

CHILDREN IN IMMIGRATION DETENTION



A study by the Swedish Red Cross



Swedish Red Cross

Children in immigration detention – A study by the Swedish Red Cross

The Swedish Red Cross is a part of the International Red Cross and Red Crescent Movement, which has long worked to improve the conditions of people who have been deprived of liberty. In Sweden, this is primarily done through visits to detention centres, correctional facilities and juvenile correctional facilities, as well as immigration detention facilities. The aim of the immigration detention visits is to offer psychosocial support to counter isolation and alleviate the negative effects of detention, and also covers the treatment of those in immigration detention. Today, the Red Cross conducts visits at three out of five Swedish immigration detention centres. Regular visits to the immigration detention centres, which began in 1998, provide the organisation with a unique understanding of the situation at the centres.

Those in immigration detention often feel that the authorities have no grounds to place them in immigration detention and express a lack of understanding regarding why they have been deprived of liberty at all. This is also true for children and families with children. As part of its work in immigration detention centres, the Swedish Red Cross has conducted a study of children in immigration detention in Sweden. The aim of this report is to shed light on the implementation of immigration detention legislation regarding children, and the impact that immigration detention has on the health and development of children. It also presents possible alternatives to immigration detention for children and families with children. The report addresses three different perspectives: a legal perspective that examines the authorities' application of immigration detention legislation, a psychological perspective that describes the impact for the health and development of children, and a comparative perspective that looks at alternatives to immigration detention for children and families with children.



Photo: Ibrahim Malla

According to the study, at least 57 children of various ages were held in immigration detention in Sweden in 2017. Due to a lack of reliable statistics, it is, however, possible that the actual number of children is higher. Most of the children are placed in immigration detention with their families, but some are held in immigration detention as unaccompanied minors. Families are either separated by one parent or caregiver being placed in immigration detention or the entire family is placed in immigration detention altogether.

The study highlights a number of serious flaws in the application of immigration detention legislation. The analysis also indicates that there is strong evidence that immigration detention has a deep and negative impact on children's health and development – even for short periods of time and also when children are held in immigration detention together with their families. States often resort to detention based on the belief that it is more effective in bringing about a successful removal, reducing absconding and ensuring that the migrant is at the disposal of the authorities. This belief is reinforced by the lack of proper statistics on alternatives to detention (ATDs) within the EU and Sweden, which makes it rather difficult to assess the levels of their application and effectiveness. With regard to families with children, this perception leads to a false choice between either separating the family members or placing the entire family in immigration detention. There are alternatives to immigration detention that are more humane and cost-effective and that can also fulfil States' compliance and efficiency objectives.

Decisions to place children in immigration detention: An analysis

The rules regarding immigration detention in Swedish law are primarily found in the Aliens Act. In addition, there are rules regarding immigration detention in European law, particularly in the Dublin Regulation¹, in the Return Directive² and in the Reception Conditions Directive³. Since immigration detention entails a deprivation of liberty, the right to liberty and other rights in the EU Charter on Fundamental Rights are applicable.⁴

Rights in the European Convention on Human Rights and Fundamental Freedoms, which is Swedish law, and the Convention on the Rights of the Child are also relevant. Guidance for the interpretation of the rules is also provided by the preparatory work to the Aliens Act, precedent from the Migration Court of Appeal, the Court of Justice of the European Union and the European Court of Human Rights and the General Comments of the Committee on the Rights of the Child.

In Sweden, immigration detention decisions regarding children can be made according to four different sections of law, which are applicable in various situations, and which set various requirements. The listed grounds for placing a child in immigration detention are as a starting point not applicable simultaneously since they pertain to different types of removal decisions. Pursuant to the principle of the precedence of EU law, the rules of the Aliens Act regarding immigration detention are not applicable in a transfer under the Dublin Regulation.⁵

In addition to these rules, there are further requirements. There is the requirement of legality, which in brief means that the decisions must be made pursuant to relevant provisions in law. In addition, there is a requirement of necessity and that children may only be placed in immigration detention as a last resort. There is also a requirement of proportionality, which means that an assessment and balancing of interests must be made between the interests of the State to achieve the purpose of the deprivation of liberty, and the intrusion that the deprivation of liberty entails for the child. It is also required that the principle of the best interests of the child is applied in the immigration detention decision.

The analysis in the report builds on all 57 immigration detention decisions regarding children that the Swedish Red Cross has been given access to by the Police Authority. The Swedish Migration Agency and the migration courts took no decisions regarding children in 2017. The analysis focuses on the implementation of the immigration detention legislation focusing on the grounds for immigration detention.

