

UNIVERSITY OF MONTPELLIER

**European Master's Programme in Human Rights and  
Democratisation  
A.Y. 2025/2026**

# TO DETAIN OR NOT TO DETAIN?

A vulnerability perspective on the detention of migrants for the purpose of  
removal from the European Union

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Word Count Declaration: 28 760



## Abstract

Vulnerable migrants are detained in the European Union for the purpose of removal, despite human-rights standards cautioning against such practices. This thesis examines the role of vulnerability in EU return detention policy and assesses whether, and how, vulnerability can serve as a meaningful normative tool to improve the situation of migrants subjected to return procedures. By examining how vulnerability is conceptualised and operationalised, this work identifies significant shortcomings in the EU return detention framework. In pursuing this analysis, the thesis seeks to fill a research gap and to advocate for an overlooked group in a precarious position: vulnerable migrants who face detention for the purpose of their removal from the EU. To that end, the study adopts a vulnerability-based perspective and draws on research concerning the lived experiences of migrants subjected to return detention. On this basis, the thesis demonstrates that the EU return framework fails to protect vulnerable migrants from return detention and fails to ensure adequate care for them within detention. The thesis proves that the role of 'vulnerability' in EU return detention policy is best characterised as performative; and that vulnerability has significant potential as a normative tool for improvement. However, the problem is not how to translate the potential of vulnerability into binding, operational, and enforceable legal standards at EU level. The problem is the EU's unwillingness to do it.

## Acknowledgements

First and foremost, I would like to express my sincere gratitude to my supervisor, Elena Pacea, for her guidance and flexibility throughout the research and writing of this thesis. I also wish to thank the University of Montpellier for their warm *accueil* during my second semester. My heartfelt thanks go to my family and friends, whose support has sustained me throughout this process. Finally, I am deeply grateful to have been part of the EMA cohort. It has been a privilege to take part in the programme and to share this journey with such inspiring and committed peers.

## Table of acronyms

|       |                                                                                                   |
|-------|---------------------------------------------------------------------------------------------------|
| CJEU  | Court of Justice of the European Union                                                            |
| CPT   | European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment |
| ECHR  | European Convention of Human Rights                                                               |
| ECtHR | European Court of Human Rights                                                                    |
| EMN   | European Migration Network                                                                        |
| EU    | European Union                                                                                    |
| RCD   | Reception Conditions Directive                                                                    |

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## INTRODUCTION

*“Send them back! Send them back! Send them back! Send them back!”<sup>1</sup>*

That’s what Far-right MEPs chanted on the 17<sup>th</sup> of June 2026 after the EU’s deportation bill, the Return Regulation, was voted in the EU parliament.

Immigration detention in the European Union serves multiple purposes, one of which is detention for the purpose of removal as part of EU return policy. Several striking headlines and analyses underscore the growing concern surrounding the Return Regulation<sup>2</sup> : *‘The Return Regulation will “ICE-ify” the EU’s Migration Policy’*;<sup>3</sup> *‘The Council of the EU’s Position on the Return Proposal: Trump-Inspired Approaches Dominate’*;<sup>4</sup> and *‘EU: European Parliament Greenlights Punitive Detention and Deportation Plans’*.<sup>5</sup>

The newly adopted Regulation extensively expands return detention, both in terms of the maximum duration of detention and the grounds on which individuals may be detained, despite the well-documented harms associated with detention.<sup>6</sup> This trajectory raises serious human rights concerns. Research shows that the harmful effects of immigration detention are further exacerbated when added to pre-existing factors that already put detainees in a situation of vulnerability, such as poor physical or mental health, disabilities, past traumatic experiences, or age.<sup>7</sup> Detention also heightens anxiety, fear, and frustration, and can exacerbate previous trauma.<sup>8</sup> Against this backdrop,

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<sup>1</sup> G Neiman, 'Far-right MEPs chant "send them back" as EU returns vote passes parliament' *EUobserver* (Strasbourg, 18 June 2026) <[euobserver.com/222523/far-right-meps-chant-send-them-back-as-eu-returns-vote-passes-parliament/](https://euobserver.com/222523/far-right-meps-chant-send-them-back-as-eu-returns-vote-passes-parliament/)> accessed 26 June 2026.

<sup>2</sup> Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a common system for the return of third-country nationals staying illegally in the Union' COM(2025) 101 final (11 March 2025) <[eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52025PC0101](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52025PC0101)> accessed 12 April 2026 (Proposal Return Regulation).

<sup>3</sup> D Colombi, 'The Return Regulation will "ICE-ify" the EU's migration policy' <[www.ceps.eu/the-return-regulation-will-ice-ify-the-eus-migration-policy/](https://www.ceps.eu/the-return-regulation-will-ice-ify-the-eus-migration-policy/)> accessed 12 April 2026; V Genovese, 'EU Parliament approves controversial bill to increase migrant returns' *Euronews* (26 March 2026) <[www.euronews.com/my-europe/2026/03/26/eu-parliament-approves-controversial-bill-to-increase-migrant-returns](https://www.euronews.com/my-europe/2026/03/26/eu-parliament-approves-controversial-bill-to-increase-migrant-returns)> accessed 12 April 2026.

<sup>4</sup> I Majcher, 'The Council of the EU's position on the Return Proposal: Trump-Inspired Approaches Dominate' (*EU Law Analysis*, 20 December 2025) <[eulawanalysis.blogspot.com/2025/12/the-council-of-eus-position-on-return.html](https://eulawanalysis.blogspot.com/2025/12/the-council-of-eus-position-on-return.html)> accessed 12 April 2026.

<sup>5</sup> Amnesty International, 'EU: European Parliament greenlights punitive detention and deportation plans' (26 March 2026) <[www.amnesty.org/en/latest/news/2026/03/eu-european-parliament-greenlights-punitive-detention-and-deportation-plans/](https://www.amnesty.org/en/latest/news/2026/03/eu-european-parliament-greenlights-punitive-detention-and-deportation-plans/)> accessed 12 April 2026.

<sup>6</sup> As proven later.

<sup>7</sup> PICUM, *Preventing and Addressing Vulnerabilities in Immigration Enforcement Policies* (PICUM 2021) <[picum.org/wp-content/uploads/2021/03/Preventing-and-Addressing-Vulnerabilities-in-Immigration-Enforcement-Policies-EN-1.pdf](https://picum.org/wp-content/uploads/2021/03/Preventing-and-Addressing-Vulnerabilities-in-Immigration-Enforcement-Policies-EN-1.pdf)> accessed 21 March 2026, 5.

<sup>8</sup> MM Mentzelopoulou and N Barlaoura, 'Detention of migrants: A measure of last resort' (European Parliamentary Research Service Briefing EPRS\_BRI(2023)753926, European Parliament September 2023)

this thesis examines the return detention of ‘vulnerable’ persons in the EU from a vulnerability perspective and assesses whether, and if so how, vulnerability can be mobilised to improve the situation, by ending detention and by ameliorating the conditions in which it occurs.

### - Contextualisation

The context of this thesis can be illustrated through a case adjudicated by the European Court of Human Rights. The experience of Sagal Abdi Mahamud, a Somali national who was detained in Malta for the purpose of her removal, was particularly grave and brings to light a series of shortcomings that will form the core of the analysis developed in this thesis.

Ms Abdi Mahamud found herself in a position of vulnerability arising from a combination of factors. She suffered from persistent medical problems, including severe headaches, earaches, fainting, and repeated collapses that required hospitalisation.<sup>9</sup> Her mental health deteriorated significantly following the rejection of her asylum claim, leaving her in a state of depression and severe anxiety.<sup>10</sup> An NGO report, with a view to obtaining her release from detention, described her condition: *“Sagal has been complaining of several medical problems ever since she arrived in Malta. She had several appointments in hospital and was also taken to emergency by ambulance after collapsing in detention. Sagal was also rejected by the Office of the Refugee Commissioner, causing her to be very depressed. Every time we visit she is in her bed crying and showing signs of severe anxiety.”*<sup>11</sup>

The abominable conditions of detention contributed to her vulnerability. She reported a lack of constructive activities to occupy detainees, overcrowding, lack of privacy, limited access to open air, and difficulties communicating with staff, other detainees, and the outside world.<sup>12</sup> Further, she complained about the lack of information about her situation and the lack of adequate heating and cooling, resulting in extreme cold in winter and extreme heat in summer.<sup>13</sup> Gender specific concerns were acute. The absence of female staff meant that ‘male soldiers’ entered the women’s dormitory every morning, removing sheets from sleeping women to perform head counts.<sup>14</sup> To avoid embarrassing moments, Ms Abdi Mahamud felt compelled to sleep fully dressed, including her

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[www.europarl.europa.eu/RegData/etudes/BRIE/2023/753926/EPRS\\_BRI\(2023\)753926\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2023/753926/EPRS_BRI(2023)753926_EN.pdf) accessed 20 March 2026, 4.

<sup>9</sup> *Abdi Mahamud v Malta* App no 56796/13 (ECtHR, 3 May 2016) §11, 16-19.

<sup>10</sup> *Ibid.*, §11.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*, §22.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

headscarf, every night.<sup>15</sup> Access to medical care was limited and inconsistent, further undermined by the absence of interpreters, which made communication with medical staff extremely difficult.<sup>16</sup> The cumulative effect of the conditions complained of, amounted to degrading treatment, they diminished Ms Abdi Mahamud's human dignity and aroused in her feelings of anguish and inferiority capable of humiliating and debasing her and possibly breaking her physical or moral resistance.<sup>17</sup>

To make matters even more troubling, although she was detained for the purpose of deportation, Malta did, in practice, not carry out removals to Somalia or Somaliland...<sup>18</sup>

#### - Research question

To what extent does the concept of 'vulnerability' play a meaningful role in EU return detention policy, and can it serve as a normative tool to improve the situation of vulnerable migrants subject to return detention?

#### - Research aim

This study aims at improving the situation of vulnerable migrants in return procedures in the EU. A second aim of this thesis is to fill and address the research gap that exist regarding this matter. While the intersection of vulnerability and migration has attracted considerable academic attention, existing scholarship has focused predominantly on *asylum-seekers*,<sup>19</sup> including those held in asylum-related detention,<sup>20</sup> leaving the situation of migrants in return detention largely underexamined in legal scholarship.

#### - Research scope

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<sup>15</sup> *Ibid*, §22.

<sup>16</sup> *Ibid*, §23.

<sup>17</sup> *Ibid*, §89-90.

<sup>18</sup> *Ibid*, §10.

<sup>19</sup> For example, the main focus of the VULNER project, VULNER, 'Home' <[www.vulner.eu](http://www.vulner.eu)> accessed 26 June 2026.

<sup>20</sup> For instance, the comprehensive study *The Protection of Vulnerable Individuals in the Context of EU Policies on Border Checks, Asylum and Immigration* contains an analysis of 'The EU and asylum detention of vulnerable persons', yet it does not address 'The EU and return detention of vulnerable persons'; E Pirjatanniemi, E Turunen and M Mustaniemi-Laakso, *The Protection of Vulnerable Individuals in the Context of EU Policies on Border Checks, Asylum and Immigration* (FRAME Deliverable No 11.3, Åbo Akademi University May 2016) <[www.fp7-frame.eu/wp-content/uploads/2016/08/Deliverable-11.3.pdf](http://www.fp7-frame.eu/wp-content/uploads/2016/08/Deliverable-11.3.pdf)> accessed 26 June 2026.

The scope of this thesis encompasses the decision to detain (or not to detain) and the detention conditions applied *in* the EU for the purpose of removal *outside* the EU with regard to ‘vulnerable’ persons, examined through a vulnerability perspective.

Several topics fall outside the scope of this study. *First*, the thesis does not examine situations in which vulnerability plays a role in obtaining international protection or subsidiary protection. *Second*, minors and families are excluded from the analysis. Their situation has been researched<sup>21</sup> and introduces different/additional obligations e.g. Article 17 of the Return Directive. *Third*, the thesis does not address the phenomenon of legal limbo for non-deportable persons. *Further*, ‘vulnerability’ safeguards outside the context of return detention e.g. Articles 4 and 14 of the Return Directive, which concern safeguards pending return, are not analysed, as they raise issues that exceed the focus (detention) of this work. *Finally*, return hubs are excluded from the scope of this thesis, given that the detention in question is carried out outside the European Union.

#### - **Methodology**

This thesis employs a *legal research methodology*, yet it deliberately moves beyond a purely doctrinal approach. A strictly legal perspective would be insufficient, given that vulnerability is inherently tied to lived experience and that legal norms both shape and are shaped by those experiences. For this reason, the thesis also draws on studies that investigate the lived experiences of migrants. The methodology is therefore not exclusively doctrinal but *socio-legal* in nature. It relies not only on primary and secondary legal sources, (such as the examination of EU law, relevant ECtHR case law, human-rights instruments, legal doctrine, NGO reports, and policy documents) empirical research on migrants’ lived experiences with regard to detention and vulnerability. These empirical findings are used to develop a fuller and more grounded understanding of vulnerability and serve as the evidential basis for critique and for formulating recommendations. This ensures that the conclusions reached are scientifically substantiated rather than based on intuition or personal sentiment about what may benefit vulnerable persons. In this regard, two projects are of particular importance for understanding lived experiences: the DEVAS project and the VULNER project.

The DEVAS project, which is discussed in more detail in *Part I*, is of particular relevance to this thesis. The study “*pushes the discussion on vulnerability and detention one step further because its*

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<sup>21</sup> For example, M Nowak, *United Nations Global Study on Children Deprived of Liberty: Executive Summary* (UN, 2020) <[repository.gchumanrights.org/bitstreams/c6116404-ac46-4837-a2a2-4547bef67adf/download](https://repository.gchumanrights.org/bitstreams/c6116404-ac46-4837-a2a2-4547bef67adf/download)> accessed 26 June 2026.

*results are based exclusively on the voices of detainees. Thus the understanding of vulnerability that emerges from this study characterises the experiences of detainees as they told it themselves.”*<sup>22</sup>

The VULNER project, through field studies in selected *refugee* settlements in different parts of the world, focuses on experiences of vulnerability when applying for *asylum and other humanitarian protection statuses* and on how those vulnerabilities might best be addressed.<sup>23</sup> The VULNER project provides a broad (theoretical) framework for understanding vulnerability of migrants. As the VULNER project’s empirical focus falls outside the immediate scope of this thesis, its findings are not directly relevant in every respect; where relevant and possible, however, this thesis extrapolates valuable elements of the VULNER framework/research to the specific context of migrants detained for removal.

This extrapolation, to the specific context of Return detention in EU law, constitutes the *added value* and novelty of the thesis. In doing this, this thesis seeks to fill a research gap and to advocate for an often-overlooked group in a precarious situation, namely migrants who are irregularly staying and detained for the purpose of removal. The VULNER project is referenced at various points throughout this work.

#### - **Announcement of the plan**

To answer the main research question, several subsidiary questions are examined and resolved across the different parts and chapters of the thesis, allowing the final conclusion to emerge from a cumulative and structured analysis.

*Part I* establishes the conceptual and normative framework against which the findings of the later research (especially part III) are assessed. This initial part clarifies what vulnerability is and how it should be approached; what return detention is; why detention should not be used, and whether vulnerability can serve as a normative tool to improve the situation of migrants subjected to return detention, and if so, in what manner.

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<sup>22</sup> JRS-Europe, *Becoming Vulnerable in Detention: Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union (The DEVAS Project)* (P Amaral ed, JRS-Europe June 2010) <[jrseurope.org/wp-content/uploads/sites/19/2020/07/JRS-Europe\\_Becoming-Vulnerable-In-Detention\\_June-2010\\_PUBLIC.pdf](http://jrseurope.org/wp-content/uploads/sites/19/2020/07/JRS-Europe_Becoming-Vulnerable-In-Detention_June-2010_PUBLIC.pdf)> accessed 26 June 2026, 7.

<sup>23</sup> L Leboeuf, *Humanitarianism and Juridification at Play: 'Vulnerability' as an Emerging Legal and Bureaucratic Concept in the Field of Asylum and Migration* (VULNER Research Report Series 1, VULNER Project 2021) <[www.vulner.eu/84987/Introductory-Research-Report-1](http://www.vulner.eu/84987/Introductory-Research-Report-1)> accessed 21 March 2026, 4; VULNER, 'Home' <[www.vulner.eu](http://www.vulner.eu)> accessed 26 June 2026.

*Part II* examines the relevant case law of the European Court of Human Rights in order to analyse the *role of vulnerability* in the Court's assessment of detention conditions in the context of return detention under Article 3 ECHR, as well as of the legality of such detention under Article 5 §1(f). This part is essential because the ECHR is legally binding on the individual Member States, which are required to comply with the human-rights standards it enshrines.

*Part III* turns to the EU framework itself and critically examines what the EU provides in terms of return detention in the light of vulnerability, building on the findings of the two previous parts. It asks to what extent the concept of vulnerability plays a meaningful role in EU return detention policy.

Within this part, *the first chapter* analyses the general EU framework on return detention (namely the current Return Directive and the future Return Regulation) both regarding the decision to detain and the conditions of detention in the light of vulnerability. *The second chapter* examines the EU's specific framework on vulnerability within detention, focusing on the obligation to pay 'particular attention' under Article 16(3) of the Return Directive and Article 34(4) of the Return Regulation. *The third and final chapter* then turns to the implementation of the Return Directive (the Return Regulation does not require transposition and is not yet applicable) and investigates what conclusions can be drawn from the situation in the Member States. It asks whether vulnerable persons are detained in the Member States, how they are treated in detention, how Article 16(3) of the Return Directive has been transposed into national legislation, where the pitfalls are and what can be improved in the Member States, and what this may (potentially) reveal about the state of protection at the EU level.

Finally, *the conclusion* articulates the answer to the research question and distils the thesis's most significant findings.

## PART I Vulnerability and its pitfalls applied to return detention

### 1 Vulnerability

#### 1.1 Introduction to the concept

Vulnerability can be framed as a ‘traveling concept’.<sup>24</sup> ‘Vulnerability’ undergoes transformation as it travels across different frameworks, acquiring distinct functions and implied meanings depending on the conceptual context in which it is used and mobilised.<sup>25</sup> For example, in the ethical conceptual framework, ‘vulnerability’ as a concept sustains ethical arguments as part of a specific theory of justice (e.g.: a ‘just’ society is a society that cares for its weakest members).<sup>26</sup> In the heuristic conceptual framework, vulnerability serves to understand for example migrants’ experiences.<sup>27</sup> Finally, in the legal conceptual frameworks it serves to identify the treatment that for example migrants should receive from the state.<sup>28</sup>

It therefore resists any single, settled definition.

#### - Vulnerability is contextual, dynamic, intersectional

Vulnerability or the extent to which a person is vulnerable varies depending on the circumstances, their personal characteristics (such as their age, gender, or health status), social position, resources, and past experiences.<sup>29</sup> Vulnerabilities come in different forms, depending on the social and interpersonal context in which they arise; a person may for example be vulnerable in one situation and may hold a position of power in another.<sup>30</sup> Positions of vulnerability are generally understood as arising from the interplay of three categories of factors: *innate characteristics*, predominantly of a corporeal nature; *situated experiences*, shaped by interpersonal relationships; and *structural factors and dynamics*, rooted in the broader organisation of society.<sup>31</sup>

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<sup>24</sup> L Leboeuf, 'The Travels and Transformations of "Vulnerability": From an Ethical and Analytical Concept to a Legal and Bureaucratic Label' in L Leboeuf and others (eds), *Between Protection and Harm* (IMISCOE Research Series, Springer 2025) <doi.org/10.1007/978-3-031-69808-8\_2> accessed 3 May 2026, 18-19.

<sup>25</sup> *Ibid.*, 19.

<sup>26</sup> *Ibid.*, 24.

<sup>27</sup> *Ibid.*, 25.

<sup>28</sup> *Ibid.*, 26.

<sup>29</sup> *Ibid.*, 24.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*, 25.

Vulnerability rests on an *intersection* of factors. Intersectionality (and taking an intersectional approach) allows to understand how positions of vulnerabilities are socially embedded, and shaped by multiple personal, social, and structural factors, while remaining attentive to their gendered dimensions.<sup>32</sup>

## 1.2 Juridification of vulnerability in migration law

There is a widespread trend in legal and policy discourse on asylum and migration at EU and UN levels to underscore the need for adopting specific protection measures for vulnerable migrants and refugees.<sup>33</sup> In other words, the concept is ‘buzzing’. Vulnerability is emerging as a buzzword in asylum and migration context.

The juridification of the notion of *vulnerability* within the European legal framework is an ongoing process and is unlikely ever to reach full conceptual closure.<sup>34</sup> At present, *vulnerability* cannot be regarded as a fully-fledged, legally binding concept capable of shaping the content of legal obligations in definite ways.<sup>35</sup> Nevertheless, it has become into a flexible legal notion that shape legal reasoning in various direct and indirect ways.<sup>36</sup>

Within this emerging legal landscape, *vulnerability* has acquired two main legal functions.<sup>37</sup> First, it operates as an interpretative tool employed by courts/judges when deciding on a specific case, most notably in the jurisprudence of the ECtHR (i.e. *vulnerability as a tool of judicial interpretation*),<sup>38</sup> see *Part II*. Second, it serves as ground for imposing additional obligations towards certain groups of

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<sup>32</sup> K Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241, 1241-1299; L Leboeuf, C Brun and S Marchetti, 'Introduction. Between Protection and Harm. Negotiated Vulnerabilities in Asylum Laws and Bureaucracies' in L Leboeuf and others (eds), *Between Protection and Harm: Negotiated Vulnerabilities in Asylum Laws and Bureaucracies* (IMISCOE Research Series, Springer 2024) <[doi.org/10.1007/978-3-031-69808-8\\_1](https://doi.org/10.1007/978-3-031-69808-8_1)> accessed 26 June 2026, 4.

<sup>33</sup> L Leboeuf, *Lived Vulnerabilities in Asylum and Migration: Confronting the 'Vulnerability' Label with Migrants' Experiences* (VULNER Research Report Series 2, VULNER Project 2023) <[www.vulner.eu/130437/final-research-report](https://www.vulner.eu/130437/final-research-report)> accessed 21 March 2026, 7.

<sup>34</sup> L Leboeuf, *Humanitarianism and Juridification at Play: 'Vulnerability' as an Emerging Legal and Bureaucratic Concept in the Field of Asylum and Migration* (VULNER Research Report Series 1, VULNER Project 2021) <[www.vulner.eu/84987/Introductory-Research-Report-1](https://www.vulner.eu/84987/Introductory-Research-Report-1)> accessed 21 March 2026, 12.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

migrants and refugees identified in legislative instruments (*vulnerability as an obligation to address special needs*).<sup>39</sup>

- **Vulnerability assessments**

The numerous and wide use of the notion of ‘vulnerability’ raises the issue and uncertainty of how to *identify* these vulnerabilities (situations or positions of vulnerability) and *address* them.<sup>40</sup> This exercise carries the risk of developing state practices that rely on stereotypical understandings of the vulnerabilities experienced by migrants and refugees and may ultimately fail to address their challenges (specific needs) in an appropriate manner,<sup>41</sup> see also 1.4 *Pitfalls of the notion of ‘vulnerability’*.

In EU asylum and migration law, there are two different legal and bureaucratic purposes behind the ‘vulnerability’ assessments.<sup>42</sup> *Firstly*, the vulnerability assessments to decide on claims to obtain protection has as its purpose to guide the evaluation of the relevant circumstances of a case when deciding on asylum applications or on other applications for protection-based residence permits.<sup>43</sup> This legal-bureaucratic understanding of ‘vulnerability’ has rarely been *formally* articulated.<sup>44</sup> In accordance with the scope of this thesis, these vulnerability assessments are not addressed. *Secondly*, the vulnerability assessments to address special needs has as its purpose is to address special needs through appropriate procedural accommodations and through the provision of additional services, for example, specialized healthcare or placement in dedicated housing units.<sup>45</sup> While some attention has been devoted to the special needs of vulnerable *asylum-seekers*, there is a *lack* of comparable provisions applicable for vulnerability within the return process, for instance, the EU return framework does not provide for any explicit vulnerability assessment (as discussed later).<sup>46</sup>

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<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, 8.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, 24.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> See part III, chapter 2.

### 1.3 ‘Vulnerable’ migrants?

*“Migrants are not inherently vulnerable, nor do they lack resilience and agency.”*<sup>47</sup>

The vulnerable *situations* or vulnerability that migrants experience may result from a variety of situational, personal and structural factors.<sup>48</sup> These factors can *intersect* or coexist at the same moment and can influence and exacerbate one another.<sup>49</sup> They may also evolve or modify over time as circumstances change.<sup>50</sup>

More concretely, migrants may face vulnerability because of a variety of situations they were or are in, such as, the conditions that forced them to leave their country of origin, the circumstances under which they had to travel, the conditions they encountered upon arrival etc.<sup>51</sup> They may also be placed in vulnerable situations due to personal characteristics such as age, gender identity, race, disability, health status, ...<sup>52</sup>

Migrants’ vulnerability to human rights violations stems from multiple and *intersecting* forms of discrimination and inequality, as well as from structural and societal dynamics that produce reduced and unequal levels of power and enjoyment of rights.<sup>53</sup>

### 1.4 Pitfalls of the notion of ‘vulnerability’

Vulnerability should not be engaged with uncritically. It carries significant pitfalls, including the risk of stigmatising, victimising or paternalizing the very individuals it purports to protect.<sup>54</sup> It risks essentialising and reducing vulnerable persons to passive victims, instead on the recognizing their individual agency and resilience. With regard to migrants for example, essentialising migrants as

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<sup>47</sup> OHCHR, 'Migrants in vulnerable situations' <[www.ohchr.org/en/migration/migrants-vulnerable-situations](http://www.ohchr.org/en/migration/migrants-vulnerable-situations)> accessed 20 March 2026.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> C Warin and L Tsourdi, *Vulnerability of migrants, asylum seekers and refugees: Council of Europe and European Union standards* (Thematic Paper, Council of Europe Division on Migration and Refugees, Council of Europe November 2025) <[odysseus-network.eu/wp-content/uploads/2025/12/Vulnerability-of-migrants-asylum-seekers-and-refugees\\_final.pdf](http://odysseus-network.eu/wp-content/uploads/2025/12/Vulnerability-of-migrants-asylum-seekers-and-refugees_final.pdf)> accessed 3 May 2026, 10-11.

*passive victims* distances them from their own experiences and lived realities.<sup>55</sup> Yet migrants are anything but passive: they have navigated and overcome numerous obstacles.<sup>56</sup> For example, many have endured harsh journeys marked by violence and exploitation, which have become increasingly common along routes to Europe.<sup>57</sup>

The use of vulnerability can also risk confining public debates to questions of ‘deservingness’;<sup>58</sup> who deserves protection and who doesn’t (especially in the asylum context), who deserves ‘extra care’ and who doesn’t. Such framings obscure the structural and contextual dimensions of vulnerability and make it difficult to acknowledge migrants’ agency.<sup>59</sup> These debates, which tend to be driven more by emotion than by evidence, hinder the development of comprehensive migration policies that adequately account for migrants’ experiences.<sup>60</sup>

Because of its exclusionary logic, vulnerability discourse can generate a form of ‘vulnerability competition’ among migrants; a competition to be considered as the ‘most vulnerable’ and thus eligible for extra safeguards, care, protection etc.<sup>61</sup> This dynamic, together with predefined categories of ‘vulnerable’ persons (see later) can pressure people to fit themselves into predefined vulnerability categories to which they are expected to conform.<sup>62</sup>

Vulnerability can also be misused and strategically mobilised in political discourse. References to ‘prioritising the most vulnerable’ sounds compassionate and humane, but when it is used in contexts where all persons/migrants (e.g. asylum-seekers) hold the same rights irrespective of their vulnerability status, such language can be used to hide and to gloss over (structural and sometimes intentional) failures, human rights violations. An example in the context of asylum reception illustrates this. The Belgian government announced that it would no longer provide shelter to single men seeking asylum, arguing that the limited reception capacity required prioritising families, women

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<sup>55</sup> L Leboeuf, 'The Travels and Transformations of "Vulnerability": From an Ethical and Analytical Concept to a Legal and Bureaucratic Label' in L Leboeuf and others (eds), *Between Protection and Harm* (IMISCOE Research Series, Springer 2025) <doi.org/10.1007/978-3-031-69808-8\_2> accessed 3 May 2026, 34.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*, 35-36.

<sup>59</sup> *Ibid.*, 35.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*, 51, 54.

<sup>62</sup> *Ibid.*, 54.

and children.<sup>63</sup> The stated aim was to prevent children from ending up on the streets during winter.<sup>64</sup> However, what is not emphasised in this narrative is that providing shelter to asylum-seekers is not a discretionary policy choice, but a legal obligation on states. This illustrates how vulnerability rhetoric can be used not to expand protection, but to ‘justify’ or normalise human rights violations<sup>65</sup>, and in this example to mask the unwillingness to provide more reception capacity/guarantee shelter for asylum-seekers.

## 1.5 Abolish vulnerability?

Throughout this work, several additional challenges and pitfalls associated with mobilising *vulnerability* as a conceptual tool for migration governance, more specifically in the context of return detention, are identified and discussed. These include, for example, the risks associated with the use of categorical lists to identify vulnerabilities (see *Part III Chapter 2, Critique on categorical list of vulnerabilities*) and other conceptual and operational shortcomings that emerge when vulnerability is deployed in migration policy and practice.

