

OPTIONS PAPER 2:

Options for governments on open reception and alternatives to detention

What are alternatives to detention (ATD)?

Any legislation, policy or practice that allows asylum-seekers to reside in the community subject to a number of conditions or restrictions on their freedom of movement.

Alternatives to detention must not become alternative forms of detention, nor imposed where no conditions on release or liberty are required. They should respect the principle of minimum intervention and pay close attention to the specific situation of particular vulnerable groups.

The liberty and freedom of movement for asylum-seekers is always the first option.

Why alternatives?

- International law requires that detention must be a measure of last resort and alternatives avoid arbitrary detention
- Costs associated with legal challenges to detention, and high compensation bills, reduced
- No evidence that detention deters irregular movements
- Alternatives are significantly cheaper than detention – 10 times cheaper
- Cooperation rates with alternatives are sound – between 80-95% compliance rates
- Short- and long-term psychological and physical harm to detainees avoided
- Trust and co-existence between asylum-seekers and their host communities enhanced

Alternatives WORK when asylum-seekers and other migrants:

- ① are treated with dignity, humanity and respect throughout the relevant immigration procedure;
- ② are provided with clear and concise information about rights and duties under the alternative to detention and consequences of non-compliance;
- ③ are referred to legal advice including on all legal avenues to stay;
- ④ can access adequate material support, accommodation and other reception conditions; and
- ⑤ are offered individualised ‘coaching’ or case management services.

1. Managing the reception process

Screening

First line officers – such as police or immigration authorities – need to base their decisions to detain or release on a detailed and individualised assessment in line with international law. Appropriate screening or assessment tools can help guide decision-makers, including to take account of the special circumstances or needs of particular categories of asylum-seekers and other migrants.



In **ZAMBIA**, new guidelines “*Protection assistance for vulnerable migrants in Zambia*” guide “first contact” personnel – such as immigration officials, police officers, social welfare, health and prison officers and civil society personnel – to identify vulnerable migrants and asylum-seekers. A “migrant profiling form”, used during the initial interview, helps identify whether the individual falls within one of the category/categories: asylum-seeker, victim of trafficking (including presumed trafficked person and potential trafficked person), unaccompanied or separated child (UASC), stranded migrant, stateless person or other vulnerable migrant. Referral to actors providing protection services and various legal processes are implemented on a case-by-case basis. Regular capacity-building activities are conducted to support the implementation of these protection-sensitive processes and procedures.



With the *Risk Classification Assessment (RCA)* tool in the **UNITED STATES OF AMERICA**, individualised custody assessments are undertaken at the moment of intake. Flight risk, danger to the community, specific vulnerabilities (pregnancy, torture survivors and victims of past persecution, among others) are considered. All factors inform – though in many cases do not determine – decisions to detain or release. For those who are detained, the RCA informs their security classification within the detained population.



The **UNITED KINGDOM**'s *Enforcement Instructions and Guidance* start with a presumption in favour of temporary admission or release and, wherever possible, to apply alternatives to detention rather than detention. The guidance directs officials to consider all reasonable alternatives to detention before detention can be authorised. A list of factors to guide decision-making are included such as previous evidence of absconding or failure to comply with conditions of release, history of compliance, ties in the UK, stage in the asylum or other procedure, history of torture or physical or mental ill health, or likelihood of removal.



The **EUROPEAN UNION** Reception Conditions Directive 2013/33/EU emphasises that detention is a last resort, only to be applied where necessary, on the basis of an individual assessment, and Member States are required to examine all non-custodial alternative measures to detention *before* resorting to detention. Member States are under an obligation to exercise due diligence such that delays in administrative procedures not attributable to the applicant cannot justify a continuation of detention.

Timely detention reviews

The right to be brought promptly before a judicial or other independent authority to have a detention decision reviewed is a crucial procedural safeguard. Such reviews should be automatic, and take place in the first instance within 24-48 hours of the initial decision to hold the asylum-seeker or other migrant. The reviewing body must be independent of the initial detaining authority, and possess the power to order release or to vary any conditions of release. Subsequent reviews to take place after 7 days until the one month mark and thereafter every month until the maximum limit is reached. The asylum-seeker and his/her representative should have the right to attend these reviews.



