

A short course on EU asylum law. III.

RECEPTION CONDITIONS, DETENTION

Presented by Boldizsár Nagy,

HR consortium

Presented at PFUR, Moscow, 2017

Reception conditions directive

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)
(OJ 2013 L 180/96)

Replacing
COUNCIL DIRECTIVE 2003/9/EC
of 27 January 2003
laying down minimum standards for the reception of asylum seekers
(OJ 2003 L 31/18)

New emphasis

Preamble explicitly refers to MS „which are faced with **specific and disproportionate pressures** on their asylum systems, due in particular to their geographical or demographic situation”.

It emphasises that the EU asylum policy „should be governed by the principle of **solidarity and fair sharing of responsibility**, including its financial implications, between the Member States.”

Much **refinement** concerning **detention** and persons with special needs

RECEPTION CONDITIONS DIRECTIVE

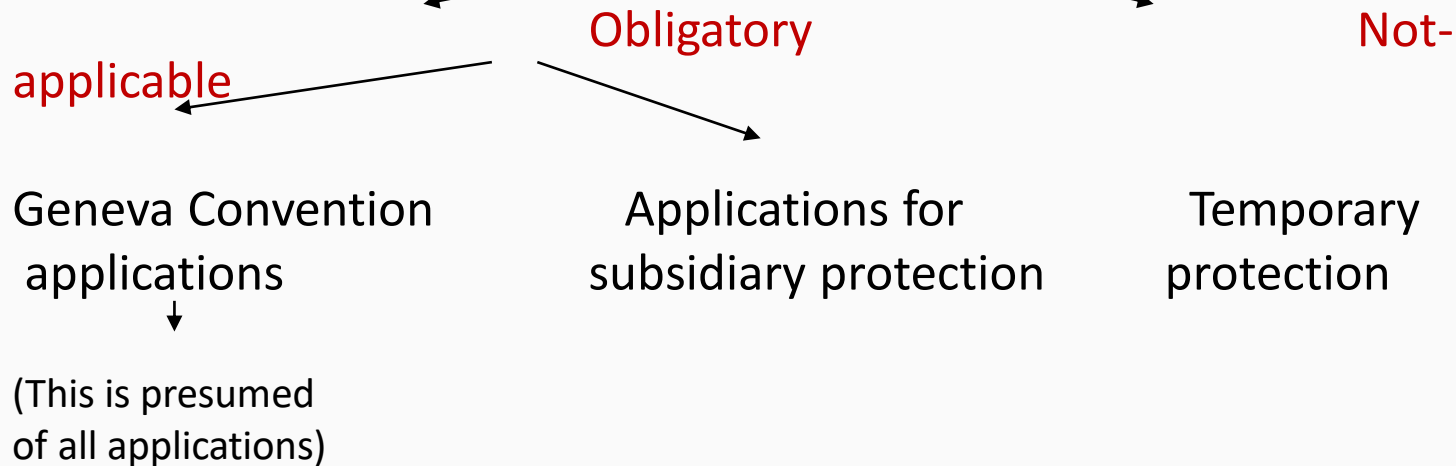
Purpose:

To ensure asylum seekers a dignified standard of living and comparable living conditions in all Member States during the refugee status determination procedure

and

by the similarity of treatment across the EU limit the secondary movements of asylum seekers influenced by the variety of conditions for their reception

Scope:



Only the minimum is prescribed – states may overperform

RECEPTION CONDITIONS DIRECTIVE

Information 15 days, in writing, language!

Documentation 3 days, permit to stay ↔ detention, border

Family unity maintain as far as possible

Medical screening optional

Schooling minors compulsory, (after 3 months)

Employment optional exclusion from labour market for a maximum of 9 months. Then access if no first instance decision yet

Ranking after EU/EEA citizens

RECEPTION CONDITIONS DIRECTIVE

Vocational training optional (States may grant access)

Material reception conditions: „provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health.”
(§ 17 /2)

Asylum system may have to contribute

Provision: in kind – money – vouchers or mix.