This raises the question whether there is any added value in mobilising ‘vulnerability’ as a tool/guiding concept for asylum and migration policies?<sup>66</sup> Should the term be avoided in legal and policy discourses because of its implied associations with victimhood and passivity?<sup>67</sup>

Yet *vulnerability* also has significant potential to shed light on migrants’ experiences.<sup>68</sup> It can function as an analytical framework that brings these experiences into legal and political reasoning at both operational and policymaking levels.<sup>69</sup> Current legal trends that emphasise attention to applicants’ vulnerability within judicial reasoning likewise offer an opportunity to strengthen the connection

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<sup>63</sup> Euronews, 'Belgium's asylum shelters will no longer take in single men in order to make room for families' *Euronews* (2 September 2023) <[www.euronews.com/2023/09/02/belgiums-asylum-shelters-will-no-longer-take-in-single-men-in-order-to-make-room-for-famil](https://www.euronews.com/2023/09/02/belgiums-asylum-shelters-will-no-longer-take-in-single-men-in-order-to-make-room-for-famil)> accessed 26 June 2026.

<sup>64</sup> *Ibid.*

<sup>65</sup> *MV and Others v Belgium* App nos 52836/22, 57898/22, 3913/23 and 4994/23 (ECtHR, 9 April 2026); *Camara v Belgium* App no 49255/22 (ECtHR, 18 July 2023).

<sup>66</sup> L Leboeuf, 'The Travels and Transformations of "Vulnerability": From an Ethical and Analytical Concept to a Legal and Bureaucratic Label' in L Leboeuf and others (eds), *Between Protection and Harm* (IMISCOE Research Series, Springer 2025) <[doi.org/10.1007/978-3-031-69808-8\\_2](https://doi.org/10.1007/978-3-031-69808-8_2)> accessed 3 May 2026, 35.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

between asylum and migration law and migrants' lived realities.<sup>70</sup> This is an essential condition for the legitimacy of any legal system, which depends on its ability to adequately reflect social realities.<sup>71</sup>

One way to reach this potential - without falling in the aforementioned 'vulnerability traps' by ultimately creating a distinction between passive victims who deserve protection and others (who don't deserve it) - is to recognise *the primacy of migrants' rights*.<sup>72</sup> If the more favourable treatment afforded to those labelled as 'vulnerable' does not undermine the rights to which all migrants are entitled, regardless of additional vulnerabilities, then debates over who qualifies as 'vulnerable' lose much of their relevance.<sup>73</sup> Applied to the specific context of this thesis, this point becomes clearer. Poor detention conditions may amount to a human rights violation for any detained migrant, and such conditions will likely reach the threshold of a violation even more quickly in the case of a particularly vulnerable person. However, these basic standards should be guaranteed for everyone. If detention conditions were adequate for all detainees, debates over who qualifies as 'vulnerable' would lose much of their relevance, even though additional special treatment for vulnerable persons could still be justified/necessary. Similarly, if detention were genuinely used only as a measure of last resort, *ultimum remedium* (see later), meaning that almost no migrants would be detained, the question of who qualifies as 'vulnerable' for the purpose of exemption from detention would lose much of its normative weight (if that exemption exists). In such a scenario, individuals would not be detained in the first place because of the 'rights' that apply to all migrants, irrespective of additional vulnerabilities. The way to better protect 'vulnerable' migrants, is to better protect migrants.

This also implies that the protection of/safeguards for vulnerable persons does not necessarily require explicit reference to 'vulnerability'. However, once vulnerability is invoked, it must be accompanied by adequate, operational and enforceable standards/measures. Simply labelling individuals as 'vulnerable' without providing substantive support risks being merely stigmatizing rather than genuinely protective.

All of this does *not* render the concept of 'vulnerability' irrelevant.<sup>74</sup> On the contrary, vulnerability can contribute to humanising state responses in individual cases.<sup>75</sup> Integrating proper attention to migrants' vulnerabilities into administrative practice can help reduce the gap between how

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<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*, 36.

decision-makers understand migrants' experiences and how migrants actually live them.<sup>76</sup> Vulnerability as a concept, holds powerful potential to guide bureaucratic action; for example, through the development of guidelines and training that more accurately reflect migrants' experiences and realities.<sup>77</sup>

## 1.6 Situational approach

A *situational approach* to vulnerability is the most appropriate way forward. While vulnerabilities may have ontological components and relate to certain innate characteristics, they are always embodied in specific contexts.<sup>78</sup> In those specific contexts, they emerge through social interactions that are themselves shaped by broader structural factors, including the organisation of society and existing social inequalities.<sup>79</sup> A situational approach emphasises how vulnerability is externally induced rather than inherent.<sup>80</sup> It is therefore the context that increases an individual's susceptibility to harm.<sup>81</sup> Vulnerability changes in form and degree over time, location and circumstances.<sup>82</sup> From this perspective, vulnerability may arise from *personal, social, or environmental* situations, including experiences of abuse or socio-political oppression.<sup>83</sup> Understanding vulnerability as situational therefore allows for a more accurate and dynamic assessment of the risks faced by migrants, and avoids reducing individuals to fixed categories detached from their lived realities.

(The analogy could be made with the social model regarding disabilities. The social model of disability states that disability (and in my view also vulnerability) is caused by the way society is organised, rather than by a person's impairment or difference ('personal' characteristics that people label as a 'vulnerability')).<sup>84</sup>

This approach is not only indispensable to properly *identify* vulnerabilities but also to properly handle/act and *accommodate* for vulnerabilities. For the abovementioned reasons, this thesis adopts

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<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> L Leboeuf, C Brun and S Marchetti, 'Introduction. Between Protection and Harm. Negotiated Vulnerabilities in Asylum Laws and Bureaucracies' in L Leboeuf and others (eds), *Between Protection and Harm: Negotiated Vulnerabilities in Asylum Laws and Bureaucracies* (IMISCOE Research Series, Springer 2024) <doi.org/10.1007/978-3-031-69808-8\_1> accessed 26 June 2026, 4.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*, 5.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> Disability Nottinghamshire, 'Social Model vs Medical Model of disability' <www.disabilitynottinghamshire.org.uk/index.php/about/social-model-vs-medical-model-of-disability/> accessed 26 June 2026.

(tries to adopt), and argues in favour of, a situated approach to vulnerability. It follows that policymakers, judges, civil servants, and other relevant actors should adopt the same approach, and that institutional actors responsible for implementing the norms designed to protect ‘vulnerable’ migrants must likewise apply a situated perspective when operationalising those norms.

It should be noted that the situational approach to vulnerability (necessarily) also implies an intersectional perspective/approach.

**- Is the situational approach emerging?**

Soft law guidelines and policy documents from key international organisations working on migration and asylum, such as the UNHCR,<sup>85</sup> have incorporated definitions of vulnerability that reflect these conceptual developments.<sup>86</sup> Also some supranational and national legal instruments have already incorporated a situational approach to vulnerability.<sup>87</sup> A clear example can be found in the Directive on preventing and combating trafficking in human beings (Directive on human trafficking).<sup>88</sup> The Directive incorporates the definition of the ‘position of vulnerability’ contained in the Interpretative Note in the *travaux préparatoires* to the 2000 UN Palermo Protocol.<sup>89</sup> The ‘position of vulnerability’ is, in the Directive, defined as “*a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved*”.<sup>90</sup> Instead of limiting vulnerability to a person’s inherent characteristics, this definition (despite its vagueness) emphasises the importance of taking into account the *circumstantial and structural factors* that render a person vulnerable to forms of

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<sup>85</sup> UNHCR and International Detention Coalition (IDC), *Vulnerability Screening Tool: Identifying and Addressing Vulnerability — A Tool for Asylum and Migration Systems* (UNHCR/IDC, 5 September 2016) <[www.unhcr.org/protection/detention/57fe30b14/unhcr-idc-vulnerability-screening-tool-identifying-addressing-vulnerability.html](http://www.unhcr.org/protection/detention/57fe30b14/unhcr-idc-vulnerability-screening-tool-identifying-addressing-vulnerability.html)> accessed 26 June 2026; UNHCR, ‘*Migrants in Vulnerable Situations*’: *UNHCR’s Perspective* (UNHCR, June 2017) <[www.refworld.org/policy/legalguidance/unhcr/2017/117621](http://www.refworld.org/policy/legalguidance/unhcr/2017/117621)> accessed 26 June 2026.

<sup>86</sup> S Marchetti and L Palumbo (eds), *Vulnerability in the Asylum and Protection System in Italy: Legal and Policy Framework and Implementing Practices* (VULNER Research Report 1, Ca’Foscari University of Venice/VULNER Project 2021) <[www.vulner.eu/78645/VULNER\\_WP4\\_Report1.pdf](http://www.vulner.eu/78645/VULNER_WP4_Report1.pdf)> accessed 26 June 2026, 19.

<sup>87</sup> L Leboeuf, C Brun and S Marchetti, ‘Introduction. Between Protection and Harm. Negotiated Vulnerabilities in Asylum Laws and Bureaucracies’ in L Leboeuf and others (eds), *Between Protection and Harm: Negotiated Vulnerabilities in Asylum Laws and Bureaucracies* (IMISCOE Research Series, Springer 2024) <[doi.org/10.1007/978-3-031-69808-8\\_1](https://doi.org/10.1007/978-3-031-69808-8_1)> accessed 26 June 2026, 5-6.

<sup>88</sup> S Marchetti and L Palumbo (eds), *Vulnerability in the Asylum and Protection System in Italy: Legal and Policy Framework and Implementing Practices* (VULNER Research Report 1, Ca’Foscari University of Venice/VULNER Project 2021) <[www.vulner.eu/78645/VULNER\\_WP4\\_Report1.pdf](http://www.vulner.eu/78645/VULNER_WP4_Report1.pdf)> accessed 26 June 2026, 17.

<sup>89</sup> UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, Addendum to the Report of the Ad Hoc Committee (A/55/383/Add.1, UN 3 November 2000) <[digitallibrary.un.org/record/426818](http://digitallibrary.un.org/record/426818)> accessed 26 June 2026, para 63.

<sup>90</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1, art 2(2).

abuse and exploitation and leave them without any concrete and real alternative.<sup>91</sup> A situational approach could and should also be taken, in other EU documents, such as in the context of migrants facing return/removal detention.

Attention to the situational dimension of vulnerability also appears in case law of the European Court of Human Rights (see also *Part II*).<sup>92</sup> For example, in the landmark judgment of the ECtHR in *Chowdury and Others v. Greece*, which concerned undocumented migrant workers from Bangladesh working on a strawberry farm in Greece under conditions of severe exploitation.<sup>93</sup> In that case, the Court paid specific attention to different factors, that taken together, produced a situation of vulnerability that exposed migrant workers to exploitation.<sup>94</sup> In this regard, the Court noted that they began working at a time when they were in a situation of vulnerability “*as irregular migrants without resources and at risk of being arrested, detained and deported*”.<sup>95</sup>

The ECtHR has, in some cases, recognised the effect of *structures and conditions* (situational), such as detention, on the vulnerability of *asylum-seekers*.<sup>96</sup> Most notably, in its landmark judgment *M.S.S. v. Belgium and Greece*, which concerned Belgium's expulsion of an Afghan asylum-seeker to Greece under the EU Dublin Regulation, the Court recognised vulnerability not as a fixed attribute but as a condition produced by the specific and contingent *situation* of asylum-seekers.<sup>97</sup> Under this approach, vulnerability may be the result of a range of past and present experiences and circumstances, for which institutional authorities can bear varying degrees of responsibility.<sup>98</sup> In *M.S.S.*, the Court took into account that “*the applicant, being an asylum-seeker, was particularly vulnerable because of*

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<sup>91</sup> S Marchetti and L Palumbo (eds), *Vulnerability in the Asylum and Protection System in Italy: Legal and Policy Framework and Implementing Practices* (VULNER Research Report 1, Ca'Foscari University of Venice/VULNER Project 2021) <[www.vulner.eu/78645/VULNER\\_WP4\\_Report1.pdf](http://www.vulner.eu/78645/VULNER_WP4_Report1.pdf)> accessed 26 June 2026, 17-18.

<sup>92</sup> *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017); S Marchetti and L Palumbo (eds), *Vulnerability in the Asylum and Protection System in Italy: Legal and Policy Framework and Implementing Practices* (VULNER Research Report 1, Ca'Foscari University of Venice/VULNER Project 2021) <[www.vulner.eu/78645/VULNER\\_WP4\\_Report1.pdf](http://www.vulner.eu/78645/VULNER_WP4_Report1.pdf)> accessed 26 June 2026, 18.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017) §97.

<sup>96</sup> *MSS v Belgium and Greece* App no 30696/09 (ECtHR GC, 21 January 2011); S Marchetti and L Palumbo (eds), *Vulnerability in the Asylum and Protection System in Italy: Legal and Policy Framework and Implementing Practices* (VULNER Research Report 1, Ca'Foscari University of Venice/VULNER Project 2021) <[www.vulner.eu/78645/VULNER\\_WP4\\_Report1.pdf](http://www.vulner.eu/78645/VULNER_WP4_Report1.pdf)> accessed 26 June 2026, 18.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

*everything he had been through during his migration and the traumatic experiences he was likely to have endured previously.”<sup>99</sup>*

This thesis examines whether such a situated approach to vulnerability is also adopted in the specific context of return detention, by the ECtHR (Part II) and, above all, within the EU return framework, including the Return Directive and the forthcoming Return Regulation (Part III).

## 2 Return detention

*Each year, a remarkably number of, approximately 100,000 people are detained for migration-related reasons in the European Union.*<sup>100</sup> This thesis focuses specifically on ‘return detention’. The concept is contextualised, clarified, and defined in the following section.

### 2.1 Definitions for the purpose of this study

‘Detention’ is, in the global context, defined as “*a non-punitive administrative measure ordered by an administrative or judicial authority(ies) in order to restrict the liberty of a person through confinement so that another procedure may be implemented.*”<sup>101</sup>

‘Immigration Detention’, for the purpose of this study, denotes the detention of a migrant for a reason related to migration, in and by an EU Member State. EU provisions differentiate between different migration situations in which third-country nationals can be subjected to immigration detention.

Immigration detention may arise at various stages in the asylum procedure, this form of detention will be referred to as ‘asylum-related detention’. This form of detention may serve a range of purposes, but in all cases, it must rest on grounds expressly provided for in the EU acquis.<sup>102</sup>

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<sup>99</sup> *MSS v Belgium and Greece* App no 30696/09 (ECtHR GC, 21 January 2011) §232.

<sup>100</sup> MM Mentzelopoulou and N Barlaoura, ‘Detention of migrants: A measure of last resort’ (European Parliamentary Research Service Briefing EPRS BRI(2023)753926, European Parliament September 2023) <[www.europarl.europa.eu/RegData/etudes/BRIE/2023/753926/EPRS\\_BRI\(2023\)753926\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2023/753926/EPRS_BRI(2023)753926_EN.pdf)> accessed 20 March 2026, 2.

<sup>101</sup> EMN, ‘Detention’ in *EMN Asylum and Migration Glossary* (v 6.0, European Commission 2018) <[ec.europa.eu/assets/home/emn-glossary/glossary.html?letters=o&detail=detentio](http://ec.europa.eu/assets/home/emn-glossary/glossary.html?letters=o&detail=detentio)> accessed 4 May 2026.

<sup>102</sup> Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection (recast) [2024] OJ L 2024/1346 (Reception Conditions Directive 2024), art 10(4).

Furthermore, immigration detention may also take place outside of the asylum procedure, for example after the asylum procedure has been completed, following a negative asylum decision.<sup>103</sup> This thesis will focus on the detention of ‘third-country nationals staying illegally on the territory of a Member State’ who have been issued a return decision. The most common ways of becoming undocumented are losing a job or losing other grounds for a residence permit or being born to undocumented parents.<sup>104</sup> For instance, entering the EU without a visa also leaves a person undocumented.<sup>105</sup> This form of detention serves the purpose of removal and will, for the sake of clarity and for the purpose of this study, be called ‘**return detention**’ or ‘**pre-removal detention**’ (detention for the purpose of removal). That is the *immigration detention* of a third-country national staying illegally on the territory of the Member States **in order to prepare the return and/or carry out the removal process**.<sup>106</sup>

For this, the following definitions<sup>107</sup> apply. A ‘*third-country national*’ means any person who is not a citizen of the European Union. An ‘*illegal stay*’ means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry, stay or residence in that Member State. A ‘*return decision*’ means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return. A ‘*return*’ means the process of a third-country national going back, whether in voluntary compliance with an obligation to return, or enforced, to his or her country of origin, *or* to a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, *or* to another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted. A ‘*removal*’ means the enforcement of the obligation to return, namely the physical transportation out of the Member State.

## 2.1 The situation in and impact of migration detention

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<sup>103</sup> MM Mentzelopoulou and N Barlaoura, ‘Detention of migrants: A measure of last resort’ (European Parliamentary Research Service Briefing EPRS BRI(2023)753926, European Parliament September 2023) <[www.europarl.europa.eu/RegData/etudes/BRIE/2023/753926/EPRS\\_BRI\(2023\)753926\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2023/753926/EPRS_BRI(2023)753926_EN.pdf)> accessed 20 March 2026, 2.

<sup>104</sup> PICUM, *FAQ: Migration Policies, Detention and Return* (PICUM, February 2021) <[picum.org/wp-content/uploads/2023/08/FAQs-Migration-policies-detention-and-returns.pdf](http://picum.org/wp-content/uploads/2023/08/FAQs-Migration-policies-detention-and-returns.pdf)> accessed 26 June 2026, 3.

<sup>105</sup> *Ibid.*

<sup>106</sup> 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 [2008] OJ L348/98 (Return Directive), art 15 (1).

<sup>107</sup> Return Directive, art 3.

As said in the introduction, research shows that the harmful effects of immigration detention are further exacerbated when added to pre-existing factors that already put detainees in a situation of vulnerability, such as poor physical or mental health, disabilities, past traumatic experiences, or age.<sup>108</sup> Detention also heightens anxiety, fear, and frustration, and can exacerbate previous trauma.<sup>109</sup>

The *Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union* (The DEVAS Project) of Jesuit Refugee Service Europe (JRS-Europe),<sup>110</sup> provides extensive and valuable insights into the situation and impact of detention on vulnerable ‘irregular’ migrants (as well as asylum-seekers).

The objective of the DEVAS project was to investigate and analyse vulnerability in detention: “*both the way in which pre-existing vulnerable groups cope with detention, and the way in which detention can enable vulnerability in persons who do not otherwise possess officially recognised vulnerabilities and special needs.*”<sup>111</sup> JRS-Europe, in partnership with NGOs in 23 EU Member States, coordinated the collection of 685 one-on-one interviews with detainees. The study builds on earlier reports and projects examining vulnerability in detention.<sup>112</sup>

The following sections present a selection of the study’s findings.<sup>113</sup>

#### - Detention is harmful

The data from the DEVAS study demonstrate that detention harms individuals who were otherwise in good health. The living conditions in detention centres, such as the lack of fresh air or the mere confinement to a single location, together with the psychological stress associated with detention, all produce harmful **physical** health consequences. Physical health deteriorates as the duration of detention increases. Whereas one quarter of those detained for *one month* describe their physical

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<sup>108</sup> PICUM, *Preventing and Addressing Vulnerabilities in Immigration Enforcement Policies* (PICUM 2021) <[picum.org/wp-content/uploads/2021/03/Preventing-and-Addressing-Vulnerabilities-in-Immigration-Enforcement-Policies-EN-1.pdf](http://picum.org/wp-content/uploads/2021/03/Preventing-and-Addressing-Vulnerabilities-in-Immigration-Enforcement-Policies-EN-1.pdf)> accessed 21 March 2026, 5.

<sup>109</sup> MM Mentzelopoulou and N Barlaoura, 'Detention of migrants: A measure of last resort' (European Parliamentary Research Service Briefing EPRS BRI(2023)753926, European Parliament September 2023) <[www.europarl.europa.eu/RegData/etudes/BRIE/2023/753926/EPRS\\_BRI\(2023\)753926\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2023/753926/EPRS_BRI(2023)753926_EN.pdf)> accessed 20 March 2026, 4.

<sup>110</sup> JRS-Europe, *Becoming Vulnerable in Detention: Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union (The DEVAS Project)* (P Amaral ed, JRS-Europe June 2010) <[jrseurope.org/wp-content/uploads/sites/19/2020/07/JRS-Europe\\_Becoming-Vulnerable-In-Detention\\_June-2010\\_PUBLIC.pdf](http://jrseurope.org/wp-content/uploads/sites/19/2020/07/JRS-Europe_Becoming-Vulnerable-In-Detention_June-2010_PUBLIC.pdf)> accessed 26 June 2026.

<sup>111</sup> *Ibid*, 7.

<sup>112</sup> *Ibid*.

<sup>113</sup> The footnotes in this section are applicable to the paragraph as a whole.

health as poor, 72% of individuals detained for *four to five months* report that their physical health is very poor. Younger detainees report poor physical health more frequently than older detainees, with minors and women aged 18 to 24 particularly who more frequently describe negative physical health impacts than others.<sup>114</sup>

Detention produces very negative consequences for detainees' **mental** health. Almost half of all the respondents in the DEVAS sample describe their mental health as poor while in detention. The very fact of being detained as such, is a primary determinant in the negative mental health consequences described by detainees. Many of them were unable to identify a specific cause; instead, they frequently reported being 'shocked', 'fearful', or 'depressed' simply at their situation of confinement. Psychological stress is further exacerbated by poor living conditions, uncertainty about their situation, and isolation from the outside world. The inability to form any perspective on their future, due to a lack of information and disconnection from the outside world, places a lot of psychological stress on detainees, often leading to deeper anxiety and depression. Prolonged detention aggravates the adverse mental health effects of detention: 71% of individuals detained for four to five months attribute their psychological problems to the detention as such. *Age* and *legal status* are two important elements for how detainees mentally cope with detention at a personal level also shape how detainees cope mentally. For example, *Minors and young adults* aged 18 to 24 frequently report negative mental-health impacts and *irregular migrants* express anxiety and uncertainty regarding what may happen to them post-expulsion.<sup>115</sup>

The DEVAS study shows that, with regard to the impact of detention on the individual, the detention itself is the greatest difficulty detainees report coping with. The mere imposition of detention, together with all of its consequent effects, constitutes an insurmountable challenge for many. *All detainees*, regardless of age, sex, legal status, or length of detention, *are affected*. Almost 70% state that detention steadily worsens their self-perception.<sup>116</sup>

A large majority of detainees express deep dissatisfaction with the quality of the food provided and more than half experience insomnia at night. Both conditions significantly contribute to the psychological stress experienced in detention. In particular, the poor quality of the food contributes

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<sup>114</sup> *Ibid*, 9.

<sup>115</sup> *Ibid*, 10.

<sup>116</sup> *Ibid*, 11.

to an overall sense of indignity among detainees. Loss of appetite and weight loss are very common, and prolonged detention further exacerbates these negative effects.<sup>117</sup>

#### - **Conditions and struggles in detention**

The DEVAS study indicates that detainees overwhelmingly feel negative about the **conditions** of the detention centre. Many complain about unsanitary toilet and shower facilities, as well as unhygienic kitchen. A large number of detainees equate the detention centre with a prison.<sup>118</sup>

The **strict regimes** in many detention centres have a profoundly negative impact on detainees' lives. Fixed eating times, limited recreation hours and mandatory nightly curfews contribute to detainees' perception that they are in prison. Many describe rules that keep them confined to their cells for extended periods above all else. As a result, numerous detainees report excessive sleeping during the day, which in turn leads to insomnia at night. Isolation and inactivity leave others feeling degraded and deprived of dignity.<sup>119</sup>

**Language** is an important factor in relations between detainees and staff. Women, in particular, report having experienced discrimination because they were unable to speak the language of the staff.<sup>120</sup>

Detainees attribute their sense of **safety** to the presence of security guards, while they attribute their lack of safety to the co-detainees. Nevertheless, physical and verbal abuse occurs both from staff and from co-detainees. Living conditions also shape detainees' perceptions of safety. Excessive noise, unhygienic conditions and the prison-like atmosphere are widely reported as factors that make detainees feel unsafe.<sup>121</sup>

The prolonged **inactivity** that comes with detention results in boredom, which significantly increases psychological stress. Notably, detainees aged 18 to 24, particularly women, report high levels of inactivity in the detention centre.<sup>122</sup>

Detention centres are generally able to provide only very *basic* **medical care**, medical *specialists* such as psychologists, gynaecologists and dentists are largely unavailable. Moreover 87% of detainees report that psychological services are not accessible to them. Language barriers further

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<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid*, 8.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid*, 9.

compound these difficulties: detainees frequently report being unable to communicate with medical staff due to linguistic differences, often relying on co-detainees for assistance because no other solution exist. Most detainees want improved improved medical services, with over 90% of women aged 18 to 24 express a need for better medical care. Many report receiving only pain-reducing medication irrespective of the medical need they express. Persons detained for more than three months are more frequently negative about the medical care provided than those detained for shorter periods.<sup>123</sup>

The environment of detention negatively affects the level and the quality of **social interaction** among detainees and between detainees and staff. The mix of cultures, nationalities and languages within the detention centre creates an environment in which conflict inevitable. Persons held for longer periods report negative social interactions more frequently than others. An absence of language skills renders certain detainees vulnerable to more dominant social groups.<sup>124</sup>

#### - **Vulnerability and becoming vulnerable**

The DEVAS research demonstrates that all types of persons are vulnerable to the negative effects of detention, irrespective of whether they possess officially recognised special needs.<sup>125</sup> It further shows that detention produces negative consequences from the very first days of confinement, the personal circumstances of detainees deteriorate as the duration of detention increases.<sup>126</sup>

The data of the study reveals not only detainees who have special needs such as medical problems, pre-existing traumatic histories etc., but also detainees who *become vulnerable* to the negative effects of detention.<sup>127</sup> *“The picture that emerges from the data is one of a detainee who is trapped and cannot escape, and is thus vulnerable to harm from the factors associated with detention. The detainee must therefore rely on their personal attributes, the people in their social network and the factors in their environment in order to free him or herself from that trap.”*<sup>128</sup> Yet these same **personal, social and environmental** factors may equally impede a detainee’s ability to reduce their vulnerability to the harmful effects of detention.<sup>129</sup>

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<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*, 10.

<sup>125</sup> *Ibid.*, 17.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*, 11.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

Taken together, the DEVAS findings demonstrate that ‘ordinary’ detention conditions are linked to vulnerability: they can both exacerbate existing vulnerabilities and generate vulnerability. Vulnerability in detention is therefore not limited to questions of medical (physical and mental) care or individualised special-needs accommodations; although these remain essential. Basic/general (structural) detention conditions, such as sufficient access to open air, are also crucial in the light of vulnerability.

- **Recommendations: Reduce vulnerability? Reduce detention!**

The DEVAS study concludes “*The negative effects of detention are so great as to warrant its spare use.*”<sup>130</sup>

The study further formulates several recommendations that are relevant for this thesis. The optimal way to reduce individuals’ vulnerability to detention is to limit its use by establishing viable alternatives to detention.<sup>131</sup>

The study further recommends that (the EU) criteria for the purpose of determining whether an ‘irregular’ migrant should be detained, should also include a holistic assessment of the person’s level of vulnerability to detention.<sup>132</sup> It accordingly recommends that the holistic individual assessment criteria should, include an examination of the *personal, social, and environmental* factors present in an individual’s situation, *such as* legal status, the presence or absence of supportive social networks, and the person’s physical and mental health.<sup>133</sup>

The situation of detainees should also be reviewed at least once per month, using holistic assessment criteria to determine the personal impact of detention.<sup>134</sup> Ongoing assessments are the only means of ensuring that the harmful effects of detention are minimised as far as possible.<sup>135</sup> These assessments may be conducted by social workers or staff members who have received adequate intercultural or psychosocial training in the context of detention.<sup>136</sup>

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<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

## 2.2 International human rights framework on immigration detention

### Article 3 UDHR

*“Everyone has the right to life, liberty and security of person.”<sup>137</sup>*

The right to personal liberty is a fundamental guarantee that applies to all individuals in all circumstances, including migrants, irrespective of their migration status.<sup>138</sup> Detention constitutes an *interference* with this human right to ‘liberty’.

The prohibition of *arbitrary* detention is absolute. It constitutes a non-derogable norm of customary international law, *jus cogens*.<sup>139</sup> As such, arbitrary detention can never be justified.<sup>140</sup> (See also *Part II* and Article 5 §1(f) ECHR the Council of Europe level.)

With regard to detention, it is important to consider the work of the Working Group on Arbitrary Detention (WGAD), a special-procedure mandate holder within the United Nations Human Rights Council.<sup>141</sup> In its *Revised Deliberations No. 5*, the WGAD consolidates its established practice concerning the deprivation of liberty of migrants.<sup>142</sup> This document reflects and synthesises the body’s existing jurisprudence in this area,<sup>143</sup> and is therefore, although non-binding, highly relevant.

#### - Exceptionality of detention in the course of migration proceedings

The WGAD stresses the exceptionality of detention in the course of migration proceedings. It is clear that, any form of administrative detention or custody in migration context must be used only as an *exceptional measure of last resort*, for the shortest possible duration, and only when justified by a legitimate purpose.<sup>144</sup>

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<sup>137</sup> Universal Declaration of Human Rights (adopted 10 December 1948, UNGA Res 217A(III)) (UDHR), art 3.

<sup>138</sup> Working Group on Arbitrary Detention, 'Revised Deliberation No 5 on deprivation of liberty of migrants' (UN Working Group on Arbitrary Detention, 7 February 2018) <[www.refworld.org/legal/resolution/unwgad/2018/120413](http://www.refworld.org/legal/resolution/unwgad/2018/120413)> accessed 21 March 2026 (WGAD, 'Revised Deliberation No 5'), 7.

<sup>139</sup> *Ibid*, 8.

<sup>140</sup> *Ibid*, 8.

<sup>141</sup> OHCHR, 'Working Group on Arbitrary Detention' <[www.ohchr.org/en/special-procedures/wg-arbitrary-detention](http://www.ohchr.org/en/special-procedures/wg-arbitrary-detention)> accessed 20 March 2026.

