

# Diversion from immigration detention – a study on alternatives to detention and the effects of deprivation of liberty



Title: Diversion from immigration detention – a study on alternatives to detention and the effects of deprivation of liberty  
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**Alternative detention – under scrutiny**

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# Foreword

Deprivation of liberty in the context of migration is a deeply intrusive measure in the life of an individual. Immigration detention for the purpose of enforcing an expulsion order may only be used as a last resort when other alternatives have proved ineffective. In view of this, the issue of immigration detention is of great practical and principled importance to the Red Cross' mission to prevent and alleviate human suffering - locally, nationally and globally. At the same time, in Sweden, we are seeing more and more political proposals for more coercive measures and an increase in immigration detention places and the use of immigration detention in order to make the return process more efficient.

The Red Cross and Red Crescent Movement works for the protection of migrants and seeks to ensure that their rights are respected, and their needs addressed along the entire migration route. We have recently published a report on sustainable and dignified /humane return, *Asylum Denied – Experiences of Return*, which highlights the importance of individualised support and the shortcomings of coercive measures. In this report, we have conducted a legal study based on the authorities' decisions on immigration detention and supervision and examined what the consequences of deprivation of liberty are for the individual and what arguments there are for using alternatives to detention instead of immigration detention?

The Red Cross and Red Crescent Movement has a long history of working in places where people are deprived of their freedom in order to improve conditions and treatment for detainees. In Sweden, this is done through visits to immigration and criminal detention centres. For almost 25 years, we have provided psychosocial support to counter isolation and alleviate the effects of detention. Another aim of the visits is to help strengthen the rights of people in immigration detention.

The Swedish Red Cross' position is that detention of migrants and asylum seekers should be avoided - liberty should be the rule. If people are detained, other options must have been explored in the first place, those affected must be able to understand why they have been detained and the reasons for their detention must be clearly stated in the authorities' decisions. Children should never be detained. This is not always the case today. With this report, we hope to contribute to a discussion based on evidence and experience and to strengthen and deepen the work on immigration detention and supervision in the Swedish context. It is of utmost importance that a broader discussion is held on the use of immigration detention and alternatives to detention - for a humane and sustainable migration process compliant with the principle of legal certainty.



Martin Ärnlov  
Secretary General, Swedish Red Cross

# Thank you

This report is written within the framework of the AMIF-funded project *Alternatives to Detention – Under Scrutiny*, which is run by the Swedish Red Cross since October 2020. The report aims to contribute to the public discussion on immigration detention, deprivation of liberty and its consequences. It is based on evidence and experience of immigration detention and alternatives to detention. A comprehensive report of this kind cannot be done without good cooperation from stakeholders representing different disciplines. We would therefore like to thank all the participants in the project's reference group: Niclas Axelsson (Swedish Migration Agency), Björn Berselius (Stockholm Court of Appeal), Andreas Fällström (Swedish Prison and Probation service), Karin Gyllenring (Swedish Asylum Service), Åsa Petersson

and Jan-Anders Rapp (Swedish Police), Alexandra Segenstedt (Swedish Red Cross), Madeleine Seidlitz (Amnesty International), Rebecca Thornburn Stern (Uppsala University) and Noah Tunbjer (Växjö Administrative Court). Thank you for contributing with your expertise, valuable discussions, information and background material during the preparation of this report.

We would also like to express our special thanks to Olle Hansen Ölmedal for his valuable comments on the content and outline of the report.

Finally, we would like to express our warm thanks to all the staff members involved at Swedish Red Cross for their proofreading, wise words and strong commitment, which made this report possible.

# Summary

The report *Diversion from Immigration Detention – A Study on Alternatives to Detention and the Effects of Deprivation of Liberty* aims to contribute to the public discussion on immigration detention and deprivation of liberty and its consequences. The report is based on evidence and experience regarding immigration detention and alternatives to detention. By reviewing the application of the law, the Swedish Red Cross wants to contribute to ensuring the legal certainty of the decisions taken. The report consists of a legal study supplemented by an account of the research and evidence available on the effects of immigration detention on the individual, and how alternatives to detention can be designed and implemented.

