

COUNCIL OF EUROPE

COMMITTEE OF MINISTERS

Recommendation Rec(2003)5 of the Committee of Ministers to member states on measures of detention of asylum seekers¹

*(Adopted by the Committee of Ministers on 16 April 2003
at the 837th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Recalling the 1950 European Convention on Human Rights and its relevant protocols, the relevant case-law of the European Court of Human Rights, the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child;

Taking into account Conclusion No. 44 (XXXVII) of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees (UNHCR) on the detention of refugees and asylum seekers;

Anxious to ensure that persons who are in need of international protection are able to seek and enjoy it;

Reiterating that no one shall be deprived of his liberty save in exceptional cases and in accordance with a procedure prescribed by law, as stipulated by Article 5.1.b. and f. of the European Convention on Human Rights and that all guarantees enumerated in Article 5, as appropriate, apply to those asylum seekers falling within the scope of this recommendation;

Emphasising that penalties shall not be imposed on persons seeking international protection coming directly from a country of persecution on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence;

Underlining that the present recommendation does not affect Recommendation No. R (94) 5 on guidelines to inspire practices of the member States of the Council of Europe concerning the arrival of asylum seekers at European airports, and Recommendation No. R (99) 12 on the return of rejected asylum seekers;

Considering that a number of asylum seekers are subject to detention by reason of their illegal entry or presence in search of asylum or for other relevant reasons linked to their asylum request and that, in such situations, certain guarantees of treatment should be provided for these asylum seekers,

Recommends to the governments of the member states to apply the following principles in their legislation and administrative practice:

¹ In conformity with Article 10.2c of the Rules of Procedure of the Ministers' Deputies, Ireland made the following statement: "With regard to paragraph 10 of the recommendation, Ireland wishes to point out that in exceptional circumstances it may not be possible for Ireland to keep asylum seekers separate from convicted criminals and prisoners on remand at all times."

Definition and scope of application

1. In the context of this recommendation, “measures of detention of asylum seekers” means any confinement of asylum seekers within a narrowly bounded or restricted location, where they are deprived of liberty. Persons who are subject to restrictions on domicile or residence are not generally considered to be subject to detention measures.
2. This recommendation does not concern measures of detention of asylum seekers on criminal charges or rejected asylum seekers detained pending their removal from the host country.

General provisions

3. The aim of detention is not to penalise asylum seekers. Measures of detention of asylum seekers may be resorted to only in the following situations:
 - when their identity, including nationality, has in case of doubt to be verified, in particular when asylum seekers have destroyed their travel or identity documents or used fraudulent documents in order to mislead the authorities of the host state;
 - when elements on which the asylum claim is based have to be determined which, in the absence of detention, could not be obtained;
 - when a decision needs to be taken on their right to enter the territory of the state concerned, or
 - when protection of national security and public order so requires.
4. Measures of detention of asylum seekers should be applied only after a careful examination of their necessity in each individual case. These measures should be specific, temporary and non-arbitrary and should be applied for the shortest possible time. Such measures are to be implemented as prescribed by law and in conformity with standards established by the relevant international instruments and by the case-law of the European Court of Human Rights.
5. Measures of detention of asylum seekers, reviewed regularly by a court in accordance with Article 5, paragraph 4, of the European Convention on Human Rights, should be applied only under the conditions and maximum duration provided for by law. If a maximum duration has not been provided for by law, the duration of the detention should form part of the review by the above-mentioned court.
6. Alternative and non-custodial measures, feasible in the individual case, should be considered before resorting to measures of detention.
7. Measures of detention should not constitute an obstacle to asylum seekers being able to submit and pursue their application for asylum.
8. Asylum applications from persons in detention should be prioritized for the purposes of processing. This is especially the case where a person is held in detention because of reasons resulting from the law pertaining to foreigners.
9. Measures of detention should be implemented in a humane manner, respecting the inherent dignity of the person and in accordance with applicable norms of international law and international standards.

10. The place of detention should be appropriate and, wherever possible, be provided for the specific purpose of detaining asylum seekers. In principle, asylum seekers should not be detained in prison. If special detention facilities are not available, asylum seekers should at least be separated from convicted criminals and prisoners on remand.

11. The basic needs and requirements of detained asylum seekers to ensure a standard of living adequate for their health and well-being should be met.

12. Asylum seekers should be screened at the outset of their detention to identify torture victims and traumatised persons among them so that appropriate treatment and conditions can be provided for them.

13. Appropriate medical treatment and, where necessary, psychological counselling should be provided. This is particularly relevant for persons with special needs: minors, pregnant women, elderly people, persons with physical or mental disabilities and people who have been seriously traumatised, including torture victims.

14. Separate accommodation within the detention facilities between men and women, as well as between children and adults should, as a rule, be ensured, except when the persons concerned are part of a family unit, in which case they should be accommodated together. The right to a private and family life should be ensured.

15. Detained asylum seekers should be allowed to practice their religion and to observe any special diet in accordance with their religion.

16. Detained asylum seekers should have the right to contact a UNHCR office and the UNHCR should have unhindered access to asylum seekers in detention.

17. Detained asylum seekers should also have the right to contact a legal counsellor or a lawyer and to benefit from their assistance.

18. Asylum seekers should be allowed to contact and, wherever possible, receive visits from relatives, friends, social and religious counsellors, non-governmental organisations active in the field of human rights or in the protection of refugees or asylum seekers, and to establish communication with the outside world.

19. Asylum seekers should be guaranteed access to a complaints mechanism concerning the conditions of detention.

Additional provisions for minors

20. As a rule, minors should not be detained unless as a measure of last resort and for the shortest possible time.

21. Minors should not be separated from their parents against their will, nor from other adults responsible for them whether by law or custom.

22. If minors are detained, they must not be held under prison-like conditions. Every effort must be made to release them from detention as quickly as possible and place them in other accommodation. If this proves impossible, special arrangements must be made which are suitable for children and their families.

23. For unaccompanied minor asylum seekers, alternative and non-custodial care arrangements, such as residential homes or foster placements, should be arranged and, where provided for by national legislation, legal guardians should be appointed, within the shortest possible time.