The study indicates serious and comprehensive flaws in the implementation of the immigration detention legislation. The analysis indicates that there are a number of flaws regarding the legality of some of the decisions. In seven of the 57 studied decisions (12 per cent), the Police Authority has not provided a relevant support in law. In five of the 57 decisions (8 per cent), it also appears to have been unclear which rules were applicable depending on the purpose for which the immigration detention



Photo: Karin Tengby

decision was taken. In addition, in decisions regarding immigration detention under the Dublin Regulation, the Police Authority has extensively applied the rules of the Aliens Act in breach of the principle of the precedence of EU law.

Furthermore, the analysis shows that the application of law has extensive shortcomings with regard to alternatives to immigration detention and does not meet the requirement of necessity according to which immigration detention constitutes a measure last resort. Alternatives to immigration detention have not been taken into account in 22 of the 57 studied decisions (38 per cent), in breach of the Aliens Act and the Dublin Regulation, respectively, as well as the Charter of Fundamental Rights of the European Union and the Convention on the Rights of the Child. The application of law in eight of the 57 decisions (14 per cent) can be criticised because it is not stated whether earlier attempts at enforcing a removal decision were carried out and failed. In none of the decisions is it stated that immigration detention was deemed to constitute a measure of last resort.

The analysis further indicates that the application of law in nearly every case (96 per cent) is deficient with regard to proportionality. The Police Authority carried out a proportionality assessment in only two of the 57 decisions. The lack of proportionality assessment is something that permeates the decisions. This is incompatible with the proportionality principle that requires an assessment or balancing of interests between the interests of the State to achieve the purpose of the deprivation of liberty and the intrusion that it entails for the child.

According to the analysis, the application of law is consistent with the principle of family unity, which is positive, but not with the principle of the best interests of the child. In a total of 19 of the 57 studied decisions (33 per cent), the Police Authority appears to have failed to apply the principle of the best interests of the child, which is inconsistent with the Aliens Act, the Dublin Regulation and the Convention on the Rights of the Child, as well as the right of the child to freedom and security in the European Convention on Human Rights and Fundamental Freedoms. In 35 of the 57 studied decisions (61 per cent), the authority refers to the children being kept together with the family through the immigration detention decision.

The mental health and development of children placed in immigration detention

The UN Committee on the Rights of the Child has stated that immigration detention for administrative reasons can never be consistent with the best interests of the child and that it altogether harms the child's physical and mental well-being and has detrimental effects on the child's development.⁶ The negative and potentially lasting effects of deprivation of liberty on people's well-being and mental health are well documented.⁷ The most important psychological problems caused by being taken into immigration detention are depression, anxiety and post-traumatic stress disorder (PTSD). Being deprived of liberty for reasons that the person does not understand can also cause a strong sense of injustice and alienation, and the longer the loss of liberty lasts, the stronger its negative impact on the individuals' mental health.⁸ Even relatively short periods of detention can have a negative impact on mental health.⁹ The deprivation of liberty of vulnerable groups, particularly children, is especially harmful. Even brief detention harms the child's physical and mental well-being, and the negative effects of being taken into immigration detention do not vanish the instant the person is released.¹⁰ The life story of children taken into immigration detention is most often disrupted, which has lasting effects that increase their vulnerability after being released.¹¹

The review of research concerning the health of children taken into immigration detention therefore shows that there is strong evidence that immigration detention has a deep and negative impact on the children's health and development regardless of the immigration detention conditions – even when it concerns brief periods of time or when together with their families.

First and foremost, the best interests of the child must be taken into account in these decisions. Care – not coercion – needs to be the guiding factor in the actions taken with regard to the children's particular vulnerability, and an assessment based on this must always be made. The principles of the least possible intrusion and the best interests of the child should govern all actions taken by the authorities.

The best interests of the child cannot be limited to keeping the family together. Family unity is not enough to legitimise or motivate the child being deprived of his or her liberty, considering the effects that being taken into immigration detention has on children's mental health and cognitive development. When it concerns ensuring family unity for the best of the child, this rather requires that authorities investigate alternatives to immigration detention for the entire family.



Photo: Roger Borgelid

Alternatives to immigration detention for children and families with children

The alternative to immigration detention that Swedish legislation provides for is supervision. According to Chapter 10 Section 8 of the Aliens Act, supervision entails that an alien is obliged to report to the Police Authority in that town or to the Swedish Migration Agency at certain times. In a decision on supervision, a person may also be ordered to surrender his or her passport or another piece of identification.

In 2017, 20 children were placed under supervision in Sweden. This can be compared with 57 children being placed in immigration detention during the same period of time, which indicates that immigration detention is still the preferred option for decision makers in Sweden and that supervision remains underused. In recent years, several actors have also pointed out that supervision is not used to its intended extent. Supervision in Sweden has been applied almost without systematic and qualitative evaluation of its effectiveness.