No equal treatment with needy nationals

Housing/accommodation: in kind or allowance for it

Family life, access to lawyers, UNHCR be guaranteed

Health care minimum: „emergency care and essential treatment of illness and of serious mental disorders” (§ 19)

Detention – a limited, exceptional tool

• Article 8 para 2:

Member States may detain only detain an applicant, „**if other less coercive alternative measures** cannot be applied effectively” – **individual assessment** is required

- Less coercive alternatives:
- regular reporting to the authorities,
 - the deposit of a financial guarantee,
 - obligation to stay at an assigned place

- Six grounds :

- determine or **verify** his or her **identity or nationality**;
- determine those **elements on which the application** for international protection **is based which could not be obtained** in the absence of detention, in particular when there is a **risk of absconding** of the applicant;
- border procedure** (decision on entry);
- when detained subject to **a return procedure** the application is made only in order to **delay or frustrate the enforcement** of the return decision
- when protection of **national security or public order** so requires;
- Dublin** procedure

Guarantees:

Detention only on the basis of **a written, reasoned order** by court or administrative authority

Info in writing on reasons and **appeal** possibilities

Detention must be **as short as possible**, and only as long as grounds are applicable.

Appeal or ex officio review of the administrative detention decision + **periodic review** of all detention + free legal assistance in the judicial review (but: MS may restrict access to free legal aid)

RECAST - DIRECTIVE 2013/33/EU - MAJOR AGREED CHANGES COMPARED TO THE 2003 DIRECTIVE - DETENTION

Conditions (§ 10)

- In **specialized facility**, or if in prison, separated from inmates
- **Not together with „other third-country nationals** who have not lodged an application for international protection”.
- Access to **open-air spaces** (No specification of time or conditions)
- **UNHCR** or organisation working on its behalf must have **access** to the site and be able to **communicate** with the detained person
- **Family** members, **legal advisors** and (recognised) **NGO-s: access and communication** unless „objectively necessary for the security, public order or administrative management of the detention facility” – but even then it must not virtually wipe out the right
- Systematic provision of **info** which explains the **rules applied** in the facility in a language which the detained persons understand or are reasonably supposed to understand.

Detention – possible (**unaccompanied minors: „only in exceptional circumstances”**, never in prison, separately from adults)

Health and mental health – primary concern
Monitoring and „adequate support”

Families: „shall be provided” with separate accommodation „**guaranteeing adequate privacy”**

Females separate from males (unless consenting family)

Derogations at border detention possible

- vulnerable persons such as minors,
- unaccompanied minors,
- disabled people,
- elderly people,
- pregnant women,
- single parents with minor children,
- victims of human trafficking,
- persons with serious illnesses,
- persons with mental disorders
- persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation

RECEPTION CONDITIONS DIRECTIVE

Reduction/withdrawal always **optional**

Decisions „shall be taken **individually, objectively and impartially and reasons shall be given**” (§ 20/5)

Cases of reduction/withdrawal: conditions may be reduced or withdrawn when an asylum seeker:

- abandons the determined place of residence w/out permit
- does not report as prescribed or does not appear for interview
- has already lodged an application in the same Member State.
- has concealed financial resources and has therefore unduly benefited
- has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival in that Member State.

As a sanction for serious breach of the rules of the accommodation centres or for seriously violent behaviour.

Emergency health care must not be withdrawn in any case!

Appeals

Against

a negative decisions relating to the granting of benefits (including reduction or withdrawal decisions) or

decisions on residence and freedom of movement (§ 7) which individually affect asylum seekers

Procedure: laid down in the national law.

At least in the last instance: appeal or a review before a judicial body

DETENTION

INTERNATIONAL AND EUROPEAN STANDARDS

IRREGULAR ENTRY IS NOT A CRIME

„The Special Rapporteur **notes with concern** that irregular entry and stay **is considered a criminal offence** in some countries. He wishes to stress that **irregular entry or stay should never be considered criminal offences**: they are not per se crimes against persons, property or national security.”

UN General Assembly
Report of the Special Rapporteur on the human rights of migrants,
François Crépeau, 2 April 2012, A/HRC/20/24

The UN HRC Working Group on Arbitrary Detention has held that **“criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate irregular immigration and leads to unnecessary detention”** (A/HRC/7/4, para. 53).

Admission to territory- article 31 of the Geneva Convention

ARTICLE 31

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

BENEFICIARIES OF ARTICLE 31

Adimi, para 16:

„That Article 31 extends not merely to those ultimately accorded refugee status but **also to those claiming asylum** in good faith (presumptive refugees) is not in doubt.