*Diversion from immigration detention – a study on alternatives to detention and the effects of deprivation of liberty*, is a continuation of previous Swedish Red Cross reports *Detention under scrutiny* (2012) and *Children in Immigration detention* (2018). In both reports the Swedish Red Cross has noted shortcomings in the application of the law. The first report noted that the alternative method to immigration detention in Sweden, i.e., supervision, has not been used to the extent intended by the legislator. The second report highlighted that the negative consequences of deprivation of liberty, particularly for vulnerable groups, are rarely taken into account when balancing the State's purpose of immigration detention with the rights of the individual.

Detention should be a measure of last resort – liberty should be the norm. If there are reasons to restrict people's liberty, less integrity-invasive measures – such as alternatives to detention – should be considered first. In Sweden, the only

alternative to detention at present is the obligation to report, known as supervision. This report highlights and clarifies how the application of the law needs to be strengthened, with a focus on supervision. Good practices and arguments for the use of alternatives to detention are highlighted to demonstrate the potential for change. There are methods from other countries that could also be developed in Sweden.

The report is based on three perspectives: **Chapter Two – Legal study** – takes a legal perspective as its starting point. It examines the application of the law by the Swedish Migration Agency and Swedish Police regarding decisions on supervision taken in 2020 and a number of detention decisions in the first quarter of the same year. The legal study reveals that the justifications behind the decisions are generally inadequate and the very basis for placing a person under supervision or in immigration detention is unclear. In the vast majority of the decisions, the assessments are only part of the review that the authorities have to make and often do not include a proportionality and/or a necessity assessment.

The analysis shows that there is often no individual assessment of why supervision cannot achieve the same purpose as immigration detention, in other words the reasons why immigration detention was deemed necessary. Several decisions show that a necessity and proportionality assessment has not been performed, in which the consequences of detention are in reasonable proportion to the purpose, i.e., the enforcement of an expulsion order. Instead, only the potential risk of the individual absconding is assessed.

The way to assess the risk of an individual absconding also differs. In many cases, the person's stated unwillingness to return may alone be the reason behind a decision that immigration detention is necessary. The shortcomings in the decisions potentially mean that people are detained without sufficient grounds with humanitarian consequences as a result.

**Chapter 3 – Effects of deprivation of liberty on health and family life** – is based on a humanitarian perspective. A summary and review of research highlights the consequences that may result from being deprived of liberty. The focus is on particularly vulnerable groups, such as children and families with children. This study shows that there is strong evidence that detention has a profound and negative impact on people's family life, well-being, physical and mental health – even for short periods and even when children are detained with their families.

**Chapter 4 – Use of alternatives to detention** – takes a broad perspective and presents international practice and arguments for the use of alternatives to detention instead of detention. There are alternatives to detention that could be de-

veloped in Sweden that are also more humane, cost-effective and at the same time effective in terms of the state's purpose of immigration detention. The Swedish Red Cross does not advocate any specific alternative to detention, but rather a method of implementing alternatives to detention that are more participative and are not coercive, such as adapting the handling of the case to individual circumstances and specific conditions.

Based on the legal study, the research review and the compilation of possible alternatives and international practice, **Chapter 5 – Concluding reflections and recommendations** – gives several recommendations.

The legislation on immigration detention and alternatives to detention as well as the application of these coercive measures must be changed, improved and legally certain. It cannot be considered reasonable to detain persons without fulfilling basic criteria of legal certainty and when it is considered unavoidably necessary. At the same time, the legislator must ensure that alternatives are available. These should enable the enforcing authorities to fulfil their missions while respecting personal integrity and the specific needs of the individual.

# 1. Introduction

The International Red Cross and Red Crescent Movement<sup>1</sup> visit people in detention around the world. Visits are based on the movement's Fundamental Principles and well-developed methods, which are founded in neutrality, impartiality and independence, among other things. Often, a parallel confidential dialogue with responsible authorities also takes place.

The aim of the Swedish Red Cross' visits to the Swedish Migration Agency's detention centers is to offer psychosocial support to counteract isolation and alleviate the negative effects of the stay. Another aim of the visits is to help strengthen the rights of people in immigration detention. As a result of our collected experiences and observations, the Swedish Red Cross has published two reports on the detention system in recent years. The reports *Detention under scrutiny* (2012) and *Children in Detention* (2018) found shortcomings in the application of the law.