CANADA Border Services, the federal agency responsible for border and immigration enforcement and customs services, has the discretionary power to order the release, with or without conditions, of individuals in administrative detention, including asylum-seekers, before the first detention review is scheduled, normally within 48 hours or without delay thereafter. If the person is not released within that period (48 hours), then a Member of the Immigration Division (ID) of the Immigration and Refugee Board (IRB), the independent review body, will hold a detention review hearing within 48 hours or without delay thereafter. Subsequent detention review hearings will follow after 7 days and then every 30 days until the ID is satisfied that there are no further grounds for detention. The ID reviews the grounds for detention to ensure that the person is not detained without sufficient reasons, and that the situation which led to the detention continues to exist.



Asylum-seekers detained by police/border guards in **LITHUANIA** cannot be held for longer than 48 hours without a court order. The police/border guards are required to apply to a local court to extend the period of detention beyond 48 hours or to impose an alternative to detention. The local court may extend the period of detention, release the individual or impose an alternative to detention. Appeals are allowed to Lithuania's Supreme Administrative Court by either the asylum-seeker or the State. Subsequent reviews of detention orders entitle an asylum-seeker to legal aid.



In the **UNITED KINGDOM**, mandatory administrative reviews are available to all persons subject to immigration detention, starting within the first 24 hours, then at 7 days, 14 days, 28 days and then every month. The reviews are to be undertaken by increasingly senior members of the administration, recognising the seriousness of prolonged detention. Applications for bail to the judicial authorities as well as judicial review of administrative decisions remain available throughout, although both are not automatic and are subject to some restrictions.



In **AUSTRIA**, the Bundesamt für Fremdenwesen und Asyl (the Federal Office for Aliens and Asylum Affairs) reviews the proportionality of detention every four weeks *ex officio* and can decide to apply an alternative to detention. After four months, the responsibility for the review lies with the Federal Administrative Court to control the legality of detention *ex officio*. Requests for court review are available throughout the procedure.

Maximum time limits in detention and automatic release

Maximum periods for detention set in national law guard against arbitrary and indefinite detention. At the end of the maximum period, persons must be released automatically. Maximum periods of detention cannot be circumvented by ordering release only to re-detain on the same grounds shortly afterwards.



Right to challenge alternatives to detention

As alternatives to detention involve more or less restrictions on freedom of movement, they must also be subject to periodic judicial or other independent review in order to minimise the restrictions imposed over time so they are no more than necessary.

Legal stay and documentation

Documentation remains one of the key safeguards against arbitrary detention or re-detention. For those required to surrender their passports or other travel documents as a condition of their stay, substitute documentation is required.

Article 27 of the 1951 Refugee Convention requires States parties to issue identity documentation to any asylum-seeker and refugee in their territory who does not possess valid travel documents.



In **COSTA RICA**, all asylum-seekers are granted a provisional legal status during the examination of their asylum claim, and a temporary identity document is issued by the Refugee Unit under the Migration Authority. If the status determination procedure takes more than three months, the asylum-seeker is entitled to obtain a new temporary identity document, which inter alia states that the holder has the right to work.



The Attorney General of **MALAYSIA**'s 2005 instruction to the Heads of the Prosecution Unit contributes to avoid the detention of asylum-seekers through identity and status verification. At the time of an arrest on immigration grounds, first line officers, such as police and immigration officers, are able to confirm the identity and status of the arrested individual through a database and call centre service (which includes a hotline service), both managed by UNHCR. If the person is registered with UNHCR, he/she is released. The authorities have fourteen (14) days to carry out this verification process. If an arrested person is not able to produce his/her UNHCR document, they can inform the arresting officer of his/her UNHCR ID No. and basic bio-data which would include date of birth, the names of parents and place of birth.