Nor is it disputed that Article 31's protection can apply equally to those **using false documents** as to those (characteristically the refugees of earlier times) **who enter a country clandestinely.**”

R v. Uxbridge Magistrates Court and Another, Ex parte Adimi, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999, available at: http://www.refworld.org/cases,GBR_HC_QB,3ae6b6b41c.htm

COMING DIRECTLY

Guy Goodwin-Gill, 2003 „Refugees are not required to have come ‘directly’ from their country of origin.” p.194 reasons for not remaining there:

- threat of persecution
- refusal of recognition as refugee or granting asylum there
- no access to protection because of safe third country or safe country of origin principles or time limits

Adimi, para 18

I am persuaded by the applicants’ . . . submission, drawing as it does on the travaux préparatoires, various conclusions adopted by UNHCR’s executive committee (ExCom), and the writings of well respected academics and commentators (most notably *Professor Guy Goodwin-Gill, Atle Grahl-Madsen, Professor James Hathaway and Dr Paul Weis*), that **some element of choice is indeed open to refugees as to where they may properly claim asylum.**

COMING DIRECTLY

Adimi, para 18 (cont'd)

„I conclude that **any merely short term stopover en route** to such intended sanctuary **cannot forfeit** the protection of the article, and that the **main touchstones** by which exclusion from protection should be judged are

the **length of stay** in the intermediate country,

the reasons for delaying there ...and

whether or not the refugee **sought or found there protection** *de jure* or *de facto* from the persecution they were fleeing.”

„ even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on”

GOOD/VALID CAUSE FOR ENTERING ILLEGALLY

Not: simply being a refugee – but why not legally

- No legal access:
 - Inaccessibility of travel document (home authorities deny)
 - Visas not issued to person
- Danger entailed in trying to get legal access
 - Persecution/threat of harm while awaiting visa
 - Threat of being identified by authorities (queuing before embassy)
- No need to prove that protection is not available elsewhere (French proposal to that effect refused at the Conference)

WITHOUT DELAY

Not: immediately. Reasons/circumstances making a delay reasonable

- linguistic + cultural barriers
- trauma
- (physically) unable to present himself/herself
- fear of summary rejection at the border
- apprehended right around entry

Firm deadlines with loss of right to apply – **illegal** (*Jabari, ECtHR, 2000!*)

-Hathaway, 2005, 391-92, UNHCR Revised Guidelines 1999

NO PENALTY UNLESS ACTUAL PROTECTION ENJOYED ELSEWHERE

Global Consultations outcome (conclusions) „The drafters only intended that **immunity** from penalty should **not** apply to refugees **who found asylum, or who were settled**, temporarily or permanently, in another country.”

Proposal by **Gregor Noll**:

The benefit of Art. 31, para. 1 **must be accorded to any refugee**, with the **exception** of those who have been accorded **refugee status and lawful residence** in a transit State to which they can **safely return**.

PENALTY

Only criminal or administrative too? (Is detention ordered after illegal entry/presence a penalty?)

Manfred Nowak: 'every sanction that has not only a preventive but also a retributive and/or deterrent character is . . . to be termed a penalty, regardless of its severity or the formal qualification by law and by the organ imposing it' (quoted in Goodwin Gill, G., 2003, 195)

Penalty = wider than criminal sanction – any measure with a dominantly retributive and/or deterrent aim

Even the denial of economic or social rights to refugees illegally entering or being present may have a punitive character.

In a British case on social security it was accepted by the appeal commissioner that: „any treatment that was less favourable than that accorded to others and was imposed on account of illegal entry was a penalty within Art. 31 unless objectively justifiable on administrative grounds”

Not imposing: not starting the penal procedure or not convicting/punishing ?
Not starting (e.g. US) Shifting the burden of proof (*Adimi*: the prosecution has to prove that article 31 does not apply)

DETENTION - DEFINITIONS

UNHCR: **“detention’ refers to the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities”**

Guidelines, 2012, para 5

Reception Conditions Directive Recast, 2013

„'detention' means confinement of an applicant by a Member State within **a particular place**, where the applicant is deprived of his or her freedom of movement”

Article 2 (h)

"Placing individuals in temporary custody in stations, ports and airports or any other facilities where they remain **under constant surveillance** may not only amount to restrictions to personal freedom of movement, but **also constitute a de facto deprivation of liberty"**

