

## **Inputs of the Portuguese National Human Rights Institution to the Special Rapporteur on the human rights of migrants:**

The Portuguese National Human Rights Institution (Portuguese Ombudsman) hereby responds to the call for information made by the Special Rapporteur on the human rights of migrants, on “Ending immigration detention of children and seeking adequate reception and care for them”. The Ombudsperson is currently Prof. Maria Lúcia Amaral.

24 April 2020

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### **1. Please provide information on any legislation or policy that prohibits or restricts the use of immigration detention of children and their families in your country.**

Detention of migrant children is not expressly forbidden in Portugal, neither by Immigration Law<sup>1</sup> nor by Asylum Law<sup>2</sup>, both of which set forth the conditions for detention of migrants. Nonetheless, both Laws affirm that detention can only be applicable as a measure of last resort. Moreover, in the Portuguese system, migration-based detention can only be applied for a maximum period of 60 days (Article 146 of the Immigration Law and Article 35-B/1 of the Asylum Law). This period cannot be extended under any circumstance.

The Immigration Law (IL) sets forth that families with children whose entry in the territory is refused may be detained in the airports’ detention centers, when their return is not possible during the next 48 hours (Article 38/4). Migrant families and their children may also be detained when they are found irregularly staying in the Portuguese territory, during a return procedure. In both cases, however, detention is seen as a last resort measure, according to the applicable EU Directives (Article 124).

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<sup>1</sup> Law n. 23/2007 of 4th July, as last amended by Law 26/2018 of 5 July.

<sup>2</sup> Law n. 27/2008, of 30 July, as last amended by Law 26/2014, of 5 May.

The Asylum Law (AL), on its turn, states clearly that persons cannot be detained for the only reason of having asked for asylum (Article 35-A/1). Moreover, detention can only be applicable when no other less serious measure is available. That is a general rule, applicable both to adults and children and is also derived from the general principles of EU Law. However, AL sets forth several exceptions to this rule. One of them concerns asylum applications made at the borders. Despite the “last resort” rule, as observed by the work of the Portuguese NHRI, in practice persons who apply for asylum at the border are systematically detained. Families and children are usually kept in the airport’s detention centres in cases where they were found in the border posts (Art. 26 AL).

According to data from the Aliens and Borders Service, the total number of children detained from 2017 to 26 June 2018 amounted to 169 children. This represents an extremely high number of child detentions on migration or asylum procedures, namely when compared to the number of entries of foreigners in Portugal. Data as for 2019 were not yet been given to the Ombudsman.

The Portuguese Ombudsman has been repeatedly claiming that detention of migrant children is contrary to their best interest, in line with the Committee on the Rights of the Child<sup>3</sup>.

As a result of the Ombudsman’s advocacy works, the Minister of Internal Affairs issued an order, in 2018, according to which all families with children aged below 16 could only stay in the temporary detention centers located in the international airports’ areas during 7 days. After this period, they must be accommodated in the Refugees’ Shelter, which is a non-detention center ran by the Portuguese Council for Refugees (NGO).

As for unaccompanied children, since an even more demanding “last resort” principle is applied to their detention, they are normally transferred to the refugees’ shelter at the outset, after being identified by the Aliens and Borders Service (Article 26/2 AL). However, in 2019, this shelter had serious problems of overcrowding and, as a result, in some cases unaccompanied children had to remain in the airport’s detention center.

**2. Please provide information on existing non-custodial alternatives to immigration detention of children in your country (e.g. community-based reception solutions) and elaborate how these alternatives effectively enhance the protection of the rights of migrant children and their families.**

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<sup>3</sup> See, on this topic, the NHRI’s alternative reports on the application of the Convention on the Rights of the Child in Portugal (2018) and on the application of the Convention against torture (2019), available at: <http://www.provedor-jus.pt/?idc=150>

IL and AL foresee several alternatives to detention, such as periodic presentation at the Aliens and Borders Service and obligation to stay in the dwelling using electronic surveillance means.

The IL sets forth that detention shall only be applicable when no other measure is deemed sufficient – namely because there is a risk of absconding (Art. 142 IL). The Portuguese Superior Courts' case-law has been highlighting that the application of such a measure must be justified under the principle of proportionality.

This jurisprudence is more easily applied in cases where migrants were already found illegally living in Portugal. In such cases, courts must analyse whether the foreigner considered was employed, had a house and children enrolled in schools. All these factors may indicate that there is no risk of absconding, and thus, neither the illegal foreigner, nor their family and children shall be detained (Art. 146 IL).

