and Mrs B.

As a minor, she had no resources and was vulnerable and isolated, and had no means of living elsewhere than in the home of Mr and Mrs B., where she shared the children's bedroom as no other accommodation had been offered. She was entirely at Mr and Mrs B.'s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred.

127. In addition, the applicant, who was afraid of being arrested by the police, was not in any event permitted to leave the house, except to take the children to their classes and various activities. Thus, she had no freedom of movement and no free time.

128. As she had not been sent to school, despite the promises made to her father, the applicant could not hope that her situation would improve and was completely dependent on Mr and Mrs B.

129. In those circumstances, the Court concludes that the applicant, a minor at the relevant time, was held in servitude within the meaning of Article 4 of the Convention.

130. Having regard to its conclusions with regard to the positive obligations under Article 4, it now falls to the Court to examine whether the impugned legislation and its application in the case in issue had such significant flaws as to amount to a breach of Article 4 by the respondent State.

131. According to the applicant, the provisions of French criminal law had not afforded her sufficient protection against the situation and had not made it possible for the culprits to be punished.

132. The Government, for their part, submitted that Articles 225-13 and 225-14 of the Criminal Code made it possible to combat the exploitation through labour of an individual for the purposes of Article 4 of the Convention.

133. The Court notes that the Parliamentary Assembly of the Council of Europe, in its Recommendation 1523 (2001), “[regretted] that none of the Council of Europe member States expressly [made] domestic slavery an offence in their criminal codes”.

134. It notes with interest the conclusions reached by the French National Assembly's joint taskforce on the various forms of modern slavery (see “Relevant law” above).

More specifically, with regard to Articles 225-13 and 225-14 as worded as the material time, the taskforce found, in particular:

“... We have available a not inconsiderable arsenal of punitive measures. However, these are not always used in full and are proving an insufficient deterrent when put to the test. ...

...

The concept, found in both Articles 225-13 and 225-14 of the Criminal Code, of the abuse of an individual's vulnerability or state of dependence contains ambiguities that could be prejudicial to their application.

...

That said, and since the law is silent, it is up to the court to determine where the scope of those provisions ends. In this connection, analysis of the case-law reveals differences in evaluation that impede the uniform application of the law throughout France ...

...

It is therefore apparent that, in the absence of legal criteria enabling the courts to determine whether there has been abuse of [an individual's] vulnerability or state of dependence, the provisions of Articles 225-13 and 225-14 of the Criminal Code are open to interpretation in different ways, some more restrictive than others.

...

Whether with regard to actual or potential sentences, the shortcomings of the provisions are clearly visible, in view of the seriousness of the factual elements characteristic of modern slavery.

...

Bearing in mind, on the one hand, the constitutional status of the values protected by Articles 225-13 and 225-14 of the Criminal Code and, on the other, the seriousness of the offences in such cases, the inconsequential nature of the penalties faced by those guilty of them is surprising, and raises questions about the priorities of the French criminal justice system.”

135. The Court notes that, in the present case, the applicant's “employers” were prosecuted under Articles 225-13 and 225-14 of the Criminal Code, which make it an offence, respectively, to exploit an individual's labour and to submit

him or her to working or living conditions that are incompatible with human dignity.

136. In the judgment delivered on 10 June 1999, the Paris *tribunal de grande instance* found Mr and Mrs B. guilty of the offence defined in Article 225-13 of the Criminal Code. Conversely, it found that the offence set out in Article 225-14 had not been made out.

137. The defendants were sentenced to twelve months' imprisonment, seven of which were suspended, and ordered to pay a fine of FRF 100,000 each and to pay, jointly and severally, FRF 100,000 to the applicant in damages.

138. On an appeal by Mr and Mrs B., the Paris Court of Appeal delivered a judgment on 19 October 2000 in which it quashed the judgment at first instance and acquitted the defendants.