UN Working Group on Arbitrary Detention,
Deliberation No. 9 para 59, 2012

ILIAS AND AHMED V. HUNGARY

(APPLICATION NO. 47287/15)

ECTHR JUDGMENT, 17 MARCH 2017

Transit zone = state territory under state control → Hungary can not claim „not entered territory”

„The applicants in the present case were confined for over three weeks **to the border zone** – a facility which, for the Court, bears a strong resemblance to an international zone, both **being under the State’s effective control irrespective of the domestic legal qualification.**”

ILIAS AND AHMED v. HUNGARY

(APPLICATION NO. 47287/15)

ECTHR JUDGMENT, 17 MARCH 2017

„The difference between deprivation of and restriction upon liberty is one of degree or intensity, and not of nature or substance” (53)

„The notion of deprivation of liberty within the meaning of Article 5 § 1 contains both an **objective element** of a person’s **confinement in a particular restricted space for a not negligible length of time**, and an additional **subjective element** in that the person **has not validly consented** to the confinement in question” (§ 53)

Holding asylum seekers in the „transit zone” „amounts to deprivation of liberty irrespective of its domestic characterisation.” (§ 66)

Ilias and Ahmed **could only leave if they gave up their application** and illegal re-entered Serbia – that can not be expected, detention was against their will.

DETENTION

In the context
of article 31

Under 31 (1)
punishment –
not allowed

Under 31 (2)
necessary – if
necessity
proven

Goodwin-Gill, G.: „The Conference records indicate that, **apart from a few days for investigation**, further detention would be necessary only in cases involving **threats to security** or a **great or sudden influx**.”

DETENTION AS PUNISHMENT

The use of detention as a deterrent is not allowed

Revised Guidelines:

„UNHCR considers detention as: confinement within a narrowly bounded or restricted location, including prisons, closed camps, **detention facilities or airport transit zones**, where **freedom of movement is substantially curtailed**, and where the only opportunity to leave this limited area is to leave the territory”

Council of Europe, Council of Ministers:

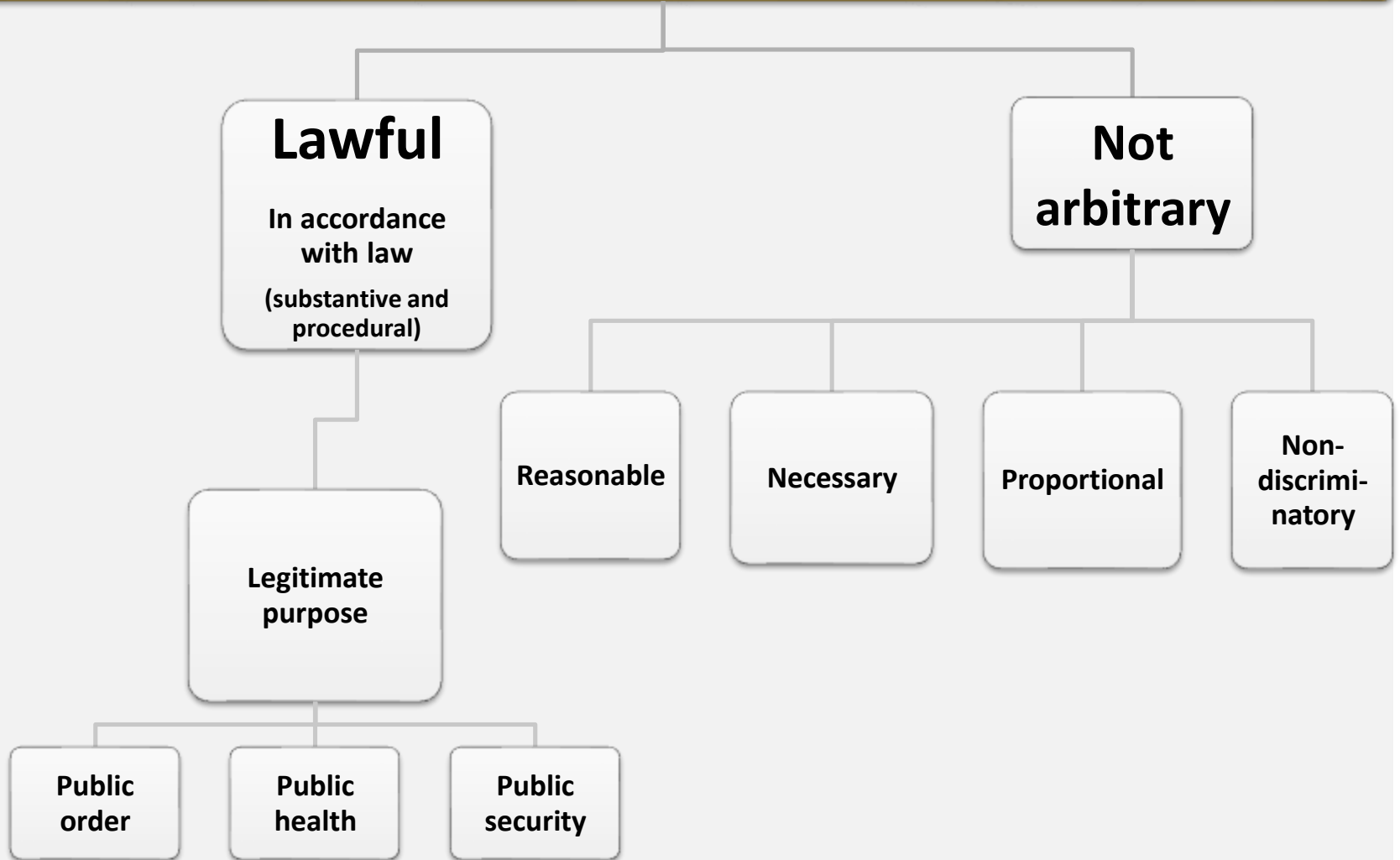
„The aim of detention is not to penalise asylum seekers.”

