JRS
JESUIT REFUGEE SERVICE
EUROPE

DETAINED AND UNPROTECTED:

ACCESS TO JUSTICE AND LEGAL AID IN IMMIGRATION DETENTION ACROSS EUROPE

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ABOUT JRS

JRS is an international Catholic organisation with a mission to accompany, serve and advocate for the rights of refugees and others who are forcibly displaced. In our 23 country offices in Europe, we do that by providing psychosocial and pastoral support in detention centres, legal counselling, education for children and adults, and many social and cultural activities as well as by advocating for structural changes in policies and legislations both at national and European level.

You can learn more about our work at https://**jrseurope.org/**

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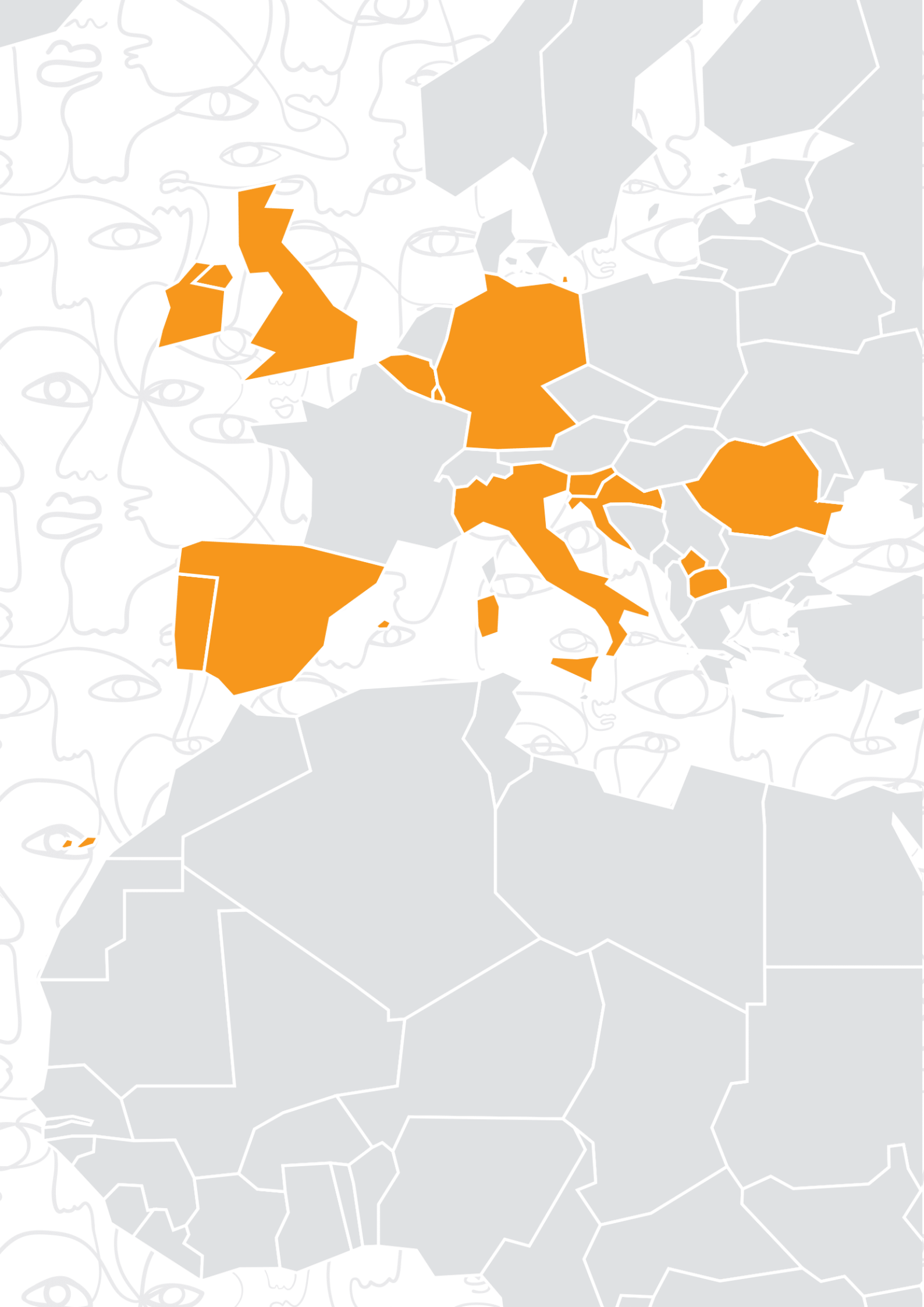
CONTENTS



ACCESS TO JUSTICE OFTEN DENIED FOR MIGRANTS IN DETENTION

Access to justice is a core human right. It means that individuals, whenever their rights are violated, can access and make effective use of existing judicial or quasi-judicial mechanisms to protect themselves and obtain redress. A person's immigration status should never hinder their possibility to seek and obtain justice.

The use of detention for the purpose of enforcing migration-related procedures intrinsically entails a high risk of human rights violations. The deprivation of liberty itself entails a huge infringement on the person, which is not proportionate to the purpose of immigration control. Therefore, the decision to detain someone can be, as such, a violation of their rights. The conditions in which someone is–lawfully–detained might also be substandard. Moreover, the context of detention automatically places people in a more difficult position when it comes to the possibility to challenge a return decision or to access the asylum procedure.

By definition, things that occur in detention occur behind walls, and in a context where those detained have been disempowered. Scrutiny and transparency are therefore often elusive, and access to justice to which people are legally entitled may be denied altogether or made more difficult. This situation is compounded because people are often detained under immigration powers at borders, or when facing removal–in contexts of limbo, where normal justice procedures are easier to circumvent.

Against this background, this report looks into if and how detained migrants can effectively access justice in Europe today. This is a particularly relevant topic, as this work comes at a moment in which the use of detention upon arrival at external borders is likely to increase, as a result of the adoption of the EU Pact on Asylum and Migration. Because of the complexity of immigration procedures in Europe, effective access to justice cannot be properly assessed without considering if migrants–in this case detainees–have effective access to legal assistance. For this reason, a chapter of this report is dedicated to access to legal aid. We further

looked into how effectively detainees can access remedies against their detention and return orders. Another chapter explores the existence and effectiveness of complaint mechanisms for detainees to address violations of rights that happen in detention. Finally, we looked into the possibility for migrants to apply for international protection while in detention.

This work is based on the experience of JRS visiting people in detention centres across Europe. JRS opposes the use of administrative detention as a practice that is inherently harmful to human dignity and has a negative impact on both physical and mental health. As long as detention is a reality, however, JRS staff and volunteers work to accompany detained migrants and advocate for the respect of their rights and for humane detention conditions.

JRS currently accesses places of detention on a regular basis in 11 European countries (Belgium, Germany, Luxembourg, Kosovo, Malta, North Macedonia, Portugal, Romania, Slovenia, Spain, UK). In the past, JRS also visited detention in Croatia, Ireland and Italy, and strives to resume visits in the future. When these countries are mentioned, the information provided is based on legislation or other publicly available sources. In some countries, JRS only visits one or few of the existing detention centres, so we cannot claim to see the full picture about detention in Europe. However, the information at our disposal already offers sufficient material to identify structural problems and formulate recommendations for change.

For the sake of brevity, in this report we refer to the countries under examination with the following country abbreviations:

Belgium	**BE**
Croatia	**HR**
Germany	**DE**
Ireland	**IE**
Italy	**IT**
Kosovo	**KO**
Luxembourg	**LU**
Malta	**MT**
North Macedonia	**MK**
Portugal	**PT**
Romania	**RO**
Slovenia	**SI**
Spain	**ES**
United Kingdom	**UK**

GETTING A GOOD LAWYER IN DETENTION: A LOTTERY WITH LITTLE CHANCE OF WINNING

ACCESS TO A LAWYER IN DETENTION: A BASIC NEED

JRS detention visitors from all over Europe are unanimous in indicating that having a qualified lawyer is an absolute basic need for detained migrants. Navigating the complexities of asylum and immigration procedures without professional support is already difficult–sometimes all but impossible–for people who are not detained. Understanding procedural steps and gathering crucial information and documentation to substantiate claims within, often, short deadlines is extremely challenging when locked up with little to no access to the outside world. Very often, even when access to asylum procedure and effective remedies are guaranteed to detainees by law, these rights remain dead letter without the support of a lawyer.

Moreover, the implementation of the EU Pact on Migration and Asylum will add more layers of complexity to the asylum procedure within the European Union (EU), increasing the possibilities of rejecting claims as inadmissible, often within an accelerated procedure. This implies a heavy burden of proof on asylum seekers, who will have to be prepared to substantiate why a given 'safe third country', or 'safe country of origin' is not in fact safe for them. However, the Pact does not provide for reinforced guarantees on legal aid. On the contrary, Member States will only be obliged to ensure asylum seekers can have a lawyer in the appeal phase of the asylum procedure. In addition, asylum seekers will more often be (de facto) detained during border procedures. Investigating how detained asylum seekers and migrants can access legal aid in the current reality of detention will therefore give important insights on what we can expect to see more often in the future and, hopefully, reveal concrete actions to reduce harm.

THE RIGHT TO LEGAL AID: NOT ALWAYS, NOT FOR EVERYBODY

Legal and judicial systems are organised in very different ways across different countries in Europe. Comparing legislation and practices related to judicial proceedings and access to legal assistance is challenging, made more difficult because sometimes the literal translation of certain terminology refers to different practices or concepts in another language.

Against this background, it is important to clarify some definitions. In this report we refer to **the right to legal aid as the right to obtain legal assistance and representation by a lawyer paid by the state**. When we use the word '**lawyer**', this refers to a solicitor, **someone practising the legal profession, with the power to represent clients in legal procedures, including in court**. When we speak about '**free legal assistance**' we refer to legal assistance **provided for free to a detained migrant by actors other than lawyers;** e.g. legal assistants or lawyers working for civil society organisations, where 'legal assistant' refers to someone assisting a person on legal matters, with a legal background (e.g. a law degree) but not necessarily practicing as a lawyer.

In all countries under examination, the national legislations include some provisions about the right to legal aid for people in administrative detention. However, **in more than half of the countries, having the right to legal aid depends on the phase of the migration-related procedure people are in**.

In less than half of the countries examined (BE, ES, LU, MK, PT, UK), detained migrants formally have the right to legal aid during each phase of the asylum procedure, as well as the right to challenge their detention and return orders. Although, as we will see, this does not mean that everybody can count on a qualified lawyer, the fact that the legal frameworks establish the right to it is as such a good practice.

In several countries (DE, HR, IT, MT, SI, RO) **the right to legal aid is limited to situations where migrants file an appeal and/or appear before a Court or tribunal**, such as in judicial proceedings[1]. This means that asylum seekers cannot

1 The situation of Kosovo is exceptional when it comes to asylum seekers, because there it is officially not possibility for them to obtain legal aid paid by the state. They are always appointed a lawyer from the start of the procedure, but these lawyers are provided by an NGO and paid through funds provided by UNCHR. In Malta, legal aid is granted at the appeal stage of the asylum procedures (International Protection Appeals Tribunal; though not the review within the context of the accelerated procedures), for the mandatory review of detention (Immigration Appeals Board), and the appeal from a removal order (Immigration Appeals Board).

avail themselves of legal aid during the administrative phase of their asylum procedure, but only when they want to appeal a decision rejecting their claim. In these cases, there is no difference between asylum seekers who have their asylum procedure examined in detention and those who do not. However, while preparing and facing an asylum interview without the support of a lawyer is hard in both cases, this is even more true for detained asylum seekers, who have little access to the outside world and larger barriers to collect information and evidence to substantiate their claim, usually within shorter timeframes.

In some countries, the possibility to avail oneself of a lawyer paid by the state depends on whether the relevant authority considers **the application or complaint to have reasonable prospects of success** (DE, LU, MT[2], UK). This condition can represent a serious obstacle for migrants, as lawyers might be discouraged to take up their case without the certainty that their work will be remunerated.

Formally, the right to legal aid in proceedings to challenge a detention order and a return order in Court exists in all countries under examination.

However, it is important to point out that **migrants are never in a position to question a detention order before or at the time this is taken**. This is because a detention order is usually given by an administrative authority, such as the Immigration Office, or by a police authority, and without the presence of a lawyer. This means that they are only left with the possibility to challenge a detention order after they have already been deprived of their liberty, either by appealing against it from a detention centre, or at the time the detention order is presented to a judge for validation[3]. Either way, it may be that a detention order is ultimately found unlawful–so detention should have never been used in a specific case, e.g. because there was no risk of absconding or there were

2 This is formally the case in Malta, however this rule is rarely applied.
3 In Spain and Portugal, authorities are given a maximum amount of time in which they can keep people in custody, namely 72 and 48 hours; after that, if they want to bring people to a detention centre, they must bring them to the judge and a lawyer will be present. However, people will have already been deprived of their liberty for two or even three days.

less coercive measures available–only after the person has already spent time locked up. Given the strong negative impact that detention has on people, even for a limited period of time, this is an important shortcoming. In this regard it is important to mention that when suspects of crimes are apprehended, they have the right to see a lawyer even before their first police interrogation, which might lead to a decision to keep the suspect in custody. There is simply no objective reason as to why migrants should not be entitled to the same support, as both situations may result in the deprivation of liberty.