The intention of the legislator is that the implementing authorities should exercise restrictiveness when assessing immigration detention. A decision on immigration detention is a serious interference with personal integrity and the individual's liberty of movement.<sup>2</sup> Restrictiveness means that immigration detention should not be used if the purpose of the coercive measure can be met by considering less intrusive measures such as supervision. Supervision means that a foreigner is obliged to report at certain times to the police or to the Swedish Migration Agency.<sup>3</sup> Supervision is also an interference with personal integrity and must be preceded by a review that fulfils the rule of law.

The Swedish Red Cross has previously pointed out shortcomings in proportionality assessments, i.e., the balance between the State's interest in facilitating enforcement and the interference that the coercive measure entails for the individual is often missing. The negative consequences of being deprived of one's liberty, in particular for vulnerable groups, are rarely considered in proportionality assessments in immigration detention decisions.<sup>4</sup> This is despite the fact that the harmful and potentially lasting effects of detention on family life, well-being, physical and mental health are well documented.<sup>5</sup>

However, the Swedish Red Cross reports conclude that supervision is not used as intended when the rules were introduced. While several stakeholders, such as the Detention Inquiry (SOU 2011:17), the Parliamentary Ombudsman (JO) and the Swedish Red Cross, have examined the use of the detention system in recent years, there is no comprehensive evaluation into the use of supervision. There is thus a knowledge gap regarding the use of immigration detention vs. supervision and whether this is done in a legally sound manner, including by applying necessity and proportionality.

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1 The International Red Cross and Red Crescent Movement is made up of the International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies (IFRC) and 192 Red Cross and Red Crescent Societies.

2 Preparatory works for the Aliens Act, which emphasise the importance of applying necessity and proportionality in the assessment of detention.

3 Chapter 10, section 8 of the Aliens Act. A supervision decision may also require a person to hand in his or her passport or other identity document.

4 Swedish Red Cross (2012) *Detention under scrutiny* and (2018) *Barn i förvar*.

5 E.g., Cleveland et al. 2018, Bosworth, M. (2016), Robjant, K. et al. (2009), Swedish Red Cross (2018) *Barn i förvar*, p. 28. See also ICRC (2017).



The limited use of supervision in Sweden today goes hand in hand with the lack of knowledge about its implementation and effectiveness. In addition, supervision is the only alternative to detention in Swedish law, which makes it impossible for the decision-maker to impose a less or more intrusive alternative to detention than supervision in an individual case. As a result of previous reports, the Swedish Red Cross sees a need to evaluate the use of immigration detention vs. supervision and to present arguments for the use of alternatives that are more humane and cost-effective than detention.

## 1.1 Purpose and key questions

The aim of the present report is to increase knowledge of the law enforcement practices regarding supervision and detention with a view of contributing to ensuring the legal certainty of these decisions. Since research shows that deprivation of liberty can cause lasting negative effects for the individual, immigration detention should be used as a last resort. Therefore, in order to contribute to a better knowledge base that should be taken into account in these decisions, the report also highlights the effects that detention may entail. It also presents arguments for preventing unfounded detention and for developing and implementing alternatives to detention in an engagement-based manner, in line with international recommendations.

The report focuses on vulnerable groups, such as children and families with children. In order to stay concise, not all the results generated by the analysis are presented. Instead, only the areas considered relevant to the project's purpose are presented here. The key questions are:

- **The law enforcement by the immigration detention and supervision system:** Has the legislation been applied according to the legislator's intention? Have implementing authorities considered restrictiveness in the assessment by considering less intrusive measures and detention as a last resort? Are the requirements to apply the principle of proportionality met? Has the decision-maker considered the best interest of the child?
- **Effects of deprivation of liberty on the individual, with a focus on vulnerable groups:** What are the consequences of immigration detention for the individual? What are the effects of detention on vulnerable groups such as children and families with children?
- **Use of alternatives to detention:** What is good practice in terms of alternatives to detention based on current research and experiences from other countries? What are the arguments for using alternatives to detention?
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## 1.2 Methodology and selection

The analysis in the legal part of the report covers decisions on supervision taken by the Swedish Migration Agency and the Swedish Police in 2020. A review of a number of immigration detention decisions in the first quarter of 2020 from the same authorities is made to establish a comparison with supervision decisions. The Swedish Red Cross' previous report *Detention under scrutiny* (2012) covered more than 900 decisions and judgments, which has been a benchmark for this study.