<sup>142</sup> Working Group on Arbitrary Detention, 'Revised Deliberation No 5 on deprivation of liberty of migrants' (UN Working Group on Arbitrary Detention, 7 February 2018) <[www.refworld.org/legal/resolution/unwgad/2018/120413](http://www.refworld.org/legal/resolution/unwgad/2018/120413)> accessed 21 March 2026 (WGAD, 'Revised Deliberation No 5').

<sup>143</sup> *Ibid*.

<sup>144</sup> *Ibid*, 12.

Alternatives to detention must be sought to ensure that detention is used solely as an exceptional measure.<sup>145</sup> Such alternatives must be realistic and must not depend on an individual's ability to pay for these.<sup>146</sup> They may take various forms, including regular reporting obligations, stay in open centres or designated locations, community-based solutions, release on bail or other securities.<sup>147</sup>

The need of detention must be assessed on an individual basis and not on migration status.<sup>148</sup> Detention must comply with the principle of proportionality; consequently, automatic or mandatory detention in the migration context is arbitrary.<sup>149</sup>

Legislation must establish a maximum period of detention in migration proceedings, and such detention is permissible only for the shortest possible duration.<sup>150</sup> Excessive detention is arbitrary, and once the maximum period set by law has expired, the individual must be released automatically.<sup>151</sup>

#### - **Respect for rights during detention in the course of migration**

The Working Group adds that persons detained in the course of migration proceedings enjoy as a minimum the same rights as those detained in the criminal justice or other administrative context.<sup>152</sup>

Importantly, all migrants in detention “*must be treated humanely and with respect for their inherent dignity. The conditions of their detention must be humane, appropriate and respectful, noting the non-punitive character of the detention in the course of migration proceedings.*”<sup>153</sup>

There are several safeguards that must be ensured in detention. All detained migrants must, for example be able to communicate with the outside world and relatives,<sup>154</sup> have access to legal

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<sup>145</sup> *Ibid*, 16.

<sup>146</sup> *Ibid*, 17.

<sup>147</sup> *Ibid*.

<sup>148</sup> *Ibid*, 19.

<sup>149</sup> *Ibid*.

<sup>150</sup> *Ibid*, 25.

<sup>151</sup> *Ibid*.

<sup>152</sup> *Ibid*, 31.

<sup>153</sup> *Ibid*, 38.

<sup>154</sup> *Ibid*, 37.

representation and advice and interpreters,<sup>155</sup> have free access to appropriate medical care, including mental-health care etc.<sup>156</sup>

- **Migrants in situations of vulnerability should not be detained**

Crucially for the purposes of this thesis is the Working Group's stance on the detention of vulnerable persons. The expert body sets out a clear and unequivocal position: detention of migrants in situations of vulnerability or at risk "*such as pregnant women, breastfeeding mothers, elderly persons, persons with disabilities, lesbian, gay, bisexual, transgender and intersex persons, or survivors of trafficking, torture and/or other serious violent crimes*" must not take place.<sup>157</sup> (emphasis added).

Not only the Working Group has stated that vulnerable persons should not be subjected to detention. Namely, the OHCHR, in cooperation with other United Nations partners, has also taken the lead in developing a comprehensive set of Principles and Guidelines on the human rights protection of migrants in *vulnerable situations*. These efforts resulted in the "*Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations.*"<sup>158</sup> Within this framework is, Principle 8 "*Ending immigration detention*" directly relevant. Guideline 3, one of the guidelines that operationalize this principle, specifies that States should "*Avoid the immigration detention of persons who have specific needs or who are particularly at risk of exploitation, abuse, sexual or gender-based violence, or other forms of violence. Such people include, inter alia, pregnant and nursing women, older persons, persons with disabilities, survivors of torture or trauma, migrants with particular physical or mental health needs, LGBTI individuals and stateless persons.*"<sup>159</sup> (emphasis added).

The use of 'inter alia' and 'such as' makes clear that the elements mentioned are merely illustrative and must not be understood as an exhaustive list. (Although certain categories are identified, it is important to emphasise that the vulnerability assessment should be *situational/holistic* and not only

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<sup>155</sup> *Ibid*, 35.

<sup>156</sup> *Ibid*, 39.

<sup>157</sup> *Ibid*, 41.

<sup>158</sup> OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders* (2014) <[www.ohchr.org/sites/default/files/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf](http://www.ohchr.org/sites/default/files/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf)> accessed 21 March 2026 (OHCHR, *Principles and Guidelines*).

<sup>159</sup> *Ibid*.

checking if one of the ‘vulnerabilities’ listed are present.) This thesis proceeds on the basis that vulnerable persons must not be detained and understands the listed categories as examples.

## 2.3 Normative conclusion: primacy of migrants’ rights

In light of *all* the considerations outlined above this thesis proceeds from the premise that return detention should be abolished in general; (or at the very least reduced to an absolute minimum, i.e. only used as a genuine last resort in accordance with human rights standards.). Ending detention is the most human-rights-friendly approach, and although this consideration alone should be sufficiently persuasive, several additional grounds for this position are advanced.

The argument rests, *first*, on the profoundly harmful effects of detention, as proven above. *Secondly*, detention has not yet proven its usefulness. In the sense that, it has been shown that detention does not deter irregular migration, it also doesn’t increase the effectiveness of return procedures.<sup>160</sup> (Instead, it only elevates the suffering of migrants and can have long-term detrimental effects on their mental health.<sup>161</sup> Research further shows that lengthy detention as a tool of migration management, is not only high in costs it’s also low in effectiveness.)<sup>162</sup> *Next*, there exists less coercive alternatives to detention which are more effective, humane and cheaper than detention.<sup>163</sup> *Finally*, in light of the overarching purpose of this thesis, namely improving the situation of the vulnerable persons in question, abolishing detention altogether for all migrants is the best way to improve their situation. Because better treatment for everyone necessarily entails better treatment for vulnerable persons.

Furthermore, vulnerable persons should not be detained. Yet this should be realised in a system where detention is genuinely used as an exceptional measure of last resort (and preferably not resorted to). This focus on the primacy of migrants’ rights helps prevent a ‘vulnerability competition’ and ensures that respect for the rights of all migrants simultaneously protects those who are particularly vulnerable.

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<sup>160</sup> F González Morales, 'Report of the Special Rapporteur on the Human Rights of Migrants: Study on the Return and Reintegration of Migrants' (A/HRC/38/41, UN Human Rights Council 38th Session, 2018) <[docs.un.org/en/A/HRC/38/41](https://docs.un.org/en/A/HRC/38/41)> accessed 26 June 2026, para 40; MG Manieri and M LeVoy, *PICUM Position Paper on EU Return Directive* (PICUM April 2015) <[picum.org/wp-content/uploads/2023/08/ReturnDirective\\_EN.pdf](https://picum.org/wp-content/uploads/2023/08/ReturnDirective_EN.pdf)> accessed 26 June 2026.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> PICUM, *FAQ: Migration Policies, Detention and Return* (PICUM, February 2021) <[picum.org/wp-content/uploads/2023/08/FAQs-Migration-policies-detention-and-returns.pdf](https://picum.org/wp-content/uploads/2023/08/FAQs-Migration-policies-detention-and-returns.pdf)> accessed 26 June 2026, 6.

Where detention nonetheless occurs, conditions must be humane, appropriate, and fully respectful of the dignity and rights of all detainees. Unfortunately, this is another key focus of the thesis: it contends that detention conditions must be ameliorated, since the evidence shows that such conditions impact vulnerability as well.

## PART II Case law of the European Court of Human Rights

For the purposes of this thesis, some relevant judgments of the European Court of Human Rights were examined and analysed in depth. These cases are elaborated and written out in ANNEX I. To ensure concision and analytical focus, the discussion below extracts the findings from the analysed case law that are most relevant to vulnerability in the context of migration detention and that bring into view the role vulnerability plays in the Court's jurisprudence on this matter. The purpose of this chapter is *not* to reiterate the Council of Europe human-rights standards that are applicable to immigration detention (general principles of Article 3<sup>164</sup> and 5<sup>165</sup> ECHR), but to analyse the implications (if any) of these standards in situations characterised by vulnerability.

The case law examined *first and foremost* revealed the gravity of the situation in many immigration detention centres (all in EU Member States, except for the case brought against Turkey). The conditions described by the Court range from unbearably cold to unbearably hot; sleeping fully clothed and veiled because no female staff were available to conduct nighttime checks; outdoor spaces were inaccessible; HIV treatment was interrupted due to detention; a wheelchair bound detainee was made to sleep on a metal table and could not access sanitary facilities... These situations are nothing short of shameful. The issue lies not merely in the deplorable conditions of detention, but even more fundamentally in the fact that the detention measure itself, at times, was arbitrary.

*Secondly*, these cases were selected to examine the role of vulnerability in the ECtHR's case law on detention conditions in the context of return detention (Article 3) and on the arbitrariness of such detention (Article 5 §1(f)). From the judgments discussed, several conclusions can be drawn regarding how vulnerability shapes the Court's assessment.

The discussed cases are mentioned in the main text; for the precise references, see *ANNEX I*.

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<sup>164</sup> For this see for example, European Court of Human Rights Registry, *Guide on Article 3 of the Convention – Prohibition of Torture* (ECtHR, updated 31 August 2025) <[ks.echr.coe.int/documents/d/echr-ks/guide\\_art\\_3\\_eng](https://ks.echr.coe.int/documents/d/echr-ks/guide_art_3_eng)> accessed 26 June 2026.

<sup>165</sup> For this see for example, European Court of Human Rights Registry, *Guide on Article 5 of the Convention – Right to Liberty and Security* (ECtHR, updated 2026) <[ks.echr.coe.int/documents/d/echr-ks/guide\\_art\\_5\\_eng](https://ks.echr.coe.int/documents/d/echr-ks/guide_art_5_eng)> accessed 26 June 2026.

## 1 Detention conditions: Article 3 ECHR

### - General findings

Article 3 prohibits torture and inhuman or degrading treatment or punishment. In the specific context of detention conditions and vulnerability, the Court adopts a positive approach. The Court takes a *situational approach*, in assessing if the treatment reaches the minimum level of severity to fall within the scope of Article 3. The Court, namely, indicates that this assessment depends on *all* the circumstances of the case, *including* the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.<sup>166</sup> For example in *Palushi v. Austria* the court took into account the totality of Mr Palushi's particular circumstances when assessing whether the threshold of Article 3 had been reached. Solitary confinement *as such* was not found to constitute a violation of Article 3. However, the combination of placing a detainee who had been on hunger strike for three weeks in solitary confinement, without conducting a proper medical examination upon admission and without ensuring adequate health monitoring and subsequently refusing him access to a doctor for several days, amounted, taken together, to treatment causing suffering and humiliation going beyond the inevitable element of suffering connected with legitimate detention (Article 3 violation).

The Court conceives of vulnerability as *more* than someone's state of health or personal characteristics only. It may be argued that the Court has extended the *M.S.S. v. Belgium and Greece* reasoning on the vulnerability of asylum-seekers (discussed above and in Annex I) to the vulnerability of 'irregular' migrants.<sup>167</sup> Namely, the Court explicitly characterised a person as being in a vulnerable position *inter alia* "*because she was an irregular immigrant*"<sup>168</sup> and it did so with express reference to *M.S.S. v. Belgium and Greece*. This is again a positive and situational approach.

A further positive observation is that the Court, as a result of its situational approach, also takes into account the distress arising from the prospect of removal, as illustrated by *Yoh-Ekale Mwanje v. Belgium*.

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<sup>166</sup> *Aden Ahmed v Malta* App no 55352/12 (ECtHR, 23 July 2013) §85

<sup>167</sup> *MSS v Belgium and Greece* App no 30696/09 (ECtHR GC, 21 January 2011) §251. "*applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection*". *MSS v Belgium and Greece* App no 30696/09 (ECtHR GC, 21 January 2011) §232. "*the applicant, being an asylum-seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously.*"

<sup>168</sup> *Aden Ahmed v Malta* App no 55352/12 (ECtHR, 23 July 2013), §97; and repeated in *Abdi Mahamud v Malta* App no 56796/13 (ECtHR, 3 May 2016) §88.

However, the Court's positive, *situational* approach under Article 3 does not detract from the fact that, as previously noted, States are expected to do considerably more than merely refrain from violating Article 3. Precisely because of the absolute nature of Article 3, the threshold of severity required (for detention conditions) to amount to inhuman or degrading treatment remains exceptionally high. The obligations that can be derived from the Court's case law, outlined below, therefore represent the *bare minimum* that States must guarantee in order to avoid crossing that threshold. Far more could and should be provided, e.g.: at EU level.

- **Specific findings**

An observation that emerges from the case law examined, that is directly relevant to the protection of certain vulnerable persons in detention, is the *positive obligation* on the authorities to protect the health of persons deprived of their liberty and that a failure to provide *appropriate medical* care may amount a violation of Article 3 of the Convention, as illustrated by *Palushi v. Austria* and *Yoh-Ekale Mwanje v. Belgium*. (Important to note is that the deterioration in health alone is *not sufficient* to conclude that the State failed to fulfil its positive obligations under Article 3 of the Convention (see *Palushi v. Austria*), but it is only not sufficient *if* it can be established that the competent domestic authorities took *all reasonable medical measures* to prevent the progression of the illness (*Yoh-Ekale Mwanje v. Belgium*)).

However, the fact that appropriate medical care was provided does not mean that there can no longer be a violation of Article 3. Vulnerability extends far beyond the purely medical sphere and so does Article 3. Even where necessary medical attention is provided, the constraints inherent in confinement can, in and of themselves, give rise to anxiety and psychological suffering of a severity sufficient to constitute a violation of Article 3, where the detained person finds themselves in a (vulnerable) condition such as an advanced and high-risk pregnancy, as illustrated by *H.M. and Others v. Hungary*.

Next, it was not necessary for the Court to explicitly invoke the concept of 'vulnerability' in order to afford protection to vulnerable persons, i.e. to come to the conclusion of a violation, as illustrated by *Palushi v. Austria*, *Yoh-Ekale Mwanje v. Belgium* and *Asalya v. Turkey*. There is no need to frame these requirements explicitly as 'vulnerability standards', nor is there any obligation on the State to have them as such. What is required is simply that detention conditions and do not amount to ill-treatment in practice. Meeting this requirement may, in certain cases, necessitate additional efforts or measures, which may take the form of vulnerability-specific standards, but this is not a prerequisite

in itself. For example, in *Abdi Mahamud v. Malta*, the Court noted that the detainees suffered from the cold. Although the provision of blankets alleviated the situation to some extent, the Court explicitly stated that “*individuals who are vulnerable because of their health may require further measures*”.<sup>169</sup>

This observation connects to a broader argument advanced in this thesis: improved detention conditions benefit all detained persons. They are, however, of particular importance for vulnerable persons as they are especially susceptible to the harmful effects of inadequate conditions (or such conditions may even generate vulnerability).

Furthermore, where authorities decide to place and keep a person with a *disability* in detention, they must demonstrate special care in guaranteeing conditions that correspond to the special needs resulting from that disability, as illustrated by *Asalya v. Turkey*. The failure to make even basic accommodations for a detained person's specific needs, which in Mr Asalya's case denied him the minimal necessities for a civilised life (such as accessible sanitation facilities or appropriate sleeping arrangements), can in itself amount to degrading treatment within the meaning of Article 3, regardless of any intention to humiliate.

It may be argued that this principle could be extended to all/other forms of vulnerability. The underlying rationale, namely that the State must take positive steps to ensure that detention conditions are suited to the specific needs of the detained person, would appear equally applicable to other vulnerable persons whose particular circumstances may render standard detention conditions degrading.

Another conclusion that can be drawn from the case law is that the Court has found violations of Article 3 in cases involving a heavily pregnant woman,<sup>170</sup> a pregnant woman with a health condition,<sup>171</sup> a breastfeeding mother,<sup>172</sup> and a woman at an advanced stage of a high-risk pregnancy.<sup>173</sup> Whilst overgeneralisation must be avoided, it can be concluded that the detention of a pregnant person in late pregnancy or with pregnancy-related health risks giving rise to an Article 3 violation, *even* where appropriate medical care is provided for that person, as illustrated by *H.M. and*

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<sup>169</sup> *Abdi Mahamud v Malta* App no 56796/13 (ECtHR, 3 May 2016) §85.

<sup>170</sup> *Mahmundi and Others v Greece* App no 14902/10 (ECtHR, 31 July 2012).

<sup>171</sup> *RR and Others v Hungary* App no 36037/17 (ECtHR, 2 March 2021) §§62–63, 65.

<sup>172</sup> *MD and AD v France* App no 57035/18 (ECtHR, 22 January 2021) §71.

<sup>173</sup> *HM and Others v Hungary* App no 38967/17 (ECtHR, 2 October 2022) §18.

*Others v. Hungary*. In conclusion, pregnant women and breastfeeding mothers should not be detained. These cases would never have reached the Court had states simply complied with (non-binding) human-rights standards. As set out in Part I on the relevant human-rights framework, both the Working Group on Arbitrary Detention and the OHCHR explicitly state that the migration detention of pregnant women and breastfeeding mothers (and other vulnerable persons) must not occur.

As mentioned before, the case of *H.M. and Others v. Hungary* illustrated that even where necessary medical attention is provided, the constraints *inherent* in confinement can, in and of themselves, give rise to anxiety and psychological suffering of a severity sufficient to engage Article 3, particularly where the detained person is in (a vulnerable condition such as) an advanced and high-risk pregnancy. Such a dynamic could be equally conceivable, and plausible, in *other* forms of vulnerability (besides an advanced and high-risk pregnancy).

Some critical reflections can be raised regarding the Court's case law. It is striking that a substantial share of the relevant judgments concerns physical health. Furthermore, although the Court endorses a situational approach to vulnerability, it nonetheless appears that less visible or less straightforward forms of vulnerability are harder to establish. An example of this is the Court's reasoning in *H.M. and Others v. Hungary*. In that case, the father alleged that he was a torture survivor and suffered from mental-health difficulties. Despite these claims, the Court concluded that he was “*not more vulnerable than any other adult asylum-seeker confined to the transit zone*”<sup>174</sup> (see ANNEX I for details).

In conclusion, vulnerability plays a particular role in the Court's assessment under Article 3.

For example, in *Aden Ahmed v. Malta* the combination of all the concrete elements, including her vulnerable position taken together with the poor conditions of detention, that amounted to degrading treatment within the meaning of Article 3 of the Convention. Those same deplorable detention conditions might not (*per se*), in and of themselves, have constituted degrading treatment in the case of a person who was not particularly vulnerable, as they may not have been sufficient to diminish that person's human dignity or to arouse feelings of anguish and inferiority capable of humiliating and debasing them or breaking their physical or moral resistance.

In other words, the Court employs the vulnerable situation and specific vulnerabilities as a relevant (aggravating) factor in its overall assessment, which tips the balance towards a finding of a violation where the conditions of detention, although deplorable, might not have sufficed to reach the requisite

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<sup>174</sup> *HM and Others v Hungary* App no 38967/17 (ECtHR, 2 October 2022), §20.

threshold of severity, without the combination with the vulnerability. This is a logical consequence of a situational approach, which takes all relevant circumstances into account.

## 2 Arbitrary detention: Article 5 §1(f) ECHR

Article 5, which protects individuals against arbitrary or unjustified deprivations of liberty, can also be relevant in the specific context of vulnerability and return detention. In this regard, the Court's case law shows that vulnerability-related factors may influence the assessment of whether detention is arbitrary.

The detention of adults with specific vulnerabilities will not be in conformity with Article 5§1(f) of the Convention where the aim pursued by the detention can be achieved by other, less coercive measures.<sup>175</sup> This requires the domestic authorities to consider alternatives to detention in the light of the specific circumstances of the individual case.<sup>176</sup>

This is illustrated by *Yoh-Ekale Mwanje v. Belgium*, concerning an adult suffering from a medical condition.<sup>177</sup> Although the Court did not explicitly invoke the language of vulnerability (which is not necessary), her vulnerable situation, in particular her advanced stage of HIV infection, rightly played an important role in the Court's finding of a violation of Article 5. Since “*the authorities had not considered a less drastic measure such as granting the applicant temporary leave to remain, in order to safeguard the public interest in her detention and at the same time avoid keeping her in detention for a further seven weeks although she was HIV-positive and her health had deteriorated in detention. In the circumstances, the Court did not perceive any link between the applicant's detention and the Government's aim of securing her removal from the country.*”<sup>178</sup>

This is equally reflected in *O.M. v. Hungary*, where the Court took into account the particular vulnerability of an LGBTI asylum-seeker.

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<sup>175</sup> European Court of Human Rights Registry, *Guide on the Case-Law of the European Convention on Human Rights: Immigration* (ECtHR, updated 28 February 2026) <[ks.echr.coe.int/documents/d/echr-ks/guide\\_immigration\\_eng](https://ks.echr.coe.int/documents/d/echr-ks/guide_immigration_eng)> accessed 19 June 2026, 40.

<sup>176</sup> *Ibid.*

<sup>177</sup> *Yoh-Ekale Mwanje v Belgium* App no 10486/10 (ECtHR, 20 December 2011) §113-125.

<sup>178</sup> Legal summary: *Yoh-Ekale Mwanje v Belgium* App no 10486/10 (ECtHR, 20 December 2011), Legal Summary <[hudoc.echr.coe.int/eng?i=002-252](https://hudoc.echr.coe.int/eng?i=002-252)> accessed 26 June 2026.

Moreover, in *Thimothawes v. Belgium*, the Court found no breach of Article 5, yet stated in the context the systematic of detaining asylum-seekers<sup>179</sup> “*la Cour a estimé que les autorités compétentes devaient rechercher s’il était possible de leur substituer une autre mesure moins radicale. Cette exigence vise à détecter si les intéressés présentent une vulnérabilité particulière qui s’oppose à la détention*” (emphasis added).<sup>180</sup> The requirement of less coercive measures aims to determine whether the individuals concerned present a particular vulnerability that precludes detention. In other words, a particular vulnerability could oppose detention, such that detaining the (vulnerable) person would amount to an arbitrary deprivation of liberty under Article 5.

A further principle emerging from the case law on Article 5 §1(f) is that for persons with specific vulnerabilities to benefit from the additional safeguards against arbitrary detention that apply to them, they must have access to an assessment of their vulnerability and be informed about the relevant procedures.<sup>181</sup> This is illustrated in the case of *Abdi Mahamud v. Malta*.

When determining whether detention was arbitrary, particularly whether it was carried out in good faith, the Court may take a wide range of factors into account. In *Abdi Mahamud v. Malta*, the Court relied on the deficiencies of the AWAS release procedure (release of vulnerable detainees, an *additional safeguard* that does not itself fall under Article 5) to assess the authorities’ good faith under Article 5. Specifically, the Court found that the lack of relevant information and active steps by the authorities with regard to this release policy, combined with the exorbitant delays in the vulnerability assessment procedure, undermined the very purpose of exempting vulnerable persons from detention and raised serious doubts about the Government’s good faith.

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<sup>179</sup> However, this thesis argues that the same could also be said for detention for the purpose of removal (return detention). As proven by the Court in *Yoh-Ekale Mwanje v Belgium* App no 10486/10 (ECtHR, 20 December 2011) §124, ‘une mesure moins sévère’.

<sup>180</sup> *Thimothawes v Belgium* App no 39061/11 (ECtHR, 4 April 2017) §73.

<sup>181</sup> European Court of Human Rights Registry, *Guide on the Case-Law of the European Convention on Human Rights: Immigration* (ECtHR, updated 28 February 2026) <[ks.echr.coe.int/documents/d/echr-ks/guide\\_immigration\\_eng](https://ks.echr.coe.int/documents/d/echr-ks/guide_immigration_eng)> accessed 19 June 2026, 41.

## PART III EU's performative vulnerability standards in the context of return detention

This *Part* critically assesses the EU's approach to return detention through the lens of vulnerability, first by analysing the general EU framework on return detention (Chapter 1), and then by examining the specific EU framework on vulnerability within detention (Chapter 2). Chapter 3 subsequently explores the conclusions that can be drawn from the situation in the Member States.

### 1 Return detention in EU law

As proven in Part I, the key to reducing vulnerability is to reduce detention and where detention is (nonetheless) used, improve detention conditions. This *Chapter* therefore examines what the EU legal framework provides with respect to return detention: both the rules governing the decision to detain and the rules governing the conditions of detention.

#### 1.1 The legal framework on return

##### - Return Directive

The *Return Directive* constitutes the principal instrument governing return procedures in the EU Member States (where it applies) and establishes common EU standards on return.

The scope of the Return Directive is broad and covers any third-country national staying illegally on the territory of a Member State.<sup>182</sup> All EU Member States (*except for Denmark (recital 25) and Ireland (recital 27)*), plus Iceland (28), Norway (28), Switzerland (29), and Liechtenstein (30) are currently bound by the Return Directive.<sup>183</sup>

The Commission formulated, in the light of the Return Directive, some recommendations establishing a common '*Return Handbook*'. The Return Handbook provides guidance to national authorities competent for carrying out return related tasks.<sup>184</sup> The Handbook does not create any legally binding

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<sup>182</sup> Return Directive, art 2.

<sup>183</sup> Return Directive, recitals 25-30.

<sup>184</sup> Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks [2017] OJ L339/83 <eur-lex.europa.eu/eli/reco/2017/2338/oj/eng> accessed 12 April 2026 (Return Handbook (2017)), 339/87.

obligations upon Member States, and it does not establish new rights and duties.<sup>185</sup> Nonetheless, it constitutes an interesting source of information and clarification.

#### - Return Regulation (Approved text and Commission's proposal)

The legal framework governing the return of irregularly staying third-country nationals in the European Union is currently undergoing significant transformation. On 11 March 2025, the European Commission formally proposed to replace the existing Return Directive with a *Regulation*.<sup>186</sup> Unlike a directive, a regulation does not require transposition into national law and is directly applicable and binding in its entirety in all Member States.<sup>187</sup> This shift reflects the general objective of this proposal, i.e. to have more uniform, efficient, and enforceable return procedures across the EU.<sup>188</sup>

Recently, on 17 June 2026, the European Parliament adopted the text of the Return Regulation.<sup>189</sup> Before it can enter into force, the Regulation must be formally adopted by the Council and published in the Official Journal.<sup>190</sup> Certain provisions, such as those concerning return hubs, age assessment of minors, and the external dimension of returns, will then apply immediately.<sup>191</sup> Other provisions requiring preparatory measures will become applicable twelve months after the Regulation's entry into force.<sup>192</sup>

This analysis will, besides the currently applicable Return Directive, discuss the *approved text of the Regulation* and where relevant *the Commission's proposal*. As the Parliament's approval of the Return Regulation is very recent, this thesis initially only examined the Commission's proposal. This made the comparison between the two possible and straightforward. The overall finding is deeply troubling: the approved text of the Regulation is even more restrictive and raises even more concerns. The text

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<sup>185</sup> *Ibid.*

<sup>186</sup> Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a common system for the return of third-country nationals staying illegally in the Union' COM(2025) 101 final (11 March 2025) <[eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52025PC0101](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52025PC0101)> accessed 12 April 2026 (Proposal Return Regulation).

<sup>187</sup> Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), art 288.

<sup>188</sup> Proposal Return Regulation, Objective(s).

<sup>189</sup> European Parliament, 'Legislative Resolution of 17 June 2026 on the Proposal for a Regulation establishing a Common System for the Return of Third-Country Nationals Staying Illegally in the Union' (P10\_TA(2026)0207, 17 June 2026) <[www.europarl.europa.eu/doceo/document/TA-10-2026-0207\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-10-2026-0207_EN.pdf)> accessed 26 June 2026 (EP, *Approved text Return Regulation*); EU Law Tracker, 'Procedure 2025/59: Common System for the Return of Third-Country Nationals Staying Illegally in the Union' <[law-tracker.europa.eu/procedure/2025\\_59?lang=en](https://law-tracker.europa.eu/procedure/2025_59?lang=en)> accessed 8 July 2026.

<sup>190</sup> European Parliament, 'New EU system for return of illegally staying third-country nationals' (Press Release, 17 June 2026) <[www.europarl.europa.eu/news/en/press-room/20260611IPR45214/new-eu-system-for-return-of-illegally-staying-third-country-nationals](https://www.europarl.europa.eu/news/en/press-room/20260611IPR45214/new-eu-system-for-return-of-illegally-staying-third-country-nationals)> accessed 26 June 2026.

<sup>191</sup> *Ibid.*

<sup>192</sup> EP, *Approved text Return Regulation*, art 52.

in **bold** represents what has been added or changed compared to the Commission’s proposal, ‘**■**’ appears in the place where text has been removed.

What is regulated by the Return Directive and the prospective Regulation with regard to ‘return detention’? The most relevant safeguards in the light of this thesis are outlined below.

### 1.1.1 Justifying return detention

#### - Return Directive

Member States are, under Article 8(1) of the Return Directive, required to take “*all necessary measures*” to enforce return decisions. Detention is one of these measures, but it may only be used as a *last resort (i.e. when other sufficient but less coercive measures cannot be applied)*.<sup>193</sup> The Court of Justice emphasised in *El Dridi* that the Directive establishes a graduated system of measures to enforce the return decision, ranging from those that interfere least with the right to liberty, i.e. granting a period for voluntary departure, to those that restrict that liberty the most, namely detention in a specialised facility.<sup>194</sup>

Detention for the purpose of removal constitutes a serious interference with the fundamental right to liberty, therefore it is subject to strict limitations.<sup>195</sup> Article 15(1) provides the circumstances in which detention is justified under the Return Directive.

#### Article 15(1)

*“Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:*

*(a) there is a risk of absconding or*

*(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.*

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<sup>193</sup> Return Handbook (2017) 339/139.

<sup>194</sup> *El Dridi* (Case C-61/11 PPU) EU:C:2011:268, para 41.

<sup>195</sup> Return Handbook (2017), 339/139.

*Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.”*

In other words, detention needs to be necessary and proportional. A Member State may *only* detain in situations in which it is clear that the use of detention is the only way (= necessity of detention) to make sure that the return process can be prepared, and the removal process can be carried out.<sup>196</sup> Any detention must be based on an individual assessment and must comply with the requirements of proportionality: detention must be as brief as possible and may only continue while removal arrangements are in progress and executed with due diligence.<sup>197</sup>

Under Article 15(1) of the Return Directive, the *only* legitimate objective of detention under the Return Directive is to prepare return and/or carry out removal process in the case *where* there exists a risk of absconding (a); or *where* avoidance or hampering of the preparation of return or the removal process exists (b) by the returnee. Where such grounds for detention are present, and where no less coercive measure would be effective in the specific case (last resort), Member States are authorised to use detention for the time necessary to ensure a successful return procedure.<sup>198</sup> The existence of a specific ground for detention together with the non-availability of effective and sufficient less coercive measures must be *individually* assessed in each case.<sup>199</sup>

The Return Directive does *not* permit the continuation, or extension of detention for reasons relating to public order.<sup>200</sup> Member States may not use immigration detention for removal purposes as a form of ‘light imprisonment’.<sup>201</sup> Article 15 is not intended to protect society from individuals who may pose a threat to public policy or public security.<sup>202</sup> Such concerns must be addressed through other legal frameworks, such as criminal law, administrative criminal law etc. <sup>203</sup>

In *Kadzoev*, the Court of Justice made this point explicit: “*The possibility of detaining a person on grounds of public order and public safety cannot be based on Directive 2008/115/EC (Return Directive). None of the circumstances mentioned by the referring court (aggressive conduct; no means of support; no accommodation) can therefore constitute in itself a ground for detention under*

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<sup>196</sup> *Ibid.*

<sup>197</sup> Return Directive, art 15 (1); Return Handbook (2017), 339/139.

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid.*

<sup>200</sup> Return Handbook (2017), 339/140.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid.*

*the provisions of that directive.*” (emphasis added).<sup>204</sup> However, an individual’s past conduct that may indicate a risk to public order or safety, may be taken into account when assessing the risk of absconding. If such behaviour suggests that the person is unlikely to comply with legal obligations and may seek to avoid return, it may legitimately support a finding that a risk of absconding exists.<sup>205</sup>

#### - Return Regulation

Under the Return Regulation, this framework changes significantly. The crucial opening words of Article 15 of the Return Directive “*unless other sufficient but less coercive measures can be applied effectively in a specific case*”<sup>206</sup> have been removed. As a result, the requirement that detention must be used as a measure of ‘last resort’ no longer exists in EU law.

Article 29(1) of the approved text of the Return Regulation, reads “*Member States may detain a third-country national pursuant to this Regulation on the basis of an individual assessment of each case and only in so far as detention is proportionate.*”

Article 29(2) Member States may, under limb (2) of Article 29, only keep in detention a third-country national “*for the purpose of **return, including for preparing the return, readmission, and carrying out the removal***”.

Also, the *grounds* for detention have been expanded extensively. Article 29(3) adds 4 new grounds in comparison with the Directive to detain ‘illegally staying third-country nationals’: “

- (a) *risk of absconding determined in accordance with Article 21a;*
- (b) *the third-country national avoids or hampers **readmission**, the preparation of the return, or the removal* ■ ;
- (c) *the third-country national poses security risks in accordance with Article 16;*
- (d) *to determine or verify his or her identity or nationality;*
- (e) *non-compliance with the **obligations under Article 21, paragraph 2, points (a)-(c), (e), (fa) and (i)-(k), including lack of cooperation in obtaining travel documents;***
- (f) *other relevant grounds related to return, provided for in national law, to ensure effective return procedures, that are necessary and proportionate.*”

<sup>204</sup> *Kadzoev* (Case C-357/09 PPU) EU:C:2009:741, para 70.

<sup>205</sup> Return Handbook (2017), 339/140.

<sup>206</sup> Return Directive, art 15 (1).

Points (c), (d), (e) and (f) are entirely new compared to the *Return Directive*, and point (f) did not even appear in the *Commission's proposal*. It is particularly concerning that the approved text now explicitly allows detention on the basis of security risks (c). Where detention this ground was not permissible under the Directive and the case law of the CJEU, the Regulation allows for such detention.<sup>207</sup>

In addition, the safeguard requiring that detention be limited to the shortest possible period and maintained solely while removal arrangements are ongoing and executed with due diligence (see above Article 15(1) RD) has been removed under the Return Regulation.

### 1.1.2 Duration and termination of detention

#### - Return directive

Article 15(4)–(6) of the Return Directive regulates the circumstances under which detention must be terminated and the maximum permissible duration of detention. Under Article 15(4), detention is no longer justified when there is no longer a reasonable prospect of removal whether it is for legal or other reasons; or when the conditions that initially justified detention cease to exist. In such cases, the individual must be released immediately.

Article 15(5) provides that detention may only be maintained for as long as the requirements of Article 15(1) (see *supra*) remain fulfilled and only insofar as it is necessary to secure the effectiveness of the removal process. Member States must establish a maximum detention period, which may not exceed 6 months.

Article 15(6) allows for an extension of this period for a further maximum of 12 months, amounting to a total of *18 months*, (i.e. one and a half years) when, despite all reasonable efforts of the Member State, the removal operation is likely to last longer, only in those situations where the third-country national doesn't cooperate, or where delays arise in obtaining the necessary documentation from third countries.

#### - Return Regulation

Under Article 32(3) of the Return Regulation the maximum length of detention has been extended from 18 months under the Directive up to 24 months (12 months with an extension possible of 12 months i.e. 2 years).

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<sup>207</sup> EP, *Approved text Return Regulation*, art 29 (2) (c).

This exorbitant long detention period, as proposed by the Commission, is even further extended by the approved text under 3a of Article 32. Detention may, after the expiry of the maximum period of 24 months, be prolonged for additional periods of up to six months (see 3a for the conditions), amounting to a total of *30 months*.<sup>208</sup> That is *two and a half years* of an individual's life spent in detention. In addition, the approved text introduces a new provision whereby a *new* period of detention shall apply, where a third-country national has moved to another Member State and their conduct constitutes a ground for detention.<sup>209</sup>

### 1.1.3 Alternatives to detention

The Return Directive contains no provision on alternatives to detention. The Return Regulation provides in Article 23c that Member States may impose alternatives to detention.

### 1.1.4 Specialised detention facilities

#### - Return directive

Article 16(1) of the Return Directive establishes that detention must, as a rule, occur in specialised detention facilities. This reflects the principle that returnees are not criminals and require treatment distinct from ordinary prisoners.<sup>210</sup> This implies an obligation on Member States to ensure sufficient capacity in such facilities and to maintain appropriate material conditions.<sup>211</sup>

The derogation provided for in Article 16(1) of the Return Directive permitting, in exceptional circumstances, the placement of pre-removal detainees in ordinary prisons, must be interpreted strictly.<sup>212</sup> When resorting to this derogation, authorities must fully respect fundamental rights, taking into account elements such as overcrowding, the avoidance of repeated transfers, and the possible detrimental effects on the returnee's wellbeing, particularly in the case of *vulnerable persons*.<sup>213</sup>

The obligation to keep returnees strictly separated from prisoners is *absolute*, whenever a Member State, in exceptional circumstances, uses non-specialised detention facilities, the Return Directive still

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<sup>208</sup> EP, *Approved text Return Regulation*, art 32 (3a).

<sup>209</sup> EP, *Approved text Return Regulation*, art 32 (3), second paragraph.

<sup>210</sup> Return Handbook (2017), 339/147.

<sup>211</sup> *Ibid.*

<sup>212</sup> *Bero and Bouzalmate* (Joined Cases C-473/13 and C-514/13) EU:C:2014:2095, 25.

<sup>213</sup> Return Handbook (2017), 339/147.

continues to impose an unconditional duty for Member States to ensure that illegally staying third-country nationals are always detained apart from ordinary prisoners.<sup>214</sup>

Detention in closed medical or psychiatric institutions is not envisaged by Article 16(1) and would undermine the Directive's effectiveness, unless the individual's medical condition and state of health necessitates placement in a specialised or adapted facility to provide adequate and constant specialised medical supervision, assistance and care, with a view to avoiding deterioration of the state of health.<sup>215</sup>

#### - **Return Regulation**

Article 34(1) of the approved text of the Return Regulation provides that “*Detention shall **generally** take place ■ in specialised facilities,*” ... “*third-country nationals shall, **to the extent possible**, be kept separated from ordinary prisoners.*” This formulation significantly dilutes the obligations on the Member States. The use of the term ‘generally’ introduces the possibility of (more) derogations on the obligation to have specialised facilities. The phrase ‘to the extent possible’ reduces the obligation to separate from ordinary prisoners to a mere duty of effort rather than a strict duty of result. In contrast to the Return Directive, which imposed an *absolute* obligation to separate, it is under the Return Regulation possible that migrants are detained with ordinary prisoners.

### **1.1.5 Material detention conditions**

#### - **Return Directive**

The other paragraphs (2) - (5) of Article 16 contain the *material* detention conditions.

One of which is the provision on ‘vulnerable persons’ (3) which will be examined extensively in the next *Chapter*. Next to this ‘specific’ provision for vulnerable persons, there are the ‘general’ material detention conditions which are also relevant for and have an impact on vulnerability. However, these (material detention conditions) are very limited on EU level.

Under Article 16 are Member States obliged to: allow detainees to establish contact with legal representatives, family members and competent consular authorities (2); provide relevant and competent national, international and non-governmental organisations and bodies the possibility to

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<sup>214</sup> Return Handbook (2017), 339/148.

<sup>215</sup> *Ibid.*

visit detention facilities (4); provide detainees with information which explains the rules applied in the facility and sets out their rights and obligations (5).

The Directive does *not* regulate certain material aspects of detention conditions, such as room size, access to sanitary facilities, outdoor exercise, or nutrition during detention.<sup>216</sup> Regarding matters not expressly governed by the Return Directive, *Member States* are required to comply with other relevant and applicable standards.<sup>217</sup> Recital 17 of the Return Directive affirms that detainees must be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law.

#### - **Return Regulation**

While the Return Directive did not have a provision on access to open-air space, the Return Regulation, Article 34(2), stipulates that detainees shall have access to open-air space. However, the access may be restricted for a limited period of time if necessary and proportionate to ensure a well-functioning detention facility.<sup>218</sup>

The other material conditions set out in Article 34 are, in substance, equivalent to those contained in the Return Directive (some differences). The specific provision on vulnerability, in Article 34(5) will be addressed in detail in the following *Chapter*.

#### **1.1.6 Return hubs**

New under the Return Regulation, that brings major concerns, is the continued push towards the externalisation of responsibility through deportations to third countries, the so-called ‘return hubs’ (see Article 37 Return Regulation). This troubling practice falls outside the scope of this thesis.

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<sup>216</sup> Return Handbook (2017), 339/149.

<sup>217</sup> *Ibid.*

<sup>218</sup> EP, *Approved text Return Regulation*, art 34(2).

## 1.2 Critique and conclusion

### 1.2.1 The decision to detain

A first and fundamental point of critique concerns the removal of the last resort requirement. Under the Return Directive, detention could only be ordered “*unless other sufficient but less coercive measures can be applied effectively in a specific case.*”<sup>219</sup> The Return Regulation discards this clause entirely. This deletion is profoundly problematic: it eliminates the explicit obligation to consider alternatives before resorting to detention, thereby weakening one of the most important general safeguards.

This must also be read together with the significant expansion of the grounds for detention under the Return Regulation. For example, the Commission’s Return Handbook explicitly stated that detention under Article 15 Return Directive is not intended to address threats to public policy or security, which should be dealt with through criminal or administrative law. The approved Regulation, however, now includes as a new ground for detention that “*the third-country national poses security risks in accordance with Article 16.*”<sup>220</sup> The expansion of the grounds for detention implies more opportunities (grounds) to decide to detain and thus possibly more individuals exposed to that harm.

From a vulnerability perspective, the Return Regulation constitutes an enormous deterioration: the most effective way to safeguard vulnerable persons is to detain less, or not at all. The Return Regulation moves in precisely the opposite direction.

If the Return Regulation is applied by the authorities as drafted, and no additional safeguards are introduced at Member State level, there would be a real risk of violating Article 5 ECHR. As demonstrated in *Part II*, the detention of adults with specific vulnerabilities is not compatible with Article 5§1(f) where the aim pursued by detention can be achieved through less coercive measures. This obliges domestic authorities to consider alternatives to detention in light of the individual circumstances of the case. Since the Return Regulation removes the requirement to assess whether other sufficient but less coercive measures could be effectively applied, it is not aligned with binding human-rights standards. Although the EU is not (yet) bound by the ECHR, all Member States are. The conclusion nevertheless remains the same: the EU actively removes a human-rights safeguard

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<sup>219</sup> Return Directive, art 15 (1).

<sup>220</sup> EP, *Approved text Return Regulation*, art 29(3).

from its legal framework, and this is blameworthy. Leaving the matter to the Member States, although they must respect human rights; does not excuse the EU from deleting such a safeguard or from failing to secure human-rights protection at EU level.

The removal of the requirement that detention be maintained only as long as removal arrangements are in progress and executed with due diligence also raises concerns when viewed in light of the ECtHR's case law. As regards the second limb of Article 5 § 1(f), the Court considers detention.<sup>221</sup>

### 1.2.2 Detention conditions

It does not stop at the mere expansion of detention. As discussed above, the Return Regulation introduces even more punitive and harmful provisions regarding detention conditions. For example, under the Regulation the obligation to separate detainees from ordinary prisoners is weakened, and access to open-air space may be restricted. The critique is further reinforced by the immense extension of the maximum detention period, resulting in a potential total of 30 months, which is exorbitantly high. That is two and a half years of an individual's life spent in detention. As demonstrated in *Part I*, the harmful effects of detention increase with its duration.

With regard to detention conditions, beyond the provisions discussed above (Article 16 Return Directive and Article 34 Return Regulation), EU law does not prescribe how detention facilities in the Member States should be organised. In other words, there are no additional protective standards at EU level aimed at minimising the harmful effects of detention.

Yet, as demonstrated in *Part I* by the DEVAS project *general* detention conditions, have an impact on vulnerability. Neither the Return Directive nor the Return Regulation addresses these concrete aspects. More detailed and binding EU-level standards could and should have been provided.

This gap constitutes a central ground of critique, which is further developed in the next Chapter. Because the absence of clear, enforceable standards, both *general* detention conditions and specific vulnerability safeguards, affect vulnerability.

As shown in *Part II*, the poor general detention conditions in EU Member States in combination with vulnerability, have led to findings of Article 3 ECHR violations. The same argument made under Section '1.2.1 Decision to detain' applies here as well: the EU should regulate these matters.

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<sup>221</sup> *Aden Ahmed v Malta* App no 55352/12 (ECtHR, 23 July 2013) §139.

Taken together, the Return Regulation marks a significant regression in the treatment of migrants in return proceedings and will only heighten vulnerability, as detention is expanded and the conditions under which it is carried out are further deteriorated. The overall direction of the instrument conveys the sense that detention is being used as a punitive measure.

## 2 Vulnerability in return detention in EU law

Once an individual is detained, it must be asked whether the EU legal framework contains any effective (specific/explicit) vulnerability-related standards or protective measures?

This chapter argues that 'vulnerability' is used by the EU as a token/buzzword rather than as a concept conferring real protection for detained vulnerable migrants. More concretely, it argues that the 'safeguard' of paying 'particular attention' to the situation of vulnerable persons in the Return Directive means very little in practice and is used more as a token gesture, allowing the EU to claim that it provides 'vulnerability protection', while appearing to have had, to date, little meaningful impact or tangible protective effect.

### 2.1 Return Directive

#### 2.1.1 Who is 'vulnerable'?

The Return Directive defines 'vulnerable persons', in Article 3(9), as “*minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.*”<sup>222</sup>

The Return Handbook notes that unlike the definition of vulnerable persons used in the asylum acquis, the definition in the Return Directive is drafted as an exhaustive list.<sup>223</sup> However, the Commission makes clear that the need to pay specific attention to the situation of vulnerable persons and their specific needs in the return context is, however, “*not limited to the categories of vulnerable persons expressly enumerated in Article 3(9).*”<sup>224</sup> The Commission further recommends that Member States

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<sup>222</sup> Return Directive, art 3 (9).

<sup>223</sup> Return Handbook (2017), 339/94.

<sup>224</sup> *Ibid.*

should also pay attention to other situations of *special* vulnerability, “such as those mentioned in the asylum acquis: being a victim of human trafficking or of female genital mutilation, being a person with serious illness or with mental disorders.”<sup>225</sup> The Commission, in its Return Handbook, thus appears to broaden this exhaustive list/closed definition of vulnerable persons and transforms it arguably into a non-exhaustive list.<sup>226</sup>

### 2.1.1.1 Critique on categorical list of vulnerabilities

This list with categories of vulnerable persons suffers from significant shortcomings. A rigid reliance on a list with ‘spotlight vulnerabilities’ fails to capture complexity of forms and dynamics of vulnerability, including those vulnerabilities that may be considered as ‘new’ or ‘emerging’.<sup>227</sup> The categories in such lists may serve as an initial warning signal, but the underlying idea should be to think *beyond* these categories, in terms of layers or degrees of vulnerability that can evolve across time and space (situational approach).<sup>228</sup> By its very nature, vulnerability cannot be adequately identified or interpreted through a simple presence-or-absence approach (to assess if a person falls within a particular category).<sup>229</sup> Such an approach reduces vulnerability to a set of objectifiable characteristics shared by a group, thereby obscuring its contextual and dynamic dimensions.<sup>230</sup>

The categorical approach also entails a *labelling process* that raises further concerns. *First*, it narrows the scope of vulnerability to very limited categories of persons. Even where such lists are not exhaustive, the concept of vulnerability requires broadening.<sup>231</sup> Factors such as socio-economic background, education level (including illiteracy), and contextual elements linked to for example the migratory journey should also be taken into account (see situational approach *Part I*).<sup>232</sup> *Secondly*, in the context of migration, intersectionality seems to be the rule rather than the exception; because migrants are likely to experience some degree of vulnerability as a result of the migration process

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<sup>225</sup> Commission Recommendation C(2015) 6250 of 1 October 2015 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return related tasks <[www.gdr-elsj.eu/wp-content/uploads/2015/10/return\\_handbook\\_en.pdf](http://www.gdr-elsj.eu/wp-content/uploads/2015/10/return_handbook_en.pdf)> accessed 21 March 2026 (Return Handbook), 13.

<sup>226</sup> Return Handbook (2017), 339/94.

<sup>227</sup> L Leboeuf, C Brun and S Marchetti, 'Introduction. Between Protection and Harm. Negotiated Vulnerabilities in Asylum Laws and Bureaucracies' in L Leboeuf and others (eds), *Between Protection and Harm: Negotiated Vulnerabilities in Asylum Laws and Bureaucracies* (IMISCOE Research Series, Springer 2024) <[doi.org/10.1007/978-3-031-69808-8\\_1](https://doi.org/10.1007/978-3-031-69808-8_1)> accessed 26 June 2026, 6.

<sup>228</sup> *Ibid.*

<sup>229</sup> *Ibid.*

<sup>230</sup> *Ibid.*

<sup>231</sup> S Marchetti, C Brun, Z Crine and others, 'Positionalities in Research and the Question of Migrants' Vulnerability' in L Leboeuf and others (eds), *Between Protection and Harm: Negotiated Vulnerabilities in Asylum Laws and Bureaucracies* (IMISCOE Research Series, Springer 2024) <[doi.org/10.1007/978-3-031-69808-8\\_3](https://doi.org/10.1007/978-3-031-69808-8_3)> accessed 26 June 2026, 51.

<sup>232</sup> *Ibid.*

itself and different vulnerabilities can overlap and intertwine.<sup>233</sup> Intersectionality provides a useful lens not only for understanding but also for *identifying* (assessing and responding to) vulnerabilities.<sup>234</sup> As a result, this form of categorical reasoning (labelling), instead of a situational and intersectional approach, makes it extremely difficult to adequately *identify* (and assess) vulnerabilities and to respond to them appropriately.<sup>235</sup>

### 2.1.2 What is guaranteed?

Article 16(3), regarding the ‘conditions of detention’, of the Return Directive provides that *“Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.”*

#### - Particular attention to the situation of vulnerable persons

The only clarification that the Return Handbook offers is that paying attention to the situation of vulnerable persons *“also implies ensuring, more generally, due consideration of elements such as the age, the disability and the health of the person concerned (including mental health)”*.<sup>236</sup>

Further, the Handbook indicates that the need to pay specific attention to the situation of vulnerable persons should *not* be limited to the situations expressly referred to by the Return Directive (during the period for voluntary departure, during postponed return and during detention).<sup>237</sup> Member States should pay attention to the needs of vulnerable persons at *all stages* of the return procedure, as part of the assessment of the individual circumstances of each case.<sup>238</sup>

In short, it is fortunate that the Return Handbook, although not binding, broadens the scope both with regard to the personal scope (above) as to the material scope of the ‘vulnerability safeguards’.

#### - Emergency health care and essential treatment of illness

The Directive requires that emergency health care and essential treatment ‘*shall* be provided’, which is clear mandatory language. At the same time, the EU could and should have gone much further than

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<sup>233</sup> *Ibid.*

<sup>234</sup> *Ibid.*

<sup>235</sup> *Ibid.*

<sup>236</sup> Return Handbook (2017), 339/148.

<sup>237</sup> Return Handbook (2017), 339/94.

<sup>238</sup> *Ibid.*

emergency care. Access to *all* health care should be self-evident in order to ensure more humane detention, or more accurately, to ensure less inhumane detention.

## 2.2 Return Regulation

### 2.2.1 Who is ‘vulnerable’?

The Return Regulation does not define “vulnerable persons”; see Article 4 on definitions, which contains no such definition in either the Commission’s proposal or the adopted text. The absence of a definition means that Member States may themselves determine who is considered vulnerable.

ECRE, commented on the proposal of the regulation and proposed the introduction of a new provision, ‘Article 4 (a) Vulnerabilities’, to ensure that individuals in a vulnerable situation or with vulnerabilities are given the support they need.<sup>239</sup> According to the proposed Article 4 (a) Vulnerabilities: “1. *Where relevant, it shall be assessed whether a third-country national in a return procedure is in a vulnerable situation, a victim of torture or has special needs or needs special procedural guarantees as within the meaning of the Reception Conditions Directive and Asylum Procedures Regulation.* 2. *Where there are indications of vulnerabilities, special needs or procedural guarantees, the third-country national concerned shall receive timely and adequate support in view of their physical and mental health. In the case of minors, support shall be given by personnel trained and qualified to deal with minors, and in cooperation with child protection authorities.*”<sup>240</sup>

### 2.2.2 What is guaranteed?

#### 2.2.2.1 The proposal gave (a little) hope

Article 34 (4) on *Detention conditions* of the Commission’s Proposal provides that: “*Particular attention shall be paid to, and special accommodation provided for, the special needs of detained vulnerable persons. Emergency health care and essential treatment of illness shall be provided to detained third-country nationals.*”

Where the current Return Directive only requires paying particular attention to the *situation* of vulnerable persons; the proposed Regulation requires to pay particular attention to *the special needs*

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<sup>239</sup> ECRE, ‘Comments on the Proposal for a Regulation of the European Parliament and of the Council establishing a common system for the return of third-country nationals staying illegally in the Union’ (ECRE, June 2025) <[ecre.org/wp-content/uploads/2025/06/ECRE\\_Comments\\_Proposal\\_Return-Regulation.pdf](https://ecre.org/wp-content/uploads/2025/06/ECRE_Comments_Proposal_Return-Regulation.pdf)> accessed 26 June 2026.

<sup>240</sup> *Ibid*, 14.

of detained vulnerable persons and adds an obligation to *provide special accommodation* for them. The shift to the term ‘special needs’ aligns the wording of the Return Regulation with that used in the EU asylum acquis.<sup>241</sup> The addition of special accommodations appears to constitute a meaningful improvement in comparison to the Return Directive. Whereas the requirement to pay particular attention is vague and difficult to enforce on Member States, the obligation to provide special accommodation is more concrete and legally enforceable. A Member State that fails to provide such accommodation could be held accountable. *Prima facie*, therefore, Article 34(4) represents an improvement of the vulnerability standard in the context of detention conditions (at least in comparison with the wording in the Return Directive).

The obligation to provide emergency health care and essential treatment of illness remains unchanged from the Return Directive.

Moreover, the Commission’s proposal introduces in Article 6(1) that Member States shall put in place efficient and proportionate measures (to detect third-country nationals who are staying illegally on their territory in view of carrying out the return procedure, and) to carry out any additional verifications needed, including vulnerability and security verifications. The obligation to put in place measures to verify vulnerability is a positive improvement.

Furthermore, there is an information-sharing provision in Article 38 on information sharing between Member States, more specifically Article 38(6)(k), which concerns information on vulnerability, health and medical needs of the third country national. (There is no information sharing provision under the Return Directive.) This is a positive development, although it would be preferable if such information sharing were automatic and not upon request as under this provision. However, there may be cases in which no information on an individual’s vulnerability exists, for example where the international protection procedure was never initiated and no vulnerability assessment has been carried out. And even where prior information on vulnerability is available and is shared, a vulnerability assessment remains necessary. Given the inherently contextual and temporal nature of vulnerability, assessment must take place at the relevant moment, for example, at the time the detention decision is made, if vulnerability precludes detention, or prior to detention to ensure that the needs of vulnerable persons will be met during detention (+ regular monitoring in detention). In

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<sup>241</sup> Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection (recast) [2024] OJ L 2024/1346 (Reception Conditions Directive 2024).

short, information-sharing is a positive step, but a vulnerability assessment (and monitoring) remains indispensable. See also the DEVAS recommendations discussed in *Part I*, the situation of detainees should be reviewed at least once per month, using holistic assessment criteria to determine the personal impact of detention.

#### **2.2.2.2 *The approved text disappoints***

However, the approved text has discarded the positive elements of the proposal.

Article 34 (4) of the approved text reads: “*Particular attention shall be paid to ■ the special needs of detained vulnerable persons. Emergency health care and essential treatment of illness shall be provided to detained third-country nationals.*”

The mandatory language requiring the provision of special accommodation has disappeared. Only the vague formulation of ‘particular attention’, now linked to special needs rather than to the situation of vulnerable persons, is left. There is therefore no improvement compared to the *Directive*.

This is clearly a weaker standard than under the *Commission’s proposal*: one can pay particular attention without actually providing anything, whereas a requirement to provide special accommodation imposes a concrete and enforceable obligation.

The active removal of the provision on special accommodation from the proposal for the Return Regulation demonstrates once again that this is a deliberate political choice, one that ensures that at EU level Member States are not obliged to provide special accommodation for vulnerable persons. In other words, the EU actively opted for a more harmful Regulation.

Furthermore, Article 6 of the Commission’s proposal, that amongst others introduced an obligation to put in place measures to verify vulnerability, has been deleted under the approved text.

### **2.3 What is not guaranteed? Critique**

This section develops further critique by highlighting the substantial areas that the EU has left unregulated.

### 2.3.1 Comparison with Reception Conditions Directive

The Reception Conditions Directive (RCD) serves as a particularly instructive example of what the EU has done and *could* also have done under its return framework but didn't. These examples demonstrate that higher protective standards are possible/workable, yet the Union chose not to incorporate them into the return framework. Two categories of standards under the RCD merit mention in the context of detention of vulnerable persons.

#### 2.3.1.1 Adequate vulnerability assessment procedure

Both the Return Directive and the approved text of Regulation do not provide for a form of vulnerability assessment whatsoever. This is a fundamental omission, since the identification of a vulnerable person is the *condition sine qua non* for any vulnerability safeguard to be effective. Visible vulnerabilities may be detected, but non-visible vulnerabilities risk going entirely undetected. There is thus no operational standard at EU level designed to give practical effect to (identify) the obligation to pay 'particular attention' to the situation/special needs of vulnerable persons.

This cannot be attributed to any incapacity on the part of the EU to devise a vulnerability assessment mechanism. The EU is well acquainted with such assessments: they exist, for example, for the purpose of identifying persons with *special reception needs* in the context of applicants for international protection. The current/new Reception Conditions Directive (RCD),<sup>242</sup> that needed to be implemented by the Member States by 12 June 2026, replaced the previous Reception Conditions Directive (RCD 2013).<sup>243</sup> Under (both the former and) the current Reception Conditions Directive Member States are required to assess whether applicants<sup>244</sup> have special reception needs. It should be noted, for the avoidance of confusion, that the concept of '*vulnerable persons*' has been replaced throughout the current Directive by that of '*applicants with special reception needs*', defined in Article 2(14) as applicants who are in need of special conditions or guarantees in order to benefit from the rights and comply with the obligations provided for in the Directive.<sup>245</sup>

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<sup>242</sup> The date of effect was 11 June 2026. Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection (recast) [2024] OJ L 2024/1346 (Reception Conditions Directive 2024).

<sup>243</sup> This Directive is no longer in force; its period of validity ended on 11 June 2026. 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) [2013] OJ L180/96 (Reception Conditions Directive 2013).

<sup>244</sup> 'applicant' means a third-country national or stateless person who has made an application for international protection in respect of which a final decision has not yet been taken; art 2 (2) RCD 2024.

<sup>245</sup> Under RCD 2013 'vulnerable persons' was used, e.g.; art 11 on the "Detention of vulnerable persons and of applicants with special reception needs".