Finally, it must be mentioned that **in all countries under examination, detained migrants have the right to receive free legal assistance outside the scope of the legal aid**. Often, this is provided by NGOs who have, under various regimes, access to the detention centres. When this is the case, this kind of assistance is usually reliant on the respective NGO's capacity to fundraise for it, and, typically, is not sufficient to ensure assistance to everyone in detention. There are cases in which NGOs have agreements to provide legal assistance in detention centres that might entail public project funding, however these too are usually limited in scope and time. In the UK, the government operates a legal rota through which people in detention can request and appointment with a legal advisor. This is known as Detained Duty Advice Scheme (DDA). Through this scheme, detainees are entitled to a 30-minute appointment with an independent legal adviser for free. Following recent developments, appointments are typically remote. This system is not easily accessible in practice (see further) and has been made less effective by being remote. However, it is in principle a good practice.

JRS'S POINT OF VIEW

- Given the complexity and the potential impact of decisions in migration procedures on people's lives, **JRS believes that the right to have a free lawyer, paid by the state, should always be granted to people during all phases of the asylum procedures, as well as in procedures to challenge a return decision and a decision to detain them**.
- **Given the specific vulnerability of migrants in detention, eligibility for legal aid should always be assumed for them**.
- **Detention orders should always be validated by a judicial body**.

People arrested for reasons related to the execution of migration-related procedures should be brought in front of such a body and should be able to **challenge a detention order before the actual detention measure is executed**. In such moments, they should always be **assisted by a lawyer**. Such guarantees are in place for people who are arrested under the suspicion of committing a crime. The is no acceptable reason as to why the right of liberty and security of migrants should not be protected with the same standards.

EFFECTIVE ACCESS TO A - GOOD - LAWYER: A PATH FULL OF OBSTACLES

As seen earlier, in most of the countries under examination some form of right to legal aid is legally established for migrants in detention. However, **in practice, obtaining a lawyer is often not easy** and, even when people usually manage to formally have one (e.g. BE, LU, PT), **finding a lawyer that is qualified to work on migration law and will have sufficient time to dedicate to their case comes down to a lottery**. Moreover, the path to quality legal assistance is full of obstacles, such as difficulties in communications and limited possibilities to actually see one's lawyer in person.

CHALLENGE NR. 1

RECEIVE THE RIGHT INFORMATION AND MASTER BUREAUCRATIC PROCEDURES TO FILE A REQUEST AND GET A LAWYER ON TIME

In the majority of the countries examined, migrants are supposed to be informed about their right to have a legal aid lawyer, or other forms of legal assistance, upon arrival in the detention centre. This can be done during a first intake conversation with a social worker or other staff of the detention centre (e.g. BE, LU, MK, PT[4], RO, UK) and/or in writing,

4 This is the case for the detention centre in Oporto. JRS does not have firsthand information about the situation in the centres of Lisbon and Faro.

with information sheets or with an explicit mention to the relevant decision (e.g. in MT on a decision rejecting the asylum application and/or the return decision). However, in several countries (e.g. ES, DE, KO, MT, HR, UK) **JRS visitors' experience is that detained migrants are not systematically nor sufficiently informed about their right and the modalities to exercise it**. The reasons mentioned are:

- **Information is not provided regularly or systematically.** Detention centres might rely on visiting NGOs for this, but these do not meet with all detainees, so not everybody is systematically informed (e.g. DE). Also, inductions that are supposed to occur systematically can be missed or truncated (e.g. UK).[5]
- **Information is only provided briefly or only in writing**, with no certainty that the person has understood (e.g. ES, HR, KO, MT, UK).
- **Information is provided in a language that the person does not understand**, or in technical jargon that the person does not understand (e.g. HR, KO, UK).

Lack of sufficiently clear information is particularly problematic in cases where the procedure to request a legal aid lawyer–or an NGO lawyer performing as a legal aid lawyer or in their capacity as NGO worker–requires specific procedural steps. In Malta, for instance, while a legal aid lawyer is often automatically appointed in the case of detention reviews or appeals against return orders, it is unclear how the system works to access legal aid for people in the asylum procedure. Moreover, while detainees are routinely informed about the legal aid system, this is not the case when it comes to their right to be assisted by an NGO lawyer, and to meet with one, they need to make a specific request for the service.

In the UK, the system to obtain a DDA appointment (see above) is inefficient and confusing; the fact of having an appointment with a DDA legal adviser

5 See JRS UK, After Brook House: Continued abuse in immigration detention (May 2024), pp.19-20, https://www.jrsuk.net/after-brook-house-report/ [last accessed: 24/05/2024]

does not mean that this person will represent the detained individual concerned. This is often poorly communicated and without checking that the person has actually understood how to get an appointment with a solicitor. Further, although DDA legal advisors are in theory obliged to provide brief written advice after the initial appointment, they very rarely do so.

In some countries (ES, HR, PT, RO, UK) another challenge reported is the fact that **procedures to obtain a lawyer might last longer than the time needed for the authorities to enforce a return or removal decision or the time limits to challenge a detention order**.

In Portugal, for instance, to benefit from legal aid, detained migrants need to fill out a form including personal information and details about the lack of economic means that justifies the need for a free lawyer. The form needs to be sent by email to Social Security of Portugal. After this, the application is sent to Social Security, which, together with the Portuguese Bar Association, places the request in a computer system that appoints a random lawyer for the applicant. For requests from the Oporto detention centre (UHSA), these are typically responded to within one to two weeks. In the worst cases, it can take up to a month to receive a reply. These delays put migrants in an extremely vulnerable situation, given that they are detained for a maximum of 60 days.

In Romania, the time limit to challenge a detention order before the competent territorial Court of Appeal is five days. If no NGO lawyer happens to be present in the detention centre within that period, the detainees will miss their opportunity to challenge their detention.

In the UK, detained migrants facing forced removal to Rwanda–or another country to which they have no connection–have only seven days to challenge their removal and may seriously struggle to obtain a lawyer in that time[6].

6 At the time of writing no flight forcibly transferring asylum seekers to Rwanda under the new scheme has occurred.

JRS'S POINT OF VIEW

- **Information on the possibility**–if applicable–**to request legal aid** and be assisted by a lawyer **to challenge a decision** taken in the context of migration procedures (e.g. detention order, order to leave the country, decision rejecting an application for international protection) **should always be mentioned, at least in writing, on the decision itself**. Such information should include the modalities and procedure to follow to request legal aid.
- **A legal aid lawyer should automatically be appointed for people who receive a detention order**.
- If this is not the case, and if the person concerned does not yet have a lawyer, as a minimum safeguard, **the authorities responsible for delivering a detention order must systematically inform the person concerned about the possibility to ask for a legal aid lawyer** to challenge such decision. This should happen **orally and in a language that the person understands**.
- In JRS's point of view, people should be able to challenge a detention order before being taken to detention. As this is currently never the case, **at the latest**, **the responsible authorities should provide oral and written information** about the possibility to request legal aid to challenge a detention order, **during the first intake** moment after people arrive at the detention centre.
- **A legal service should be present in all detention centres and available seven days per week**. Such service should be tasked, among others, with being available to inform detainees about their right to obtain legal aid, to assist them in filing a request for a legal aid lawyer and in supporting them to follow up relations with their lawyers if needed. Civil society associations could be involved in the organisation of such a service.

CHALLENGE NR. 2

ESTABLISH AND MAINTAIN CONTACT WITH YOUR LAWYER

Even when detainees manage to get a legal aid lawyer appointed to their case, in practice they face **a range of practical obstacles to actually establish and maintain contact with them**.

This can include (a combination of) the following:

- Lack or severe limitation of (free) phones or other remote communications tools (DE, HR, KO, MK, MT, RO, UK)
- Language barriers, combined with a lack of interpretation (DE, LU, HR, MT, RO, UK)
- Lack of awareness of the fact of having been appointed a legal aid lawyer, especially if this is done automatically (MT)
- Need to request a visit from a lawyer in advance, following specific–strict–procedures (HR, KO, UK)

Moreover, **detention centres are often located in remote areas and are overall not easily accessible**. This makes it very time-consuming and not cost-effective for lawyers to make regular visits to their clients. As a result, legal aid lawyers rarely visit detention centres on a regular basis, unless they work for NGOs (BE, DE, ES, MT).

In Portugal, the detention process is often initiated in Lisbon, and only later do people get transferred to the detention centre in Porto. This means that the lawyers appointed in Lisbon to assist people during the judicial decision of placement in detention often lose contact and their relationship with the clients when they are transferred. Similarly, a lawyer appointed in Porto to assist a detainee to challenge, for instance, a negative asylum decision, is usually not available to travel to Lisbon, where the administrative removal process is commonly initiated and where the detention measure is commonly validated.

In addition, in many countries JRS visitors report a **generalised unresponsiveness on the side of appointed lawyers**. The reasons behind this are varied. On the one hand, JRS visitors report a general shortage of lawyers that are specialised in migration issues and are truly committed

to supporting their client. As a result, those who are often struggle to keep up the requests and ensure a regular communication along with the proper preparation of a case. This is also problematic in cases where detainees cannot book an external visit on their own initiative but need to rely on the lawyers to do so (e.g. UK). On the other hand, those lawyers who are less committed to defending their clients, are also less ready to invest time in what are often challenging conversations.

This **lack of responsiveness and/or reluctance from the side of lawyers to meet with their clients in person is also reported in countries where detainees have overall sufficient information and possibilities to reach out to them**. In Luxembourg, for instance, despite the fact that detainees have the tools to reach out to their lawyer, and lawyers can easily contact and visit them, in practice, contact might only be established after two or three months in detention. In most cases, contact is made every three weeks. Also in Belgium, JRS visitors report a general reluctance by lawyers to meet people in person; even in a relatively accessible centre like the one in Bruges, only 25% of the people detained met with a lawyer in person in 2022[7].

The situation in the Oporto Detention Centre in Portugal stands out as good practice on this point: all detainees are entitled to daily and private use of their mobile phones, including smartphones. They also have access to the centre's Wi-Fi. This allows them to easily communicate with their lawyers, including via email and other means such as WhatsApp. Those detainees who do not have a phone can use the landline available in the office of JRS Portugal's social assistant, who is present in the centre every working day. Moreover, lawyers are allowed to visit their clients on any working day just by presenting their identification as lawyers and their power of attorney for the person they want to visit. Interpretation is available upon request, funded by the state.

On a positive note, **if detainees manage to arrange and receive a visit in person from their lawyer, in all but one of the countries under examination JRS visitors report that such visits happen in private rooms, where detainees can be alone with their legal representative,**

7 Based on JRS Belgium's direct experience; in 2022, they met with 122 of the 439 people detained at the centre in Bruges. See: JRS Belgium, Centres de detention pour migrants – Rapport 2022, September 2023, p.19, https://www.jrsbelgium.org/IMG/pdf/2023_rapport_monitoring_fr-2.pdf [last accessed on 24/05/2024]

and that offer sufficient privacy for a client-lawyer conversation. The one country where this is not granted is Malta. Here, a lawyer can only meet a given number of clients in one visit to the centre and there is limited space available for use by external service providers, which limits the possibilities for regular contact with a lawyer. Moreover, recently cameras have been placed in the rooms where detainees meet with their lawyers. These should only be recording video, with no sound, however one can hardly consider such condition as conducive to a confidential conversation.

JRS'S POINT OF VIEW

Establishing and maintaining contact with lawyers is crucial for detained migrants. For this reason, we think that:

- **Detainees should be able to use their personal mobile phones**, including smartphones, when in the centres.
- **Detention centres should provide the necessary infrastructure for detained migrants to ensure they can communicate with their legal representatives**. This includes:
  - The **availability of sufficient–working–phones to call their lawyers for free.** Such phones should be located in places where detainees can have a confidential conversation with their legal representatives.
  - The **necessary IT infrastructure**–e.g. computers, internet connection.
- **Detention centres should proactively put in place a framework that allows and supports detainees to remotely have contact with their lawyers**. The presence of a 7/7 available legal service in detention centres is crucial to this end.
- **A detainee should be able to make an appointment** with their lawyer **autonomously** without unnecessary procedural steps.
- **Lawyers should be able to visit their clients without previous notice** to the detention centre, simply during visiting hours. There should be no limit on the number of clients that a lawyer can see on a given day.

CHALLENGE NR. 3

HOPE THAT YOUR LAWYER IS QUALIFIED TO DEFEND YOU

In the majority of the countries under examination (BE, DE, HR, KO, MK, MT, PT, RO) **there is no requirement for lawyers that intervene as legal aid lawyers in migration cases to have any formal training in migration law**.

At the same time, in certain cases, on-call lawyers are automatically appointed to represent a detainee in front of a judge (PT), or the national legal system obliges lawyers to take up a certain number of legal aid case per year (e.g. this is the case in BE for lawyers in training). In such situations, detainees who do not know a specialised lawyer and rely on the legal aid system might end up being defended by someone who is not qualified to do so. This can lead to very serious mistakes and compromise the future of the detainees.