However, the same does not happen to those who are refused to enter in the territory or who applied for asylum at the borders. Migrants in these cases are, in practice, systematically detained, irrespective of having children, in the airport's detention area. As the NHRI has witnessed and reported, alternatives to detention are very seldom applied in border procedures.

As for unaccompanied children arriving to the territory, the EU Law – and, thus, also the Portuguese Law - requires an even more demanding *ultima ratio* principle for detention. Several measures shall be preferably applied to children, such as their accommodation with other adult family members or their accommodation in specialized homes. As previously said, they are normally accommodated in the Refugees' shelter ran by a Portuguese NGO, funded by the Portuguese State.

**3. Please provide information on any existing good practices or measures taken in your country to protect the human rights of migrant children and their families while their migration status is being resolved, including inter alia their rights to liberty, family life, health and education(e.g. by ensuring effective access to inter alia adequate reception, healthcare, education, legal advice, family reunion).**

According to the Portuguese Asylum Law, migrant children are considered especially vulnerable persons (Article 2/1/y of AL). They have special procedural rights and shall also benefit from special accommodation conditions. The same set of procedural rights is not foreseen, however, in the Immigration Law.

Procedural Rights: The Portuguese Asylum Law sets forth some protection duties during the procedure:

. All personnel involved in examining applications for international protection made by unaccompanied minors shall be adequately trained to children's specific needs (Article 79/12 AL).

. Unaccompanied children shall be represented by a non-governmental entity or organization, or by any other form of legally permitted. The Aliens and Borders Service is competent to request the Family and Children Court to designate a legal guardian (Art. 79 AL);

. Age assessment: authorities may use medical expertise through a non-invasive expert examination. The child must be informed on the procedure and may refuse to perform it – refusal cannot be taken against the child. The Aliens and Borders Service has already recognized that documentation is usually enough to prove the applicant's age. In case of doubt, the applicant is deemed to be a minor until there is a proof on the contrary (Art. 79 AL).

Material accommodation conditions: Both the IL and the AL establish specific requirements for detention of children:

. Asylum-seeker children must be accommodated in establishments deemed adequate, according to international standards recognised by UNHCR, Red Cross and UNICEF (Article 26/2 AL), and be accompanied by specialized personnel (Article 35-B, n.6 AL).

. Both IL and AL require that families must not be separated on detention (Article 146-A/6 IL and Article 35-B/7 AL. However, in some airports' detention centers, there are no "family rooms", and detainees are separated by sex, which means that members of the family remain separated during sleep hours.

. In border procedures, the first accommodation center, both for asylum seekers or for migrants whose entry was refused, is the airport's detention center. These detention centres do not provide child-friendly conditions. They are extremely small and are, oftentimes, overcrowded. Children aged below 14 stay in the women's common room, which offers no privacy conditions. Although food is given, healthcare is only provided by the Doctors of the World, an NGO That visits the centre three times per week. In case of need, urgent medical treatment and a visit to the hospital may be arranged. As for recreational activities, they are very little or non-existent. After some insistence from the Ombudsman, the Centre's responsible personnel have acquired some toys. However, no recreational activities are organised. Access to outdoors is only guaranteed by providing access to an interior patio. In these centres there is also no psychosocial assistance and protection measures to the child. After being contacted by the Ombudsman, the Ministry of Internal Affairs recognized the difficulties of the airports' detention centers, and committed to initiate in 2019 the construction of a new temporary

detention center located in Sintra, near Lisbon, and equipped with appropriate conditions for families and children. However, to this date, this new centre is yet to be opened.

. The Portuguese Council for Refugees runs several shelters, to where families are transferred after the end of the detention period. However, these shelters only function as temporary accommodation. They offer age-appropriate housing and reception conditions for an average stay period of 7 months and 12 days. These shelters are organized through a multidisciplinary approach, encompassing social workers, psychologists, cultural mediators and lawyers. Children have access to several social rights, such as education and leisure activities. In practice, accompanied and unaccompanied children are systematically referred to public schools upon accommodation at the shelter. According to the experience of its social department, enrolment in local public schools is generally guaranteed within a reasonable period, although the placement of students in secondary education (i.e. over the age of 15) can prove problematic due to more demanding bureaucratic procedures and placement examinations.