The report presents the “best practice” with regard to the implementation of alternatives to immigration detention for children and families that could be adapted to the Swedish context. In order to increase compliance, several alternatives should be made available to the adjudicator besides supervision to ensure that the type of alternatives chosen matches the individual’s profile. Alternatives that only have an enforcement focus and are applied with the use of coercive means have consequences to the individual’s dignity, well-being and mental health.

Family-based and engagement-based or participatory alternatives are those that are best suited to children and families with children and that are recommended in this report. According to research, these alternatives are more effective since people are more inclined to stay involved and meet the requirements of return, including accepting negative decisions about their status, when they believe that they have undergone a fair process and the following fundamental needs have been met.¹² These mean:

- A good understanding of the asylum and return process, its results and the asylum seeker’s obligations. Experience shows that information about the consequences of a negative decision at an early stage improves the chances for cooperation, including in the event of return.
- Clear and available information on the return process and ways for voluntary return.¹³
- Access to legal advice for children and families with children. Legal advice or guidance for individuals who must return that aims to exhaust all available legal alternatives. This has been shown to increase the number of those who return. Early access to support, advice and information also contributes to maintaining the individual’s cooperation with the authorities. This is particularly true if there is access to further help for investigating other ways of protection and legal stay, as well as access to basic social services.
- Access to a complete range of social and health care services, including welfare assistance and education. These should in continuation also be provided if the child or the family with children have not complied with a deportation decision. Experience shows that access to social services, such as access to education for children, also during the return process can improve cooperation between individuals and the authorities concerned. Current practice in Sweden and other EU countries shows that the lack of access to social services can obstruct the application of alternatives to immigration detention.¹⁴
- Holistic and tailored case management. This means a tailored case management that identifies alternatives for individuals as a result of an individual assessment process. This is especially relevant for vulnerable groups, such as children and families (including cases where there are practical obstacles to enforcement of a removal decision, so-called “unreturnables” and stateless individuals).

States often use deprivation of liberty based on the notion that it is more effective for the enforcement of deportation decisions, reduces absconding and ensures that the individual is at the authority’s disposal. With regard to families, this notion leads to either separating families by taking a parent or caretaker into immigration detention or by placing the entire family in immigration detention together to maintain family unity. However, keeping the family together is not the best and only alternative to family separation. There are alternatives to immigration detention that are both more humane, effective and more cost-effective for children and families.



Photo: Marie Sparréus

Recommendations

5.1. Legislative recommendations

Immigration detention

- Revise the legislation so that it is clearly stated that children should not be detained solely for migration-related purposes, regardless of whether it concerns children in a family or unaccompanied minors.
- Codify the proportionality principle so that it is clearly stated in the immigration detention legislation that a weighing of interests must precede both decisions and implementation of control or coercive measures. Due to the severe impact that immigration detention has on the child's mental health and development, it cannot be considered proportionate that children are placed in immigration detention to ensure the preparation or enforcement of a deportation decision.

Alternatives to immigration detention

- Investigate possible alternatives to immigration detention, besides supervision, to be codified in future revisions of legislation, with a clear focus on children and families with children.
- Reduce the negative humanitarian consequences and financial costs of immigration detention by prioritising the codification and use of alternatives to immigration detention, especially since they have proven to be more humane and cost-effective, as well as less harmful to the individual.

5.2. Recommendations for adjudicators

Immigration detention

- Insofar as deciding authorities place children in immigration detention, ensure that this only takes place with support in applicable law.
- Insofar as deciding authorities take children in immigration detention, ensure that this only takes place after other alternatives have been taken into account, so that children are not placed in immigration detention except when it is unavoidably necessary and as a measure of last resort when alternatives to immigration detention cannot be applied effectively.
- Insofar as the deciding authorities deprive children of liberty, ensure that this only takes place if the intrusion that the action constitutes is proportionate to its purpose in the individual case, and considering the best interests of the child.
- Insofar as the deciding authorities deprive children of liberty, ensure that it occurs after the authority has carefully investigated what is in the best interests of the individual child, and when this has then primarily been taken into account then weighing it against other interests.
- Set higher requirements on the formulation and justification of immigration detention decisions. The legal and factual grounds for depriving a person of liberty, especially for children and families with children, should be carefully justified and clearly stated in the decisions. It is of major significance to the individual, to an eventual appeal and by extension to the rule of law that the decisions are as well motivated as possible.
- Strengthen the adjudicator's competence regarding the best interests of a child, the impact of detention on the child's health and development, the application of the proportionality principle and alternatives to immigration detention.
- Improve the statistics concerning immigration detention in general and children in particular.
- Ensure that children taken into immigration detention have access to all care they need including support from counsellors, psychologists or similar persons.

