



Jesuit Refugee Service – Europe

May 2005.

JRS-Europe's positions on the Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status.

The Jesuit Refugee Service (JRS) is a global Catholic organization, which was founded in 1980 and whose mission is to accompany, serve and defend the rights of refugees and forcibly displaced people regardless of their religious affiliations. The regional office of JRS - Europe in Brussels networks with JRS staff in 22 European countries. JRS personnel in Europe accompany inter alia detained asylum seekers and former detainees.

Because of this experience, JRS-Europe has a more specific concern about **Article 17** dealing with the detention of asylum seekers.

The **first paragraph** of Article 17 states: "*Member States shall not hold a person in detention for the sole reason he/she is an applicant for asylum.*"

JRS-Europe welcomes the reaffirmation of the general principle that asylum seekers should not be detained¹.

The **second paragraph** of Article 17 states: "*Where an applicant for asylum is held in detention, Member States shall ensure that there is the possibility of speedy judicial review.*"

JRS-Europe is worried about the vague formulation of this paragraph, which clearly leaves Member States with the complete liberty to detain asylum applicants. In accordance with the jurisprudence of the European Court on Human Rights, **the grounds for detention should be set clearly and precisely in an exhaustive and enumerative way in order to avoid risks of arbitrariness**². In this respect, the UNHCR Guidelines on detention of asylum seekers³ recommends that "detention of asylum seekers may only be resorted to, if necessary, in order: (i) to verify identity; (ii) to determine the elements on which the claim for refugee status or asylum is based; (iii) to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum; or (iv) to protect national security and public order"⁴⁵.

¹ Article 31 of the 1951 Convention relating to the Status of Refugees.

² See ECtHR, *Amuur v. France*, Judgement of 25 June 1996: "where a national law authorises deprivation of liberty – especially in respect of a foreign asylum seeker – it must be sufficiently accessible and *precise* in order to avoid all risk of arbitrariness (...)"

³ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999.

⁴ Guideline 3: Exceptional grounds for detention.

⁵ These were the grounds for detention provided in the 2000 Commission's Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status; Article 11, COM (2000) 578 final.

However, in all cases, detention should be a measure of last resort and **alternatives** to it (i.e. non-custodial measures like the use of bail or the provision of a guarantor⁶) should be properly considered.

In all cases also, **detention should not be a systematic measure** but be based on the individual circumstances and personal history of the asylum seeker. In addition, it should respect the **principle of proportionality**⁷.

Moreover, **vulnerable persons** should not be detained. The detention of minors, especially unaccompanied minors, is always contrary to the principle of the best interest of the child^{8,9}. In line with the UNHCR's positions, JRS-Europe would further recommend explicit exceptions to detention measures in relation to unaccompanied elderly persons, survivors of torture or sexual violence, traumatised persons, and persons with a mental and physical disability¹⁰.

When the use of detention cannot be avoided, a **maximum duration** should be provided. To this extent, JRS-Europe proposes a time limit of 2 months, which is a reasonable length of time to allow the authorities to examine asylum demands on a case-by-case basis. If after 2 months the asylum seeker is still held in detention without any decision taken on his/her asylum demand, he/she should be released immediately.

During the time of their detention, asylum seekers should have access to a **"speedy review"**, as stipulated in Article 17 (2). However, JRS-Europe regrets again that this provision is not precise enough. To ensure that the right to a judicial review is fully guaranteed, JRS-Europe especially recommends that:

- The detainee should be able to ask for a judicial review at any stage of the procedure.
- If the detainee does not ask for a judicial review, the administrative law should provide an automatic judicial review after a certain time in detention.
- The review should be conducted by an independent Court, different from the authority that has delivered the order to detain.
- During the review procedure, the detainee should be heard individually and, if needed, a translator recognised by the review authority and paid by the States should be provided.
- If the detention is found to be unlawful, the detainee should be released immediately¹¹ and, in accordance with Article 5 (5) of the ECHR, he should have an "enforceable right to compensation".

⁶ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Guideline 4: Alternatives to Detention.

⁷ The *principle of proportionality* is a general common principle of law according to which any measure of a public authority that affects a human right must be: *appropriate* in order to achieve the objective, which is intended; *necessary* in order to achieve the objective which intended, i.e. there are no less severe means to achieve the objective which is intended; *reasonable*, i.e. the person concerned can reasonably be expected to accept the measure in question.

⁸ Article 3 of the Convention on the Rights of the Child: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

⁹ Concerning detention, Article 37 (b) of the Convention on the rights of the Child states: "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

¹⁰ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Guideline 7: Detention of Vulnerable Persons.

¹¹ Article 5 (4) of the ECHR: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

Apart from the access to a speedy judicial review, the detention of the asylum seekers should respect other requirements to be lawful according to **the European and international human rights standards**. In particular, detainees should:

- be informed promptly about the grounds of their detention and the procedure to be followed in a language they understand¹²
- have access to legal, medical and social assistance¹³.
- have the right to be visited by their families, as well as by their lawyer, by representatives of the UNHCR¹⁴, NGOs and Churches¹⁵.

Finally, it is worth remembering that detained asylum seekers are not people convicted for criminal offences so that they should not be held in prison facilities.

Concerning **Article 35** of the Amended Proposal dealing with cases of border procedures, JRS-Europe would like to recall that the ECtHR stated in the *Amuur v. France* Judgement that transit zones are places of detention. Consequently, the above recommendations concerning detention should also be taken into account when considering transit zones.

In particular, JRS-Europe worries about the wording of the **second paragraph** of Article 35, which allows Member States to derogate from the minimum procedural safeguards when examining asylum demands at border or transit zones.

¹² Article 5 (2) of the ECHR; Article 5 of the Council Directive 2003/9/EC of 27 January 2003 laying down Minimum Standards for the Reception of Asylum Seekers.

¹³ See ECtHR, *Amuur v. France*, No 11; Article 15 (1) of the Council Directive laying down Minimum Standards for the Reception of Asylum Seekers.

¹⁴ In this respect, JRS-Europe welcomes Article 21-1 (a) of the Amended Proposal: “Member States shall allow the UNHCR to have access to applicants for asylum, including those in detention and in airport and port transit zones.”

¹⁵ See also: UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Guideline 10: Conditions of Detention; Article 14 (2) b of the Council Directive laying down Minimum Standards for the Reception of Asylum Seekers.