Recommendation Rec(2003)5 of the Committee of Ministers to member states on measures of detention of asylum seekers, point 3

„The Special Rapporteur would like to emphasize that **there is no empirical evidence that detention deters irregular migration or discourages persons from seeking asylum.** Despite increasingly tough detention policies being introduced over the past 20 years in countries around the world, **the number of irregular arrivals has not decreased.** This may be due, inter alia, to the fact that **migrants possibly see detention as an inevitable part of their journey**”

Para 8 of the report

Detention – General legal requirements



DETENTION UNDER 31(2)

If procedure started: lawful presence (see, e.g. UNHCR submission in the Saadi v UK case)

Detention: only to establish identity and basis of claim. If *prima facie* refugee – no longer necessary

Are necessary ≠ “as it may deem necessary” – that proposed text was discarded by the Conference drafting the convention
Are necessary – objective test, not state subjective precaution

Thereafter Art 26 GC prevails – freedom of movement

**THE (REVISED)
UNHCR
GUIDELINES ON
DETENTION**

2012

GUIDELINE 1.	The right to seek asylum must be respected		
GUIDELINE 2.	The rights to liberty and security of person and to freedom of movement apply to asylum-seekers		
GUIDELINE 3.	Detention must be in accordance with and authorised by law		
GUIDELINE 4.	Detention must not be arbitrary, and any decision to detain must be based on an assessment of the individual's particular circumstances, according to the following:		
	GUIDELINE 4.1 Detention is an exceptional measure and can only be justified for a legitimate purpose	GUIDELINE 4.2 Detention can only be resorted to when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose	GUIDELINE 4.3 Alternatives to detention need to be considered
GUIDELINE 5.	Detention must not be discriminatory		
GUIDELINE 6.	Indefinite detention is arbitrary and maximum limits on detention should be established in law		
GUIDELINE 7.	Decisions to detain or to extend detention must be subject to minimum procedural safeguards		
GUIDELINE 8.	Conditions of detention must be humane and dignified		
GUIDELINE 9.	The special circumstances and needs of particular asylum-seekers must be taken into account		
GUIDELINE 10.	Detention should be subject to independent monitoring and inspection		

Procedures Directive, Recast Art 26

„Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.” (para 1)

If detained „speedy judicial review” (para 2)

Return Directive, Article 15

(Directive 2008/115/EC of 16 December 2008)

Member States may only keep in detention a third-country national if sufficient but less coercive measures can not be applied (para 1)

„When it appears that a reasonable prospect of removal no longer exists

detention ceases to be justified and the person concerned shall be released (para 4) immediately.”