. However, lately, these shelters are often overcrowded, and there have been several problems as regards finding suitable accommodation for families. Frequently, they are accommodated in hostels or other hotels – which have been proven to be unsuitable for accommodating children

. Families with children who were found illegally staying in the territory, are normally detained in another special detention (temporary accommodation center) in Porto (Unidade Habitacional de Santo António), which is prepared to receive children. There are daily activities scheduled for detainees, an educational room for children, and access to psychologists and medical doctors are provided. The Jesuit Service for Refugees has a permanent office therein.

- As for unaccompanied children, as already mentioned, they are usually received in the Refugees' shelter at the outset, unless there is a lack of vacancies in these shelters. A legal representative must be designated and several rules shall apply to these children: for example, siblings must not be separated, and their security and health must be strictly safeguarded – namely as regards protection against trafficking of human beings. The State shall immediately begin the procedure for finding the child's family and initiate the family reunification procedure. When family reunification is not possible, unaccompanied children must remain in the territory and all rules governing the protection of national children in danger are applicable to them: for example, stability must be provided at the maximum extent possible. Preferably, these children shall be accommodated with foster families or institutions. The Law on Protection of Children in Danger and the Nationality Law also provide access to a legal status or even nationality to children in State custody.

**4. Please indicate any challenges and/or obstacles in the development and/or implementation of non-custodial alternatives to immigration detention of children and their families.**

Asylum and Immigration law require that detention measures which may last for more than 48 hours must be communicated to the judge, who shall then authorize the migrant's permanence in detention centers. Procedures differ deeply depending on whether the foreigner was found illegally staying in the national territory or on whether he or she was found at the border.

In the former situation, the foreigner is presented to the judge, as soon as possible, who will decide which measure shall be applicable (Art. 146 IL). The foreigner has access to a lawyer and the procedure is adversarial. In particular, the migrant may present evidence showing the he or she does not represent a risk of absconding, or he or she is a parent of minor children, whose best interest must be taken into consideration. In these cases, there is room for discussion on alternative measures to be applicable.

However, the same is not applicable to foreigners who are found at borders, wither trying to enter illegally in the country or who apply for asylum therein. In these situations, the IL and AL do not mention expressly that the judge must hear the detainees before deciding on whether these persons are kept in the airports' detention areas. It only sets forth that the detention must be communicated to the judge, in order to determine whether the migrant will remain in the centre (Article 38/4 IL and 35-A/6). According to the Portuguese Constitution, constitutional guarantees on effective justice and fair proceeding would demand that a judicial authorization in this context encompass a mandatory judicial and adversary hearing, legal representation and the need to take into account the best interest of the involved children (Art. 20 Constitution). In practice, however, the Aliens and Borders Service informs the Court, by fax or email, that a certain group of foreigners are to be retained in the airport's detention center, and the Judge merely confirms that such persons may remain therein. This judicial decision is also communicated by the same remote means – either by email or by fax.

This procedure has been leading to a systematic application of detention measure, irrespective of the involvement of children. Without hearing the detainees, judges can hardly evaluate on the possible application of an alternative measure. On the other hand, it can hardly take into consideration the best interest of possible children at stake.

In this context, the Ombudsman suggested to the Committee on the Rights of the Child to recommend an amendment the Immigration and Asylum Laws, requiring that all detention

measures could only be maintained for more than 48 hours after a judicial authorisation mandatorily preceded by a judicial hearing of the detainee, who must necessarily be represented by a lawyer;

However, for the Ombudsman, detention of migrant children is always contrary to their best interest. Thus, it has issued an even more demanding suggestion to the Committee on the Rights of the Child, stating that children might only stay in the Temporary Detention Centers located in the airports for a maximum period of 48 hours;

**5. What support could other stakeholders (other than your Government) provide to strengthen the development and/or implementation of non-custodial alternatives to immigration detention of children and their families that enhance the protection of their rights?**

The International Organization for Migration has been actively advocating for the use of alternative measures to detention on migration contexts. Workshops, conferences and trainings have been developed, some of them dedicated to the judges. The Ombudsman has developed a partnership with this International Organization, precisely for advocating in this context.

The Ombudsman has been advocating for the application of alternative measures in several fora – for example, through alternative reports and statements made to UN bodies (Committee on the Rights of the Child, Committee Against Torture) and also in its annual reports (namely in its quality as NPM) and the media.