Access to legal representation and legal aid

Legal representation and, where it is available to nationals similarly situated, provision of free legal aid, help the detainee understand and exercise his/her rights and reduce cases of arbitrary detention.



The **EUROPEAN UNION** Reception Conditions Directive 2013/33/EU foresees independent and free legal assistance and representation in cases of appeal or review of detention where asylum-seekers cannot afford the costs involved or where such assistance is necessary to realise effective access to justice. Arrangements for accessing such legal assistance are to be laid down in national law.



In **JAPAN**, following a Memorandum of Understanding signed between the Immigration Bureau, the Forum for Refugees Japan (FRJ) and the Japan Federation of Bar Associations (JFBA), a new framework has been established for the improvement of the asylum system, including the issue of detention of asylum-seekers. As part of an alternative to detention pilot project, identified cases are referred by the Immigration Bureau to the FRJ. Eligible persons include those who could possibly be granted either landing permission for temporary refuge, provisional release, or permission for provisional stay. FRJ, after consideration of the cases, identifies accommodation and appoints a case manager. FRJ provides assistance such as psychological counselling and secures access to education and medical care; JFBA provides free legal assistance to asylum-seekers.

Case management

Case management is a strategy for supporting and managing individuals and their asylum or other migration claims whilst their status is being resolved, with a focus on informed decision-making, timely and fair status resolution and improved coping mechanisms and well-being on the part of individuals.



In **SWEDEN**, asylum-seekers are appointed two case workers after registration. A first case worker is responsible for the asylum process: he/she conducts interviews with the applicant in order to investigate his/her claim for asylum and to prepare the decision that will be taken by the executive officer of the Swedish Migration Agency. A second case worker supports the applicant in solving everyday life questions (daily allowance, special allowance, school, housing etc.), referring him/her to medical care, counselling or other services where required. Located at a Reception Unit near the residence of the applicant, he/she is also tasked to inform the applicant on decisions by the Swedish Migration Agency or Migration Courts. This second case worker also provides “motivational counselling” in order to prepare the asylum-seeker for all possible migration outcomes, and assesses the risk of absconding after a negative asylum decision. In the return process, he/she organises formalized contacts to discuss return.

This caseworker system is considered a factor that has positively affected the voluntariness of departure from Sweden. For instance, in 2012, 65% of third country nationals (or 12,988 persons) who were ordered to leave Sweden did so voluntarily.



In **BELGIUM**, as part of the “open family units” for families with children, case management is provided in the form of a “coach”. The assigned “coach” is from the Immigration Office, who is on-site daily, to help resolve their asylum or immigration case. Coaches also consider all legal avenues to remain in Belgium, as well as assist with preparing for return, and facilitate access to legal advice. The coach also arranges appointments (doctor, school, pro-bono lawyer, etc.) and provides or facilitates logistical, administrative and medical support to the families.

TOP TIPS:

- Case managers should be appointed at an early stage of the asylum or immigration process and continue until status is resolved or deportation takes place.
- Active information sharing is essential.
- Case managers may be social workers, but they may face a conflict of interest in certain settings.
- Code of conduct and other regulations on staff behavior guard against abuses.

2. Open reception and alternatives to detention

Living in the community with work and/or social rights



In **CHILE**, once an asylum-seeker has lodged an asylum application, he/she is issued with a renewable temporary stay permit, valid for eight months with the entitlement to work. Based on an agreement signed between the Department of Social Action under the Ministry of Interior and Public Security and the Fundación de Ayuda Social de las Iglesias Cristianas, UNHCR partner organisation, a comprehensive social assistance scheme is organized to facilitate the integration of asylum-seekers and refugees into local social and economic structures. The programme comprises: assistance for asylum-seekers and accompanying family members, an integration scheme for refugees, and services for vulnerable persons and cases with specific protection profiles. In particular, the assistance programme aims to cover basic needs for the duration of the asylum procedure, in particular food, housing (including furniture), documentation and transportation. Over the first three months of his/her stay in Chile, the applicant is entitled to full support. The amount provided respectively decreases to 75% after three months and 50% after six months. The support normally ends after twelve months, but the implementing agency can request the Department of Social Action to extend the support owing to special circumstances.