In order to limit the scope of the legal study, a number of choices were made. The aim was to obtain a representative basis for a qualitative analysis of the justification behind

the decisions. The deciding authorities have an obligation to state the justifications behind immigration detention and supervision decisions, according to Chapter 13, Section 10 of the Aliens Act. The obligation to state justifications behind decisions means that the decision must be in writing and contain the reasons on which it is based.

The year 2020 was an eventful year to use as a basis for the investigation of immigration detention and supervision, as the corona pandemic affected operations. There was an assumption that it would influence the decisions made by the Swedish Migration Agency and Swedish Police. In spring 2020, 200 people were released from immigration detention and some of them were placed under supervision. The reason was to avoid the spread of the corona virus within the immigration detention centres, but also because the corona pandemic made it more difficult to enforce expulsion orders.<sup>6</sup> In the selection of immigration detention decisions, the first quarter of 2020 was therefore a particularly interesting period to observe possible changes in the argumentation.

In Sweden, The Swedish Migration Agency, Swedish Police, Swedish Security Service and the Migration Courts can make decisions on immigration detention and supervision under Chapter 10, sections 12–16 of the Aliens Act. The study has focused on first instance decisions, i.e., from the Swedish Migration Agency and Swedish Police. The change rate of first instance decisions by Migration Courts is low, as in all migration cases. This can be interpreted in different ways, including that the Migration Courts follow the decisions made by the Central Administrative Authority, in this case the Swedish Migration Agency. Whatever the reason, the current amendment rate is the reason behind analysing first instance decisions only.

The following requests were made by the Swedish Red Cross to the Swedish Migration Agency and Swedish Police as a basis for the evaluation: all supervision decisions made in 2020 and all immigration detention decisions made in the months from January to April 2020. Immigration detention decisions in Dublin cases under the Dublin Regulation are not included as the study concerns only third-country nationals.

The rationale behind reviewing rejected asylum applications and expulsion orders is that the Swedish Red Cross' legal advisory service is focused on providing legal advice to persons who have applied for subsidiary protection and have received an expulsion order. For this reason, but also to further limit the selection, only non-EU citizens are included. The analysis is based on 372 supervision decisions and 224 immigration detention decisions that the Swedish Red Cross has received from the Swedish Migration Agency and Swedish Police. The total number of decisions is 596. It should be noted that the Swedish Red Cross is not aware if all decisions from the authorities have been handed over. It has been difficult to get a complete picture of the total number of decisions taken during the period. One of the explanations being that cases are registered and recorded retrospectively. After the analysis was completed, Swedish Police stated that they have handed over "a critical mass" to the Swedish Red Cross, suggesting that only a sample of the decisions has been handed over. However, it is considered that sufficient evidence has been provided to achieve the objectives of the study and to draw general conclusions.

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6 The Parliamentary Ombudsmen (2020).

In a number of decisions, the Swedish Police has masked parts of the data on gender and citizenship and therefore a complete list of these elements cannot be provided. The evaluation covers more than 30 different nationalities. The fact such information was missing did not have any obvious impact on the analysis of the decisions.

An individual review of each decision was carried out. Given the purpose and key questions of this report, the analysis sets out to identify the justifications on which the decisions are based. It also allows identifying patterns of application of the law where variations in the wording of and justifications behind the decisions could be evaluated. In two decisions from the Swedish Police, additional documents were requested from the oral hearing in order to gain a better understanding of the background to these decisions.

The other chapters are based on a literature review of international and national research and studies in the areas of alternatives to detention, humanitarian consequences and effects of detention, and international practice on alternatives to detention. Evidence was also obtained from the International Red Cross and Red Crescent Movement.

#### Documentation on immigration detention and supervision

	Decisions received	Decisions removed	Decisions analysed	Of which
Swedish Migration Agency supervision	205	27	178	4 children 36 women 142 men
Swedish Police supervision	218	24	194	13 children 16 women 115 men 63 unknown
<b>TOTAL</b>	<b>423</b>	<b>51</b>	<b>372</b>	
Swedish Migration Agency immigration detention	129	3	126	8 women 118 men
Police immigration detention	102	4	98	3 women 34 men 61 unknown
<b>TOTAL</b>	<b>231</b>	<b>7</b>	<b>224</b>	

## 2. Legal study

The Swedish Red Cross sees a need for increased knowledge of how legislation on immigration detention and supervision is used by law enforcement authorities. The aim is to contribute to developments in this area that both achieve the State's purpose of detention and its alternatives but also respect the rights of the individual and reduce overly intrusive measures on personal integrity. To do this a review and an analysis of a selection of decisions are required. This chapter presents the legal study carried out within the context of the report.