Article 25 of the RCD stipulates that Member States shall, as early as possible after an application for international protection is made, individually assess whether the applicant has special reception needs, using oral translation where necessary. Importantly, and in contrast to the 2013 Directive, the current Directive stipulates that this assessment must be completed within thirty days of the making of the application.<sup>246</sup>

Under the RCD, *detention* of applicants for international protection is possible, as provided for in Article 10 RCD (i.e. a form of asylum related detention). This makes a comparison with the detention of vulnerable persons under the Return Directive possible. The ‘vulnerability’ assessment under the RCD is directly relevant to *detention* of applicants with special reception needs under the RCD for two reasons. First, the obligation to assess whether an applicant has special reception needs *and address those needs*, applies not only at the moment of lodging the application but at every stage of the international protection procedure.<sup>247</sup> Second, Article 13 of the RCD introduces *specific provisions on the detention of applicants with special reception needs* (see next Section).

Such a vulnerability assessment mechanism could equally and perfectly well be imposed in the context of return detention. This is a purely political choice, with profound implications for the rights of those concerned. It is a matter of political will, not of legal or practical impossibility.

Article 25(2) of the RCD, in contrast to the former Article 22 of the 2013 Directive, further develops a set of operational standards, requiring, *among other things*, that staff assessing special reception needs are properly trained, that assessments include information on the nature of the applicant's special reception needs, on the measures identified to address those needs, and on the authorities responsible for addressing those needs, and that applicants are referred to the appropriate medical practitioner or psychologist where necessary and that where necessary, oral translation shall be provided by professionals trained in translation to ensure that the applicant is able to communicate with medical staff (see Article 25). This illustrates that even at EU level, where a one-size-fits-all approach to vulnerability is neither feasible nor desirable, it is entirely possible to develop clear and operational standards like this. Regulating this at EU level, rather than leaving it to the (goodwill of) individual Member States, improves the protection and treatment of vulnerable persons ensures a guaranteed minimum standard across the EU, irrespective of which Member State the person finds themselves in.

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<sup>246</sup> Compare Reception Conditions Directive 2024, art 25 (1) with Reception Conditions Directive 2013, art 22.

<sup>247</sup> Reception Conditions Directive 2024, 25 (1) paragraph 5 and 6.

### ***2.3.1.2 Operational and mandatory provisions on the treatment of vulnerable persons in detention***

When the safeguards provided under the RCD for ‘applicants for international protection with special reception needs’ in detention are placed alongside those available to ‘vulnerable persons’ detained under the Return Directive, the contrast is striking: the framework established under the RCD is considerably more elaborate, protective and imperative.

For example, Article 13 RCD provides:

#### ***“Detention of applicants with special reception needs***

*1. The health, including the mental health, of applicants in detention who have special reception needs shall be of primary concern to national authorities.*

*Where the detention of applicants with special reception needs would put their physical and mental health at serious risk, those applicants shall not be detained.*

*Where applicants with special reception needs are detained, Member States shall ensure regular monitoring of, and the provision of timely and adequate support to, those applicants, taking into account their particular situation, including their physical and mental health.” (emphasis added).*

The RCD proves that it is possible to have enforceable and specific provisions on the detention of persons with special reception needs/vulnerable persons. Excluding certain persons from detention where detention would pose a serious risk to their physical or mental health, and, where other vulnerable (special-needs) persons are detained, imposing regular monitoring and timely and adequate support, are concrete standards that could readily be established within the return framework. The sole provision applicable to vulnerable persons in return detention remains the vague obligation to pay ‘particular attention’ to their situation/special needs.

The disparity between the Reception Conditions Directive and the Return framework on the detention of vulnerable persons is difficult to justify. There should be no differentiation in treatment of and safeguards for *detained* vulnerable migrants based on the legal ground (reason) for their deprivation of liberty.

### 2.3.2 Council of Europe standards

As regards those issues which are not expressly regulated by the Return Directive or Regulation, *Member States* should comply with other applicable standards, such as the Council of Europe standards, e.g.: the ECHR and in particular the CPT standards.<sup>248</sup> A pertinent example of a standard that is relevant to vulnerable persons can be found in the *Twenty Guidelines on Forced Return* of the Committee of Ministers, Guideline 10 on conditions of detention pending removal, provides that preferably some staff “*should be able to recognise possible symptoms of stress reactions displayed by detained persons and take appropriate action.*”<sup>249</sup> Similarly, the *CPT standards on immigration detention* prescribe that staff should be taught to recognise possible symptoms of stress reactions displayed by detained persons, whether post-traumatic or induced by socio-cultural changes, and to take appropriate action.<sup>250</sup>

Furthermore, the CPT standards on immigration detention provide more specific medical requirements than the Return Directive. For example, the CPT standards prescribes that all newly arrived detainees should be promptly examined by a doctor or by a fully qualified nurse reporting to a doctor, and that the right of access to a doctor should also include the right, if the irregular migrant so wishes, to be examined by a doctor of their choice (the detainee might be expected to meet the cost of such an examination).<sup>251</sup> Moreover, the CPT standards place particular emphasis on a medical (vulnerability) assessment, something that is absent from the Return Directive and Regulation. The standards note that the assessment of the state of health of irregular migrants during their deprivation of liberty is an *essential* responsibility, both in relation to each individual detainee and in relation to the group as a whole.<sup>252</sup> The CPT standards note that the mental and physical health of the detained illegally staying migrants may be negatively affected by previous traumatic experiences, and that “*the loss of accustomed personal and cultural surroundings and uncertainty about one's future may lead to mental deterioration, including exacerbation of pre-existing symptoms of depression, anxiety and post-traumatic disorder*”.<sup>253</sup> The standards further specify that, at a minimum, a person with a recognised nursing qualification must be present on a daily basis at all centres for detained illegally

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<sup>248</sup> *Ibid.*

<sup>249</sup> Council of Europe Committee of Ministers, *Twenty Guidelines on Forced Return* (Council of Europe 4 May 2005) <[www.refworld.org/policy/legalguidance/coeministers/2005/20254](http://www.refworld.org/policy/legalguidance/coeministers/2005/20254)> accessed 1 June 2026, Guideline 10(3).

<sup>250</sup> Council of Europe Committee for the Prevention of Torture (CPT), *The CPT Standards* (CPT/Inf/E (2002) 1 rev 2010, Council of Europe 8 March 2011) <[www.refworld.org/reference/themreport/cocept/2011/78171](http://www.refworld.org/reference/themreport/cocept/2011/78171)> accessed 1 June 2026, 29.

<sup>251</sup> *Ibid.*, 82.

<sup>252</sup> *Ibid.*, 90.

<sup>253</sup> *Ibid.*

staying migrants.<sup>254</sup> This person should be performing the initial medical screening of new arrivals, receiving requests to see a doctor, ensuring the provision and distribution of prescribed medicines, maintaining medical documentation, and supervising the general conditions of hygiene.<sup>255</sup>

None of these requirements find an equivalent in the Return Directive or Regulation. Yet they are of relevance to vulnerable persons in return detention. The EU could and should incorporate and elaborate upon such standards within its own legal framework and competences.

The existence of relevant Council of Europe standards does *not* constitute a justification for not regulating these matters more extensively at EU-level. The following arguments support this conclusion.

*First*, there is an added value of EU-level binding standards because the Council of Europe standards in question are, unfortunately, not legally binding. (The CPT standards carry no binding legal force, and the same applies to the *Council of Europe Guideline 10*, as the word 'guideline' itself indicates.<sup>256</sup>) Whilst Member States should undoubtedly comply with these standards, the argument that the existence of such standards renders EU-level regulation unnecessary, is unconvincing. On the contrary, incorporating such standards into binding EU law would result in better enforceable protection for vulnerable persons in return detention.

*Second*, the return procedure is an EU procedure. A person subject to return is being removed from the EU as a whole, and the legal framework governing that procedure is (largely) determined at EU level. Yet the *safeguards* governing this EU procedure are, in the opinion of this thesis, not sufficiently elaborated at EU level. It is inconsistent for the EU to embrace the enforcement aspects of return, the 'coercive' dimensions of return, whilst leaving the (vulnerability) safeguards for those subject to it insufficiently developed. The protective and human rights dimensions, seems to be no priority.

*Finally*, the EU could go even further than the existing Council of Europe standards. The fact that certain matters are addressed at the Council of Europe level (although non-binding) does not mean that the EU doesn't have to regulate it or even could go beyond what the Council of Europe framework currently provides. The same applies for the binding (on the Member States) ECHR standards.

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<sup>254</sup> *Ibid*, 91.

<sup>255</sup> *Ibid*.

<sup>256</sup> Council of Europe, 'The CPT in Brief' <[www.coe.int/en/web/cpt/about-the-cpt](http://www.coe.int/en/web/cpt/about-the-cpt)> accessed 26 June 2026. "The CPT is not an investigative body, but provides a non-judicial preventive mechanism to protect persons deprived of their liberty against torture and other forms of ill-treatment. It thus complements the judicial work of the European Court of Human Rights."

### 2.3.3 Closing reflection

*On the one hand*, this thesis criticises the vagueness of Article 16(3) of the Return Directive/Article 34 (4) of the Return Regulation and the fact that the obligation to pay 'particular attention' to the situation/special needs of vulnerable persons carries no concrete obligations/implications for Member States, beyond the provision of emergency healthcare and essential treatment of illness. *On the other hand*, there is no one-size-fits-all approach to the treatment and accommodation of vulnerable persons, given the situational dimension of vulnerability. However, the foregoing has demonstrated that certain minimum requirements with more specific obligations for Member States at EU level, are perfectly feasible.

The choice to prescribe nothing more than 'particular attention' remains *a choice* made by the EU and one that is open to criticism. All the more, when the purpose of return detention is kept in mind, namely the in order to prepare the return and, or carry out the removal process.<sup>257</sup> Prepare the return, can for example imply obtaining documents from the embassy; and carrying out the removal process entails the enforcement of the obligation to return, namely the physical transportation out of the Member State.<sup>258</sup> Providing more specific and binding 'vulnerability standards' and more protective 'detention conditions', such as ensuring wheelchair accessibility or providing nutritious food, does not in any way undermine the effectiveness of removal. Better treatment of, safeguards for vulnerable persons (or detained persons in general) within detention is not in tension with the objective of return detention; it is simply a matter of basic human dignity. There is no justification for failing to provide adequate treatment and special accommodations within detention.

The need for such standards should not obscure a more fundamental point: ideally, these provisions should never need to be invoked. If Member States/EU were to comply with human rights *standards*, vulnerable persons would, not be detained in the first place.

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<sup>257</sup> Return Directive, art 15 (1); Return Regulation, art 29 (2) "*for the purpose of return, including for preparing the return, readmission, and carrying out the removal*".

<sup>258</sup> Return Directive, art 3.

### 3 Member State implementation law and practices: EMN National Reports

#### 3.1 Introduction

Are vulnerable persons detained in the Member States? How are vulnerable persons in detention treated in the Member States? How has Article 16(3) of the *Return Directive* been transposed into national legislation, and what effective impact does it have for vulnerable persons in practice? (The impact of the *Return Regulation* cannot be assessed, as it is not applicable yet at the time of writing this thesis.<sup>259</sup> As demonstrated in the previous chapter, with regard to explicit vulnerability safeguards, little has changed: see 16(3) of the Return Directive and Article 34(4) of the Return Regulation. Accordingly, the Return Regulation does not appear likely to produce a substantially different effect in this respect.)

To answer these questions, this section analyses the European Migration Network (EMN) study 2021 about '*Detention and alternatives to detention in international protection and return procedures*'.<sup>260</sup> The 2021 edition constitutes the latest version from the EMN on the matter. The study aims to identify similarities, differences, practical challenges and best practices in the use of detention and alternatives used by Member States in the framework of international protection and return procedures.<sup>261</sup> The study pays special attention to the issue of detaining and/or providing alternatives to detention for vulnerable persons.<sup>262</sup> The study was prepared on the basis of national contributions from 25 EMN National Contact Points (EMN NCPs).<sup>263</sup> All EU Member States are represented by a national report, with the exception of Denmark, Malta, Portugal and Romania.<sup>264</sup>

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<sup>259</sup> EU Law Tracker, 'Procedure 2025/59: Common System for the Return of Third-Country Nationals Staying Illegally in the Union' <law-tracker.europa.eu/procedure/2025\_59?lang=en> accessed 8 July 2026.

<sup>260</sup> European Migration Network, *Detention and Alternatives to Detention in International Protection and Return Procedures* (EMN Study, European Commission 2021) <home-affairs.ec.europa.eu/whats-new/publications/emn-study-2021-detention-and-alternatives-detention-international-protection-and-return-procedures\_en> accessed 6 May 2026. The "*EMN report 2021: Detention and alternatives to detention in international protection and return procedure*" on this site will hereinafter be referred to as 'General report, page.'. The national reports on this site will hereinafter be referred to as 'Country, page.' (e.g. Austria, 1.).

<sup>261</sup> General report, 12.

<sup>262</sup> General report, 13.

<sup>263</sup> General report, 2.

<sup>264</sup> National reports found on the site: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Slovakia, Slovenia, Spain and Sweden.

- **Methodology, scope and caveats**

The *methodology* of this analysis consisted of a systematic reading of the national reports of each Member State under study, from which all relevant material pertaining to vulnerability in return detention was extracted and analysed. Given the word limits of this thesis and in the interest of readability, it has been opted not to devote separate and extensive treatment to each Member State individually. The following analysis therefore focuses on the most significant and illustrative findings across Member States. These are subsequently presented and critically examined, addressing both positive and negative practices, with the aim of identifying broader patterns, common threads/pitfalls.

Consistently with the *scope* of this thesis, the following categories and situations (although covered by the 2021 EMN Study) fall outside the present analysis: minors, families with children and single parents with a minor *and* detention in the context of international protection procedures. It follows that the observations and findings of this analysis are entirely independent of the aforementioned categories and situations and relate exclusively to the return detention of vulnerable persons within the scope of this thesis. Accordingly, where this analysis identifies a particular practice or legal position in a given Member State, this should not be taken to reflect the position as regards minors, families with children, or detention under international protection procedures, which may be subject to distinct rules and limitations.

Any reference in this analysis to Member States relates solely to those Member States that participated in the 2021 EMN Study and whose reports can be found on the website, with the exception of the report of Ireland. As Ireland falls out the scope of this thesis. (As Ireland does not participate in the Return Directive, and therefore follows different procedures as regards returns as compared to other EU Member States.)<sup>265</sup> This results in a total of 21 national reports that form the basis of this analysis. The most national reports<sup>266</sup> use a common template developed by the EMN NCPs to ensure, to the extent possible, comparability.<sup>267</sup>

It should be noted that, although the 2021 EMN Study is the most recent available, the situation in individual Member States may have (or not have) evolved since its publication. Nevertheless, the principal critiques advanced in this analysis remain valid as a matter of principle, even where the situation in a specific Member State may have changed in the meantime.

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<sup>265</sup> Ireland, 4.

<sup>266</sup> The following Member States didn't use this template: Austria, Belgium, France.

<sup>267</sup> General report, 2.

### 3.2 Findings and reflections

The findings and reflections drawn from the national reports comprising the 2021 EMN Study are structured around two overarching parts. *The first* examines whether vulnerable persons are detained in the Member States, whilst *the second* assesses how vulnerable persons are treated once in detention. Before turning to these two parts, three preliminary findings and reflections are briefly addressed that are relevant to both parts of the analysis (3.2.1 regarding decision to detain and 3.2.2 regarding the treatment in detention).

*First*, vulnerability considerations are taken into account on a *case-by-case* basis across the Member States,<sup>268</sup> in their return *procedures*.<sup>269</sup> This is consistent with the requirements of the Directive (*supra*). Whilst this is to be welcomed, the operative language employed in the national provisions, such as 'to consider', 'to take into account', or 'to pay particular attention' to vulnerabilities/to the situation of vulnerable persons both with regard to the *decision to detain* and with regard to the *conditions of detention*, does not amount to a hard, enforceable obligation and cannot be considered operational. Such formulations afford the authorities a wide margin of discretion and, whilst a degree of flexibility is welcome and unavoidable given the inherently contextual nature of vulnerability, they cannot substitute for more specific, concrete, and operational safeguards. Vague obligations to 'take into account' vulnerability may serve as a starting point, but they must be complemented by clearly defined measures that translate vulnerability considerations into tangible and enforceable outcomes for the persons concerned.)

*Secondly*, a widespread absence of data and statistics on vulnerable persons in return detention emerges from the national reports.<sup>270</sup> As illustrated by the statistical annexes of the national reports, the sections pertaining to vulnerable persons frequently contain no data or remain unanswered entirely (with the exception of data concerning minors). This absence of data is a fundamental concern: it

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<sup>268</sup> General report, 26.

<sup>269</sup> General report, 26.

<sup>270</sup> For example: Sweden, 36 et seq.; Spain, 35 et seq.; Slovak Republic, 42 et seq. "Statistical data on other vulnerable persons apart from minors and unaccompanied minors are not recorded, i.e. the stated numbers are a total of those two categories. The statistical data on vulnerable persons are included in the overall number of detained third-country nationals in other rows."; Slovenia, 55 et seq. the statistics only include (unaccompanied Minors), ....

constitutes a necessary first step without which no effective, evidence-based vulnerability policy can be developed or evaluated.<sup>271</sup>

Finally, the concerns regarding *vulnerability assessment*, discussed below, are relevant to both parts of the analysis.

### 3.2.1 Are vulnerable persons detained in the Member States?

Within the aforementioned common template, there is one research question that is of particular importance for this first chapter of the analysis/discussion. The question assesses if it is possible within the national legal framework of the Member State in question “*to detain (or to impose an alternative to detention to) persons belonging to vulnerable groups, including minors, families with children, pregnant women or persons with special needs? Please indicate whether persons belonging to these vulnerable groups are exempt from detention, or whether they can be detained in certain circumstances.*”

In this regard, the common template draws a distinction between the following categories: unaccompanied minors (excluded from this analysis), persons with a disability,<sup>272</sup> elderly people, families with children and single parents with minor (excluded from this analysis), persons with serious illnesses and persons with mental disorders, victims of human trafficking, pregnant women, other vulnerable persons.

It should be noted that the categories of vulnerable persons identified in the EMN Study do not correspond to those set out in the Return Directive, and that the Study investigates a residual (open) category of 'other vulnerable persons' alongside the fixed categories, which is to be welcomed.

#### - To detain or not to detain?

The analysis of the National Reports reveals that there is *no* Member State where the detention of vulnerable persons *as a whole* is explicitly prohibited within the national legal framework.

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<sup>271</sup> This also raises the question of whether this absence reflects a failure to share existing data, a failure from the authorities to collect it in the first place or a (general) failure to identify vulnerable persons beyond the category of minors?

<sup>272</sup> ENM study uses ‘disabled people’.

In a minority of Member States (8 out of 21), the detention of certain specific *categories*<sup>273</sup> of vulnerable persons, is explicitly prohibited within the national legal framework. Below are some examples of categories that are exempt in a certain Member States.

To illustrate, in Poland, persons who, due to their health or psychophysical condition are *presumed* to be a *victim of torture* are excluded from detention.<sup>274</sup> Other vulnerable persons in Poland may nonetheless be detained, unless the detention may cause a *hazard to their life or health*, or their mental or physical condition may justify the *assumption* that the foreigner was subjected to *violence*.<sup>275</sup>

Another example is Bulgaria where *victims of human trafficking* and *pregnant women* cannot be placed in return detention.<sup>276</sup> In addition, in Cyprus, detention orders cannot be issued against *potential victims of human trafficking*.<sup>277</sup> It should be noted that this is broader than confirmed victims only, as is the case in Latvia<sup>278</sup> for example, where potential victims of human trafficking may still be detained (the same goes for Bulgaria<sup>279</sup> and Italy<sup>280</sup>).

Furthermore, Germany is the only Member State to provide for a maximum age limit, thereby affording protection to the category of *elderly people* by explicitly excluding those over the age of 65 from detention (alongside pregnant women).<sup>281</sup> Similarly, Italy is the only Member State to explicitly exclude *persons with serious illnesses and persons with mental disorders* from detention, (alongside victims of human trafficking and pregnant women).<sup>282</sup> Finally, and as noted above, Poland explicitly excludes *presumed victims of torture* from detention and is with that the only Member State to do so.<sup>283</sup> However, there is *no* Member State that excludes the category of *persons with disabilities* (or the open category of *other vulnerable persons*) from detention. Overall, the most frequently excluded categories across Member States are victims of human trafficking, followed by pregnant women.<sup>284</sup>

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<sup>273</sup> The categories as identified under the EMN Study (see above).

<sup>274</sup> Poland, 32.

<sup>275</sup> Poland, 19-20.

<sup>276</sup> Bulgaria, 18. The Bulgarian national report, which makes use of the common template, provides no further information beyond a single 'No' in response to the question of whether it is possible, within the national legal framework, to detain victims of human trafficking. No additional explanation or elaboration is offered in the report.

<sup>277</sup> Cyprus, 15-16.

<sup>278</sup> Latvia, 25-26.

<sup>279</sup> Bulgaria, 18. The national report, using the common template, merely indicates 'no' with respect to victims of human trafficking, without providing any further information beyond this single entry in the template.

<sup>280</sup> Italy, 22. The national report indicates, with respect to victims of human trafficking, "*NO The right to reception in ad hoc centres/structures is provided for (art. 18 Consolidated Act on Immigration)*".

<sup>281</sup> Germany, 26.

<sup>282</sup> Italy, 22.

<sup>283</sup> Poland, 32.

<sup>284</sup> See table in ANNEX II.

In other words, it may be concluded that substantial differences exist among the Member States.

Whilst the aforementioned exclusions are to be welcomed, they remain limited because, all other vulnerable persons in those Member States (that do provide for categorical exclusions) can still be detained. Moreover, in the vast majority of Member States, namely 13 out of 21, even no single (category of) vulnerable person is explicitly excluded from detention under national legislation. That means that the detention of all vulnerable migrants is allowed *in principle*.<sup>285</sup> This is the case in Austria,<sup>286</sup> Belgium,<sup>287</sup> Czech Republic,<sup>288</sup> Estonia,<sup>289</sup> Finland,<sup>290</sup> Greece,<sup>291</sup> Hungary,<sup>292</sup> Lithuania,<sup>293</sup> Luxembourg,<sup>294</sup> Netherlands,<sup>295</sup> Slovak Republic,<sup>296</sup> Spain<sup>297</sup> and Sweden<sup>298</sup>.

See *ANNEX II* for a visual overview.

- **No detention in practice or additional hurdles to detain (justify detention)**

These findings should be interpreted with caution and require further nuance.<sup>299</sup>

There are some reports of Member States that explicitly indicate that vulnerable persons (in most/some/all cases) are not detained *in practice*, although it is possible within the national legal framework.<sup>300</sup> Other Member States, whilst not prohibiting the detention of vulnerable persons

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<sup>285</sup> See nuances below. I.e. it is possible, within the national legal framework of that Member State, to detain persons belonging to vulnerable groups.

<sup>286</sup> Austria, 11.

<sup>287</sup> Belgium, 58.

<sup>288</sup> Czech Republic, 27.

<sup>289</sup> Estonia, 14

<sup>290</sup> Finland, 11-13.

<sup>291</sup> Greece, 16-18.

<sup>292</sup> Hungary, 10-11.

<sup>293</sup> Lithuania, 16-17.

<sup>294</sup> Luxembourg, 13-15.

<sup>295</sup> Netherlands, 10.

<sup>296</sup> Slovak Republic, 16-18. No automatic exclusion of detention; however, the Slovak Republic does foresee in a conditional *expiry* of the *detention decision* for a specific category of vulnerable persons. Namely, the detention decision shall expire for victims of human trafficking upon the inclusion of the person in the programme of support and protection of victims of human trafficking of the Ministry of Interior.

<sup>297</sup> Spain, 16.

<sup>298</sup> Sweden, 17.

<sup>299</sup> For the most accurate and contextually nuanced information, the individual report of each Member State should be consulted.

<sup>300</sup> Although it is possible, within the national legal framework to detain vulnerable persons. In other words, these are Member States that did not provide a clear or unequivocal 'no' in response to the relevant research question concerning whether it is possible within the national legal framework to detain vulnerable persons, yet whose national reports indicate that, in practice, certain categories of vulnerable persons are not detained.

outright, impose additional conditions or thresholds that must be met before the detention of vulnerable persons may be ordered (besides the general EU requirements e.g.: proportionality).

Lithuania for example has both. Pursuant to the law vulnerable persons may be detained, but only in exceptional cases having regard to the best interests of the vulnerable persons.<sup>301</sup> However, the Lithuanian report indicates that it is a *common practice* in the case-law of the Supreme Administrative Court of Lithuania to provide an alternative to detention to vulnerable persons, despite having received a motion for detention.<sup>302</sup>

As said in Cyprus, only *potential* victims of human trafficking are excluded from detention.<sup>303</sup> However, the report from Cyprus also indicates, although the law does not provide strict guidelines in terms of detention of vulnerable persons, that *in practice* vulnerable people are not detained *unless* there are special circumstances where detention is unavoidable.<sup>304</sup>

The question is if and to what extent '*unavoidable*' sets a higher threshold than the 'last resort' requirement, meaning that there are no other sufficient but less coercive measures than detention that can be applied effectively in the specific case, see Article 15 (1) RD, see *supra* Chapter 1.

Whilst the existence of such practices is to be welcomed, they lack legal certainty and above all legal enforceability. This concern is not just a formal one (because jurists love law), it has impact. Legal provisions are useful/necessary to ensure consistency and predictability and above all to provide vulnerable persons with a legal basis upon which the authorities can be held accountable.

Luxembourg equally exemplifies this practice. The example of Luxembourg is particularly striking and reveals a number of *other* significant incongruences, which will be discussed in various sections.

#### **- Luxembourg: the inadequacy of the Return Directive's vulnerability framework illustrated**

The National Report of Luxembourg explicitly states that in principle the law does *not* prevent the placement in detention of persons belonging to vulnerable groups.<sup>305</sup> However, in *practice* vulnerable

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<sup>301</sup> Lithuania, 16-17.

<sup>302</sup> Lithuania, 34, 50.

<sup>303</sup> Cyprus, 15-16.

<sup>304</sup> Cyprus, 15-16, 28.

<sup>305</sup> Luxembourg, 13.

groups are generally not detained in Luxembourg.<sup>306</sup> “As reported by the competent authorities, this only happened on very rare occasions in the past as this is generally avoided.”<sup>307</sup>

Moreover “the Detention Centre reported that they are not adequately equipped to accommodate, for example, disabled people.”<sup>308</sup> (See 3.2.2 for comments on this). It looks from the report that in some cases victims of human trafficking (may not) cannot be detained in Luxembourg.<sup>309</sup> “These persons may be eligible to be granted a period of reflection and a residence permit for victims of trafficking if the conditions set out by the Immigration Law are met.”<sup>310</sup> This is based on information provided by the Returns Department of the Directorate of Immigration, Ministry of Foreign and European Affairs.<sup>311</sup> Finally, it appears from the report that no formal vulnerability assessment is made when deciding whether, a third-country national is to be placed in detention or an alternative to detention may be imposed.<sup>312</sup>

Concerns arise from the fact that no formal vulnerability assessment is conducted in Luxembourg when deciding whether a third-country national is to be placed in detention. It remains unclear whether an informal assessment takes place, or whether the question of vulnerability is simply not addressed at all. This gives rise to a significant problem: how can vulnerable persons be kept out of detention if no inquiry is made into whether a person is vulnerable in the first place? In the absence of any identification mechanism, only those whose vulnerability is immediately visible will be recognised as such, whilst those whose vulnerability is less apparent, (such as victims of torture, rape or other serious forms of psychological, physical or sexual violence), risk going entirely undetected and therefore unprotected (in this case: detained, although exempted from it). If a person/persons was/were not identified as vulnerable, it becomes easy to claim that no vulnerable persons are being detained.

It should be noted that this concern and criticism equally applies to those Member States where the detention of certain categories of vulnerable persons is explicitly prohibited by law (in Luxembourg it's a *practice* to not detain). A legislative prohibition or any safeguard/accommodations for vulnerable persons provided for by law, is rendered largely meaningless in the absence of systematic

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<sup>306</sup> *Ibid.*

<sup>307</sup> *Ibid.*

<sup>308</sup> *Ibid.*

<sup>309</sup> *Ibid.*, 15.

<sup>310</sup> *Ibid.*

<sup>311</sup> *Ibid.*, footnote 112.

<sup>312</sup> *Ibid.*, 4-5, 35, 37, 39.

identification (vulnerability assessment). A person whose vulnerability is never assessed and discovered cannot benefit from a protection that is, on paper or in practice, available to them.

On the other hand, this absence of a formal vulnerability assessment, although illogical and deeply problematic, is unsurprising when viewed against the backdrop of EU law. The Return Directive does not require any formal vulnerability assessment, in stark contrast to the Reception Conditions Directive (see above).

This leads to the next point.

- **Vulnerability assessment: non existing or lacking quality**

The identification of vulnerability is a prerequisite for any meaningful protection/effective safeguards. This concern applies for part 3.2.1 as well as part 3.2.2, because a vulnerability assessment to identify beneficiaries is indispensable to guarantee all kinds of ‘vulnerability’ protection.

The absence of a formal assessment mechanism such as in Luxembourg is not the only concern: even where such procedures exist, they may fall short in practice.

Austria provides a telling example of a practice that may appear sound on paper yet proves inadequate upon closer scrutiny. In Austria vulnerabilities are already examined in each individual case before detention pending removal or alternative measures are ordered, as part of the investigation of the relevant facts, and special consideration always given to them when they are determined.<sup>313</sup> The Austrian report cites the OHCHR that in 2018 criticised that "*the identification of people in vulnerable situations throughout the asylum and return procedures, including in pre-removal detention, tends to be random and unsystematic, for instance only when vulnerabilities are clearly visible, or dependent on disclosure by the individuals themselves*".<sup>314</sup> This discrepancy between formal commitment and actual practice illustrates that what is presented as systematic and individualised assessment may in reality amount to little more than ad hoc identification, leaving a significant number of vulnerable persons undetected and therefore unprotected.