139. On an appeal on points of law by the applicant alone, the Court of Cassation overturned the Court of Appeal's judgment, but only in respect of its civil aspects, and the case was remitted to another court of appeal.

140. On 15 May 2003 that court gave a judgment upholding the findings of the *tribunal de première instance* and awarded the applicant damages.

141. The Court notes that slavery and servitude are not as such classified as offences under French criminal law.

142. The Government pointed to Articles 225-13 and 225-14 of the Criminal Code.

The Court notes, however, that those provisions do not deal specifically with the rights guaranteed under Article 4 of the Convention, but concern, in a much more restrictive way, exploitation through labour and subjection to working and living conditions that are incompatible with human dignity.

It therefore needs to be determined whether, in the instant case, those Articles provided effective penalties for the conduct to which the applicant had been subjected.

143. The Court has previously stated that children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity (see, *mutatis mutandis*, *X and Y v. the Netherlands*, cited above, pp. 11-13, §§ 21-27; *Stubbings and Others*, cited above, p. 1505, §§ 62-64; and *A. v. the United Kingdom*, cited above, p. 2699, § 22; and also the United Nations Convention on the Rights of the Child, Articles 19 and 37).

144. Further, the Court has held in a case concerning rape that “the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated” (see *X and Y v. the Netherlands*, cited above, p. 13, § 27).

145. The Court observes that, in the instant case, the applicant, who was subjected to treatment contrary to Article 4 and held in servitude, was not able to see those responsible for the wrongdoing convicted under the criminal law.

146. In this connection, it notes that, as the Principal Public Prosecutor did not appeal on points of law against the Court of Appeal's judgment of 19 October 2000, the appeal to the Court of Cassation concerned only the civil aspect of the case and Mr and Mrs B.'s acquittal thus became final.

147. In addition, according to the report of 12 December 2001 by the French National Assembly's joint taskforce on the various forms of modern slavery, Articles 225-13 and 225-14 of the Criminal Code, as worded at the material time, were open to very differing interpretations from one court to the next, as

demonstrated by this case, which, indeed, was referred to by the taskforce as an example of a case in which a court of appeal had unexpectedly declined to apply Articles 225-13 and 225-14.

148. In those circumstances, the Court considers that the criminal-law legislation in force at the material time did not afford the applicant, a minor, practical and effective protection against the actions of which she was a victim.

It notes that the legislation has been changed but the amendments, which were made subsequently, were not applicable to the applicant's situation.

It emphasises that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies (see paragraph 121 above).

149. The Court thus finds that in the present case there has been a violation of the respondent State's positive obligations under Article 4 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

150. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

151. The applicant did not make a claim in respect of damage.

B. Costs and expenses

152. The applicant sought 26,209.69 euros for the costs of legal representation, from which the sums received by way of legal aid were to be deducted.

153. The Government first observed that the applicant had not produced any evidence that she had paid this sum.

They also considered that the amount sought was excessive and should be reduced to a more reasonable level.

154. The Court considers that the applicant's representative has undoubtedly done a considerable amount of work in order to submit and argue this application, which concerns an area in which there is very little case-law to date.

In those circumstances, the Court, ruling on an equitable basis, awards the applicant the entire amount claimed in costs.

C. Default interest

155. The Court considers it appropriate that the default interest should be based on an annual rate equal to the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection based on the applicant's loss of victim status;
2. *Holds* that there has been a violation of Article 4 of the Convention;
3. *Holds*:
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 26,209.69 (twenty-six thousand two hundred and nine euros sixty-nine cents) in respect of costs and expenses, plus any tax that may be chargeable;
 - (b) that the sums received by way of legal aid are to be deducted from that amount;
 - (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in French, and notified in writing on 26 July 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley NAISMITH Ireneu CABRAL BARRETO
Deputy Registrar President
SILIADIN v. FRANCE JUDGMENT

SILIADIN v. FRANCE JUDGMENT



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