Alternatives to immigration detention

- Ensure that alternatives to immigration detention do not become alternative forms of immigration detention and that their application generally results in a reduction of the use of immigration detention.
- Shift from coercion-based alternatives to immigration detention to a more humane and engagement-based approach that strives for the individuals being involved in the asylum and return processes.
- Keep reliable statistics on alternatives to immigration detention and conduct a qualitative evaluation of their effectiveness.

- 1 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. (recast)
- 2 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.
- 3 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.
- 4 Charter of Fundamental Rights of the European Union.
- 5 See Migration Court of Appeal case MIG 2015:5.
- 6 UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, para 5. Available at: <http://www.refworld.org/docid/5a1293a24.html>, see Council of Europe (2014), *The Alternatives to Immigration Detention of Children*, p. 13. Available at: <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21130&lang=en>. See also Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe (2017), *A study of immigration detention practices and the use of alternatives to immigration detention of children*, p. 9. Available at: <https://edoc.coe.int/en/migration/7533-a-study-of-immigration-detention-practices-and-the-use-of-alternatives-to-immigration-detention-of-children.html>
- 7 Cleveland et al, (2018), Symbolic violence and disempowerment as factors in the adverse impact of immigration detention on adult asylum seekers' mental health. *International Journal of Public Health*: Available at: <https://doi.org/10.1007/s00038-018-1121-7>.
- 8 De Bruycker, Philippe, Bloomfield, Alice, Tsourdi, Evangelia, and Pétin, Joanna (ed.) (2014), p. 26. Available at: <http://odysseus-network.eu/wp-content/uploads/2015/02/FINAL-REPORT-Alternatives-to-detention-in-the-EU.pdf>
- 9 Bosworth, M. (2016), *The Impact of Immigration Detention on Mental Health: A Literature Review*. Centre for Criminology, Oxford: University of Oxford; Robjant, K. et al. 2009. "Mental health implications of detaining asylum seekers: systematic review." *The British Journal of Psychiatry* 194: 306-12.
- 10 International Detention Coalition (2012), *Captured Childhood – Introducing a new model to ensure the rights and liberty of refugee, asylum-seeker and irregular migrant children affected by immigration detention*. Available at: http://idcoalition.org/wp-content/uploads/2012/03/Captured_Childhood-report
- 11 International Committee of the Red Cross (2017), *Second ICRC Comment on the Global Compact for Safe, Orderly and Regular Migration: Focus on Immigration Detention*, p. 4, available at: https://refugeesmigrants.un.org/sites/default/files/icrc_second_comment_on_the_gcm.pdf
- 12 For an overview of "best practice" see for example International Detention Coalition (2017), *A new network of NGOs piloting alternatives in Europe*. Available at: <https://idcoalition.org/news/showing-detention-is-not-necessary>; International Detention Coalition (2015), *There are alternatives: a handbook for preventing unnecessary immigration detention (revised edition)*. Available at: <http://www.ohchr.org/Documents/Issues/Migration/Events/IDC.pdf>, International Detention Coalition (2012), *Captured Childhood – Introducing a new model to ensure the rights and liberty of refugee, asylum-seeker and irregular migrant children affected by immigration detention*. Available at: http://idcoalition.org/wp-content/uploads/2012/03/Captured_Childhood-report; UNHCR (2015), *Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families*. Available at: <http://www.refworld.org/docid/5523e8d94.html>; Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe (2017), *A study of immigration detention practices and the use of alternatives to immigration detention of children*. Available at: <https://edoc.coe.int/en/migration/7533-a-study-of-immigration-detention-practices-and-the-use-of-alternatives-to-immigration-detention-of-children.html>; Council of Europe (2014), *The alternatives to immigration detention of children*. Available at: <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21130&lang=en>; Costello, C and E. Kaytaz (2013), *Building empirical research into alternatives to detention: perceptions of asylum-seekers and refugees in Toronto and Geneva*. Available at: <http://www.refworld.org/pdfid/51a6fec84.pdf>
- 13 See Swedish Red Cross (2016), *Gender perspectives – in the asylum process and in returning*. Available at: <https://www.redcross.se/press-och-opinion/rapporter/genusperspektiv--i-asyprocessen-och-vid-atervandande/>
- 14 See European Alternatives to Detention Network (2018), *Alternatives to Detention: from theory to practice. Evaluation from three engagement-based Alternatives to Immigration Detention pilot projects in Bulgaria, Cyprus and Poland*. Available at: https://www.epim.info/wp-content/uploads/2018/09/ATD-Evaluation-Briefing_FINAL.pdf

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