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<sup>313</sup> Austria, 11.

<sup>314</sup> *Ibid.* Report refers to OHCHR, *Report of Mission to Austria Focusing on the Human Rights of Migrants, Particularly in the Context of Return* (OHCHR 2018) <[www.ohchr.org/sites/default/files/Documents/Countries/AT/AustriaReport.pdf](http://www.ohchr.org/sites/default/files/Documents/Countries/AT/AustriaReport.pdf)> accessed 27 May 2026, 6.

The Dutch report also signals significant shortcomings in the assessment of vulnerability in the Netherlands. The report refers to a Dutch study by Amnesty International and others, which reveals that the individual assessment conducted prior to detention shows severe shortcomings when it comes to the examination of (special) personal circumstances with vulnerable persons being overlooked because they do not always fit within the predefined categorisations established for the identification of vulnerable people.<sup>315</sup> This once again illustrates the risk and pitfalls of (only) using a list of categories of vulnerable persons for the vulnerability assessment, as it fails to capture the full complexity of individual situations (see previous chapter: *Chapter 2 of Part III*, comments on the list of categories of vulnerable persons under the Return Directive).

A further concern relates to the suitability of the authority responsible for conducting vulnerability assessments, which varies considerably across Member States. For example, in the Czech Republic the vulnerability assessment is conducted by the police authorities.<sup>316</sup> The question raises whether the specific authorities in the Member States possess the requisite training and time to perform assessments of the necessary quality and diligence.

In conclusion, there is a need for a properly regulated and qualitative case-by-case assessment of vulnerability (at EU level); one that ensures not only the existence of such assessments in law, but also their effective and high-quality implementation in practice. This requires a thorough vulnerability assessment, grounded in a situational approach and carried out by trained professionals, rather than reliance on vulnerability checklists, predefined categories, or merely visible vulnerabilities. Ultimately, the effectiveness of the protection afforded depends entirely on the (quality of the case-by-case) vulnerability assessment.

- **The detention decision: genuine last resort?**

A related concern, which affects vulnerable persons alongside the broader detained population, is the quality of a *detention decision*. Under the *Return Directive*, detention is only permitted where all the requirements for it are met in each individual case (see *Chapter I*). This, amongst others, includes an

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<sup>315</sup> Netherlands, 66-67. Report refers to Amnesty International, Dokters van de Wereld and Stichting LOS (Meldpunt Vreemdelingendetentie), 'Isolatie in vreemdelingendetentie' (2020) <[www.amnesty.nl/content/uploads/2020/09/AMN\\_20\\_26\\_rapport-isolatie\\_digitaal.pdf](http://www.amnesty.nl/content/uploads/2020/09/AMN_20_26_rapport-isolatie_digitaal.pdf)> accessed 27 May 2026.

<sup>316</sup>For example in the Czech Republic, 45.

obligation on the authorities to assess whether a sufficient but less coercive measure than detention can be effectively applied in the specific case. However, practice does not always reflect this standard.

The Dutch national report, for example, indicates that researchers have observed that in practice alternative measures are not always fully considered before detention is ordered.<sup>317</sup> Whilst the formal framework may thus appear compliant on paper, the actual decision-making process falls short of what the Return Directive requires, which is a matter of concern for all persons subject to such decisions and thus also vulnerable persons.

It is all the more concerning that the *Return Regulation* removes this requirement altogether. In other words, Member States are no longer obliged to assess whether a sufficient but less coercive measure than detention could be effectively applied in the individual case.

### **3.2.2 How are vulnerable persons in detention treated in the Member States?<sup>318</sup>**

Having examined the standards and practices governing the exclusion of (certain categories of) vulnerable persons from detention, it is important to note that none of the positive elements identified above can be attributed to Article 16(3) of the Return Directive. As indicated earlier, EU law contains no prohibition on the detention of vulnerable persons, whether as a whole or with respect to specific categories. The exclusions and protective practices discussed above are therefore the result of the (goodwill of) individual Member States, not of any obligation imposed by EU law.

Article 16(3) of the Return Directive governs the treatment of vulnerable persons when they, despite their vulnerability, are detained (the detention conditions). What safeguards are in place for vulnerable persons in return detention? How is the obligation to pay 'particular attention' to the situation of vulnerable persons translated into national legislation, and what are the practical implications of this provision across Member States?

#### **- Vagueness and 'inoperativeness' is reproduced at Member State level**

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<sup>317</sup> Netherlands, 10.

<sup>318</sup> The EMN Study focusses less on the conditions once in detention. Nevertheless some relevant things are to be noted from the national reports .

Article 16(3) of the Return Directive is sometimes quite literally or similarly transposed into national legislation. Greek law, for instance, has adopted an almost literal transposition, providing that “*Emergency health care and essential treatment of illness shall be provided to third-country nationals in detention. Particular attention shall be paid to the situation of vulnerable persons.*”<sup>319</sup> Cypriot law similarly provides, in terms closely resembling the original, that “*vulnerable people are given special attention and are provided with the necessary health care.*”<sup>320</sup> Under Luxembourg law, special attention is paid to the situation of vulnerable persons in case they are/would be placed in detention.<sup>321</sup>

To what extent do these provisions oblige Member States to provide concrete accommodations, specialised treatment, or other specific measures for vulnerable persons in detention? A distinction must be drawn between the two components of Article 16(3) of the Return Directive. The obligation to provide emergency healthcare and essential treatment of illness constitutes a relatively clear and enforceable obligation: it has identifiable content and (concrete) implications, in that emergency healthcare and essential treatment of illness must be provided to any detained person. (See above, this thesis has argued that more than only emergency healthcare and essential treatment should be provided.)

The same cannot be said, however, of the obligation to pay 'particular attention' to the situation of vulnerable persons. Paying particular attention to something does not in itself entail any concrete action. This provision is vague and, as illustrated, it is sometimes transposed into national law in terms that simply reproduce its vagueness. There is nothing (legally) objectionable about a literal transposition of Article 16(3), but without any further specification or operationalisation at the national level, such a transposition remains hollow. Where no additional (legal) provisions elaborate or refine this obligation, and the national framework goes no further than reproducing the Directive's wording, the provision is devoid of any real implications for the treatment and detention conditions of vulnerable persons in practice. It functions more as a performative commitment than as a genuine legal obligation, enabling Member States (and as proven in the previous chapter the EU) to claim compliance whilst affording vulnerable persons no concrete and enforceable protection.

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<sup>319</sup> Greece, 16-18. Report refers to paragraph 3, article 31, Law 3907/2011.

<sup>320</sup> Cyprus, 16. Report refers to article 18II(3) of the Aliens and Immigration law.

<sup>321</sup> Luxembourg, 13. Report refers to the amended law of 28 May 2009 on the creation and organisation of the detention centre.

Whilst it is positive that vulnerability is at least considered, the operative language used both at the EU and national level, whether 'to consider', 'to take into account', or 'to pay particular attention', falls well short of effective and specific 'vulnerability protection' *and that is a (blameworthy) choice*.

- **Specific findings**

Nevertheless, some Member States have put in place safeguards that go beyond, or are more operational than, the mere EU obligation to pay particular attention to the situation of vulnerable persons once in detention. At the same time, a number of problematic practices have been identified, which EU law does not prevent from happening. Both are discussed below through concrete examples from Member States.

*French* law goes further than, the vague obligation to pay 'particular attention' and concretises some guarantees for vulnerable persons. *Firstly*, French law guarantees detainees the right to free medical care for the duration of their detention<sup>322</sup> (see *Part I* International human rights framework) and provides that the motor, cognitive or psychological disabilities and support needs of foreign nationals are taken into account when determining their detention conditions.<sup>323</sup> *Secondly*, a 2018 decree<sup>324</sup> introduced the possibility for detained third-country nationals *to request* an assessment of their state of vulnerability, conducted by agents of the French Office of Immigration and Integration (OFII i.e. Office français de l'immigration et de l'intégration) or by a doctor from the medical unit of the detention centre (CRA i.e. centre de rétention Administrative).<sup>325</sup> Following such an assessment, the OFII officer and the responsible doctor may formulate opinions on the possible need to adapt the conditions of detention or on whether continued detention is incompatible with the person's vulnerability.<sup>326</sup>

In *Slovenia*, when due to special reasons or needs a person cannot be accommodated in the Centre for Foreigners, the person may be accommodated in a social protection institution or provided with other appropriate institutional care at the expense of the Centre.<sup>327</sup>

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<sup>322</sup> France, 17. Report refers to article R.553-12 of the CESEDA.

<sup>323</sup> France, 17. Report refers to article L.551-1 of the CESEDA.

<sup>324</sup> France, 17.

<sup>325</sup> France, 17. Report refers to Decree No.2018-528 of 28 June 2018.

<sup>326</sup> France, 17. Report refers to article 2 Decree No.2018-528 of 28 June 2018.

<sup>327</sup> Slovenia, 51.

The *Slovak Republic* is the only Member State to adapt the maximum duration of detention for vulnerable persons. Vulnerable persons may only be detained for a maximum period of six months.<sup>328</sup> Whilst an extension of detention beyond the initial six-month period is possible for the general detained population, no such extension is permitted for vulnerable persons in the Slovak Republic.<sup>329</sup> In doing so, the Slovak Republic goes further than what the Return Directive merely permits, which allows for a total detention period of up to eighteen months for everyone if the conditions are fulfilled (see *Chapter 1*).

As said in practice vulnerable people in *Cyprus* are not detained unless there are special circumstances where detention is unavoidable.<sup>330</sup> The Cypriot report further indicates that where ‘vulnerability’, (such as pregnancy, special needs, or a history of violence), appears and is evidenced during the revaluation of detention, a personalised interview is conducted by a designated employee of the Civil Registry and Migration Department (CRMD). In such cases, alternative to detention (ATD) measures are implemented.<sup>331</sup> When necessary, a dedicated report is composed by Social Welfare Services and/or Health Services.<sup>332</sup>

- **Isolation within detention: punishment over protection**

The *Dutch* report refers to a report by Amnesty International and others, this time concerning isolation measures in detention facilities.<sup>333</sup> The report states that stating that both people with and without psychological vulnerability can be harmed by isolation.<sup>334</sup> One of its findings is that *people with a psychiatric background* are more likely to be placed in solitary confinement because of their unusual or undesirable behaviour.<sup>335</sup> Given that solitary confinement can have harmful consequences for a person's health,<sup>336</sup> the finding that this measure is disproportionately applied to persons who are already vulnerable on psychiatric grounds is deeply concerning. Rather than affording protection to

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<sup>328</sup> Slovak Republic, 16-18.

<sup>329</sup> *Ibid.*

<sup>330</sup> Cyprus, 15-16, 28.

<sup>331</sup> Cyprus, 28.

<sup>332</sup> Cyprus, 28.

<sup>333</sup> Netherlands, 65-66. Report refers to Amnesty International, Dokters van de Wereld and Stichting LOS (Meldpunt Vreemdelingendetentie), 'Isolatie in vreemdelingendetentie' (2020) <[www.amnesty.nl/content/uploads/2020/09/AMN\\_20\\_26\\_rapport-isolatie\\_digitaal.pdf](http://www.amnesty.nl/content/uploads/2020/09/AMN_20_26_rapport-isolatie_digitaal.pdf)> accessed 27 May 2026.

<sup>334</sup> *Ibid.*

<sup>335</sup> *Ibid.*

<sup>336</sup> *Ibid.*

vulnerable persons, this practice produces the opposite effect: it 'penalises' individuals precisely because of their vulnerability, exposing them to conditions that risk causing further harm.

- **Not adequately equipped to accommodate**

The report of *Luxembourg* states that the Detention Centre (itself) reported “*that they are not adequately equipped to accommodate, for example, disabled people.*”<sup>337</sup> Whilst Luxembourg reports that the detention of vulnerable persons is rare, though not non-existent, even in those exceptional cases where detention does occur, a detention centre ought to be equipped to adequately accommodate vulnerable persons.

Seen from the perspective of EU law, however, it's not entirely surprising that Luxembourg can find/finds itself in this position. Because the EU imposes no concrete obligation on Member States to make specific accommodations (or extra equipment) for vulnerable persons in return detention. The standard set by the Return Directive, namely that *particular attention shall be paid to the situation of vulnerable persons*, whatever that may mean in practice, is considered sufficient. And Luxembourg complies with this standard perfectly on paper, as, according to the amended law of 28 May 2009 on the creation and organisation of the detention centre, in case of detention “*special attention is paid to the situation of vulnerable persons.*”<sup>338</sup> In other words, Luxembourg does precisely what EU law requires, and EU law requires very little. It is precisely in the *practical reality* of detention centres that the inadequacy of this standard/guarantee becomes most apparent: a vague obligation to pay 'particular attention' is manifestly insufficient to ensure that a detention centre is adequately equipped to accommodate vulnerable persons, such as persons with disabilities.

### 3.3 Conclusion

The analysis of the national reports comprising the 2021 EMN Study reveals a fragmented landscape of vulnerability protection in return/pre-removal detention across the European. The considerable divergences identified across Member States in terms of legislative frameworks, assessment procedures, and practical safeguards are a logic consequence of the absence of more specific standards and harmonisation on EU level. The concrete protection afforded to vulnerable migrants in

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<sup>337</sup> Luxembourg, 13.

<sup>338</sup> Luxembourg, 13.

return detention thus depends, to a very significant extent, on the (goodwill of) individual Member States.

Luxembourg served as a particularly striking illustration of what is fundamentally wrong with the vulnerability protection framework established by the Return Directive. Luxembourg formally complies with the requirements of the Directive: its national law provides that special attention is paid to the situation of vulnerable persons in detention, which constitutes a solid transposition of Article 16(3). From the perspective of EU law, there is nothing to criticise. And yet, this compliance exposes the inadequacy of the Directive itself: a Member State that does no more than what the Directive requires finds itself in a situation where no formal vulnerability assessment is conducted and where the detention centre is not (per se) adequately equipped to accommodate persons with disabilities. Luxembourg does not fail the Directive; the Directive and Luxembourg fail vulnerable persons.

The analysis indicated several shortcomings in the landscape of vulnerability safeguards/protection in the Member States.

The absence of adequate vulnerability assessment and thus identification is a fundamental problem that became apparent in this analysis. Without systematic, thorough and adequate assessment and identification all other safeguards (whether legislative prohibitions on the detention of certain categories, good practices, tailored accommodation, or specialised care etc.), are rendered entirely ineffective. A vulnerable person who is never identified as such cannot benefit from any protection that exists on paper or in practice. Member States such as the Netherlands and Austria have exemplified these shortcomings of existing vulnerability assessment procedures. In the Netherlands, individual assessments prior to detention have been found to exhibit severe shortcomings in the examination of special personal circumstances, with vulnerable persons being overlooked because they do not fit within predefined categorisations. In Austria, the identification of vulnerable persons has been characterised by the OHCHR as random and unsystematic, occurring only where vulnerabilities are clearly visible or disclosed by the individuals themselves. Luxembourg goes further, operating without any formal vulnerability assessment whatsoever.

Equally troubling are the problematic practices identified once detention has been ordered. The finding stated in the Dutch national report that persons with a psychiatric background are disproportionately likely to be placed in solitary confinement on account of behaviour stemming from

their condition, despite the well-documented harmful consequences of such confinement for mental health, stands as a striking example of a practice that does not merely fail to protect vulnerable persons but actively causes them further harm.

Finally, this chapter has reinforced a broader observation that practice is often more determinative for vulnerable persons than the law on paper. It has become apparent that Member States often rely on practices, informal procedures etc rather than legally grounded provisions. Whilst positive practices, such as refraining from detaining vulnerable persons in the absence of a legal prohibition, are to be welcomed, they offer no legal certainty and no enforceable guarantee. The ideal framework is one in which both the law and practice are adequate. Legal provisions are necessary not only to ensure consistency and predictability, but also to provide vulnerable persons with a basis upon which the authorities can be held to account. A good practice without being enshrined in the law is precarious and an ‘adequate’ law without the execution in practice is hollow.

- Normative Conclusion

The findings of this chapter point, once again, to the need for more concrete EU standards for the protection of vulnerable persons in return detention. Vulnerable persons would benefit, *first and foremost*, from a clear EU-level obligation to exempt them from detention (i.e. using less coercive alternative measures). And if not *secondly*, where exemption from detention is not provided for all (categories of) vulnerable persons, the EU framework should, as a minimum, establish specific and concrete, evidence-based standards for the treatment and accommodation of vulnerable persons in detention.

The findings also point to the need of a mandatory and adequate vulnerability assessment for persons subject to return proceedings. Such an assessment must take a situational approach and not be limited to fixed, predefined categories of vulnerable persons. Without (such an adequate assessment and) identification, ‘vulnerability’ protection (whether exemption from detention or concrete detention conditions, standards for treatment and accommodation ...) might be rendered useless.

## CONCLUSION

### *Research Question*

To what extent does the concept of 'vulnerability' play a meaningful **role** in EU return detention policy, and can it serve as a normative **tool** to improve the situation of vulnerable migrants subject to return detention?

### *Answer*

The **role** of 'vulnerability' in EU return detention policy, both under the current legal framework established by the Return Directive and the future framework under the Return Regulation, is best characterised as *performative*. The invocation of the concept creates the appearance of vulnerability 'protection' whilst delivering little of its substance. The rising prominence of vulnerability language in migration policy (buzzword) has not translated into meaningful or enforceable safeguards in the specific context of return detention. The obligation to pay 'particular attention' to the situation of vulnerable persons, as enshrined in Article 16(3) of the Return Directive, or to pay 'particular attention' to the special needs of detained vulnerable persons under Article 34(4) of the Return Regulation, carries no concrete legal consequences and imposes no operational obligations on Member States. In this sense, vulnerability operates as a *token gesture* that allows the EU to claim that protection for vulnerable persons exists, whilst in practice the concept remains legally hollow and devoid of real impact on the lives of those it purports to protect.

And yet, vulnerability retains significant *potential* as a normative **tool** for improvement, precisely because of the analytical and critical lens it provides if taken situational and intersectional approach. Properly understood and critically engaged with, the concept of vulnerability allows for a deeper understanding of the lived experiences of migrants detained under return procedures, persons who, as this thesis has argued, ought not to be detained in the first place. As a tool, vulnerability enables one to identify what places a person in a position of vulnerability, heightened susceptibility to harm, what structural, situational, and personal factors converge to render certain individuals particularly vulnerable or at risk, and, crucially, what can be done to prevent or mitigate that harm. Vulnerability as a concept, holds powerful potential to guide bureaucratic action; for example, through the development of guidelines and training that more accurately reflect migrants' experiences and realities.

The problem is not how to translate the analytical potential of vulnerability into binding, operational, and enforceable legal standards at EU level. The problem is the EU's unwillingness to do it. This unwillingness is clearly demonstrated by the fact that such operational standards exist in EU asylum

acquis (Reception Conditions Directive), that the EU takes a situational approach towards vulnerability in the Directive on human trafficking; and above all by the deletion, in the transition from proposal to adopted text of the Return Regulation, of more protective vulnerability provisions, most notably the obligation to provide accommodation for special needs in return detention. The need for such standards should not obscure a more fundamental point: ideally, these provisions should never need to be invoked. If Member States/EU were to comply with human rights standards, vulnerable persons would, not be detained in the first place.

In order to provide a substantiated answer to the research question, this thesis has demonstrated the following (non-exhaustive) points.

**PART I** proved that vulnerability results from situational, personal and structural factors and that vulnerability should be approached in a situational manner.

This part also demonstrated that return detention is profoundly harmful; that it exacerbates existing vulnerability and that detention can render a person vulnerable. The optimal way to reduce individuals' vulnerability to detention is to limit the use of detention.

International human-rights standards, although non-binding, clearly affirm that vulnerable persons should not be subjected to return detention. It has been argued that vulnerable persons should not be detained. Yet this should be realised in a system where detention is genuinely used as an exceptional measure of last resort (and preferably not resorted to). This focus on the *primacy of migrants' rights* helps prevent a 'vulnerability competition' and ensures that respect for the rights of all migrants simultaneously protects those who are particularly vulnerable. Where detention nonetheless occurs, conditions must be humane, appropriate, and fully respectful of the dignity and rights of all detainees, since evidence shows that detention conditions impact vulnerability.

This part also pleaded for improved detention conditions for all detained persons, as better conditions are to the benefit of everyone's wellbeing. As it has been demonstrated that 'ordinary' detention conditions are linked to vulnerability: they can both exacerbate existing vulnerabilities and generate vulnerability. Vulnerability in detention is therefore not only limited to questions of medical (physical and mental) care or individualised special-needs accommodations; although these remain essential. Basic, structural detention conditions are also crucial in the light of vulnerability.

**PART II** analysed the relevant case law of the European Court of Human Rights. The case law starkly exposed the severity of the situation in migration detention. It is clear that the Court adopts a situational approach to vulnerability. Furthermore, the Court has also characterised an individual as being in a vulnerable position, *inter alia* “because she was an irregular immigrant”.<sup>339</sup>

With respect to Article 3 ECHR, the Court employs vulnerability as a relevant factor in its overall Article 3 assessment, which tips the balance towards a finding of a violation where the conditions of detention as such, although deplorable, might not have sufficed to reach the requisite threshold of severity, without the combination with the vulnerability. Furthermore, the detention of a pregnant person in late pregnancy or with pregnancy-related health risks giving rise to an Article 3 violation, *even* where appropriate medical care is provided for that person. An example of an obligation under Article 3 is that where authorities decide to place and keep a person with a *disability* in detention, they must demonstrate special care in guaranteeing conditions that correspond to the special needs resulting from that disability.

With respect to Article 5 ECHR, the Court’s case law shows that vulnerability-related factors may influence the assessment of whether detention is arbitrary. The detention of adults with specific vulnerabilities will not be in conformity with Article 5§1(f) of the Convention where the aim pursued by the detention can be achieved by other, less coercive measures. This requires the domestic authorities to consider alternatives to detention in the light of the specific circumstances of the individual case. The requirement of less coercive measures aims to determine whether the individuals concerned present a particular vulnerability that precludes detention. Furthermore, vulnerability-related procedures and practices are also relevant in evaluating whether the authorities acted in good faith, to determine whether detention was arbitrary. For persons with specific vulnerabilities to benefit from the additional safeguards against arbitrary detention that apply to them, they must have access to an assessment of their vulnerability and be informed about the relevant procedures.

**PART III** has established that the EU’s return detention framework fails to adequately address vulnerability.

*Chapter 1* analysed the general EU framework on return detention and demonstrated that, from a vulnerability perspective, the Return Regulation constitutes an enormous deterioration. The most

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<sup>339</sup> *Aden Ahmed v Malta* App no 55352/12 (ECtHR, 23 July 2013), §97; and repeated in *Abdi Mahamud v Malta* App no 56796/13 (ECtHR, 3 May 2016) §88.

effective way to safeguard vulnerable persons is to detain less and preferably not at all and the Return Regulation moves in precisely the opposite direction. A comparison of the Return Directive and the Return Regulation namely revealed that detention will be possible on more grounds (including on the basis of ‘security risks’), for longer periods (up to two and a half years), without a ‘last resort’ requirement and without the requirement that any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence. The Return Regulation is not aligned with human-rights standards (Article 5 ECHR) as it, for example, removed the requirement to assess whether other sufficient but less coercive measures could be effectively applied (‘last resort’).

With regard to the general detention conditions once in detention, beyond the very limited provisions in the Return Directive and Regulation, EU law does not prescribe how detention facilities in the Member States should be organised. It has been criticized that there are no additional protective standards at EU level aimed at minimising the harmful effects of detention. The Return Regulation entails a deterioration in this respect as well.

*Chapter 2* analysed the *specific* EU framework on vulnerability within detention and demonstrated several structural shortcomings. A comparison between the Return Directive and the Return Regulation revealed that little will change under the Regulation. The only minor difference is, where the Return Directive requires paying particular attention to the *situation* of vulnerable persons; the Regulation requires paying particular attention to *the special needs* of detained vulnerable persons, and it does not longer define who qualifies as vulnerable.

The obligation to pay particular attention is manifestly insufficient to adequately care for vulnerable persons; it is vague, difficult to enforce, and does not require Member States to take any concrete action. One can pay particular attention without providing anything.

The chapter showed that the EU has actively chosen not to adopt more concrete and imperative vulnerability standards. A comparison between the Commission’s initial proposal for the Return Regulation and the text approved by the European Parliament demonstrated that the EU deliberately removed the more protective provision requiring that special accommodation *shall* be provided for the special needs of detained vulnerable persons.

The chapter also established that the EU return framework lacks a proper vulnerability assessment, which is indispensable for any effective safeguard, even though such assessments do exist under the asylum acquis.

Finally, it showed that the EU return framework lacks *other* operational and enforceable standards necessary to give effect to vulnerability provisions. These other standards do exist under the asylum acquis, (and also at CPT level (albeit non-binding)), demonstrating that there is no (practical) excuse to not do the same in the context of return.

*Chapter 3* analysed the situation in the Member States. The analysis of the EMN Reports proved where both the EU and the Member States fall short. The findings of the EMN study further demonstrated that the concerns previously identified at EU level are not merely theoretical. Rather, these same concerns are substantiated by the (factual) situation in the Member States. For example, the analysis once again demonstrated the need for adequate, situational and holistic vulnerability assessments (e.g. Member States with no vulnerability assessment or vulnerable persons that are being overlooked because they do not fit within predefined categorisations etc.).

With regard to the *decision to detain*, the EMN reports examined demonstrated that vulnerable persons are allowed to be detained in the Member States. In the vast majority of Member States, 13 out of the 21 under study, not a single (category of) vulnerable person is explicitly excluded from detention under national law. However, some Member States indicate that they refrain from detaining certain vulnerable groups ‘in practice’, but such practices are not grounded in binding legal obligations. The exclusions and protective practices identified are the result of the (goodwill of) individual Member States, not of any obligation imposed by EU law.

Regarding *treatment within detention*, the chapter showed that the vagueness and non-operational nature of the ‘vulnerability standard’ of Article 16(3) of the Return Directive is often reproduced at national level. The treatment of vulnerable persons varies from Member State to Member State, which is unsurprising given the absence of concrete EU-level standards.

***In fine***, EU demonstrates no meaningful care for vulnerable migrants in return procedures: not by exempting them from detention, not by addressing their specific needs within detention, and not by ensuring more general conditions that do not exacerbate harm.

**To detain or not to detain?** That should not be a question in return procedures of vulnerable persons...

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## ANNEX I - European Court of Human Rights' case law

The European Convention on Human Rights (ECHR) is binding on all EU Member States, and Article 6(2) TEU provides that the European Union shall accede to it; although this has not yet occurred. The judgments of the European Court of Human Rights (ECtHR) are binding on the state against which they are delivered. These human rights standards are therefore highly relevant for the purposes of this thesis.

The central question that raises is: what role does vulnerability play in the Court's case law on migration-detention (conditions) and what (positive/negative) obligations rest upon the Convention states in this regard? A number of principles concerning vulnerability in the context of return detention can be distilled from the Court's jurisprudence.

### 1 Vulnerability in the context of migration: a general overview

Vulnerability plays a role in ECtHR case law in the context of *migration* more broadly, but the relevant case law predominantly concerns matters other than the specific focus of this thesis.

For example, in expulsion cases, when the Courts outlines the reasons why it concluded to a risk of ill-treatments, it sometimes explicitly refer to the vulnerable position that applicants would face *in* the country *to which* they are to be removed.<sup>340</sup> This body of case law, falls outside the scope of the present thesis. As this thesis focuses exclusively, on (the detention decision and on) the treatment *in* the country *from which* they are to be removed (i.e. an EU Member State) and not on the treatment *in* the country *to which* they are to be removed (i.e. a non-EU Member State or another EU Member State in a different context e.g. the competent Member State under the Dublin Regulation).

In these rulings, the explicit emphasis on 'vulnerability' primarily served to justify findings of a Convention violation, though such emphasis is far from systematic.<sup>341</sup> Explicit references to 'vulnerability' in the Court's decisions are not necessarily meaningful, nor is the absence of such references.<sup>342</sup> They may also reflect the applicants' own argumentation, who sometimes frame their legal arguments around their 'vulnerability', which may in turn prompt the Court to employ that

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<sup>340</sup> L Leboeuf, 'The Travels and Transformations of "Vulnerability": From an Ethical and Analytical Concept to a Legal and Bureaucratic Label' in L Leboeuf and others (eds), *Between Protection and Harm* (IMISCOE Research Series, Springer 2025) <doi.org/10.1007/978-3-031-69808-8\_2> accessed 3 May 2026, 30.

<sup>341</sup> *Ibid*, 31.

<sup>342</sup> *Ibid*, 32.

concept in its ruling.<sup>343</sup> It is therefore difficult to distinguish between decisions in which ‘vulnerability’ is used in a purely descriptive way when referring to the situation at hand, and decisions in which it played a substantive role in shaping the Court's legal reasoning and the ultimate decisions in the case.<sup>344</sup>

There is one exception, the ECtHR has, in cases concerning the implementation of the Dublin Regulation, assigned explicit legal meaning and consequences to finding that asylum-seekers find themselves in a particularly vulnerable position in host countries, thus legally using the concept and giving it explicit concrete legal consequences.<sup>345</sup> The landmark judgement of *M.S.S. v. Belgium and Greece* is in this regard really clear, there ‘vulnerability’ was used as an explicit criterion that justified expanding the protection of the ECHR.<sup>346</sup> The ECtHR held that a transfer under the Dublin system would violate the Convention where the responsible Member State is unable to provide adequate reception conditions.<sup>347</sup> The case concerned an Afghan asylum-seeker who, upon being returned to Greece, was left *homeless*, without any form of assistance, and with no realistic prospect that his asylum application would be examined by the authorities.<sup>348</sup> The Court attached “*considerable importance to the applicant’s status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection.*”<sup>349</sup>

In this case, vulnerability operated as an explicit criterion that justified *expanding* the scope of protection under the Convention; although the Convention generally does not safeguard individuals against *material deprivation* to the extent of requiring States to adopt *welfare policies*.<sup>350</sup> This body of case law, however, falls outside the scope of the present thesis where it concerns expulsion (the transfer to Greece) and the living conditions (in Greece). Nevertheless, as later established,

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<sup>343</sup> *Ibid.*

<sup>344</sup> *Ibid.*

<sup>345</sup> *Ibid.*

<sup>346</sup> *MSS v Belgium and Greece* App no 30696/09 (ECtHR GC, 21 January 2011); L Leboeuf, 'The Travels and Transformations of "Vulnerability": From an Ethical and Analytical Concept to a Legal and Bureaucratic Label' in L Leboeuf and others (eds), *Between Protection and Harm* (IMISCOE Research Series, Springer 2025) <doi.org/10.1007/978-3-031-69808-8\_2> accessed 3 May 2026, 32.