TOP TIPS:

- Preferred approach is living independently in the community in private accommodation.
- Caseworker support treats asylum-seekers with dignity, allowing them to live “normal lives “and minimizes non-compliance with immigration conditions.
- In the absence of work rights, appropriate levels of social support are required.
- Right to work granted by the host state fosters independence and increases the ability of the individual to self-sustain as well as to cope and constructively engage with asylum and/or migration processes.
- A range of accommodation options helps provide for the particular situation of individuals and their families.

Network of open accommodation options



NEW ZEALAND and countries in Europe such as **DENMARK, FINLAND, IRELAND, PORTUGAL, SPAIN** and **SWEDEN** have developed a strong culture of open accommodation centres, which may be a cluster of flats, or a purpose built centre, often called reception centres, that allow for a range of services to be provided on site where people may come and go freely, but often must meet their caseworker regularly. Sometimes this is communal living, dormitory style and mess hall kitchens for example. In other places, it is independent living similar to self-contained flats with a kitchen.

Living independently in the community with caseworker support



Since 2006, the International Social Service, **HONG KONG** branch (ISSHK), a non-governmental organization, has run a government-funded programme to assist refugee and torture claimants in Hong Kong SAR (“non-refoulement claimants”), to live in the community while their cases are being processed.

ISSHK assists non-refoulement claimants to find suitable private accommodation in the community, with beneficiaries being able to choose their place of residence within the allowable rent/month. ISSHK covers the monthly rental income and carries out inspections of living standards at intervals. Different accommodation types are available including ISSHK supervised shelters, an elderly home, emergency guesthouses, rented flats, government facilities and private apartments. A contract is signed between the persons and ISSHK on rights and responsibilities. ISSHK also provides food, clothing, toiletries, medical assistance and education for children, based on careful assessments of the individual’s situation and history. All support is provided “in kind”.

For its part, the Hong Kong Immigration Department (HKID) issues a recognizance document with photo, renewable monthly to certify that the person has a claim under process and has permission to stay in Hong Kong. All non-refoulement claimants are required to report in person to the HKID once a month or as scheduled. Failure to report is tantamount to absconding and consequently results in an investigation and potential arrest.

Reporting



In **SWEDEN**, supervision can be applied by the Swedish Migration Agency or the Swedish Police to persons liable for detention. Under a supervision order, the person is obliged to report to the police authority or to the Swedish Migration Agency at certain times. To make it as convenient as possible for the person subject to the supervision order, the reporting may be at the police station/Swedish Migration Agency office situated closest to where he/she is residing. An individual may also be required to surrender his/her passport or other identity document. The decision on supervision or detention can be appealed against at any time.

TOP TIPS:

- Frequency of reporting to be no more than required, reducing over time.
- Modalities of reporting to be adapted to specific needs (e.g. telephonic reporting).
- Reporting conditions to be periodically reviewed.
- Locations for reporting need to be convenient and accessible to avoid non-compliance.
- Reporting to different authorities – e.g. social workers – may avoid retraumatisation (e.g. instead of to the police).
- Reasons for non-compliance need to be properly assessed and some flexibility shown where there are good reasons for any delays.

Reporting by telephone



Reporting obligations imposed on asylum-seekers in the **UNITED STATES OF AMERICA** may be satisfied via telephonic reporting. The technology is owned and administered by a private contractor to the US Government. Individuals can “check-in” with U.S. immigration enforcement authorities over the phone via the contractor’s biometric voice recognition software. The frequency of the call-in is based on an assessment of risk and may be increased or decreased depending on the stage of an individual’s case. If the individual does not call-in at the appropriate intervals, reporting may be escalated or they may be subject to re-detention.