The „Dublin III” regulation

Preamble

underlying **principle**: that a person **should not be held in detention for the sole reason that** he or she is seeking international protection.

Detention **should be for as short a period as possible** and subject to the **principles of necessity and proportionality**.

Detention must be **in accordance with Article 31 of the Geneva Convention**.

The new **reception conditions criteria** on guarantees and conditions apply

Entry into force:
19 July 2013
Applicable to
applications
submitted after
19 January 2014

Article 28 Detention

When there is a **significant risk of absconding**, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on the basis of an individual assessment and **only in so far as detention is proportional** and other **less coercive alternative measures** cannot be applied effectively.

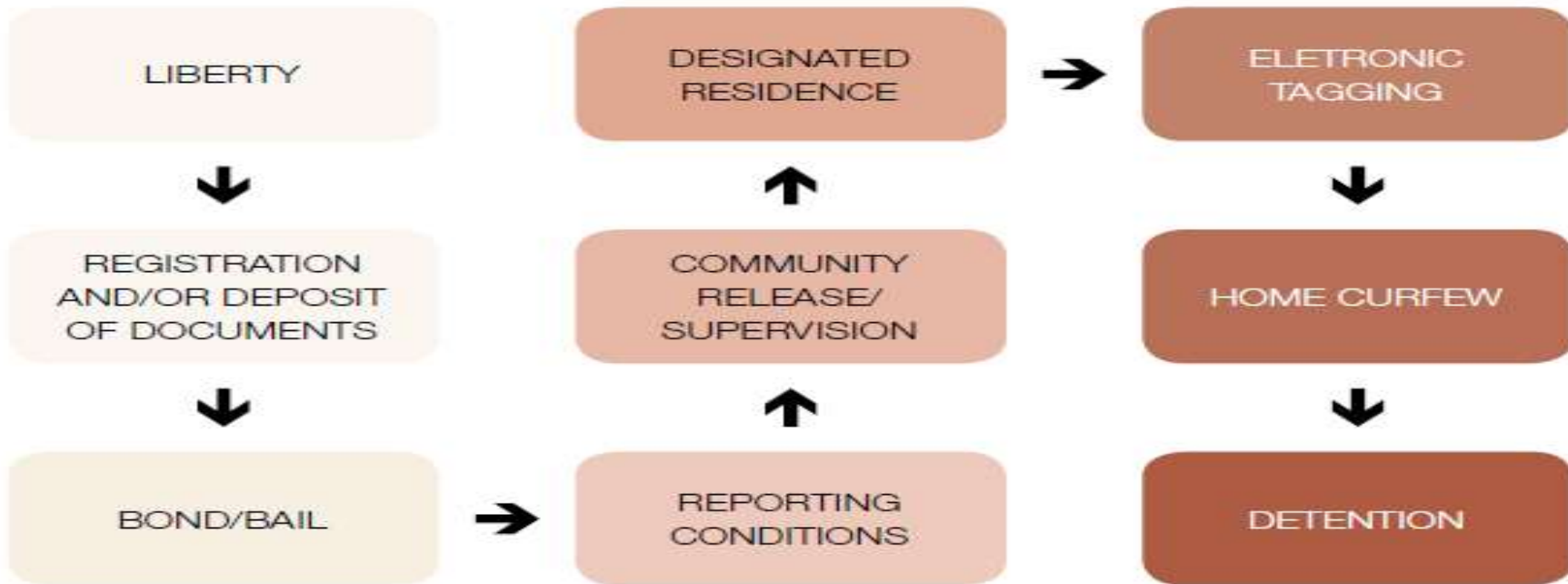
Detention shall be for **as short a period as possible** and shall be for no longer than the time **reasonably necessary** to fulfil the required administrative procedures **with due diligence** until the transfer under this Regulation is carried out.