Moreover, JRS visitors in several countries (BE, LU, MK, MT, PT, RO, SI, UK) report a **generalised lack of specialised/committed migration lawyers**, including in countries where formal training in migration law is needed to act as a legal aid lawyer in migration procedures. This can result in **detained migrants being defended by unqualified lawyers**, **having a lawyer that has too many clients to follow and therefore cannot follow their case properly**, or ending up **not being able to get a lawyer appointed to their case at all**.

Dedicated research–including a dedicated survey among lawyers–is needed to be able to properly assess the reasons behind such a shortage of committed migration lawyers. A possible reason that the JRS visitors mention, based on their experience and observations, is the fact that working on migration and asylum cases requires a high level of specialisation and knowledge, and a substantial amount of time to be dedicated to each case. If done properly, the amount of work that goes into it is hardly sufficiently remunerated under the existing legal aid systems. For committed migration lawyers it is therefore challenging to make a living only out of legal aid cases, but it is difficult to find paying clients in such a field of law. In addition to this, the chances of 'winning' a case in this field are limited. Lawyers have therefore often to cope with the fact that they will not ultimately be able to help their client. All of this makes this career path not particularly attractive.

Finally, existing research on the topic at the national level, suggest that the availability of asylum and immigration lawyers can be influenced by deep, systemic factors. This is the case in the UK, where the lack of availability of legal advice for asylum and immigration, stems out of years of underfunding and successive negative changes to the legal aid funding and payment structure[8].

In some countries (HR, KO), lawyers working for NGOs can legally represent clients in migration proceedings under a legal aid scheme. Although this does not necessarily remove other–earlier mentioned–obstacles for detainees to obtain a lawyer, it is a good practice that can, if sufficient funding is granted, offer a solution to the challenges of having committed and specialised lawyer with a certainty on their incomes.

JRS'S POINT OF VIEW

- **Legal aid lawyers who intervene in migration-related procedure must always have had a formal training in migration law**.
- The national legal aid systems must take duly consideration of the real amount of work required for the proper preparation and handling of migration-related cases. Adequate remuneration must be guaranteed. At the same time, transparent control mechanisms must be put in place–for instance, through the bar associations–to evaluate the work performed by legal aid lawyers.
- Systems allowing lawyers working for NGOs to represent clients must be developed where they do not exist. All these systems must be sufficiently supported with public funds.

8 Jo Wilding, Droughts and Deserts: A report on the immigration legal aid market (2019).

UNVEILING THE INEFFECTIVENESS OF REMEDIES AGAINST DETENTION

THE IMPORTANCE OF HAVING EFFECTIVE LEGAL REMEDIES AGAINST IMMIGRATION DETENTION

The right to an effective legal remedy constitutes a human right. It is enshrined in various international and regional human rights instruments, such as article 8 of the Universal Declaration of Human Rights (UDHR), article 2(3) of the International Covenant on Civil and Political Rights (ICCPR), article 13 of the European Convention of Human Rights (ECHR) and article 47 of the EU Charter of Fundamental Rights.

Provisions stipulating the requirement for effective remedy can be found also in EU law: article 46 of the so-called Asylum Procedure Directive[9] guarantees this right for asylum seekers.

An effective legal remedy refers to a mechanism or procedure through which individuals can assert their rights and seek redress for violations or grievances before a national competent judicial authority. A legal remedy is considered effective when it ensures meaningful access to justice, provides adequate relief or compensation, and is accessible, fair, timely, and enforceable.

The individual definitions of the above-mentioned components are provided below to better grasp not only the effective but especially the ineffective elements of the procedures in place at national contexts, which amplify the violation of detainees' human rights instead of providing tools to address them:

9 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 (EU Return Directive)

To be **accessible**, the remedy should be readily available to all individuals without discrimination or unnecessary barriers, including financial, procedural, or geographical obstacles.

To be **fair**, the remedy should guarantee procedural fairness, including the right to a fair hearing, legal representation, and the opportunity to present evidence and arguments.

To be **timely**, the remedy should be prompt and efficient, allowing for timely resolution of disputes, and preventing undue delays that may undermine its effectiveness.

For the decisions or the orders resulting from the remedy to be **enforceable**, it means that the authorities have the capacity and willingness to implement them effectively.

And last but not least, for the relief or compensation provided to be **adequate**, it must be commensurate with the harm suffered, addressing the violations or grievances effectively.

In the landscape of migration policies and practices, the issue of detention stands as a contentious point where human rights considerations are undermined by concepts like national sovereignty, security and other similar state-related concerns. At the heart of this discourse lies the recognition that detention -whether for administrative purposes, pending deportation, or other immigration-related reasons- not only deprives the person of their freedom but can also profoundly impact the lives and dignity of those subjected to it, and as a practice can be inherently unfair and disproportionate, also because of the unequal power relation between the migrant and the state authorities. Therefore, the availability of effective remedies against such decisions becomes imperative not only as a matter of legal obligation but also as a moral necessity to uphold the inherent worth and rights of every individual, regardless of their immigration status.

CHALLENGE DETENTION: POSSIBLE BUT WITHIN BLURRED FRAMEWORKS

A · APPEAL OR OTHER REMEDY

With the exception of the UK, in all other countries under examination (BE, MK, DE, LU, HR, IE, PT, SI, KO, ES, MT, IT, RO), **national legislations provide for the possibility for a detained migrant to challenge their detention order.** As we will see, however, detained people face important practical and bureaucratic obstacles when trying to access legal remedies.

The **time limits for people to file an appeal against a decision ordering their detention differ**. In RO, KO, MK and MT, the period within which a person can appeal against their detention order varies from three (this is the case of MT, for instance) to eight days. In ES, IT, LU and PT, the time-limit is longer, fluctuating between one and three months. In DE, provisional detention orders must be challenged within two weeks, while an appeal against a final detention order must be filed within one month. In the case of HR, an administrative dispute can be initiated against the administrative court after a decision extending the detention is made, but never immediately against a detention order. In MK, migrants are usually detained on the grounds that they were witnesses at smuggling activities, and in this case, the time limit is eight days. In practice, however, the person will be released within two to four days, and thus the reason for which the remedy was submitted is rendered obsolete. In the case of IE, the lawfulness of the detention can be challenged in habeas corpus proceedings[10] before the High Court. The case of BE is of interest too, as the law there provides for the possibility to challenge one's detention every month, and the competent judge will have to make a ruling within five days.

10 According to the Legal Information Institute (LII) of the Cornell Law School, Habeas corpus is a legal principle that protects individuals from unlawful detention or imprisonment. The term "habeas corpus" is Latin for "you shall have the body," indicating the requirement for a person under arrest or detention to be brought before a court or judge. Habeas corpus proceedings involve a legal action through which a person who is detained or imprisoned can challenge the lawfulness of their detention. It is considered a fundamental legal right and serves as a safeguard against arbitrary detention or abuse of power by the government.

In LU, things happen even more differently, as a detainee will receive **two different decisions ordering their detention**. More specifically, for a person to be detained, they will receive a decision made by the Ministry ordering their detention for three months, which they can challenge within one month. Once they are detained, though, they will receive a second decision ordering their decision for one month, which they will be able to challenge within 15 days. A person can appeal one of these two decisions and usually, according to JRS experience in LU, lawyers opt for challenging the second decision. Interestingly, the first decision will be renewed once, resulting in maximum time of detention of six months, without being signed by the detainee, whereas the second decision of one month duration will be renewed every month, upon signature of the detainee, until the release of the person. This is how, in practice, people have only 15 days to challenge the decision of their detention, which is being renewed every month, rendering the remedy ineffective. JRS has already raised this inconsistency before the Ministry and the management of the detention centre, and their response is currently awaited.

It is important to point out that migrants are never in a position to question a detention order before or at the time this is taken. This is because a detention order is usually given by an administrative authority, such as the Immigration Office, or by a police authority, and without the presence of a lawyer. This means that they are only left with the possibility to challenge a detention order after they have already been placed in detention, by appealing against it. In the case of ES and PT, people can challenge a detention order also at the time this is presented to a judge for validation. In these countries, authorities are given a maximum amount of time in which they can keep people in custody, namely 72 and 48 hours; after that, if they want to bring people to a detention centre, they must bring them to the judge. Either way, it may be that a detention order is ultimately found unlawful, or not validated by the judge –e.g. because there is no risk of absconding or there are less coercive measures available– only after the person has already spent time locked up. Given the strong negative impact that detention has on people, even for a limited period of time, this is an important shortcoming.

B · JUDICIAL REVIEW

Regular judicial review of a detention measure is also established in the law of all countries under examination, except in the UK.

In most of the national frameworks (HR, IE, IT, KO, LU, MT, PT) **the review is supposed to take place automatically** –in some cases after a specific period of time (e.g. after 5 months in BE-, **whereas in DE, MK, ES, RO and SI it can solely be requested through the intervention of the legal representative of the detainee.** In DE the judicial review can also be asked by a person of trust of the detainee. It cannot be underscored enough how having a lawyer is an absolute necessity to ensure that one's legitimate request to review has any real chance of success.

Time limits vary also for the use and the implementation of this remedy against a detention measure. In PT, the decision ordering the detention of a person has to be reviewed every eight days; in IE. the review has to take place every 21 days (three weeks); in IT, the detention decision is reviewed every three months; and in MT, for the first 14 working days, it happens once per seven days, and after this period, after two months.

When implementing the remedy of the judicial review, the judge cannot always examine the substance of the case. This happens in BE and KO where only the legality of the detention, but not the necessity and proportionality in the individual case, can be re-examined and therefore, in these cases, the effectiveness of the remedy can be seriously questioned. In LU and MK, the legality of the detention and the individual situation of the detained person can be reviewed. Under the rest of the national legislative frameworks under examination, the judge can examine the legality of the detention as well as its necessity and proportionality, taking into account the conditions which form the personal situation of the detainee. **A test of 'necessity and proportionality' is crucial when assessing the legitimacy of an order of deprivation of liberty**. This is because a person could technically be in a condition fulfilling one of the possible grounds for detention, yet one should also always look into whether other less coercive measures were available in the first place. Moreover, taking into consideration the personal situation of the individual concerned, detention could be seen as unnecessary, because, for instance, the risk of absconding is very low, or because the person concerned works, or has a home and family, and is not likely to disappear. Finally, a measure of deprivation of

liberty could be deemed as 'not proportionate' in cases of people with specific vulnerabilities, because of the potential harm inflicted.

As already mentioned, in the case of the UK, the legal landscape is different, resulting in worse treatment of the detained persons than elsewhere; the law does not enshrine automatic external review by a judge of detention, so the remedy migrants have against a detention measure is to apply for bail once detained. Currently, any detained migrant who has been in the UK for at least eight days can apply to the courts for bail. Under upcoming new legislation, detained migrants will be prevented from applying for bail for the first 28 days in detention.

To conclude, the experience of JRS in Portugal and Luxembourg shows that the automatic review by the courts either does not really happen in practice, despite being a legal provision (PT), or that the legality, necessity and proportionality of one's detention is not truly re-examined, and the detention measure is only re-confirmed. More specifically, in LU, a proper review happens in very rare cases such as when a serious disease or other serious vulnerability exists.

More generally, in all legal frameworks under examination, the real possibility for detained migrants to access effective judicial review of their detention is assessed by JRS country offices as very limited.

BETWEEN NECESSITY AND REALITY: THE IMPERATIVE OF LEGAL REPRESENTATION IN CONTESTING DETENTION ORDERS AMIDST FORMIDABLE HURDLES

The necessity of having a lawyer representing the detainee constitutes one of the central findings but also one of the recommendations of the present report. A lawyer is in most of the cases absolutely necessary for a person to have access to challenging a detention order.

As per the data at our disposal, **the possibility for detained migrants to access effective judicial review of their detention order or submit an appeal is often very small in practice**, if at all existent. In particular, in the cases of HR, KO, PT and RO, our visitors reported that in very limited cases they saw a detention order challenged, and in extremely few, as we will see below, the detention was found to be unlawful as such. The said situation is justified by the below obstacles that jeopardize the effectiveness of the procedure:

- **The majority of the detained people never manage to have access to a qualified lawyer to undertake their case**. This is particularly important when there are crucial personal conditions to be brought up which could have an important impact on the turn of the case. Also, in some national contexts, for instance in DE, it is not possible to inspect files without the presence of a lawyer.

- **Even when a state lawyer is found, they are not always adequately trained** and specialized in international law, migration law and refugee law. This is of importance as the cases of detention are very often complex cases that relate not only to the aforementioned areas of law but also criminal law and administrative law.

- **There is always a considerable language barrier;** on the one hand, the detention orders and other relevant documents are made only in languages which the detainees cannot understand (e.g. in MK, the detention orders are published in Macedonian and English), and on the other hand, the police and the competent state authorities do not provide the necessary information to the people. In addition to that, importantly, there is a lack of interpreters, as was reported in the case of Romania where the ones provided by the state are only deployed during the trial as such, and not during the meetings between the detainee and lawyer. The right of the detained person to be informed is in this way violated.