<sup>347</sup> *Ibid.*

<sup>348</sup> *Ibid.*

<sup>349</sup> *MSS v Belgium and Greece* App no 30696/09 (ECtHR GC, 21 January 2011) §251.

<sup>350</sup> *MSS v Belgium and Greece* App no 30696/09 (ECtHR GC, 21 January 2011); L Leboeuf, 'The Travels and Transformations of "Vulnerability": From an Ethical and Analytical Concept to a Legal and Bureaucratic Label' in L Leboeuf and others (eds), *Between Protection and Harm* (IMISCOE Research Series, Springer 2025) <doi.org/10.1007/978-3-031-69808-8\_2> accessed 3 May 2026, 32.

vulnerability-related case law concerning detention and detention conditions may still be of relevance, despite not being situated within the specific context of return detention.

Furthermore, the landmark *M.S.S.* judgment is crucial, as it illustrates the Court's situational conception of vulnerability in relation to *asylum-seekers*.<sup>351</sup>

Having briefly outlined the role of vulnerability in other migration-related contexts, the central question that now arises is what role, if any, 'vulnerability' plays in the ECtHR's case law specifically concerning the detention conditions of migrants held in return detention? Or, more broadly, which cases are relevant to the present thesis, even where the concept of vulnerability is not explicitly invoked, and what principles and lessons can be distilled from them for the purposes of this analysis.

## 2 Vulnerability in the context of migration detention

### 2.1 Arbitrary detention: Article 5 §1(f) ECHR

Article 5 ECHR enshrines a fundamental right, namely the protection of every person against arbitrary interference by the State with their liberty. Any deprivation of liberty must fall within one of the exceptions provided for in sub-paragraphs (a) to (f) of Article 5 §1.

Sub-paragraph (f) permits States to restrict the liberty of aliens in the context of immigration control and is therefore relevant for this thesis. **§1** "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:" ... **f)** "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition." The discussion centres on the second limb of Article 5 § 1(f), which concerns the lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition.

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<sup>351</sup> *MSS v Belgium and Greece* App no 30696/09 (ECtHR GC, 21 January 2011) §251, 232.

### 2.1.1 Article 5§1(f) general principles<sup>352</sup>

Some general principles regarding Article 5§1(f) can be recalled. *First*, any deprivation of liberty must be ‘lawful’,<sup>353</sup> and Article 5§1 further requires that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness.<sup>354</sup> *Secondly*, in order not to be considered arbitrary, a measure involving deprivation of liberty taken under Article 5§1(f) must be carried out in good faith and must be closely connected to the ground of detention invoked by the Government.<sup>355</sup> As regards the second limb of Article 5§1(f), the Court considers that detention is justified only as long as deportation proceedings are genuinely ongoing (in progress).<sup>356</sup> (This provision does not require that the detention also is reasonably necessary).<sup>357</sup> *Thirdly*, the place and conditions of detention must be appropriate.<sup>358</sup> There must be a connection between the ground relied upon for the deprivation of liberty and the place and regime detention regime applied.<sup>359</sup> *Lastly*, the duration of the measure (detention) may not exceed the time reasonably necessary to achieve the purpose pursued.<sup>360</sup> Accordingly, under the second limb of Article 5§1(f), detention ceases to be justified where the deportation proceedings are not pursued with the required diligence.<sup>361</sup>

This thesis does not purport to examine the other/technical aspects of Article 5 in depth, such as the right to have the lawfulness of detention decided speedily by a court (§4 of Article 5). The analysis is instead confined to examining the extent to which, and the manner in which, *vulnerability* plays a role under Article 5 §1(f) in the specific context of (return) migration detention .

### 2.1.2 Cases

Some of the relevant cases are discussed in the section on Article 3, given that they raise both Article 5 and Article 3 issues.

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<sup>352</sup> *Aden Ahmed v Malta* App no 55352/12 (ECtHR, 23 July 2013) §138-141; *Yoh-Ekale Mwanje v Belgium* App no 10486/10 (ECtHR, 20 December 2011) §115- 119.

<sup>353</sup> *Aden Ahmed v Malta* App no 55352/12 (ECtHR, 23 July 2013) §115; *Yoh-Ekale Mwanje v Belgium* App no 10486/10 (ECtHR, 20 December 2011) §140.

<sup>354</sup> *Aden Ahmed v Malta* App no 55352/12 (ECtHR, 23 July 2013) §141; *Yoh-Ekale Mwanje v Belgium* App no 10486/10 (ECtHR, 20 December 2011) §116.

<sup>355</sup> *Yoh-Ekale Mwanje v Belgium* App no 10486/10 (ECtHR, 20 December 2011) §117.

<sup>356</sup> *Aden Ahmed v Malta* App no 55352/12 (ECtHR, 23 July 2013) §139.

<sup>357</sup> *Aden Ahmed v Malta* App no 55352/12 (ECtHR, 23 July 2013) §139; *Yoh-Ekale Mwanje v Belgium* App no 10486/10 (ECtHR, 20 December 2011) §117.

<sup>358</sup> *Yoh-Ekale Mwanje v Belgium* App no 10486/10 (ECtHR, 20 December 2011) §118.

<sup>359</sup> *Ibid.*

<sup>360</sup> *Ibid.*, §119.

<sup>361</sup> *Ibid.*

The detention of adults with specific vulnerabilities will not be in conformity with Article 5 §1(f) of the Convention where the aim pursued by the detention can be achieved by other, less coercive measures.<sup>362</sup> This requires the domestic authorities to consider alternatives to detention in the light of the specific circumstances of the individual case.<sup>363</sup>

This is illustrated by *Yoh-Ekale Mwanje v. Belgium*, concerning an adult suffering from a medical condition, addressed *infra*.<sup>364</sup>

This is equally reflected in *O.M. v. Hungary*, where the Court took into account the particular vulnerability of an LGBTI *asylum-seeker* in its assessment under Article 5 §1(b). It held that “*the decisions of the authorities did not contain any adequate reflection on the individual circumstances of the applicant, a member of a vulnerable group by virtue of belonging to a sexual minority in Iran*”.<sup>365</sup> This failure to consider his vulnerability contributed directly to the finding of a violation of Article 5 §1. It is important to note, that the case concerned Article 5 §1(b) and asylum-related detention and that the person was subsequently recognised as a refugee. Although the case arose in the context of asylum detention, this analysis suggests that its reasoning is also relevant for return detention. Not all LGBTI persons obtain refugee status; for example, where persecution cannot be sufficiently substantiated, and some may therefore (or for other reasons) enter return procedures and be detained for removal. With that in mind, it is entirely conceivable that a similar situation could arise in the context of return detention: a LGBTI person may nonetheless face significant risks in detention if the authorities fail to “*exercise particular care in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place*”<sup>366</sup>. This includes the obligation to consider whether a ‘vulnerable’ individual will be safe in custody among other detainees, “*many of whom had come from countries with widespread cultural or religious prejudice against LGBT persons*”<sup>367</sup>. It may thus be argued that, in such circumstances, ordering return detention without assessing these vulnerability-related risks could amount to a failure to meet the State’s obligations under Article 5, just as in *O.M. v. Hungary*.

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<sup>362</sup> European Court of Human Rights Registry, *Guide on the Case-Law of the European Convention on Human Rights: Immigration* (ECtHR, updated 28 February 2026) <[ks.echr.coe.int/documents/d/echr-ks/guide\\_immigration\\_eng](https://ks.echr.coe.int/documents/d/echr-ks/guide_immigration_eng)> accessed 19 June 2026, 40.

<sup>363</sup> *Ibid.*

<sup>364</sup> *Yoh-Ekale Mwanje v Belgium* App no 10486/10 (ECtHR, 20 December 2011) §113-125.

<sup>365</sup> *Ibid.*, §53.

<sup>366</sup> *Ibid.*

<sup>367</sup> *Ibid.*

Moreover, in *Thimothawes v. Belgium*, the Court found no breach of Article 5, yet stated in the context the systematic of detaining asylum-seekers<sup>368</sup> “*la Cour a estimé que les autorités compétentes devaient rechercher s’il était possible de leur substituer une autre mesure moins radicale. Cette exigence vise à détecter si les intéressés présentent une vulnérabilité particulière qui s’oppose à la détention*” (emphasis added).<sup>369</sup>

A further principle emerging from the case law is that, for persons with specific vulnerabilities to benefit from the additional safeguards against arbitrary detention that apply to them, they must have access to an assessment of their vulnerability and be informed about the relevant procedures.<sup>370</sup>

This is illustrated in the case of *Abdi Mahamud v. Malta*, in particular in paragraph 134, which will also be discussed below.<sup>371</sup>

## 2.2 Detention conditions: Article 3 ECHR

### Article 3 - Prohibition of torture

“*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*”

Before turning to the case analyses, this section outlines some general principles relevant to Article 3 ECHR that are pertinent for the purposes of this thesis, without attempting to provide an exhaustive overview.

Given the absolute nature of Article 3 of the European Convention on Human Rights, which permits no derogations, the threshold of severity required for detention conditions to amount to inhuman or degrading treatment is high. This means that even where the threshold for an Article 3 violation is not met, the detention conditions in question may nonetheless be deeply problematic and open to serious criticism. Far more could and should be provided, e.g.: at EU level, than merely ensuring compliance with the bare minimum required to avoid a finding of ill-treatment.

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<sup>368</sup> However, this thesis argues that the same could be said for detention for the purpose of removal.

<sup>369</sup> *Thimothawes v Belgium* App no 39061/11 (ECtHR, 4 April 2017) §73.

<sup>370</sup> European Court of Human Rights Registry, *Guide on the Case-Law of the European Convention on Human Rights: Immigration* (ECtHR, updated 28 February 2026) <[ks.echr.coe.int/documents/d/echr-ks/guide\\_immigration\\_eng](https://ks.echr.coe.int/documents/d/echr-ks/guide_immigration_eng)> accessed 19 June 2026, 41.

<sup>371</sup> *Abdi Mahamud v Malta* App no 56796/13 (ECtHR, 3 May 2016) §134.

### 2.2.1 Article 3 general principles: a situational approach

The Courts' case-law holds that ill-treatment must reach a minimum level of severity before it falls within the scope of Article 3.<sup>372</sup> This assessment of the minimum level of severity is relative and depends on *all* the circumstances of the case, *including* the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.<sup>373</sup>

This reflects a situational approach consistently adopted by the Court, which is to be welcomed.

In considering whether treatment is 'degrading' within the meaning of Article 3, the Court considers whether the treatment had the object to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3.<sup>374</sup> However, the absence of such a purpose does not conclusively preclude a finding of a violation.<sup>375</sup>

In the context of *detention conditions*, Article 3 imposes States to ensure that individuals are detained in conditions compatible with respect for human dignity.<sup>376</sup> This requires that the manner and method of detention (of the execution of the measure) do not subject the person to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that the detainee's health and well-being are adequately secured.<sup>377</sup> In assessing detention conditions, the Court evaluates the cumulative effects of these conditions, the specific allegations raised by the applicant, and the length of time during which the individual was exposed to those conditions.<sup>378</sup>

### 2.2.2 No distinction between asylum-related detention and return detention

Cases about asylum-related detention under Article 3 ECHR are equally relevant for this thesis, although asylum-related detention doesn't fall under the scope of the thesis.

They are relevant because of the following considerations. Article 3 is absolute and applies to everyone, regardless of immigration status. The ECtHR does not distinguish between asylum-related detention and return detention when assessing detention conditions under Article 3 ECHR.<sup>379</sup> (The

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<sup>372</sup> *Aden Ahmed v Malta* App no 55352/12 (ECtHR, 23 July 2013) §85.

<sup>373</sup> *Ibid.*

<sup>374</sup> *Ibid.*

<sup>375</sup> *Ibid.*

<sup>376</sup> *Ibid.*, §86.

<sup>377</sup> *Ibid.*

<sup>378</sup> *Ibid.*

<sup>379</sup> European Court of Human Rights Registry, *Guide on the Case-Law of the European Convention on Human Rights: Immigration* (ECtHR, updated 28 February 2026) <[ks.echr.coe.int/documents/d/echr-ks/guide\\_immigration\\_eng](https://ks.echr.coe.int/documents/d/echr-ks/guide_immigration_eng)> accessed 19 June 2026, 39.

vulnerability of an asylum-seeker (in detention) differs from that of a person in return detention; this will be discussed further, compare *M.S.S. and Abdi Mahamud*.) The Court does not articulate different Article 3 thresholds for asylum-related detention and return detention. When determining whether the conditions of immigration detention comply with Article 3, the Court applies the principles developed in its case law on prisoners' rights.<sup>380</sup>

Factually seen the line between asylum related detention or return detention is also not always clear. Some persons only ask asylum once in return detention or they already asked it but got refused and later accepted. For example, Mr Palushi (see *infra*) was detained in a prison with a view to expulsion on account of his illegal stay in Austria, because his request for asylum had been refused by the second-instance authority.<sup>381</sup> Later on, his asylum request was granted.<sup>382</sup>

This shows that asylum-related detention cases are relevant, and some will be addressed; such as *H.M. and Others v. Hungary*, concerning transit-zone detention.

### 2.2.3 Cases

#### - Palushi v. Austria, 2009

Mr Naser Palush, a national of the former Socialist Federal Republic of Yugoslavia, alleged before the Strasbourg Court that he had been subjected to ill-treatment contrary to Article 3 of the Convention during his detention in the Vienna Police Prison.<sup>383</sup>

Mr Palushi's detention was ordered by the Vienna Federal Police Authority, with a view to expulsion because he was staying illegally in Austria, after his asylum request had already been rejected.<sup>384</sup> He was transferred the same day to Vienna East Police Prison and began a hunger strike two days later.<sup>385</sup>

Mr Palushi alleged before the Strasbourg Court that he: had been beaten and kicked, been stabbed behind the ears with ballpoint pens, suffered injuries as a result of the inappropriate manner in which he had been carried down the stairs, had subsequently been placed in solitary confinement; and not had been given sufficient medical care.<sup>386</sup>

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<sup>380</sup> *Ibid.*

<sup>381</sup> *Palushi v Austria* App no 27800/05 (ECtHR, 22 October 2009) §7.

<sup>382</sup> *Ibid.*, §18.

<sup>383</sup> *Ibid.*, §1-3.

<sup>384</sup> *Ibid.*, §7.

<sup>385</sup> *Ibid.*, §8.

<sup>386</sup> *Ibid.*, §48.

The treatment (violence) to which Mr Palushi was subjected by the police officers,<sup>387</sup> falls outside the scope of this thesis. (In reaching the conclusion that Mr Palushi was subjected to inhuman and degrading treatment, the Court had taken into account the fact that he had been “*on hunger strike for three weeks at the time of the events and was undisputedly in a physically and mentally weakened state*”.<sup>388</sup> The Court found that the treatment to which he was subjected, namely “*the stabbing behind his ears and the manner in which he was carried to the individual cell, such that his back dragged along the edges of the steps, causing skin abrasions of a considerable size*”, must have caused him physical and mental pain and suffering.<sup>389</sup> In addition, the acts were such as to arouse in Mr Palushi feelings of fear, anguish and inferiority capable of debasing him and possibly breaking his physical and moral resistance.<sup>390</sup> Therefore Article 3, on account of the ill-treatment, was violated.<sup>391</sup>)

- Article 3

Relevant for this thesis are the conditions of Mr Palushi’s detention, specifically his placement in solitary confinement and the lack of medical care.<sup>392</sup> Important to note is that the solitary confinement (the removal from association with other prisoners for security, disciplinary or protective reasons) in itself doesn’t amount to inhuman or degrading treatment or punishment.<sup>393</sup>

However, the Court attached weight to one particular element of the case: at the time Mr Palushi was placed in solitary confinement, he had already been on hunger strike for three weeks.<sup>394</sup> The Court further recalled that he had injuries as a result of the ill-treatment he had suffered (see above).<sup>395</sup>

The Court reiterated that, under its established case law, the authorities are under a *positive obligation* to protect the health of persons deprived of their liberty, and that a lack of appropriate medical care may amount to treatment contrary to Article 3.<sup>396</sup>

The Court finds it problematic to place a detainee in solitary confinement, who is at an advanced stage of a hunger strike, and who may therefore be at heightened risk of losing consciousness, “*unless*

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<sup>387</sup> *Ibid.*, §57-65.

<sup>388</sup> *Ibid.*, §64.

<sup>389</sup> *Ibid.*

<sup>390</sup> *Ibid.*

<sup>391</sup> *Ibid.*, §65.

<sup>392</sup> *Ibid.*, §66-75.

<sup>393</sup> *Ibid.*, §68.

<sup>394</sup> *Ibid.*, §70.

<sup>395</sup> *Ibid.*

<sup>396</sup> *Ibid.*, §71.

*appropriate arrangements are made in order to supervise his state of health” in the solitary confinement.*<sup>397</sup> Upon his placement in solitary confinement, Mr Palushi had not been examined by a doctor.<sup>398</sup> The assessment, that “*he had only pretended to be unconscious and that his state of health did not require permanent supervision and thus permitted detention in an individual cell*” had been made by a paramedical officer.<sup>399</sup> The CPT report had indicated that, at the relevant time, paramedical staff had received only very basic training, and that no sufficiently developed approach to the management of hunger strikers was in place.<sup>400</sup> Finally, the Court noted that Mr Palushi had requested access to a doctor but had been refused until 24 May 1994.<sup>401</sup>

In conclusion, the Court found these facts taken together, namely that Mr Palushi, “*as a hunger-striker, was placed in solitary confinement without a proper medical examination and was refused access to a doctor until 24 May 1994*”, must have have caused him suffering and humiliation exceeding the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.<sup>402</sup> In the Court’s view, Mr Palushi was therefore exposed to degrading treatment in breach of Article 3 of the Convention.<sup>403</sup>

See also the relevant case of *Sakir v. Greece*.<sup>404</sup> The Court found, certain shortcomings regarding the sufficient consideration given by the police authorities to Mr Sakir’s medical situation and his state of vulnerability during his detention.<sup>405</sup> This, amongst other factors, led to a finding of a violation of Article 3.<sup>406</sup>

#### - **Yoh-Ekale Mwanje v. Belgium, 2011**

Khaterine Yoh-Ekale Mwanje, a Cameroonian national, was issued a first order to leave the territory on 22 September 2009, on the grounds that she did not possess valid documents authorising her stay

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<sup>397</sup> *Ibid*, §72.

<sup>398</sup> *Ibid*.

<sup>399</sup> *Ibid*.

<sup>400</sup> *Ibid*.

<sup>401</sup> *Ibid*, §73.

<sup>402</sup> *Ibid*, §74.

<sup>403</sup> *Ibid*, §74-75.

<sup>404</sup> *Sakir v Greece App no 48475/09 (ECtHR, 24 March 2016)*.

<sup>405</sup> *Ibid*, §57.

<sup>406</sup> *Ibid*, §58.

in Belgium and was in possession of a forged passport.<sup>407</sup> On the same day she was placed in the Bruges closed centre for undocumented migrants pending the issuance by her national authorities of a travel document for her expulsion.<sup>408</sup> On 12 October 2009, relying on Article 3 of the Convention and the fact that she was HIV-positive, her lawyer submitted an application for release.<sup>409</sup> She was released because no travel document had been issued to facilitate her removal.<sup>410</sup> Therefore was her application for her release dismissed as it had become devoid of purpose.<sup>411</sup> She had to leave the territory by 21 October 2009.<sup>412</sup> On 17 December 2009, Ms. Yoh-Ekale Mwanje was issued with a second order to leave the territory accompanied by a removal order.<sup>413</sup> The second order to leave the territory was accompanied by a detention order, and she was placed on the same day, in a closed centre pending her expulsion.<sup>414</sup> She was released on 9 April 2010.<sup>415</sup>

(Throughout the process described above, her lawyer repeatedly sought her release and the suspension of her expulsion to Cameroon, invoking her deteriorating health condition and the medical treatment she required. These efforts included, for example, an application to the ECtHR under Rule 39 of the Rules of Court, requesting an *interim measure* suspending her expulsion.<sup>416</sup>)

Before the ECtHR, she raised complaints under various provisions of the Convention. The present thesis, however, confines its analysis to the alleged violation of Article 3 ECHR during her detention.

#### - Article 3

The Court reiterated its case-law concerning Article 3 and the deprivation of liberty of seriously ill persons, as well as the principles it has established in *Aleksanyan v. Russia*.<sup>417</sup> In particular, it emphasized that at least three factors must be taken into account in this context: the person's medical condition, the adequacy of the medical assistance and treatment provided in detention, and whether continued detention was appropriate in light of the person's state of health.<sup>418</sup>

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<sup>407</sup> *Yoh-Ekale Mwanje v Belgium* App no 10486/10 (ECtHR, 20 December 2011) §1, 5, 18.

<sup>408</sup> *Ibid*, §20.

<sup>409</sup> *Ibid*, §21.

<sup>410</sup> *Ibid*, §22.

<sup>411</sup> *Ibid*, §23.

<sup>412</sup> *Ibid*, §22.

<sup>413</sup> *Ibid*, §24.

<sup>414</sup> *Ibid*, §27.

<sup>415</sup> *Ibid*, §37.

<sup>416</sup> *Ibid*, §33.

<sup>417</sup> *Ibid*, §91.

<sup>418</sup> *Ibid*, §91.

Regarding the first factor, the Court noted that Ms. Yoh-Ekale Mwanje, who was living with HIV, suffered from a serious and incurable illness.<sup>419</sup> It is undisputed that her health deteriorated and that her HIV infection progressed during the period of detention in question.<sup>420</sup> It appeared highly probable that the suffering of which she complained during her detention resulted from immune deficiency.<sup>421</sup>

The Court nevertheless recalls that a deterioration in health alone (even though it may *prima facie* raise questions regarding the adequacy of the treatment provided during detention), is *not sufficient* to conclude that the State failed to fulfil its positive obligations under Article 3 of the Convention, if it can otherwise be established that the competent domestic authorities took *all reasonable medical measures* to prevent the progression of the illness.<sup>422</sup> In this regard, the Court noted that the Belgian authorities were informed that Ms. Yoh-Ekale Mwanje was HIV-positive during the first period of detention she served in a closed detention centre.<sup>423</sup>

The Court noted that, as a result of her detention, she was prevented from attending her scheduled medical appointments.<sup>424</sup> Additionally, the Court observed that it was only on 9 February 2010 that she was examined for the first time on the initiative of the Immigration Office, by the services of Erasme Hospital, whose staff expressed shock at the Belgian authorities' lack of diligence.<sup>425</sup> In the Court's view, these circumstances, which resulted in delaying the determination of the appropriate treatment, were entirely attributable to the Belgian authorities.<sup>426</sup> The Court considers it established that she began receiving treatment she needed, only on 1 March 2010.<sup>427</sup>

In light of the foregoing, the Court found that the authorities clearly failed to act with the required diligence by not taking, before 1 March 2010, all the measures that could reasonably have been expected of them to protect the Ms. Yoh-Ekale Mwanje's health and prevent the deterioration of her condition.<sup>428</sup> In the Court's opinion, *this situation* undermined her dignity and, when *combined with the distress arising from the prospect of removal*, subjected her to a particularly severe ordeal that went beyond the unavoidable level of suffering inherent in detention and in the illness from which

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<sup>419</sup> *Ibid.*, §92.

<sup>420</sup> *Ibid.*

<sup>421</sup> *Ibid.*

<sup>422</sup> *Ibid.*, §93.

<sup>423</sup> *Ibid.*, §94.

<sup>424</sup> *Ibid.*

<sup>425</sup> *Ibid.*

<sup>426</sup> *Ibid.*, §96.

<sup>427</sup> *Ibid.*, §97.

<sup>428</sup> *Ibid.*, §98.

she suffered.<sup>429</sup> It therefore amounted to inhuman and degrading treatment contrary to Article 3 of the Convention.<sup>430</sup>

- Article 5

Relevant for Article 5, was the decision extending the detention. An extension may be ordered on condition that steps towards removal have been undertaken, are being pursued diligently, and that there remains a possibility of effectively removing the alien within a reasonable period.<sup>431</sup> The decision extending the detention set a repatriation date, but that repatriation was prevented by the indication of the interim measure by the Court.<sup>432</sup> (See the facts: her lawyer had previously seized the Court, hence the indication of the interim measure.)

The Court affirmed that the interim measure has no impact as such on the lawfulness of the detention, however, that the detention cannot be based on the prospect of the Court giving its (final decision) ruling *within* the period provided for by Belgian legislation.<sup>433</sup>

While acknowledging that the statutory detention period was not exceeded, the Court noted several factors: the authorities knew her identity and address, she had cooperated with immigration authorities, and she had taken steps to regularise her status.<sup>434</sup> It also considered her serious health condition (HIV), the deterioration of her health during detention, and that if she had been released, she would have been dependent on emergency medical assistance.<sup>435</sup> Despite these circumstances, the authorities failed to consider less restrictive alternatives to detention, such as temporary residence authorisation, in order to safeguard the public interest served by detention and avoid keeping her in detention.<sup>436</sup>

The Court therefore concluded that there was *no connection between* her continued detention *and* the aim pursued by the Government of removing her from the territory.<sup>437</sup> As a result, it found a violation of Article 5 § 1(f) of the Convention.<sup>438</sup>

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<sup>429</sup> *Ibid.*

<sup>430</sup> *Ibid.*, §98-99.

<sup>431</sup> *Ibid.*, §122.

<sup>432</sup> *Ibid.*, §123.

<sup>433</sup> *Ibid.*

<sup>434</sup> *Ibid.*, §124.

<sup>435</sup> *Ibid.*

<sup>436</sup> *Ibid.*

<sup>437</sup> *Ibid.*, §125.

<sup>438</sup> *Ibid.*

- **Aden Ahmed v. Malta, 2013**

Aslya Aden Ahmed, a Somali national, entered Malta irregularly by boat, where she was registered by the immigration authorities and issued with a removal order, after which she was placed in detention.<sup>439</sup> She subsequently lodged an asylum application, but the Office of the Refugee Commissioner rejected her claim.<sup>440</sup> Shortly after this refusal, she escaped from detention and travelled to the Netherlands, intending eventually to reach Sweden to reunite with her father, siblings, and minor son.<sup>441</sup> Under the Dublin II Regulation, she was returned to Malta.<sup>442</sup> At the time of her return she was two months pregnant.<sup>443</sup> In Malta, she was charged with escaping from public custody and providing false information, and was subsequently convicted and sentenced to six months' imprisonment.<sup>444</sup> During her imprisonment, she was admitted to a hospital where she miscarried and later developed an infection that required further hospitalisation.<sup>445</sup> After completing her prison sentence, Ms Ahmed was again placed in immigration detention, namely Hermes Block in *Lyster Barracks* Detention Centre, pending her removal from Malta.<sup>446</sup>

During this period in detention, following a referral by the Jesuit Refugee Service,<sup>447</sup> Ms Ahmed was interviewed by the Vulnerable Adults Assessment Team of AWAS with a view to determining whether she should be released from detention on grounds of vulnerability according to government policy.<sup>448</sup>

*"The person conducting the interview spoke in English. No interpreter was provided and although the applicant who had learnt some English managed to understand what was happening, she could not communicate fully or explain the full extent of her problems. The applicant was never formally informed of the outcome of this interview or of the decision taken regarding her request. However, some months later, she happened to see the woman who had conducted the interview at the Detention Centre, and, on enquiring, was verbally informed that her request had not been acceded to."* (emphasis added)<sup>449</sup>

Ms Ahmed explained that the vulnerability assessment procedure operated by AWAS had been developed by that organisation in order to implement the government policy providing that vulnerable

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<sup>439</sup> *Aden Ahmed v Malta* App no 55352/12 (ECtHR, 23 July 2013) §1, 6-8.

<sup>440</sup> *Ibid.*, §9-12.

<sup>441</sup> *Ibid.*, §13.

<sup>442</sup> *Ibid.*, §14.

<sup>443</sup> *Ibid.*

<sup>444</sup> *Ibid.*, §16.

<sup>445</sup> *Ibid.*, §17.

<sup>446</sup> *Ibid.*, §18.

<sup>447</sup> *Ibid.*, §21.

<sup>448</sup> *Ibid.*, §28.

<sup>449</sup> *Ibid.*

migrants should not be detained.<sup>450</sup> Although AWAS had no formal legal mandate for this procedure, in practice it exercised full responsibility for it. It was not regulated by law, or by any publicly available rules or procedures.<sup>451</sup> Decisions were issued without written reasons, and there was no possibility of appeal, although in practice a review could sometimes be requested if new evidence emerged or if individual's condition worsened.<sup>452</sup>

Ultimately, she was released in accordance with Maltese government policy, having spent a total of 18 months in immigration detention since her arrival.<sup>453</sup> (It should be borne in mind that this constitutes the maximum detention period authorised under the Return Directive.)