State funded bail and community supervision



Under contract with the **CANADIAN** Border Services Agency, the Toronto Bail Program (TBP), a non-profit entity, operates to support immigration detainees, including asylum-seekers and persons awaiting removal, to be released from detention via bail. The TBP acts as the “bondsperson” for those who have no family or other eligible guarantors to pay bond and in this way, removes the financial discrimination inherent in other bail systems. Under the TBP, no payment is made, rather asylum-seekers are released on the basis of the TBP’s guarantee. The TBP carries out interviews to assess suitability of candidates for their supervision.

Asylum-seekers agree voluntarily to cooperate with TBP and all immigration procedures, including any reporting conditions set by the TBP and voluntary return to their countries of origin in the event of a final negative decision on their asylum or immigration applications. As per the contract signed between the asylum-seeker and the TBP, they agree to appear for all appointments, to notify the TBP of a change of address and to participate in meaningful activities while in Canada (e.g. education, vocational training, work). Reporting requirements generally reduce as trust is established between TBP and the asylum-seeker. Unannounced visits to the asylum-seeker’s residence may be organized by the TBP. Failure to comply with reporting obligations may result in the TBP informing the provincial authorities, in which case the person would be placed under a Canada-wide arrest warrant. TBP makes it explicit that failure to report may result in return to detention.

In FY 2012-2013, 95.1% of a total of 415 supervised individuals complied fully with the programme. Part of the success of the TBP relates to the provision of a comprehensive orientation at the beginning of the programme. TBP staff provide individuals with information on how to access legal, psycho-social and healthcare services in Ontario.

Bail with options for provision of surety



Bail is available upon request in the **UNITED KINGDOM** within the first 8 days of detention by making an application to an Immigration Officer not below the rank of Chief Immigration Officer (CIO). After the 8 days, they can apply for bail to an Immigration Judge. There are some exceptions.

Bail guidance for judges presiding over immigration and asylum hearings instructs them to consider: (a) the reason or reasons why the person has been detained; (b) the length of the detention to date and its likely future duration; (c) the available alternatives to detention including any circumstances relevant to the person that makes specific alternatives suitable or unsuitable; (d) the effect of detention upon the person and his/her family; and (e) the likelihood of the person complying with conditions of bail. Detained asylum-seekers may be required to produce a surety, an individual who agrees to be held responsible for ensuring compliance with bail conditions. This requirement is not automatic: due regard should be given to the fact that people recently arrived in the country may have nobody to whom they could expect to stand surety for them. If there are no reasonable grounds for concluding that the applicant will abscond, a surety would be unnecessary.

The Bail guidance and its annexes further describe bail conditions that can be imposed. They make clear that stringency of the conditions should vary according to the circumstances of the applicant and the level of monitoring required. Indication about how to fix the amount of any financial bond is also given.

TOP TIPS:

- Bail hearings to be preferably automatic.
- Bail is particularly difficult for many asylum-seekers to access given their vulnerable financial situation, so efforts to minimize the financial disadvantage are welcomed.
- Guarantors or sureties may be more accessible to asylum-seekers than financial payments.
- Guarantors or sureties need to be checked properly, to avoid any exploitation of asylum-seekers or other migrants.
- General information about bail, lawyers and legal aid needs to be available in multiple languages and in various forms of communication (e.g. video screens or pamphlets in detention facilities), etc.

Provision of a guarantor or surety



The **LITHUANIAN** aliens law foresees the possibility for aliens to be released, trusting them to the guardianship of a citizen of Lithuania or a relative legally residing in Lithuania. This guarantor commits to taking care and supporting the migrant on the territory. Never applied to asylum-seekers, this provision has however been implemented in a few cases of other aliens. Aliens have been released, for example, to the care of a charity or church.

Directed residence to a specific address or administrative region until status is determined



An asylum-seeker distribution system operates in **GERMANY** where a quota is calculated on an annual basis per Länder, taking into account their tax receipts and population size (“Koenigsteiner Quota”). Asylum-seekers are assigned to an initial reception centre using a nationwide distribution system called “EASY”.