- **Usually, the court examining the appeal or conducting the judicial review follows the (initial) decision issued by the administration (e.g. ministry) or the police, which implies that the re-examination of the case, regardless of the remedy used, does not actually take place**. Flagrant cases include LU, where last year only one of the appeals was accepted by the judge, but the Ministry appealed this decision and the judge ruled in favour of the Ministry. In the other cases, none of the appeals have been positive.

- **The legal basis is very broad, which leaves a lot of room for interpretation**. At the same time, the proceedings are often long and slow, as happens in MK and ES.

Special mention must be made of the case of the UK, where there was no time limit on the detention of adults. New legislation not yet in force would also remove existing time limits on the detention of children. According to the case law, indefinite detention for immigration purposes is arbitrary as a matter of international human rights law. Under the outgoing legal framework, most detention is ordered for the purpose of removal and is only legal if removal can be carried out in a reasonable timeframe; e.g., during the first phase of the COVID-19 pandemic, courts ordered the release of nearly everyone who applied because no planes were flying anywhere. However, under a provision from new legislation that is already in force, the UK government, rather than the courts, decides whether detention is reasonable. It is too early to tell how this will play out, but it appears to remove a vital safeguard against arbitrary detention.

In parallel, in MT, a good example is found in the law: next to the ex-officio review/s of the lawfulness of detention, it is possible for detainees to challenge the lawfulness and/or the reasonableness of detention by means of an application to the Immigration Appeals Board and an application to the Magistrates' Court. By providing–by law–more legal ways or solutions, the possibilities to have a result or at least one's case examined are accordingly increased and this practice is in any case in favour of the detainees who are always in an inferior position before the state authorities and power.

SHEDDING LIGHT ON CHALLENGED DETENTION ORDERS' DECISIONS: STRUGGLE FOR TRANSPARENCY AND UPHOLDING BASIC QUALITY STANDARDS

In the national contexts JRS investigated, there is no publicly available statistical data on the amount of detention orders challenged and the results of the remedies used. However, JRS presence in detention facilities across European territory and long experience on the field has enabled us to gather some data and draw the following, rather concerning, conclusions:

- In HR, after having reviewed recently published judgements on return procedures, JRS HR found that not even one person has been dismissed due to unlawful detention.

- In LU, during 2023, only one of the appeals was accepted by the judge, but the Ministry appealed this decision and the judge ruled in favour of the Ministry. In the rest of the cases, none of the appeals were positive.
- In PT, only eight people (4%) were released following a review of the detention order in 2022. In 2023, nine people (5%) were released on the same basis.
- In MT, from 2021 until 2023, almost all reviews found detention lawful.
- In MK, during 2023, some 200 persons were released from detention and transferred to an open Reception Centre, following their accompaniment by JRS. As regards the decisions on any appeals, the Court always follows the state's decision. There was not a single case where the detention was found unlawful.
- In KO, our JRS colleagues never experienced a case where the detention was found unlawful by a court. The majority of the people had already signed to be voluntarily returned, which they were encouraged to do by the authorities; this constitutes the main practice.
- Only in DE can a different trend be noticed: according to some estimates, half of the people detained were found to be detained unlawfully. In particular, from 2015-2022, 61% of 254 rulings by the Federal Supreme Court established the unlawfulness of detention orders pending deportation.

The quality of the decisions in all countries was found to be poor: the text is standardized, and typos and instances where text was copied and pasted have been noted repeatedly. Furthermore, as an individual assessment of each case does not take place, the court, almost always, rules according to the verdict of the state, which in most of the cases invokes unjustifiably the risk of absconding, and other immigration and security-related factors that eventually outweigh vulnerability and other crucial arguments concerning the personal situation of the detainee. In the case of ES, the epitome of unindividualized assessment is observed; there have been cases of decisions for collective detention. To be noted that "collective detention is considered arbitrary and contrary to International Law"[11] and therefore illegal. Same goes for MT where, when a judicial review is examined, more people can be heard at the same time and the hearing time is minimum.

11 Working Group on Arbitrary Detention of the Global Compact of Safe, Orderly and Regular Migration (GCM), Annual Report of 15 January 2010

AFTER UNLAWFUL DETENTION: BEING RELEASED AND PURSUING COMPENSATION

As explained in the introduction of this chapter, a legal remedy, in order to be considered effective, must provide adequate relief or compensation in proportion to the harm suffered, and address the violations effectively. Therefore, we need to examine what happens across the different national contexts if the detention of a migrant is found unlawful following the lodging of any of the mentioned remedies.

> As reported by our visitors, in most of the countries under examination, the person, of which the detention was found unlawful will be released immediately.

If the person is an asylum seeker, they will be moved to a reception facility for asylum seekers. In MT, for instance, as soon as the individual is released from detention, they will be moved into an open centre, where various levels of support are provided by the government Agency for the Welfare of Asylum Seekers (AWAS). In BE, the person will be eligible for reception too, though will not necessarily immediately have a place upon release from detention.

Despite the provision of the national laws that the person should be released, various obstacles arise which hinder the satisfaction of the rights of the persons who have been unlawfully detained. Delays have been noticed in some countries: in PT, if a court finds one's detention unlawful, this will lead to the immediate release of the person concerned in only very sensitive cases (e.g. when they are an asylum seeker or suffers from a vulnerability like serious mental health disease), thus not systematically.

In BE, people are not immediately released after a court finds their detention unlawful because the Immigration Office systematically appeals against such judgements and people remain detained while waiting for the result of such appeal.

In a few countries, JRS is not aware of any decision that found the detention of a migrant unlawful (KO, LU, MK).

Finally, in the UK, as was said above, the law does not provide for the possibility to challenge one's detention, but only to request to be released on bail. However, even when bail is granted, delays in the actual release may occur if the person cannot secure accommodation when this is a condition for the release on bail.

Based on article 5.5 ECHR, compensation for non-material damages can be claimed by the former detainee but it will not be provided automatically by the state, which had previously ordered their detention. Compensation will not be provided automatically to the provided but in most of the countries (DE, ES, HR, PT, UK), in theory, it can be claimed. A lawyer is necessary for this procedure, which can prove lengthy and costly.

JRS'S POINT OF VIEW

Based on our observations and in order to ensure that all detained migrants can exercise their right to an effective remedy against a detention measure taken in their case, JRS recommends the following:

- **Establish by law that detention orders must always be validated by a judicial body.** People arrested for reasons related to the execution of migration-related procedures should be immediately brought in front of such a body and should be able to challenge a detention order before the actual detention measure is executed.
- Establish in law the possibility of an **effective legal remedy against a detention order** with **automatic suspensive effect.** This means that the **detention order should not be implemented while waiting** for a decision on the lawfulness of the detention measure.
- Establish by law the **automatic periodical review of a detention measure by a judicial body.**
- **Establish by law that the judicial body responsible for the validation or review of a detention order must examine the legality, necessity and proportionality of the detention measure** in relation to the individual case of the person concerned.

- Ensure the **automatic appointment of a trained legal aid lawyer for people who receive a detention order**. A lawyer should always assist them when they appear in front of the judicial body for the validation or review of a detention order.
- Establish in law **maximum and short time limits on detention**, which should never become the default time spent in detention but serve as a guarantee against indefinite detention.
- To **always provide interpretation** for any in-person interactions between state authorities-detainees, lawyers-detainees and detainees with any other actors they might come across with.
- To have the documents referring to their case provided in a language detained migrants understand, so their right to be informed is safeguarded.
- To establish in law the **right to compensation when one's detention is found unlawful**. The right to compensation should be always examined and, if needed, ordered by the judicial body when it finds a detention measure to be unlawful.

COMPLAINT MECHANISMS IN ADMINISTRATIVE DETENTION: DESIGNED TO BE INEFFECTIVE

COMPLAIN ABOUT SUBSTANDARD CONDITIONS IN DETENTION: A HUMAN RIGHT

The use of detention in the context of migration-related procedures is allowed by law in a number of cases in today's Europe. Therefore, while in JRS's point of view the use of detention is in itself a violation of migrant's rights, the execution of a detention order, as such, can be lawful. However, it can result in violations of migrants' fundamental rights if people end up in substandard detention conditions, if they are exposed to inhumane or degrading treatment while in detention, and/or if they find themselves in situations in which they are systematically prevented from accessing their fundamental rights.

Detention centres are per definition isolated from the external world. JRS's experience shows that the access of external actors is often very limited, both in frequency and in the possibility to freely access all areas of the centres. For this reason, there is a high risk that certain violations of migrants' rights remain unnoticed.

This is why the possibility for migrants to complain about substandard detention conditions or other violations of their rights in detention (e.g. violence by the hand of guards, centre's staff or other detainees), to have their complaint heard and investigated, and to find redress when appropriate is crucial to ensure detainees' access to justice in detention.

COMPLAINT MECHANISMS FORMALLY IN PLACE

Our research shows that some forms of complaint mechanisms are in place in all countries under examination.

Depending on the country, detainees might have the possibility to:

- Present a written or oral complaint to the direction of the detention centre (BE, DE, HR, KO, LU, MT, SI, RO, UK).
- Address an anonymous written complaint to the direction of the centre (HR).
- Address a written or oral complaint to any (police) officer or centre's staff member who then refers it to the responsible authority–usually the centre's management (IE, HR, LU, MT, SI, RO).
- File a written complaint to an external independent body (e.g. a specific commission, advisory committee or the Ombudsman) (BE, DE, IT, MK, PT, RO, UK).
- File a written complaint to an external independent judicial body (ES).

In the case of Germany, the rules on complaint mechanism, procedures and responsible authorities depend on the legislation of the single Länders. The systems differ therefore depending on where the detention centre is located.

BIASED, UNTRANSPARENT, INEFFECTIVE: COMPLAINT MECHANISMS LEAVE DETAINEES UNPROTECTED

Of the European countries in which JRS is currently regularly visiting, there are only two, Romania and Slovenia, for which the assessment of the visitors in relation to the existing complaint mechanism is positive. Based on the visitors' observations in both countries, if detainees have reasons to complain, they can address them to the centres' management who take them seriously, investigates them, and takes relevant measures if needed.

For all the other countries, **when asked whether, based on their experience, the existing complaint mechanisms are effective, JRS detention visitors respond negatively**.

It must be mentioned that there are not always statistics available about how many complaints have been filed in a given centre or country[12]. This has partially to do with the fact that in many cases complaints are done orally and, often, even when filed in writing, they are dealt with rather informally. Nevertheless, JRS detention visitors report that according to their knowledge few complaints are filed. This, however, should not be interpreted as a sign that there is no reason to complain, rather as a sign of lack of trust in the fact that complaining will actually lead to any result.

When asked for the reasons behind such a negative evaluation, JRS visitors mention the following elements:

- **People are not routinely informed about the existence of a complaint mechanism** (ES, MT, UK).
- **The entity responsible for the examination of the complaints does not provide sufficient guarantees in terms of procedure, independence, impartiality, accessibility or transparency** (BE, MT, UK).
  - This is usually mentioned in relation to 'internal' complaint mechanisms; that is, when the responsible authority to examine the complaint is the centre's management.
  - In the case of Malta, for instance, the law establishes the right for detainees to present a complaint, but it fails to outline the procedure for examination and determination of the complaints submitted, or to put in place a mechanism to ensure transparency and accountability.
  - In the UK, JRS observes that most complaints are not upheld by the centre, even if they do appear to have a strong basis, and this leads JRS UK to believe that the complaints procedure is ineffective.

12 Some statistics for the detention centres in Belgium can be found in the annual report of the Belgian NGO Coalition 'Move', Rapport Monitoring 2022, 2024, https://movecoalition.be/wpfd_file/rapport-monitoring-2022-mars-24/ [last accessed: 24/05/2024]

- In the case of Belgium, along with complaints to the centre's direction, detainees can also file a complaint at a special dedicated independent commission. However, this commission has been criticized for not providing sufficient guarantees in terms of procedure, independence, impartiality, accessibility or transparency[13].

- **Complaints are addressed in an informal way** (HR, KO).
- **The complaint procedure requires the support of a lawyer**, and that is not always available (MK).
- **Filing a complaint does not lead to result/redress** (LU, PT, UK).
  - In Luxembourg. for instance, to JRS's knowledge, several complaints have been lodged with the police against the violence of the security guards, but this has not led to any result as either **the detainees were released before the end of the procedure** or there was a **lack of evidence,** and as a result the **complaints were dropped or dismissed**.

- In the case of Portugal, the Ombudsman's **recommendations do not have a binding effect**, so they do not necessary lead to any prompt redress of the situation for the detainee. Moreover, the examination of complaints usually takes long.
- **Fear of repercussions**
  - Several of the JRS detention visitors also report that detainees might refrain from complaining out of fear of repercussions, either from the staff centres or from fellow inmates. Considering that a complaint rarely seems to lead to a change in the situation while they are still in detention, the risk of worsening their condition by complaining is not worth being taken.

13 Myria (Belgian Federal Migration Centre), Recommendations aux cnetres fermés dans le cadre de la pandémie de COVID-19, 2020, https://www.myria.be/fr/recommendations/recommandations-aux-centres-fermes-dans-le-cadre-de-la-pandemie-de-covid-19 [last accessed: 24/05/2024] ; Myria, La Commission des plaintes chargée du traitement des plaintes des personnes détenues en centres fermés (2004-2007), 2008, https://www.myria.be/files/Rapport_final_commission_des_plaintes.pdf [last accessed: 24/05/2024].