- Article 5 violations, not relevant for the purposes of this research

The Court found a violation of Article 5 §4 of the Convention<sup>454</sup> (not analysed) and a violation of Article 5 §1 of the Convention, that was not based on considerations of vulnerability. (Under the second limb of Article 5 §1(f) detention will be justified only for as long as deportation or extradition proceedings are in progress.<sup>455</sup> As the authorities had made no real effort to pursue her removal, the Court concluded that deportation proceedings were not actually in progress.<sup>456</sup> Consequently, her detention could not be justified under Article 5 §1(f). The Court therefore held that her detention for fourteen and a half months was unlawful and constituted a violation of Article 5 §1 of the Convention.)

- Article 3

Only the final period of detention in *Lyster Barracks* was found admissible by the Strasbourg Court, due to the operation of the six-month rule.<sup>457</sup>

Ms Ahmed complained about the conditions in which she had been detained in the Hermes Block in Lyster Barracks. The Court noted with concern Ms Ahmed's statements that, "*dormitories were shared by so many people with little or no privacy, that she suffered from heat and cold, that an inadequate diet was provided, that there was a lack of female staff to deal with the women detainees*

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<sup>450</sup> *Ibid*, §29.

<sup>451</sup> *Ibid*.

<sup>452</sup> *Ibid*.

<sup>453</sup> *Ibid*, §30.

<sup>454</sup> *Ibid*, §115-124.

<sup>455</sup> *Ibid*, §144.

<sup>456</sup> *Ibid*, §144-145.

<sup>457</sup> *Ibid*, §72-73.

and above all that there was a lack of access to open air.”<sup>458</sup> In that connection Ms Ahmed contended in particular that she and the other detainees had no access to the recreation yard from April to June 2012.<sup>459</sup> This had been corroborated by another detainee.<sup>460</sup>

The Court assessed and took into account, all of the foregoing in (paragraphs 91 to 96 of) her judgment. The most pertinent paragraph for the purposes of this thesis is paragraph 97, where the Court notes that Ms Ahmed was in a vulnerable position. “*Although not acknowledged by the domestic authorities in the AWAS procedure, the Court considers that the applicant was in a vulnerable position, not only because of the fact that she was an irregular immigrant and because of her specific past and her personal emotional circumstances, but also because of her fragile health. The medical documents submitted by Ms Ahmed showed that she suffered from, inter alia, insomnia, recurrent physical pain and episodes of depression.*” (emphasis added).<sup>461</sup> The Government confirmed that she had received at least fourteen medical visits during her detention.<sup>462</sup> The Court stated further that an appropriate and varied diet, in addition to adequate surroundings, were of crucial importance for her state of health.<sup>463</sup> However, the Government failed to adduce any evidence that the food provided was in fact adequate.<sup>464</sup>

The Court observed that the situation and the aforementioned conditions persisted for a continuous period of *fourteen and a half months*.<sup>465</sup> Moreover, the Court reminds that the detention was imposed in the context of immigration and was therefore a measure applicable, not to those who have committed criminal offences, but to aliens who, often fearing for their lives, have fled from their own country.<sup>466</sup>

The Court concludes that - in view of all the above-mentioned circumstances taken as a whole, which Ms Ahmed, as a detained immigrant, endured for a total of fourteen and a half months, and in the light of her specific situation - the cumulative effect of the conditions complained of diminished her human dignity and aroused in her feelings of anguish and inferiority capable of humiliating and debasing her and possibly breaking her physical or moral resistance.<sup>467</sup> In sum, the conditions of Ms Ahmed's detention in the Hermes Block (of Lyster Barracks) amounted to *degrading treatment* within

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<sup>458</sup> *Ibid*, §92.

<sup>459</sup> *Ibid*.

<sup>460</sup> *Ibid*.

<sup>461</sup> *Ibid*, §97.

<sup>462</sup> *Ibid*.

<sup>463</sup> *Ibid*.

<sup>464</sup> *Ibid*.

<sup>465</sup> *Ibid*, §98.

<sup>466</sup> *Ibid*.

<sup>467</sup> *Ibid*, §99.

the meaning of Article 3 of the Convention.<sup>468</sup> The Court accordingly found that there had been a violation of Article 3 of the Convention.<sup>469</sup>

- **Abdi Mahamud v. Malta, 2016**

Ms Sagal Abdi Mahamud, a Somali national complained, in another case against Malta, about the same detention centre.<sup>470</sup> Ms Abdi Mahamud suffered in detention from several medical problems, including headaches, earaches and fainting, and was frequently hospitalised.<sup>471</sup> She additionally showed signs of severe anxiety and depression, which worsened following the refusal of her asylum request.<sup>472</sup>

- Article 3

The ECtHR observed that this case was akin to that of *Aden Ahmed v. Malta*, as both cases concerned the same premises during more or less the same period, and the duration of detention was comparable, amounting to fourteen and a half months in *Aden Ahmed* and more than sixteen months in the present case.<sup>473</sup> The Court explicitly noted that, as in *Aden Ahmed*, Ms Abdi Mahamud was also vulnerable.<sup>474</sup> Whilst in *Aden Ahmed* the domestic authorities had failed, through the AWAS procedure, to acknowledge the her vulnerability, the Court had nonetheless found that Ms Aden Ahmed "was in a vulnerable position, not only because of the fact that she was an irregular immigrant and because of her specific past and her personal emotional circumstances (see also *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 232, ECHR 2011), but also because of her fragile health (§ 97)." (emphasis added, see previous case).<sup>475</sup>

In the *present* case, by contrast, the domestic authorities had, through the AWAS procedure, established that Ms Abdi Mahamud was vulnerable and ought to be released, a finding that the Court saw no reason to second-guess.<sup>476</sup>

In view of her vulnerability, the Court adopted a situational approach, taking into account her health alongside all circumstances, namely "*the fact that the applicant had no access to outdoor exercise for anything between eight and twelve weeks, the poor environment for outdoor exercise in the remaining*

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<sup>468</sup> *Ibid.*

<sup>469</sup> *Ibid.*, §100.

<sup>470</sup> *Abdi Mahamud v Malta* App no 56796/13 (ECtHR, 3 May 2016) §1, 6.

<sup>471</sup> *Ibid.*, §11, 16-19.

<sup>472</sup> *Ibid.*

<sup>473</sup> *Ibid.*, §88.

<sup>474</sup> *Ibid.*

<sup>475</sup> *Ibid.*

<sup>476</sup> *Ibid.*

*period, the lack of specific measures to counter act the cold, the lack of female staff, the little privacy offered in the centre, and the fact these conditions persisted for over sixteen months."*<sup>477</sup> The cumulative effect of these conditions was found to have diminished her human dignity and to have aroused in her feelings of anguish and inferiority capable of humiliating and debasing her and possibly breaking her physical or moral resistance.<sup>478</sup> The Court accordingly concluded that the conditions of Ms Abdi Mahamud's detention in Hermes Block amounted to degrading treatment within the meaning of Article 3 of the Convention and found a violation of that provision.<sup>479</sup>

Also relevant for this thesis is that the Court, regarding the cold, noted that, although the provision of blankets alleviated the situation to some extent, "*individuals who are vulnerable because of their health may require further measures*".<sup>480</sup>

- Article 5: the AWAS procedure

The Court found a violation of Article 5 §1 in respect of two periods of Ms Abdi Mahamud's detention.<sup>481</sup> The reasoning with regard to the first period is particularly relevant because the Court, though Article 5 does not apply to the *AWAS procedure* as such, effectively brought that opaque and concerning procedure indirectly within its Article 5 scrutiny by relying on its deficiencies in assessing the lawfulness of the detention (namely, with regard to whether the detention was carried out in good faith).

Ms Abdi Mahamud complained about the quality of the rules governing the AWAS procedure.<sup>482</sup>

The Court acknowledges that the rules governing the AWAS procedure could be improved.<sup>483</sup> However, since the provisions which provide a legal basis for immigration detention do not exempt vulnerable persons from detention (triggering Article 5 scrutiny), the regulatory framework for their *release* is not subject to the same level of scrutiny.<sup>484</sup> However, the Court stated that the application of that framework in practice may affect the assessment of whether the detention was arbitrary, particularly with regard to whether the detention was carried out in good faith; whether it remained

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<sup>477</sup> *Ibid.*, §89.

<sup>478</sup> *Ibid.*, §89.

<sup>479</sup> *Ibid.*, §89-90.

<sup>480</sup> *Ibid.*, §85.

<sup>481</sup> *Ibid.*, §139.

<sup>482</sup> *Ibid.*, §130.

<sup>483</sup> *Ibid.*

<sup>484</sup> *Ibid.*

closely connected to the ground of detention relied upon by the Government; whether the place and conditions of detention were appropriate; and whether the duration of the detention exceeded what was reasonably required for the purpose pursued.<sup>485</sup>

The Court reiterated concerns previously expressed about problematic practices by the domestic authorities in handling migrant arrivals and subsequent detention.<sup>486</sup> The Court maintained its reservations about the Government's good faith, in applying a blanket detention policy (with only narrow exceptions for specific vulnerable categories) and in bypassing voluntary departure procedures, noting that these two practices *also* occurred in the present case.<sup>487</sup>

Of particular relevance in the present case was the Government's policy that allowed individuals claiming vulnerability to request release.<sup>488</sup> Yet Ms Abdi Mahamud's vulnerability assessment took *eleven months* to be concluded and no explanation or justification was provided for the delays.<sup>489</sup> Ms Abdi Mahamud demonstrated with examples, which were not contested by the Government, that the procedure often was lengthy, and in this case reached unacceptable delays.<sup>490</sup>

Furthermore, the Court noted that *although* she had the opportunity to apply under the AWAS Adult Vulnerability Assessment Procedure, she did so only six months after her detention.<sup>491</sup> It is unclear whether this delay resulted from a significant deterioration in her condition occurring only at that time, or from her lack of awareness of the procedure.<sup>492</sup> While the Government submitted that the procedure was widely known within the migration sector and a policy document had been issued about it and that forms were distributed to individuals working in the sector such as NGOs; it had not been argued that detainees themselves were directly informed of this possibility, nor that the authorities took any proactive measures to identify vulnerable detainees.<sup>493</sup> On the contrary, it appeared that the authorities largely relied on the initiative and goodwill of NGOs.<sup>494</sup>

The Court considered that “*such a lack of relevant information and active steps by the authorities in this regard, as well as the exorbitant delays in the vulnerability assessment procedure*” certainly undermines the very purpose of exempting vulnerable persons from detention and raises serious

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<sup>485</sup> *Ibid.*

<sup>486</sup> *Ibid.*, §131.

<sup>487</sup> *Ibid.*

<sup>488</sup> *Ibid.*, §132.

<sup>489</sup> *Ibid.*

<sup>490</sup> *Ibid.*

<sup>491</sup> *Ibid.*, §133.

<sup>492</sup> *Ibid.*

<sup>493</sup> *Ibid.*

<sup>494</sup> *Ibid.*

concerns regarding the Government's good faith.<sup>495</sup> This was all the more troubling given that it constituted one of the few applicable exceptions to the blanket detention policy.<sup>496</sup>

The Court, even assuming that her first period of detention remained connected to the ground of detention relied, found that the delays in the AWAS procedure in her case raise serious concerns regarding the Government's good faith.<sup>497</sup> These delays were particularly troubling when considered alongside the absence of any other procedural safeguards available to Ms Abdi Mahamud and bearing in mind that, as a consequence of the delay in the assessment process, she endured several months of detention in inappropriate conditions despite her ill-health (Article 3 violation, see above).<sup>498</sup> The domestic system therefore failed, taken as a whole, to protect her from arbitrary detention.<sup>499</sup>

In conclusion, the Court found that there has been a violation of Article 5 §1 in respect of this period of her detention.<sup>500</sup>

After the rejection of her asylum claim, Ms Abdi Mahamud remained detained for almost nine months.<sup>501</sup> Although this period could in principle fall under Article 5 §1(f) as detention with a view to deportation, such detention will be justified only for as long as deportation or extradition proceedings are in progress.<sup>502</sup> The Government argued that she was released once it became clear that her country of origin could not be established, yet the domestic appeal decision had *already* treated her as Somali, and no steps were taken to effect her return.<sup>503</sup> The Government provided no explanation of any efforts to establish her identity or to initiate removal during this entire period.<sup>504</sup> In reality, her release resulted solely from the acceptance of her vulnerability assessment.<sup>505</sup> The Court therefore held that this period of detention was also not compatible with Article 5 §1(f).<sup>506</sup>

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<sup>495</sup> *Ibid*, §134.

<sup>496</sup> *Ibid*.

<sup>497</sup> *Ibid*, §135.

<sup>498</sup> *Ibid*.

<sup>499</sup> *Ibid*.

<sup>500</sup> *Ibid*, §139.

<sup>501</sup> *Ibid*, §137.

<sup>502</sup> *Ibid*.

<sup>503</sup> *Ibid*, §138.

<sup>504</sup> *Ibid*.

<sup>505</sup> *Ibid*.

<sup>506</sup> *Ibid*, §138-139.

- **Asalya v. Turkey, 2014**

Mr Asalya, a stateless Palestinian national, who became paraplegic and wheelchair-bound following a missile attack in the Gaza Strip, which he alleges directly targeted him.<sup>507</sup> He was brought to Turkey by a humanitarian organisation for medical treatment,<sup>508</sup> and subsequently married his Turkish physiotherapist in April 2009, following which he was granted a long-term temporary residence permit.<sup>509</sup> On 12 August 2009, Mr Asalya was taken to the Istanbul Police Headquarters under the false pretext of an interview and was verbally informed that his residence permit had been cancelled and that he would be deported.<sup>510</sup> The deportation order, issued on 27 July 2009 at the request of the Turkish National Intelligence Agency on suspicion of involvement in international terrorism, was never formally served on him.<sup>511</sup> Mr Asalya was placed in the Kumkapı Foreigners' Admission and Accommodation Centre, a regular detention facility that was not adapted for wheelchair users.<sup>512</sup> During his seven-day detention, he was unable to independently use the toilet, as the facility was equipped only with squat toilets and lacked a lift: each time he needed to relieve himself, he had to be carried by at least two police officers to a hotel located fifty metres away, which he found utterly degrading.<sup>513</sup> No special sleeping arrangements were made for him: due to overcrowding and the absence of a lift, he was made to sleep on a table in a ground-floor office.<sup>514</sup> His daily physiotherapy and the constant care provided by his wife were also interrupted during his detention.<sup>515</sup> Mr Asalya was released on 18 August 2009 by a decision of the Interior Ministry, seven days after his initial detention.<sup>516</sup>

- Article 5 violations, not relevant for the purposes of this research

The Court found a violation of Article 5 §1, §4 and §5, however these were not relevant for the purposes of this research, namely considerations of ‘vulnerability’.

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<sup>507</sup> *Asalya v Turkey* App no 43875/09 (ECtHR, 15 April 2014) §6.

<sup>508</sup> *Ibid*, §7.

<sup>509</sup> *Ibid*, §9.

<sup>510</sup> *Asalya v Turkey* App no 43875/09 (ECtHR, 15 April 2014) §10.

<sup>511</sup> *Ibid*, §11.

<sup>512</sup> *Ibid*, §12-13.

<sup>513</sup> *Ibid*.

<sup>514</sup> *Ibid*.

<sup>515</sup> *Ibid*.

<sup>516</sup> *Ibid*, §16.

- Article 3

Before the Strasbourg Court, the Turkish Government did not contest Mr Asalya's allegations regarding the specific conditions in which he was kept, namely that he was detained for seven days in a regular detention facility which was not adapted for wheelchair users, and that no special arrangements were made during that time to alleviate the hardships he faced.<sup>517</sup> The Court recalled in this connection that when authorities decide to place and keep a person with a disability in detention, they must demonstrate *special care* in guaranteeing such conditions as correspond to the *special needs* resulting from his disability.<sup>518</sup> The Court noted that, as a result of the lack of effort to cater for his disability, Mr Asalya experienced serious difficulties in meeting his most basic needs, for example using the toilet.<sup>519</sup> The Court further noted in this connection that the inaccessibility of the sanitation facilities raised a particular concern under Article 3 of the Convention, in particular as Mr Asalya was entirely dependent “*on the good will of the police officers to assist him, on account of the structural deficiencies at the place of detention*”.<sup>520</sup> The fact that his wife was occasionally available to accompany him and the police officers to the toilets, did not diminish his suffering.<sup>521</sup> The Court found it equally unacceptable that Mr Asalya had been required to sleep on a hard table in an office not designed for overnight use, particularly in light of the serious spinal injury he had sustained shortly before his detention.<sup>522</sup>

Whilst there was no evidence that the authorities had intended to humiliate or debase him, the Court nonetheless concluded that the detention of Mr Asalya in conditions where he was denied some of the minimal necessities for a civilised life, “*was not compatible with his human dignity and exacerbated the mental anguish caused by the arbitrary nature of his detention (see paragraph 68 below), regardless of its relatively short period.*”<sup>523</sup> The Court found that Mr Asalya had been subjected to degrading treatment incompatible with Article 3 of the Convention.<sup>524</sup>

The Court noted that the deplorable detention conditions exacerbated the mental anguish caused by *the arbitrary nature of Mr Asalya's detention*, which gave rise to a violation of Article 5 §1 of the

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<sup>517</sup> *Ibid.*, §49.

<sup>518</sup> *Ibid.*, §50.

<sup>519</sup> *Ibid.*, §51.

<sup>520</sup> *Ibid.*

<sup>521</sup> *Ibid.*

<sup>522</sup> *Ibid.*, §52.

<sup>523</sup> *Ibid.*, §53.

<sup>524</sup> *Ibid.*, §53-54.

Convention.<sup>525</sup> His detention was arbitrary on two grounds: first, it lacked a legal basis, as Turkish law contained no clear legal provisions governing the procedure for ordering detention with a view to deportation,<sup>526</sup> and second, Mr Asalya continued to be deprived of his liberty for four days after the Ankara Administrative Court had ordered a suspension of his deportation, at which point his continued detention was entirely devoid of any legal ground.<sup>527</sup>

- **H.M. and Others v. Hungary, 2022**

- Preliminary remarks

Cases involving families with minor children fall outside the scope of this thesis. However, in several such cases the Court has, in addition to finding a violation of Article 3 in respect of the minor children, also found a violation in respect of the accompanying parent, specifically in view of that parent's particular vulnerability. The analysis below focuses exclusively on the Article 3 violation concerning the accompanying parent and the role of that parent's particular vulnerability. To avoid unnecessary repetition, only the most recent judgment among a group of similar cases will be discussed here. Other relevant examples include *M.D. and A.D. v. France* (2021, § 71), concerning a breastfeeding mother, and *R.R. and Others v. Hungary* (2021, §§ 62–63 and 65), concerning a pregnant woman with a health condition.

A comparable case outside the family-with-minors context is *Mahmundi and Others v. Greece* (2012), in which the Court held that the immigration detention of a heavily pregnant woman breached Article 3 of the Convention.

- Facts

A family (a mother, father and their four minor children) left their country of origin, Iraq, after the father had allegedly been tortured by the national security services.<sup>528</sup> They arrived at the Tompa transit zone on the border of Hungary and Serbia.<sup>529</sup> They submitted asylum requests upon their

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<sup>525</sup> *Ibid*, §63–68.

<sup>526</sup> *Ibid*, §66.

<sup>527</sup> *Ibid*, §67.

<sup>528</sup> *HM and Others v Hungary* App no 38967/17 (ECtHR, 2 October 2022) §5.

<sup>529</sup> *Ibid*.

arrival at the transit zone.<sup>530</sup> The family was housed in a container in the family section of the Tompa transit zone, from which they were unable to leave unless escorted by guards or police officers to medical or other appointments.<sup>531</sup> In addition to describing the general conditions in the Tompa transit zone, the family further alleged that the father was a torture survivor who had required but not received any psychiatric or psychological treatment during his time in the transit zone.<sup>532</sup> The mother was pregnant upon arrival at the transit zone and experienced complications during her pregnancy.<sup>533</sup> She was hospitalised on several occasions, and her pregnancy was classified as high risk.<sup>534</sup>

When the mother was transported to hospital by police officers, the father accompanied her whilst handcuffed and attached to a leash, a situation witnessed by their children.<sup>535</sup> He also remained handcuffed in the hospital, including whilst assisting his wife with interpretation.<sup>536</sup> During their stay in the transit zone, the mother repeatedly complained the Immigration and Asylum Office, referring to, among other things, her pregnancy and the difficulties experienced by the father and their children confined in the transit zone.<sup>537</sup> Further, as a form of protest, she refused food for a few days.<sup>538</sup> Their stay in the transit zone lasted for a period of almost four months.<sup>539</sup>

- Article 5 violations, not relevant for the purposes of this research

The family's stay for almost four months in the transit zone amounted to a *de facto* deprivation of liberty.<sup>540</sup> Article 5 is therefore applicable.<sup>541</sup> The Court concluded that the family's detention cannot be considered "lawful" for the purposes of Article 5 §1 of the Convention and that they did not have at their disposal any proceedings by which the lawfulness of their detention could have been decided speedily by a court.<sup>542</sup> There has therefore been a violation of Article 5 §§1 and 4 of the Convention.<sup>543</sup>

- Article 3 regarding the mother

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<sup>530</sup> *Ibid*, §6.

<sup>531</sup> *Ibid*, §7.

<sup>532</sup> *Ibid*.

<sup>533</sup> *Ibid*.

<sup>534</sup> *Ibid*.

<sup>535</sup> *Ibid*, §8.

<sup>536</sup> *Ibid*.

<sup>537</sup> *Ibid*, §9.

<sup>538</sup> *Ibid*.

<sup>539</sup> *Ibid*, §17, 30.

<sup>540</sup> *Ibid*, 30.

<sup>541</sup> *Ibid*.

<sup>542</sup> *Ibid*, 32.

<sup>543</sup> *Ibid*.

Although this case concerned detention in a transit zone and involved asylum-seekers rather than migrants subject to return proceedings, the principles established by the Court could equally apply to return detention conditions (see above) .

The Court found, with regard to *the mother*, that it is established that she had experienced a high-risk pregnancy and experienced repeated complications.<sup>544</sup> Further, whilst she appeared to have received the necessary medical attention, the Court considered that *the constraints inherent during confinement*, to which she was subjected throughout an advanced stage of pregnancy, must have caused her “*anxiety and psychological suffering, which, given her vulnerability, attained the threshold of severity required to engage Article 3 of the Convention*”.<sup>545</sup> The Court accordingly found a violation of Article 3 with respect to the mother.<sup>546</sup>

- Article 3 regarding the father

The Court finds that, unlike the mother, the *father* was “*not more vulnerable than any other adult asylum-seeker confined to the transit zone.*”<sup>547</sup> As regards his alleged mental health problems which were related to his treatment in Iraq, it has not been shown that the father sought any assistance in this connection from the staff in the transit zone. The Court does not therefore find it substantiated that the otherwise acceptable general conditions in the transit zone were particularly ill-suited in the father’s circumstances. No violation of Article 3 was found in this regard.

However, the Court did find a violation of Article 3 regarding the specific issue of him being handcuffed and attached to a leash, there has been a violation of Article 3 of the Convention.<sup>548</sup> (In the absence of any discernible security risk or other legitimate reason warranting the measure, and given that it was not imposed in connection with a lawful arrest or detention, the use of handcuffs and a leash was not justified; it diminished his human dignity and was in itself degrading.<sup>549</sup>)

This approach is not uncommon in the Court's case law. In *Ilias and Ahmed v. Hungary*, for instance, the Grand Chamber also noted that whilst asylum-seekers may be considered vulnerable on account of everything they might have been through during their migration and the traumatic experiences they were likely to have endured previously (as established in *M.S.S. v. Belgium and Greece*, see above),

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<sup>544</sup> *Ibid*, §18.

<sup>545</sup> *Ibid*.

<sup>546</sup> *Ibid*, §19.

<sup>547</sup> *Ibid*, §20.

<sup>548</sup> *Ibid*, §20-28.

<sup>549</sup> *Ibid*, §27.

that there was “no indication that the applicants in the present case were more vulnerable than any other adult asylum-seeker confined to the Röszke transit zone in September 2015”.<sup>550</sup>

- Reflection

The Court's reasoning with regard to the father's mental health and vulnerability is noteworthy and merits critical reflection in the context of this thesis, stating that he was not more vulnerable than any other adult asylum-seeker confined to the transit zone. “As regards his alleged mental health problems which were related to his treatment in Iraq, it has not been shown that the first applicant sought any assistance in this connection from the staff in the transit zone.”<sup>551</sup>

First, the Court held that it had not been substantiated that the father had requested psychological support from the border authorities. There is well-founded scholarly critique regarding the Court's inconsistent approach to the *burden of proof* in this regard. As noted in the literature: “In the material case, not only was the applicant father in an empirically difficult situation to produce the necessary documents (eventually owned by the borders authorities), but it is also noteworthy that the respondent Government had never expressly denied such an allegation. Thus, the ECtHR should have held this circumstance to be proved.”<sup>552</sup>

Second, (even if he didn't ask for psychological support (*quod non*)), must a person actively seek assistance in order to be recognised as vulnerable by the Court? The reasoning suggests, at least indirectly/implicitly, that the answer is yes, which is problematic. It places a burden on the individual concerned, without any consideration of the barriers that may prevent a torture survivor from seeking help (e.g.: distrust of authorities).<sup>553</sup> Further, the Court *therefore* found that it was not substantiated that the otherwise acceptable general conditions in the transit zone were particularly ill-suited in the fathers' circumstances.<sup>554</sup> This is a rather striking corollary/inference. In other words, the question of whether the (acceptable) general conditions in the transit zone could maybe be particularly ill-suited to the father's circumstances only would rise, in the Court's reasoning, once it had been established that he had actually sought assistance from the staff in connection with his alleged mental health

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<sup>550</sup> *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR GC, 21 November 2019) §192.

<sup>551</sup> *HM and Others v Hungary* App no 38967/17 (ECtHR, 2 October 2022) §20.

<sup>552</sup> L Bernardini, 'HM and Others v Hungary', (*Strasbourg Observers*, 19 August 2022) <[strasbourgobservers.com/2022/08/19/h-m-and-others-v-hungary-immigration-detention-burden-of-proof-and-principle-of-necessity-weakening-safeguards-at-the-borders/](https://strasbourgobservers.com/2022/08/19/h-m-and-others-v-hungary-immigration-detention-burden-of-proof-and-principle-of-necessity-weakening-safeguards-at-the-borders/)> accessed 19 June 2026.

<sup>553</sup> including fear, distrust of authorities, trauma-related symptoms, or simply a lack of awareness of available support

<sup>554</sup> *HM and Others v Hungary* App no 38967/17 (ECtHR, 2 October 2022) §20.

problems. Because the Court's reasoning is that, since he did not seek any assistance, it is not substantiated that the general conditions were particularly ill-suited to his situation. Yet it is entirely possible that otherwise acceptable general conditions may nonetheless be particularly ill-suited to a specific individual, for example a victim of torture, as he allegedly is (despite that person didn't seek any assistance).

## ANNEX II - A visual overview of the EMN National Reports

This annex provides a visual overview of the results discussed in Part III, Chapter 3.1. It illustrates how few categories of vulnerable persons are exempted from detention in the EU Member States. For an accurate interpretation, the table must be read together with the nuances discussed in the relevant chapter, including situations in which vulnerable persons are not detained *in practice*, expiry of the detention decision etc.

The first six columns represent the categories and labels as indicated in the common template of the EMN study. The seventh and final column has been added to indicate where an ‘other’ category of vulnerable persons is exempted from detention. This is distinct from the category of ‘other vulnerable persons’ as a whole.

|                 | ‘Disabled people’ | ‘Elderly people’ | ‘Persons with serious illnesses and persons with mental disorders’ | ‘Victims of human trafficking’ | ‘Pregnant women’ | ‘Other vulnerable persons’ | Other            |
|-----------------|-------------------|------------------|--------------------------------------------------------------------|--------------------------------|------------------|----------------------------|------------------|
| Austria         |                   |                  |                                                                    |                                |                  |                            |                  |
| Belgium         |                   |                  |                                                                    |                                |                  |                            |                  |
| Bulgaria        |                   |                  |                                                                    |                                | X                |                            |                  |
| Cyprus          |                   |                  |                                                                    | X <sup>555</sup>               |                  |                            |                  |
| Czech Republic  |                   |                  |                                                                    |                                |                  |                            |                  |
| Estonia         |                   |                  |                                                                    | X                              |                  |                            |                  |
| Finland         |                   |                  |                                                                    |                                |                  |                            |                  |
| France          |                   |                  |                                                                    |                                |                  |                            |                  |
| Germany         |                   | X                |                                                                    |                                | X                |                            |                  |
| Greece          |                   |                  |                                                                    |                                |                  |                            |                  |
| Hungary         |                   |                  |                                                                    |                                |                  |                            |                  |
| Italy           |                   |                  | X                                                                  | X                              | X                |                            |                  |
| Latvia          |                   |                  |                                                                    | X <sup>556</sup>               |                  |                            |                  |
| Lithuania       |                   |                  |                                                                    |                                |                  |                            |                  |
| Luxembourg      |                   |                  |                                                                    |                                |                  |                            |                  |
| Netherlands     |                   |                  |                                                                    |                                |                  |                            |                  |
| Poland          |                   |                  |                                                                    |                                |                  |                            | X <sup>557</sup> |
| Slovenia        |                   |                  |                                                                    | X                              |                  |                            |                  |
| Slovak Republic |                   |                  |                                                                    |                                |                  |                            |                  |
| Spain           |                   |                  |                                                                    |                                |                  |                            |                  |
| Sweden          |                   |                  |                                                                    |                                |                  |                            |                  |

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<sup>555</sup> *Potential* victims of trafficking (broader).

<sup>556</sup> *Recognized* victim of human trafficking. See Latvia, 25-26 for more information.

<sup>557</sup> People due to their health or psychophysical condition presumed to be a victim of torture.