Max. **6 weeks** for request and response(silence) **Another 6 weeks** for transfer

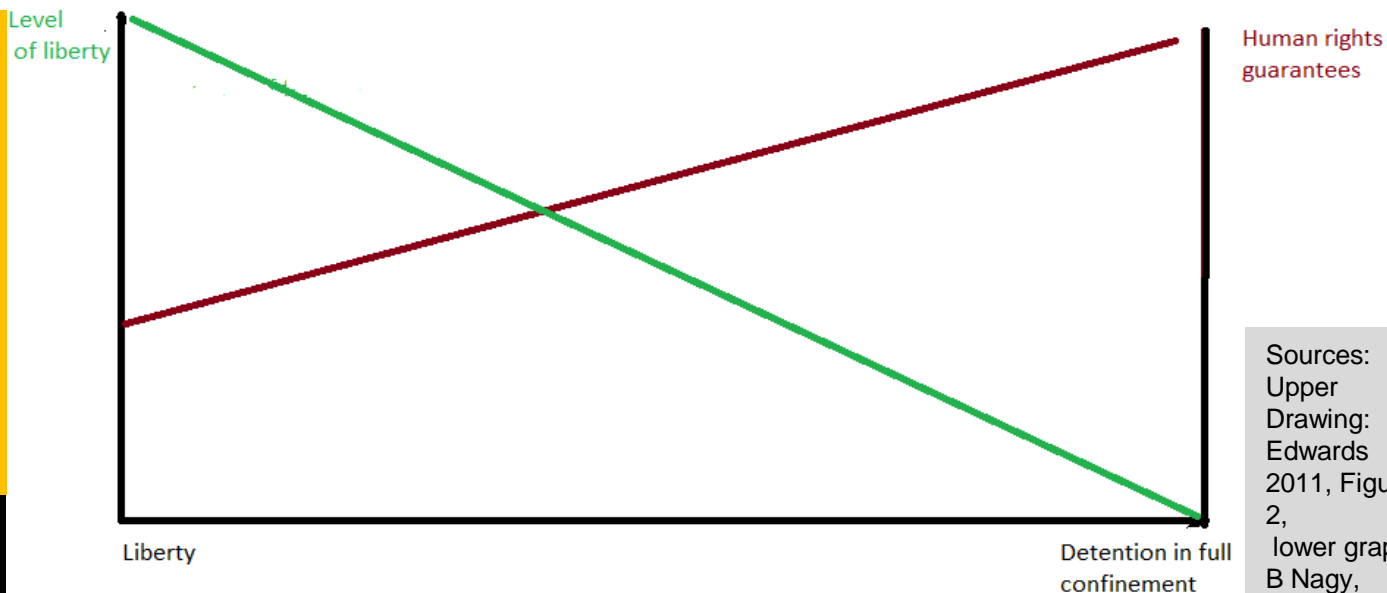
If deadlines not met, the person **shall no longer** be detained

Articles 9, 10 and 11 of Directive 2013/33/EU on **reception conditions shall apply**.

ALTERNATIVES TO DETENTION



From full liberty to detention – steps and the role of human rights guarantees



Sources:
Upper
Drawing:
Edwards
2011, Figure
2,
lower graph:
B Nagy,

SELECT LITERATURE

Achermann, A, - Künzli, J – von Rütte, B: European Immigration Detention Rules Existing Standards, November 2013

http://www.coe.int/t/democracy/migration/Source/migration/Compilation%20of%20existing%20standards_eng.pdf

Edwards, A: *Back to Basics: The Right to Liberty and Security of Person and “Alternatives to Detention” of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants, UNHCR Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, April 2011,*

Edwards, A: „Less Courcive means”: The legal Case for Alternatives to detention for refugees, Asylum Seekers and Other Migrants in: Juss, S.S (ed.): *The Ashgate Research Companion to Migration Law, Theory and Policy*, Ashgate, Farnham, 2013, pp. 443 - 470

Goodwin-Gill, G.S.: 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection', in: *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Feller, E./Türk, V./Nicholson, F., eds., 2003), pp. 185–252

Goodwin-Gill, G.S. and McAdam, J.: *The Refugee in International Law* 3rd edn., Oxford University Press, 2007

Hathaway, J: *The Rights of Refugees Under International Law*, Cambridge University Press, 2005

UNHCR 2012: Guidelines on the Applicable Criteria and Standards

relating to the Detention of Asylum-Seekers and Alternatives to Detention

UNHCR 2013: UNHCR'S position on the detention of asylum-seekers in Malta 18 September 2013

THANKS!

BOLDIZSÁR NAGY

**E-mail: [nagyb at ceu.hu](mailto:nagyb@ceu.hu)
www.nagyboldizsar.hu**

CEU IR and Legal