In short: complaint systems seem to be generally ineffective and rather useless, mostly leaving detainees unprotected and unable to challenge substandard detention conditions or situations of violence or abuse in detention centres.

Although not without limitations, the Spanish system of the 'Supervisory judges' stands out as a good practice. For each detention centre, a so-called 'Supervisory Judge' is appointed. The appointed judge is tasked with supervising the compliance of the centre with the legislation and can receive complaints both from civil society actors on behalf of detainees or directly from detainees. The Supervisory judges have the power to investigate such complaints and order binding redressing measures when they find them founded. Still, not all detainees find their way to the Supervisory judge for various reasons: they are not necessarily aware or informed about this possibility; addressing a judge might be a step too big for many, especially without legal support; and finally, the system to file a complaint–a mail box close to the centre director's office where complaints written on paper can be dropped off, and that the centre is obliged to deliver to the Supervisory judge–is arguably not the most efficient or trustworthy. However, the 'Supervisory judges' system remains the best practice among those in the countries under examination, and should be replicated elsewhere. Moreover, the fact that NGOs can also bring their observations to the attention of the supervisory judges and that they can start an investigation based on them, is undoubtedly an added value.

The work of the **Italian National and Regional Guarantors for the Rights of the Detained Person** is also worth mentioning. The Guarantor is established in the framework of the UN Optional Protocol to the Convention Against Torture (OPCAT) and is tasked to monitor places of deprivation of liberty, including administrative detention. Detained migrants may contact them orally or by letter with complaints related to violations of their rights in detention. As JRS is currently not visiting detention in Italy, we are not in a position to assess its effectiveness in relation to the complaint mechanisms; however, the establishment of a dedicated, specialized and independent authority is as such a good practice.

JRS'S POINT OF VIEW

Given the intrinsically limited oversight on detention centres from external actors, it is crucial for detainees to have an effective possibility to raise complaints if their rights are violated while in detention, either because of substandard detention conditions or because of violence and/or abuse by staff members or fellow inmates.

The responsibility to run a detention centre in a way that respects fundamental rights lies in the first place with the centre's management. In this sense, the possibility to address complaints to the centre's director is logical and should be maintained. It is also up to the centre directors to run the facility in a way that fosters trust among the people involved.

However, the intrinsic large imbalance in the power structure in a detention centre will often make it very difficult for detained people to believe in the impartiality of an internal complaint mechanism. Moreover, complaints can also be directly related to mismanagement by the centre's direction.

Therefore, for the credibility and effectiveness of any complaint mechanisms, JRS recommends the following:

- Detained people must always have the possibility to address a complaint to an **external, independent body.** This could be a **judicial body**, such as the 'Supervisory Judge' in Spain. Alternatively, such a task could also be assigned to **independent national human rights bodies**, or other existing independent bodies tasked with the supervision of places of deprivation of liberty, such as the Italian National Guarantor for the rights of detained persons.
- Any independent entity tasked with receiving detainees' complaints should be **adequately staffed and funded**, in order to guarantee the swift processing of complaints.
- Any independent entity responsible to receive detainees' complaints must have **investigating powers** as well as the power of pronouncing **binding decisions** and to follow up on their executions.

- Independent entities in charge of processing detainees' complaints should also be able to **order interim measures**, such as the transfer of a detainee elsewhere while awaiting a decision, in order to minimize the risk and fear of repercussions.
- Detainees should be **routinely informed** about the existence of complaint mechanisms.
- The possibility to file **anonymous complaints should be allowed**.
- **Procedures to file a complaint should be as simple as possible, to allow the detainee to follow them without the support of a lawyer or a legal assistant**.
- However, a **detainee should be able to ask and receive the support of a lawyer to file a complaint if they so wish**. In this sense, the recommendations expressed under the section on access to legal aid apply. If detainees can count on the support of a qualified lawyer, it is more likely that they will disclose with them any situation of violation of their right, and that the lawyer will provide them with advice on how to proceed.

SEEKING REFUGE BEHIND BARS: ACCESS TO INTERNATIONAL PROTECTION FROM DETENTION

DETAINING ASYLUM SEEKERS IN EUROPE: COMMON PRACTICE INSTEAD OF LAST RESORT

Access to international protection and the ability to make asylum claims are fundamental human rights enshrined in international law. Every individual, regardless of their immigration status, deserves the chance and is entitled to seek sanctuary from persecution and violence. The Universal Declaration of Human Rights stipulates that everyone has the right to seek and enjoy asylum, and the 1951 UN Refugee Convention protects refugees and asylum seekers and lays down its core principle of *non-refoulement*.

Under its mandate, the standards of the European Committee for the prevention of Torture and Inhuman or Degrading treatment or Punishment (CPT) of the Council of Europe provide that the detention of asylum seekers should be an "exceptional measure" and, if applied, the individuals "should be afforded a wide range of safeguards". Furthermore, in its legislation, which will soon be replaced by the relevant provisions of the new European Pact on Asylum and Migration, the EU has recognized the above through directives such as the Qualification Directive[14], the Asylum Procedures Directive[15] and the Reception Conditions Directive[16],

14 DIRECTIVE 2011/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)

15 DIRECTIVE 2013/32/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)

16 DIRECTIVE 2013/33/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)

which outline the rights of asylum seekers, including those in detention, who therefore must enjoy the same possibility to access the asylum procedure as those not detained.

The detention of asylum seekers within the territory of the EU is not allowed on the sole basis that the person asked for asylum. When it is absolutely necessary –after an individual assessment of every case– and if less coercive alternative measures cannot be applied, the detention of asylum seekers who arrive irregularly in the EU is permeated by specific legal provisions and it may be justified, should at least one of the six grounds foreseen in art. 8 of the recast Reception Conditions Directive apply. This is the case if detention is deemed as needed to determine their identity; for reasons of national security or public order; or when the asylum seekers have received a return order, and the responsible authority considers that they only applied for asylum in order to delay the ordered return. Finally, it is also possible to detain asylum seekers to transfer them to another EU country that has been determined to be responsible for examining their asylum application.

In the countries under examination, it is common to find asylum seekers in detention centres, on different grounds. In BE, HR, LU, MT, RO and SI asylum seekers are detained **upon arrival if travelling irregularly** and apprehended in border crossings; usually, in this case, people remain detained in the framework of a border procedure. In the same countries, asylum seekers are detained **in the framework of Dublin procedure** (either upon arrival or in the transfer procedure), and also if they apply for asylum after having been placed in detention. The latter happens also in the UK. In particular, in DE and PT, **if people apply for asylum while being detained, they will remain detained** until the completion of the procedure, be it of a positive or a negative outcome. As per the data we have at our disposal, **only in ES and KO are people who apply for asylum not detained, or are immediately released if they were already detained**.

In IT, people who apply for asylum upon irregular entry must be put in detention, and their application should be examined within 28 days to see if they come from a "safe country of origin". In order to avoid detention, these individuals can deposit a caution of almost € 5,000. It goes without saying that the majority of the people placed in detention cannot pay such a high caution so they remain incarcerated.

In MK, asylum seekers are placed in the so-called "Reception Centre for Foreigners"–despite its name, it is a detention centre–and if, after six months,

the asylum procedure is still ongoing, then they will be transferred to the open reception centre for asylum seekers.

In PT, the Ministry of Interior decided to end border procedures at the detention centre located at Lisbon Airport following the death of a Ukrainian citizen who was held there in March 2020. Although the provisions of the law were still in place, they ceased to be applied in practice, and asylum seekers who applied for international protection at this detention centre were granted entry into national territory and no longer subjected to detention. However, since October 29, 2023, the accelerated procedures have been resumed and the use of detention with it.

As we will see further, in practice, should a migrant file an application for international protection from detention, this –as shown in half of the cases we examined– will lead to them having to spend more time detained, as the person would wait detained to have not only his case examined but also an appeal against a negative decision.

APPLYING FOR ASYLUM IN DETENTION: THE IMPORTANCE OF THE RIGHT TO INFORMATION

It is imperative for detained migrants to receive timely and clear information from the authorities regarding the possibility to seek international protection and the procedure for doing so, including the possibility to challenge an eventual negative decision. Access to accurate information is a fundamental right enshrined in international and EU law, which mandates that asylum seekers receive information about their rights and obligations in a language they understand. Also, providing comprehensive information empowers people in detention to make informed decisions about their legal options; without access to such information, they risk being unaware of their rights, leading to potential violations of due process and the principle of non-refoulement. Moreover, timely dissemination of information is crucial for preventing unnecessary delays in the asylum process, promoting efficiency, and potentially alleviating the burden on national asylum systems created by backlogs. At the same time, the lack of information exacerbates the already precarious mental health conditions of people in detention, contributing to heightened anxiety, stress, and feelings of helplessness and despair. Ultimately, ensuring that detained migrants receive clear and timely information about their right to seek international protection is a legal obligation, essential for upholding the principles of fairness, dignity, and respect for human rights.

According to JRS's experience, the current reality in detention is one of a blatant lack of information. More precisely, **information on the right to apply for asylum in detention either is not systematically provided to the detainees or they need to actively ask for it**, which implies that they already know part of their rights, even it is a small part of them, and this is not always the case. There is therefore a lurking risk that one will never have the information needed in order to have possibilities to receive international protection.

In almost half of the countries we examined (ES, IE, KO, LU, RO, UK), **the detained migrants might receive some information at the beginning of their detention but not systematically.** In the cases of **the other half** of the national contexts under examination (BE, DE, MK, SI), they **will receive it but only if they explicitly ask for it themselves or with the support of a social assistant**. It is to be mentioned that, **even when people are informed** by the state authorities, **most of the time the information is not adequately explained or is too technical to be understood.** In the cases of KO and IT*, though, the good practice of providing leaflets is taking place. In KO the leaflets are distributed in at least both English and Albanian.

Amid the above-described lack of information, the role of lawyers and civil society is pivotal as it substitutes the gap of the non-provided service from the side of the state. Indeed, in DE, ES, RO and the UK, **NGOs play a crucial role in providing information and addressing relevant questions people in detention might have.** The lawyers render detainees aware too (e.g. BE, DE), and a special mention has to be made to the fact that other detained people might share with the newly-arrived some details on the procedure as happens for instance in LU and the UK.

In MT, it has been observed that some detained people are discouraged by the authorities from applying for asylum, due to the likelihood that their case will be rejected and they will be returned to their country of origin with an entry ban.

In HR, the police have been implementing another method: during the border procedure –conducted in the police station– the police officers ask the newly arrived whether there is existing fear of returning to their country of origin because of racial, religious or ethnic persecution, nationality, belonging to a certain social group or because of political opinion, or because of torture, inhumane or degrading treatment. The person is also notified that they will be detained until

their return is carried out. While **the fact that authorities proactively enquire about a potential desire of people to ask for protection is, as such, a good practice**, this approach **cannot be considered equivalent to the adequate provision of information** about an individual's right to apply for asylum, as conditions of high stress prevail during border crossings, and people are likely not able to process such information. Additionally, among the newly arrived, there are very possibly cases of illiterate individuals. Finally, since the process is conducted orally, the correct implementation of the question depends on the respective police officer, which involves the potential for errors and negligence. It must be also said that, if during the same process the individual is informed that they will be detained until they are returned to their country of origin, it is as if the outcome is being prejudged and there is not sufficient space for the submission of other requests and the challenge of the detention as such.

Detained migrants must be informed not only about their right and the possibility to apply for international protection and to subsequently appeal against a negative decision (decision rejecting the asylum claim), but also the possibility to appeal against a return order. As reported by our partners across Europe, this provision of information indeed takes place in most cases, with some exceptions: in HR, this information is not given, and in the UK, too, people must be proactive and request it. In RO, it is directly linked with the possibility for interpretation and the availability of the NGO employee.

As with all other issues addressed in this report, here too it is essential to mention that **the presence of a lawyer plays a pivotal role in asking and receiving information** for a detained person. Indeed, in some of the countries (e.g. DE), the main way of provision of information is the lawyer. However, as illustrated in the dedicated chapter of this report, effective access to a qualified lawyer is, as such, a challenge for many people. Therefore, civil society organisations play a crucial role in filling this gap in various countries (DE, ES, RO and the UK). This underscores the important of ensuring regular and unhindered access for NGOs to detention places. Whenever such services are not available, people might seek information from other detainees, as happens for instance in LU and the UK. This, however, entails a risk of receiving erroneous information or sharing of information that might be based on personal relations among the detainees, which are not always balanced, and this might be detrimental to the person receiving the information.