The individual designation of the residence is based on the available reception capacities in one of the 22 initial reception centers; the country of origin of the asylum-seeker; or the presence of core family members in one of the German individual states (spouses, children, or – in case of asylum-seeking children - their parents). In cases where other relatives are present in Germany, asylum applicants may apply to be re-allocated to another Länder.

With the exception of the so-called “city states” (i.e. Berlin, Hamburg and Bremen where individuals are generally directly allocated to collective accommodation centers or private housing), asylum-seekers in Germany usually stay for a minimum period of 6 weeks in the Initial Reception Centre (IRC), where basic provisions are provided in the form of non-cash assistance. Compulsory accommodation in those centers ends if the asylum-seeker is granted refugee status or temporary protection; if he/she is granted residence on account of marriage in Germany; has received a binding decree ordering his/her deportation that cannot, in the foreseeable future, be executed; or, in any case, no later than 3 months after the asylum application was lodged. Thereafter, asylum-seekers awaiting successful completion of their asylum procedure are usually transferred to open collective accommodation centers (CACs), run by private companies or charity organizations under contract with the municipality, or are privately accommodated.

TOP TIPS:

- Any distribution system needs to take into account the personal situation of the claimant and his/her family, such as family or diaspora links, any special support or services required, best interests of the child, etc.
- Upon re-allocation of one or more family members to another place in the country, (financial) compensation mechanisms may need to be applied between the concerned territorial entities (landers, regions, etc.).
- Directed residence should not interfere with broader freedom of movement rights, some flexibility is required.
- Directed residence not to continue after status is recognized.

Alternatives to detention in the context of return

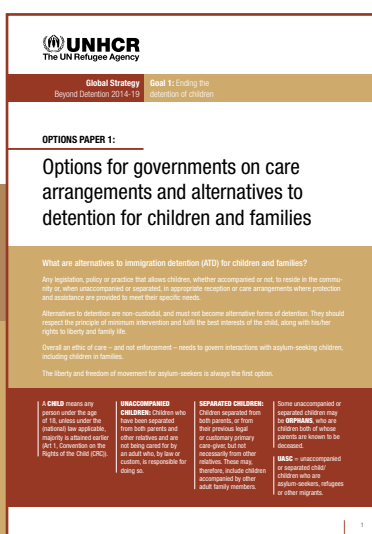
In **THE NETHERLANDS**, a number of different alternatives to detention are available as part of the Government's returns policy. The Repatriation and Departure Service (DT&V) and the police when assessing the need for an alternative to detention consider the following factors: the prospects of return, the alien's willingness to actively work towards return, the risks of absconding and any new facts or developments in the alien's personal situation. The DT&V collaborates with local NGOs if the alien is willing to work on return with an NGO instead of the DT&V. Every year the DT&V accepts applications for grants for local initiatives dealing with return, such as case management, or other in-kind or cash assistance upon return.

Different monitoring measures varying in intensity may be applied, sometimes in combination, for example, a duty to regularly report combined with DT&V assistance to prepare for return, the handing over of security deposit assessed against their financial situation, the deposit of documentation to the police or a measure of directed residence.

Attention to vulnerable groups such as families, unaccompanied or separated children, elderly persons or persons with physical disabilities or medical or psychological problems is included in the returns policy. Pregnant women, for example, are entitled to postponement of return from six weeks before the due date until six weeks after the delivery, and they are provided with lawful residence and shelter and care during this period.

TOP TIPS:

- NGOs can support rejected asylum-seekers and migrants in an irregular situation to work towards a dignified and voluntary return while in an alternative to detention.
- Assistance to voluntary return and reintegration in the country of origin can be in cash or in kind.
- Extra support may be required for persons with vulnerabilities or special needs.



For options for governments on care arrangements and alternatives to detention for children and families, see Options Paper 1, UNHCR 2015, available at: <http://refworld.org/docid/5523e8d94.html>

The standards reflected in this Options Paper are drawn from UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html>

This Options Paper 2 is available at: <http://refworld.org/docid/5523e9024.html>