ADEQUATE LEGAL DEADLINES MEAN ENSURING ACCESS TO THE RIGHT TO ASYLUM

Providing legal deadlines that are long enough for both the submission and examination of an asylum application is crucial for ensuring access to the right to asylum. Adequate timeframes allow asylum seekers to gather necessary documentation, secure legal representation, and prepare a comprehensive case, thereby safeguarding their right to a fair and thorough assessment. This aligns with international and EU legal standards, such as the Geneva Convention and the EU Asylum Procedures Directive, which emphasizes the importance of fair procedures in asylum claims. Conversely, imposing overly short deadlines undermines this right by rushing the process, often leading to inadequate consideration of the applicant's circumstances and potential errors in decision-making. Such practices can result in the denial of protection to those genuinely in need, effectively impeding their access to asylum and violating fundamental human rights principles. Therefore, balanced legal deadlines are essential to uphold the integrity of the asylum process and ensure that those fleeing persecution receive the protection they are entitled to under international law.

When it comes to the examination of asylum claims in detention, it must be mentioned that the time needed for examination of a claim must never result in an extension of the period of detention. This should not, however, be read as encouraging the use of accelerated procedures in detention, as such procedures in contradiction with a qualitative asylum examination. Rather, it should be read as evidence of the fact **that the use of detention is never compatible with the effective access to asylum**.

Through our work and research, we investigated the different national contexts to see whether **different time limits apply for people applying for asylum from detention compared to those who do so outside detention procedures**. It was found that **in 10 out of 14 countries, different rules apply, and this includes differentiations in deadlines**. The four countries where this is not the case are KO, LU, MT and SI. This paragraph will focus on the other 10.

On a general note, it can be said that **people applying for asylum from detention face usually shorter deadlines than the rest,** and this leads to fewer guarantees for a decision of quality which takes into account the individual elements and needs of the person seeking asylum. Furthermore, as mentioned before, only in ES and KO will the person applying for asylum within detention

be immediately released. In all other countries, the person will spend time in detention, the period of which varies according to the national context.

In IT, there is a differentiation by law between asylum seekers who originate from the so-called "safe countries of origin" and those who do not. Thus, if a person comes from a "safe country", they should have their claim examined within 28 days from the day it was submitted, regardless whether they are in in detention or not. On the other hand, an asylum claim being submitted outside from a person coming from a country of origin other than a "safe" one is examined in at least 14 months from the date when the asylum application is formalized. In this case, people will have to wait for at least one year and two months to have their appointment date with the Territorial Commission for the Recognition of the International Protection. To be noted is the fact that asylum seekers cannot be detained for more than 120 days unless they apply for asylum and they receive a decision rejecting it. If they appeal, they will remain in detention for the appeal to be assessed but, according to the law, for no more than one year.

In ES, there are laws foreseeing a border procedure –which includes shorter time limits- and a mainland procedure. In PT, there is an accelerated asylum procedure by law; this is not exclusive for detention but it can be applied, and can help accelerate the process(e.g. if the applicant has purposely applied for asylum in order to delay the removal decision, or if they have entered Portugal illegally and have not applied for asylum as soon as possible). In addition to that, again in PT, the time limit for appealing against an admissibility decision that rejects an asylum application lodged on national territory is eight days, but if it is lodged at a border, it is just four days.

In the case of LU, people applying for asylum in detention and originating from Maghreb countries receive negative, not individualized, replies after about three weeks.

In RO, there is an accelerated procedure too: the Immigration Office has at its disposal only three days to decide if a claim for international protection lodged by a person in detention is valid or not.

In IE, the case of an asylum seeker in detention must be prioritized if necessary, according to the law, and dealt with as soon as possible compared to applications by people not detained. JRS, however, does not have first-hand experience in the practical implementation of the said provision.

In the UK, the time limits are reduced as well: some individuals who claim asylum in detention will be processed via the Detained Asylum Casework (DAC) team. This means their asylum claim will be processed and determined in detention usually at a faster rate. To be mentioned is that, under the Nationality and Borders Act 2022, there is provision for an accelerated detained appeal process where people have reduced time –only five days– to appeal refusal of an asylum claim, and the court then only has 25 days to decide it. This is not yet in force.

In BE, for people arriving at the border and not deemed to have entered the territory, the asylum procedure must be concluded within four weeks.

As a note of conclusion, it is to be said that, **in most of the cases under examination and despite the provision of the law that asylum seekers cannot be detained on the sole basis of having submitted an asylum application, people remain in detention while awaiting a decision on their asylum case**. This is not the legal framework only in KO; in HR, it depends on the case, so asylum seekers often remain in detention while waiting for a decision on their asylum application. In IE, according to a study carried out by the Irish National Contact Point of the European Migration Network (EMN), since the enactment of the International Protection Act 2015, only one international protection applicant had been detained under the relevant provisions of that act between 2017 and 2020.

LOCKED UP, LEFT BEHIND: MORE DISPARITIES IN ASYLUM PROCESS WITHIN DETENTION

The application for international protection is a procedure that encompasses the disclosure of sensitive personal data of the person, and very often implies the re-experience of painful, traumatising facts and events of one's life. However, as per the experience of JRS of detention across Europe, **detained asylum seekers face the same obstacles as all asylum seekers, only exacerbated and amplified by the conditions of detention as such,** and thus they find themselves in an even more difficult position per definition.

Therefore, the conditions and considerations below should be taken into account to create, as much as possible, the circumstances for a person to develop an asylum claim, even while their freedom is restricted.

1 · ADEQUATE ENVIRONMENT AND INTERPRETATION

An appropriate space is necessary, where adequately trained person/s can interview the applicant for international protection under conditions of privacy and calmness, to the most possible extent. It is dubious whether a detention centre is the right place for a person to elaborate such a claim and speak about such events. In JRS's experience, **detention centres certainly do not constitute welcoming and 'safe' spaces**; on top of that, detention facilities are premises made for deportation and return, not for asylum seeking that can thwart such return of the person to their country of origin. **Nevertheless, in the majority of the cases examined** (BE, HR, DE, LU, MT, MK, PT, RO, SI, ES and the UK) **asylum interviews take place in such detention facilities.** In IT, the interview can take place in detention facilities and in the Territorial Commission Office premises. It can be noted as a good practice that in PT, since 2023, interviews in the context of removal or asylum procedures take place in a room with a window that allows the security conditions to be fulfilled and monitored, while also having no police presence in the room, and detained asylum seekers are informed of the different roles that public bodies play. Also in BE, interviews take place in a separate room where privacy is respected.

Interpretation is usually provided in the course of such a process, but the space is not always a given.

2 · INTERVIEW VIA VIDEO-CALL: NOT CONDUCIVE FOR A SERENE ENVIRONMENT

From the beginning of the COVID-19 pandemic and onwards, in some national contexts having an interview via video call is possible. This is the case in BE, HR, IE, RO and the UK. However, even if having an interview via video call provides flexibility in the process and might save time–especially in cases where a facility is far away from the service responsible for the conduction of the interview (like in the case of HR, where the transit reception centre for foreigners in Trilj is located at a long distance from Zagreb)–it does not serve at all the procedure as such.

Carrying out asylum interviews online in front of a screen hinders the person from expressing themselves properly, and the procedure takes on a

more impersonal character. The body language of the person is not seen or understood and thus cannot be taken into consideration. Technical issues often occur, which unavoidably disrupt the procedure and increase the stress of the applicant, who is at the same time trying to explain the reasons for their fear in their country of origin that may, as mentioned above, include painful events and situations which can re-traumatise the person.

3 · ACCESS TO LEGAL AID, INFORMATION AND COMMUNICATION WITH EXTERNAL ACTORS

Based on the experience of our colleagues visiting detention within their national contexts, in nine (HR, DE, ES, IT, KO, MT, PT, RO, UK) out of 14 participating countries, **asylum seekers detained have more limited chances and guarantees than people applying for asylum outside detention**. First of all, as discussed in detail in the chapter on access to legal aid, **access to quality legal support in detention is very limited** and thus results in fewer guarantees for the detained person.

Furthermore, the following elements have been observed based on JRS presence in detention facilities across Europe. First and foremost, **people have their right to freedom restricted and therefore this leads to limited access to social life, information, legal aid (they cannot visit their lawyer or be visited easily**), which naturally has a huge impact on their mental health. In KO, for instance, people are let out of their cell for only two hours a day. Moreover, asylum seekers in **detention** do not have the same access to rights such as work, health services or education, there is almost always a considerable language barrier between the applicant and the police officer, the mental (but also the physical) health of the person is severely exacerbated in detention and thus, as analysed above, it **does not form an ideal place for one to develop an asylum claim.**

In the UK, cases have been observed where a person tried to make an asylum application, but this was not registered by the authorities. Still in the UK, the following facts were reported as examples of factors discouraging and hampering access to the asylum procedure in detention: faxes and computers are often broken; access to the internet is limited to certain times during

which the computer room can be accessed, as smartphones are prohibited, and then some websites, including those of solicitors and NGOs, have sometimes been blocked; lack of phone credit and poor signal can further hamper communication. In some cases detained migrants must rely on detention centre staff to send and receive formal emails for them, and often things are missed or delayed.

In addition, it must be underlined that **in all but one of the countries under examination, the detainees' access to mobile phones is very limited or impossible,** and thus they cannot present materials to support their case or connect relatives or friends to for support in their situation. Only in PT do people have regular access to their mobile phones, including smartphones, and this must be underlined as a good practice which stands out in settings full of restrictions and limitations.

Finally, it has been analysed above that in most cases people meet shorter deadlines when their claim is examined in detention but also encounter worse access to information.

ENSURING JUSTICE AND SAFETY: THE SUSPENSIVE EFFECT IN ASYLUM AND APPEAL PROCESSES FOR DETAINED APPLICANTS

The suspensive effect of both an asylum application and an appeal against a negative decision on an asylum claim is crucial in immigration detention to protect the fundamental rights of detained migrants, asylum seekers included. The EU Asylum Procedures Directive and the EU Return Directive[17] stipulate that asylum seekers should not be deported before a final decision on their application is being made, ensuring in this way the principle of *non-refoulement*. However, the current asylum procedure directive already allows for exception to the suspensive effect

17 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 national

of appeals in some cases (art. 46 par 6), and the return directive gives the judge the power to suspend –or not to enforce– the decision related to the return. This suspensive effect is vital as it prevents the execution of deportation orders while appeals or asylum claims are still pending, thereby safeguarding individuals from being returned to potential persecution or serious harm. It also provides a pivotal guarantee for due process and access to a fair legal remedy, upholding the rights enshrined in the European Convention on Human Rights–such as article 3, which prohibits inhumane or degrading treatment. States shall protect the dignity and security of detained migrants, ensuring their right to a fair hearing and preventing irreversible harm, by maintaining the provisions leading to suspensive effect.

Should a person apply for asylum while being detained, this will in most of the countries have a suspensive effect on the return order, but not in the case of subsequent applications for BE and the UK. Moreover, also **appealing against a negative asylum decision in detention, in most of the cases examined, suspends the return order**. In BE and the UK, the return order will not be suspended upon the submission of an appeal in the context of a subsequent application. In particular, in the case of the UK, if the Home Office judges that the asylum claim is 'clearly unfounded', an appeal against the negative decision is not at all foreseen and therefore the removal of the person will be carried out. Under the legislations of DE, ES and IT, the return order for a person who appealed against a negative decision will not hamper their return, as the return order for this person will not be suspended automatically. In ES, HR and IT, the suspension must be requested upon submitting the appeal. It is thus clear that these states risk sending back individuals to their countries of origin where they would face persecution or serious harm, violating international as well as European law. Regarding the suspension of a return upon appealing from detention against the return order as such, in most of the cases, the appeal leads to the suspension of the return. It will happen though in DE, IT and KO. In MT and the UK, the appeal will have suspensive effect, including some of the subsequent applications.

JRS'S POINT OF VIEW

JRS does not consider the use of detention as compatible with the respect of the rights of asylum seekers and the guarantees of asylum procedure, therefore **the competent authorities should release immediately and without any delay a detainee, should they make an asylum claim**.

If, however, States still chose to keep asylum seekers in detention during the asylum procedure, they should ensure by law that the same guarantees apply to asylum seekers in detention as the one outside. This must include **reasonable legal deadlines, without overly extending the detention time**.

Moreover, the recommendations included in the chapter on access to legal aid from detention apply and should also be stressed within the context of access to the asylum procedures when in detention. In fact, the analysis made in the present chapter strengthens the recommendations about the importance of having legal aid within detention, and confirms the pivotal role that the lawyer can play in immigration detention cases and asylum cases in detention. The **presence of a lawyer during asylum interviews should be always required**, and **should certainly be made mandatory for those interviews taking place within detention facilities**.

In addition, States should adapt their legislation, where needed, in order to:

- Establish by law the **automatic suspension of a return order** taken after the rejection of an asylum application, as soon as an appeal against that asylum decision is filed.
- Establish by law the **automatic suspensive effect of all appeals against a decision rejecting an application for international protection.**
- Establish by law the **automatic suspensive effect of appeals against a return order**.

Finally, if States maintain the use of detention during the asylum procedure, at the very least, the following actions should be put in place to reduce the negative impact that deprivation of liberty has on the basic guarantees for asylum seekers:

- **Inform in an adequate, timely and understandable way the person detained about the right to apply for asylum**, and what this would entail, but also the possibility of an appeal against a decision rejecting an asylum application. Information about other ways to regularise one's immigration status should be also provided, by explaining the differences in terms of legal status and time limits.
- **Provide access to detention facilities to civil society actors** beyond the state-related ones, as they constitute not only an important source of information for the detained asylum seekers, but they also increase their feeling of security, transparency, accountability and support.
- **Ensure that asylum interviews are carried out outside detention centres.** If bringing detained asylum seekers outside the detention facility is not possible, **at the very least**, suitable conditions and **space suitably configured for an interview for an asylum claim** to take place must be arranged in the detention centres.
- **Always ensure interpretation** in the language in which the detained asylum seekers can more easily express themselves.
- **Allow detained asylum seekers to use their mobile phones, including smart phones, and have access to internet and other means of communications for the purpose of the preparation of their asylum claim**.

CONCLUSIONS AND RECOMMENDATIONS TO IMPROVE ACCESS TO JUSTICE FOR DETAINED MIGRANTS

A deep sense of injustice is probably the feeling that JRS detention visitors express most often when they speak about their experiences visiting and accompanying detained migrants. The very idea that people are deprived of their liberty–the most important thing a person has after life–for the only reason of their immigration status, is as such intrinsically unjust. Moreover, time and time again, they are confronted with situations that deepen that injustice; situations in which detainees cannot access their rights or seek redress for violations they suffer. This report was an attempt to try to do some justice to the people we meet, by exposing some of these situations, and propose solutions for change.

Our research has exposed a complex legal system, in which the use of detention–a measure that should be of very last resort–is often ordered without a rigorous previous scrutiny on its necessity and proportionality in the context of the person concerned, and without, in most cases, a real chance for the person affected to challenge it.

We have seen that effective remedies against the arbitrary use of detention are scarce, and that, even if people eventually succeed in having their detention order annulled, this will inevitably happen after they have already spent time locked up. Moreover, even when effective remedies are available, their effectiveness depends heavily on whether or not the person concerned can rely on the assistance of a lawyer to make their case.

Regrettably, access to qualified legal aid appears to be a path full of obstacles almost everywhere. Eligibility for legal aid might depend on the immigration status or the phase of the migration procedure one is in. Even when people manage to get appointed a lawyer, several other obstacles–from practical communications issues to the lawyer's qualification to take up the case–render securing proper legal assistance in practice something like a lottery.

This report also exposed the several limitations of the complaint mechanisms available to detained migrants for situations in which their rights are violated while in detention. Such mechanisms often prove ineffective and unable to provide redress. In several countries they also lack transparency and independence. As a result, only a few detainees trust them and end up refraining from complaining, which in turn leads to simply enduring wrongdoing done to them.

Finally, this research sheds some light on the increased difficulties encountered by people seeking international protection while in detention. Many of the challenges highlighted–availability of qualitative information, access to qualified legal support, the challenges of accelerated procedures–are the same that all asylum seekers, including those outside detention, face. The specific context of deprivation of liberty, however, exacerbates them and confirms the fundamental incompatibility between having a procedure aimed at protecting people in a context that inevitably harms them.

As already mentioned, JRS opposes the use of administrative detention as a practice that is inherently harmful to human dignity and has a negative impact on both physical and mental health. As long as detention is a reality, and based on the findings of this report, we formulate the following recommendations to the competent authorities to ensure that detained migrants can have effective access to justice.

RECOMMENDATIONS TO ENSURE THE RIGHT TO LEGAL AID IN ADMINISTRATIVE DETENTION

1. Establish by law the right for detained migrants to have a lawyer paid by the state during all phases of the asylum procedures, as well as to challenge a return decision and a decision to detain them.
2. Establish by law an assumption of eligibility for legal aid for detained migrants.
3. Establish by law that detention orders must be taken by a judicial body. People arrested for reasons related to the execution of migration-related procedures should be immediately brought in front of such a body and should be able to challenge a detention order before the actual detention measure is executed.

4 · Ensure the automatic appointment of a legal aid lawyer for people who receive a detention order.

5 · Ensure that information on the possibility to request legal aid and be assisted by a lawyer to challenge a decision taken in the context of migration procedures (e.g. detention order, order to leave the country, decision rejecting an application for international protection) is always mentioned at least in writing on the decision itself. Such information should include the modalities and procedure to follow to request legal aid.

6 · Ensure, as a minimum safeguard, that authorities responsible for delivering a detention order systematically inform the person concerned about the possibility to ask for a legal aid lawyer to challenge such decision. This should happen orally and in a language that the person understands.

7 · Establish a legal service in all detention centres. Such service should be available seven days per week, and be tasked to inform detainees about their right to obtain legal aid, to assist them in filing a request for a legal aid lawyer and to support them to follow up relations with their lawyers if needed.

8 · Allow detainees to use their personal mobile phones, including smartphones.

9 · Ensure that detention centres provide the necessary infrastructure for detained migrants to communicate with their legal representatives, including sufficient free phones and the necessary IT infrastructure–e.g. computers, internet connection.

10 · Ensure that detainees are able to make an appointment with their lawyer autonomously, without unnecessary procedural steps.

11 · Ensure the possibility for lawyers to visit their clients without previous notice to the detention centre, simply during visiting hours.

12 · Establish by law that legal aid lawyers who intervene in migration-related procedures must always have had formal training in migration law.

13 · Ensure that the national legal aid systems take duly consideration of the real amount of work required for the proper preparation and handling of migration-related cases, and establishes adequate remuneration for it. National legal aid systems should also take steps to ensure adequate availability of asylum and immigration lawyers.

14 · Establish systems allowing lawyers working for NGOs to represent clients and provide sufficient funding to support them.

RECOMMENDATIONS TO ENSURE THE ACCESS TO EFFECTIVE REMEDIES AGAINST DETENTION

1 · Establish by law that detention orders must always be validated by a judicial body. People arrested for reasons related to the execution of migration-related procedures should be immediately brought in front of such a body and should be able to challenge a detention order before the actual detention measure is executed.

2 · Establish by law the possibility of an effective legal remedy against a detention order with automatic suspensive effect. This means that the detention order should not be implemented, while waiting for a decision on the lawfulness of the detention measure.

3 · Establish by law the automatic periodical review of a detention measure by a judicial body.

4 · Establish by law that the judicial body responsible for the validation or review of a detention order must examine the legality, necessity and proportionality of the detention measure in relation to the individual case of the person concerned.

5 · Ensure the automatic appointment of a trained legal aid lawyer for people who receive a detention order. A lawyer should always assist them when they appear in front of the judicial body for the validation or review of a detention order.

6 · Establish by law maximum and short time limits on detention, which should never become the default time spent in detention, but serve as a guarantee against indefinite detention.

7 · Always provide interpretation for any in-person interactions between state authorities-detainees, lawyers-detainees, and detainees with any other actors they might come across.

8 · Have the documents referring to their case provided in a language detained migrants understand, so their right to be informed is safeguarded.

9 · Establish by law the right to compensation when one's detention is found unlawful. The right to compensation should be always examined and, if needed, ordered by the judicial body when it finds a detention measure to be unlawful.

RECOMMENDATIONS TO ENSURE EFFECTIVE COMPLAINT MECHANISMS FOR DETAINED MIGRANTS

1 · Detained people must always have the possibility to address a complaint to an external, independent body. This could be a judicial body, such as the 'Supervisory Judge' in Spain. Alternatively, such a task could also be assigned to independent national human rights bodies, or other existing independent bodies tasked with the supervision of places of deprivation of liberty, such as the Italian National Guarantor for the rights of detained persons.

2 · Any independent entity tasked with receiving detainees' complaints should be adequately staffed and funded, in order to guarantee the swift processing of complaints.

3 · Any independent entity responsible for receiving detainees' complaints must have investigating powers, as well as the power to pronounce binding decisions and to follow up on their executions.

4 · Independent entities in charge of processing detainees' complaints should also be able to order interim measures, such as the transfer of a detainee elsewhere while awaiting a decision, in order to minimize the risk and fear of repercussions.

5 · Detainees should be routinely informed about the existence of complaint mechanisms.

6 · The possibility to file anonymous complaints should be allowed.

7 - Procedures to file a complaint should be as simple as possible, to allow the detainee to follow them without the support of a lawyer or a legal assistant.

8 - Detainees should be able to ask for and receive the support of a lawyer to file a complaint if they so wish. In this sense, the recommendations expressed under the section on access to legal aid apply. If detainees can count on the support of a qualified lawyer, it is more likely that they will disclose with them any situation of violation of their right, and that the lawyer will provide them with advice on how to proceed.

RECOMMENDATIONS TO ENSURE ACCESS TO INTERNATIONAL PROTECTION FOR DETAINED MIGRANTS

1 - The responsible authorities should release immediately and without delay a detained person who makes an application for international protection.

2 - If States still chose to keep asylum seekers in detention during the asylum procedure, they should ensure, by law, that the same guarantees apply to asylum seekers in detention as the ones outside. This must include reasonable legal deadlines, without overly extending the detention time.

3 - Access to a lawyer and to legal aid should be guaranteed to asylum seekers in detention. The presence of a lawyer during asylum interviews should be always required, and should certainly be made mandatory for interviews taking place within detention facilities.

4 - States should adapt their legislation, where needed, in order to:

- Establish by law the automatic suspension of a return order taken after the rejection of an asylum application, as soon as an appeal against that asylum decision is filed.
- Establish by law the automatic suspensive effect of all appeals against a decision rejecting an application for international protection
- Establish by law the automatic suspensive effect of appeals against a return order.

5 - At the very least, States should take the following actions to reduce the negative impact that deprivation of liberty has on the basic guarantees for asylum seekers:

- Inform in an adequate, timely and understandable way the person detained about the right to apply for asylum, including the possibility of an appeal against a decision rejecting an asylum application.
- Provide access to detention facilities to civil society actors.
- Ensure that asylum interviews are carried out outside detention centres. If bringing detained asylum seekers outside the detention facility is not possible, at the very least, suitable spaces for interviews must be arranged in the detention centres.
- Always ensure interpretation in the language in which the detained asylum seekers can more easily express themselves.
- Allow detained asylum seekers to use their mobile phones and have access to internet and other means of communications for the purpose of the preparation of their asylum claim.

ANNEX 1
NATIONAL LEGAL FRAMEWORK

ACCESS TO LEGAL AID

Belgium	• Judicial code, article 508/13/1, §2, 9° and 10° • Royal Decree of 2 August 2002 determining the regime and regulations to be applied in the places on the Belgian territory managed by the Immigration Office where an alien is detained, placed at the disposal of the government or withheld, in application of art. 74/8 §1 of the Aliens Act, art. 62
Croatia	• Aliens Act (Official Gazette 133/2020, 114/2022, 151/2022), art. 198. • Rulebook on free legal aid in the procedure of expulsion and return of foreigners (Official Gazette 28/2014, 20/2015, 57/2018, 133/2020) • Rulebook on treatment of citizens of third countries (Official Gazette 136/2021), art. 54. • International and temporary protection Act (National Gazette no. 70/2015, 127/2017, 33/2023) • Rulebook on the stay in the reception centre for foreigners and the method of calculating the costs of forced removal (Official Gazette 145/2021, 155/2022)
Germany	• Legislative Decree no. 286/1998 "Consolidated Act on provisions concerning the Immigration regulations and foreign national conditions norms" art. 14 • Act on Proceedings in Family Matters and in Matters of Voluntary Jurisdiction (FamFG), section 76 and 78 in conjunction with Code of Civil Procedure, sections 114-127

Ireland	• Statutory Instrument No. 230/2018 - European Communities (Reception Conditions) Regulations 2018, Section 19(4): • International Protection Act 2015
Italy	• Decree of the President of the Republic n.115 of 30 May 2002 (based on art. 24 par.3 of the Italian Constitution) • Decree of the President of the Republic n.394 of 31 August 1999, art. 21; • Decree of the Minister of Interior of 20 October 2014, n. 12700, art. 2, 5, 7
Kosovo	• Law of Foreigners, 04/L-219 of 2013 • Regulation of the functioning of Detention Centre.
Luxembourg	• Law of 18 December 2015 on international protection and temporary protection, art. 17
Malta	• Subsidiary Legislation 420.06, RECEPTION OF ASYLUM SEEKERS REGULATIONS (2005) Regulation 6A(5) (Detention Order) • Subsidiary Legislation 217.12, COMMON STANDARDS AND PROCEDURESFOR RETURNING ILLEGALLY STAYINGTHIRD-COUNTRY NATIONALS REGULATIONS (2011) Regulation 11(4) (Removal Order)
North Macedonia	• Law on Free Legal Aid, art. 40
Portugal	• Portuguese Constitution, art. 20(1) • Law on Access to Law and the Courts no. 34/2004, updated by Law no. 47/2007
Romania	• Emergency Ordinance no. 194 /2002 of the Regime of Aliens
Slovenia	• International Protection Act, Official Gazette of RS, No. 16/17 and subsequent amendments (including the Act Amending the International Protection Act, Official Gazette of RS, no. 54/21), art. 9(1) • Rules on the access to refugee counsellors, remuneration and reimbursement of the expenses of refugee counsellors, and criteria for calculation the reimbursement of the expenses from the person with sufficient own means - Official Gazette of RS, No. 162/21

Spain	• Organic Law 4/2000 of 11 January, on the rights and liberties of foreigners in Spain and their social integration, art. 62 bis. • Royal Decree 162/2014, of 14 March, that approves the rules on the functioning and internal regime of the detention centres for foreigners, art. 16.
United Kingdom	• Legal Aid, Sentencing and Punishment of Offenders Act, 2012

ACCESS TO EFFECTIVE REMEDY AGAINST DETENTION

Belgium	• Law of 15 December 1980, art. 71
Croatia	• Aliens Act, art. 212
Germany	• Basic Law, art. 19(4) and 104 • Act on Proceedings in Family Matters and in Matters of Voluntary Jurisdiction (FamFG), section 58, 63, 64, 68, 71, 429
Ireland	• International Protection Act, section 20 • Immigration Act 1999, section 5 • Immigration Act 2004 • Irish Constitution, article 40(4) • Illegal Immigrants (Trafficking) Act 2000
Italy	• Legislative Decree n.286 of 1998 "Consolidated Act on provisions concerning the Immigration regulations and foreign national conditions norms", art. 14
Kosovo	• Law for Foreigners nr. 04/L-219
Luxembourg	• Loi modifiée du 29 août 2008 sur la libre circulation des personnes et l'immigration, art. 120 • Loi du 18 décembre 2015, art. 22
Malta	• Immigration Act (Ch 217), art. 25A (6) (7), (9) - (12) • Reception Regulations (Regulation S.L. 420.06), art. 6(3) • Return Regulations (S.L. 217.12), art. 11(8) • Criminal Code (Ch 9), art. 409A

North Macedonia	• Law on foreigners - official gazette of Republic of Macedonia no: 97 from 28 May 2018 • Law on Administrative disputes - official gazette of Republic of North Macedonia no: 96 from 17 May 2019
Portugal	• Portuguese Code of Criminal Procedure, art. 219 • Law 23/2007 of 4 July, art. 142 (1)(c) • Law No. 34/94 which establishes the regime for the reception of foreigners or stateless persons in temporary settlement centres, art. 2
Romania	• Aliens Ordinance no. 194 of 2002
Slovenia	• International Protection Act, Official Gazette of RS, No. 16/17 and subsequent amendments (including the Act Amending the International Protection Act, Official Gazette of RS, no. 54/21), art. 9(1)
Spain	• Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, art. 62 (3), 65 • Code of Criminal Procedure
United Kingdom	• Illegal Migration Act 2023 (not all parts are yet in force) • Immigration Act 2016

COMPLAINT MECHANISMS

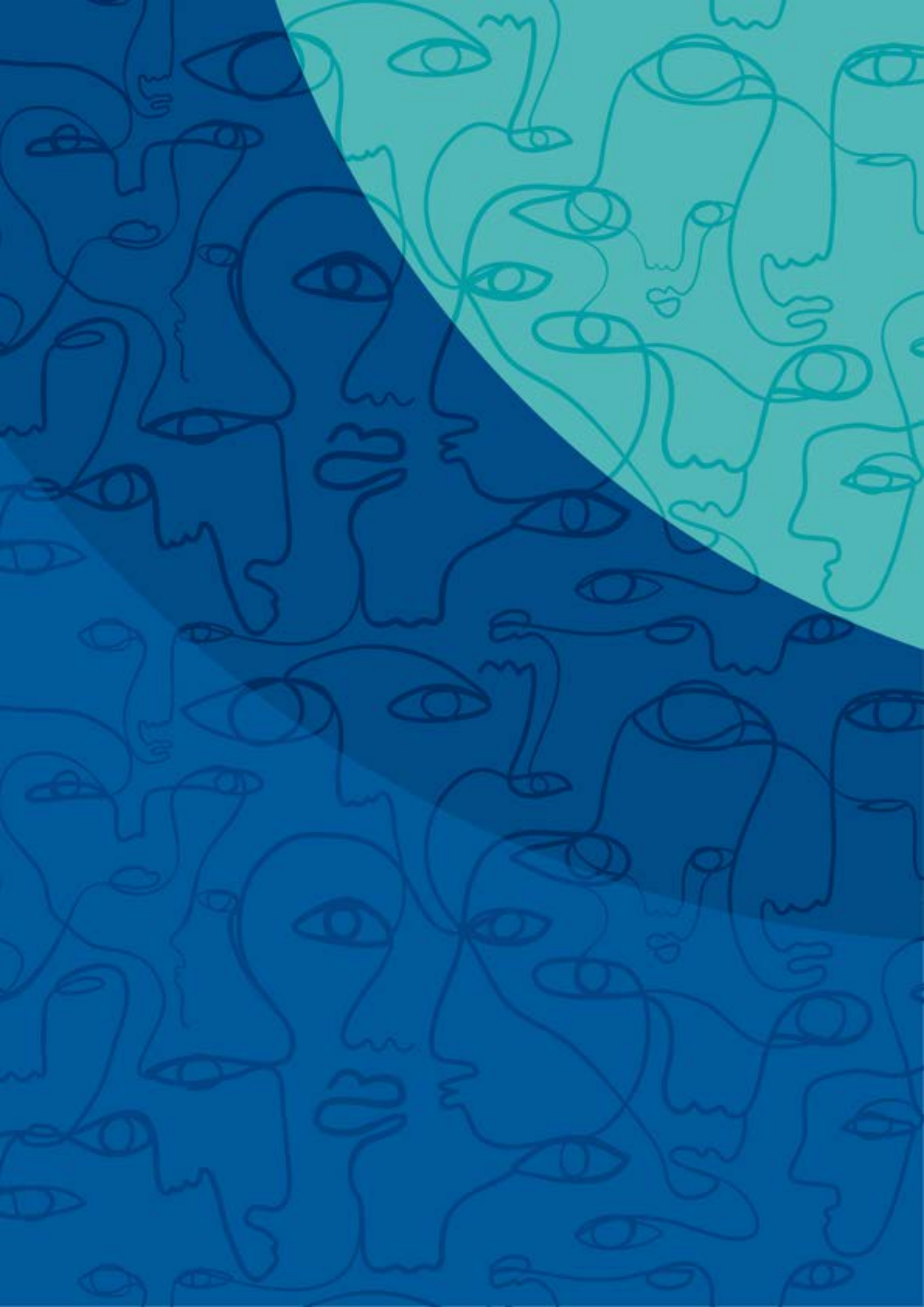
Belgium	• Royal Decree of 2 August 2002 determining the regime and regulations to be applied in the places on the Belgian territory managed by the Immigration Office where an alien is detained, placed at the disposal of the government or withheld, in application of article 74/8 §1 of the Aliens Act, art. 129 and following
Croatia	• Rulebook on the stay in the reception centre for foreigners and the method of calculating the costs of forced removal, art. 25
Germany	• Varying legal framework depending on Länders

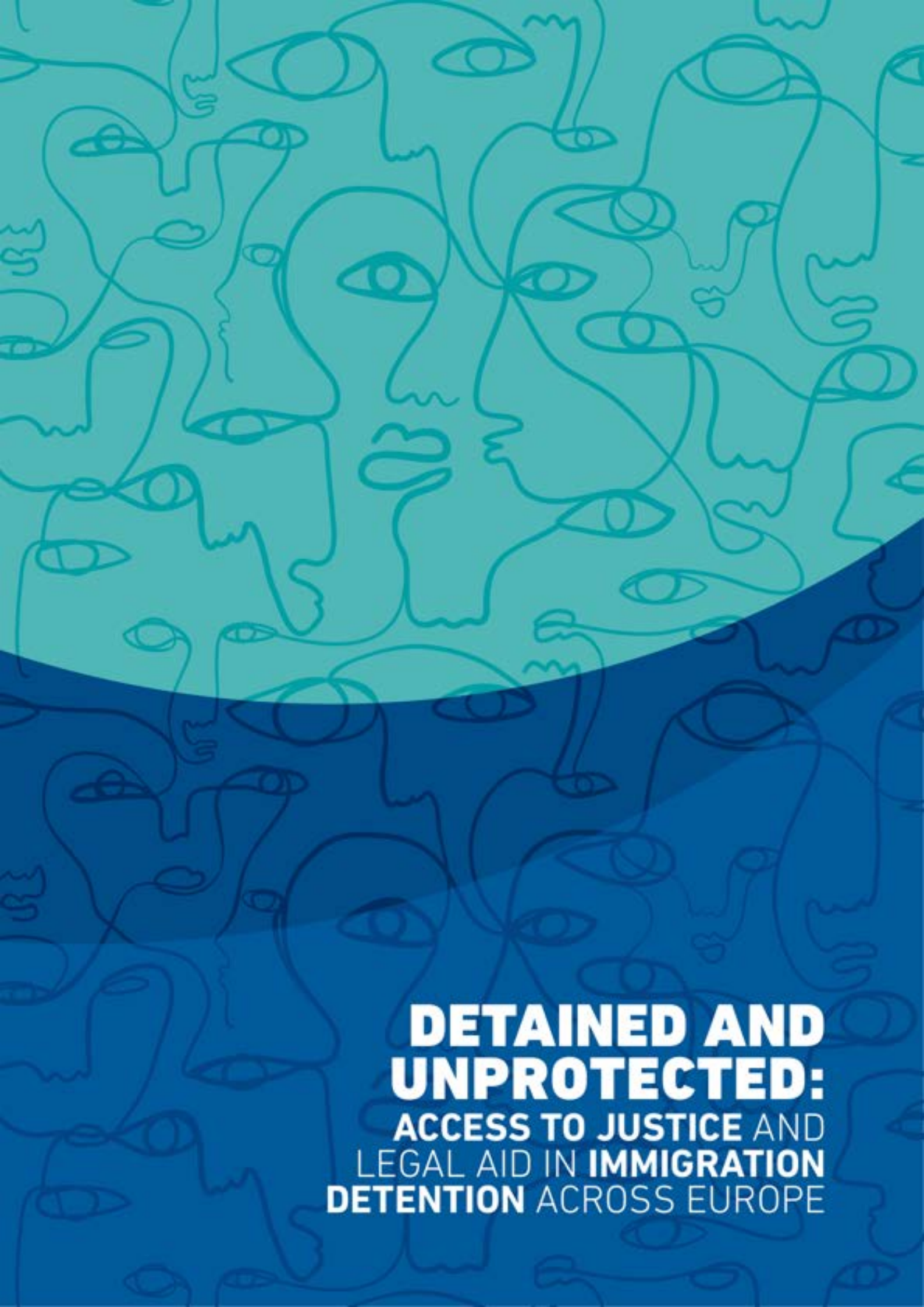
Ireland	• S.I. No. 252 of 2007 PRISON RULES 2007 REVISED (Updated to 1 January 2024 by the Law Reform Commission)
Italy	• Legislative Decree no. 286/1998 "Consolidated Act on provisions concerning the Immigration regulations and foreign national conditions norms" art. 14
Kosovo	• Regulation on the functioning of the detention centre.
Luxembourg	• Law of 28 of May 2009 on the creation of the Detention Centre, article 21
Malta	• Subsidiary Legislation 217.19, Regulation 42 Detention Services Regulations (2016)
North Macedonia	• Law on the Ombudsman
Portugal	• Law of the Ombudsman Office, Law Decree n.80/2021 of 6 October
Romania	• Public Custody Centres Regulation of 30 July 2014
Slovenia	• Aliens Act
Spain	• Royal Decree 162/2014, of 14 March, that approves the rules on the functioning and internal regime of the detention centres for foreigners, art. 16.
United Kingdom	• Detention Centre Rules (2001), rule 38

ACCESS TO ASYLUM PROCEDURE IN DETENTION

Belgium	• Aliens Act (Law of 15 December 1980), art. 50 (et seq)
Croatia	• International and Temporary protection Act (National Gazette no. 70/2025, 127/2017, 33/2023), art. 33
Germany	• Asylum Act, section 14 (3)

Ireland	• International Protection Act 2015, section 20 (18)
Italy	• Legislative Decree n.142 of 18 August 2015, "Implementation of Directive 2013/33/EU on standards for the reception of asylum applicants and the Directive 2013/32/EU on common procedures for the recognition and revocation of the status of international protection", art. 6 • Legislative Decree N. 25/2008 "Implementation of Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status"
Kosovo	• Law Nr. 04/L-073 on Asylum
Luxembourg	• Loi du 18 Décembre 2015 relative à la protection internationale et à la protection temporaire
Malta	• Regulation 5 and 5A, Procedural Standards for granting and withdrawing International Protection, S.L. 420.07 • Regulation 12 (3), S.L. 420.07
North Macedonia	• Law on International and temporary protection - official gazette of Republic of Macedonia no: 24 from 11 April 2018
Portugal	• Lei 27/2008 (Portuguese asylum law), art. 19
Romania	• Law 122/2006 on Asylum
Slovenia	• International Protection Act
Spain	• Law 12/2009 of 30 October, art. 21
United Kingdom	• Illegal Migration Act 2023 (not yet fully in force) • Nationality, Immigration and Asylum Act 2002 • Nationality and Borders Act 2022 (not yet fully in force)





DETAINED AND UNPROTECTED:

ACCESS TO JUSTICE AND LEGAL AID IN IMMIGRATION DETENTION ACROSS EUROPE