The basic principle in migration law is that, if his/her asylum request is rejected and has been given an expulsion order, a person should first be given the opportunity to return voluntarily, i.e., go back to one's home country by himself. If this does not happen, authorities can act with coercion to enforce the decision. Within the context of the Aliens Act, authorities and courts can order coercive measures by detaining a person, for the purpose of executing the order. The decision on supervision is also an intrusion of a person's life and must be subject to the same key safeguards as a detention decision.

Restricting a person's liberty is one of the most intrusive measures an authority can take. According to the preparatory works of the Aliens Act, detention of migrants may only be carried out if it is absolutely necessary. Authorities must consider restrictiveness in the application of the immigration detention system. Immigration detention should not be used if the purpose of a coercive measure can be achieved by placing a foreign national under supervision.<sup>7</sup>

The focus of this study is on the supervision system and the analysis dwells on the use of supervision as an alternative to detention in connection with a rejected asylum application or expulsion order. The study highlights whether the relevant authorities take into account necessity and proportionality when deciding on supervision. It also examines whether the authorities make a proportionality assessment between the restriction of the individual's rights caused by the measure and the purpose the measure is intended to meet. In comparison to the supervision decisions, a number of immigration detention decisions are reviewed. This is to be able to determine the authorities' reasoning and consideration behind the less intrusive measure of supervision compared to detention. Since grounds for immigration detention is a precondition for taking a decision on supervision, the review itself and the decision-making procedure are also examined. A comparison is also made to see whether there are differences that can be discerned in the review of the circumstances justifying a detention or a supervision decision. In cases where a child is affected by a decision, both directly and indirectly, the justification of the authorities and whether a child impact assessment is de facto carried out are reported.

### 2.1 Legal framework for immigration detention and supervision decisions

#### EU law

If a decision on immigration detention or supervision is taken in Sweden, this must be done in accordance with EU law. As regards immigration detention, the Return and

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<sup>7</sup> For example, MIG (2020:2); prop. (1975/76:18) p. 130 and prop. (1981/82:146) p. 37.

Reception Conditions Directives and the Dublin Regulation are particularly relevant. A person who has been refused entry or must be deported from Sweden is covered by the Return Directive.<sup>8</sup> An asylum seeker in Sweden, irrespective of the stage at which the asylum application is made, is covered by the Reception Conditions Directive.<sup>9</sup> It follows from the latter that a person cannot be detained merely because he or she is seeking asylum. A detention decision may be taken, if necessary, based on an individual assessment of the case and if less intrusive measures cannot be applied effectively.

### **Swedish Foreign Nationals Act**

In Swedish law there are rules on immigration detention in Chapter 10 in the Aliens Act. There are four types of immigration detention: detention to establish identity, detention to prevent absconding, detention for the purpose of investigating the migrant's right to remain in Sweden and detention to effect removal. Detention to effect removal is the most common type of immigration detention. The purpose of detention to effect removal is to be able to carry out a refusal of entry or expulsion order. A prerequisite is that a decision rejecting the asylum application has been taken or it is likely that such a decision will be taken. It may also be used if there is a risk that the foreigner/migrant will engage in criminal activity or obstruct enforcement, for example by absconding or evading the authorities.

In Chapter 1. section 15 of the Aliens Act a number of criteria are set out for what constitutes a risk of absconding and may include that the person:

- has previously absconded
- has stated that he or she does not intend to leave the country following a refusal of entry or expulsion order
- has acted under a false identity
- has not participated in clarifying his/her identity, thereby complicating the review of his/her application for a residence permit
- has knowingly provided inaccurate information or withheld essential information
- has previously infringed a re-entry ban
- has been convicted of an offence which can lead to imprisonment
- has been deported by a public court for a criminal offence.

The legal provision states that the list is exhaustive, i.e., only these listed factors may be taken into account by the authorities when assessing whether there is a risk of absconding.

Chapter 10. section 6 of the Aliens Act states that if the conditions for immigration detention are met, the option of supervision may be used instead. Thus, the same conditions are required for a decision on supervision as for immigration detention. The provision is very brief, simply stating that supervision may be used as an alternative to detention but does not provide any criteria as to when it should be used or whether there are situations where it must be used. Supervision decisions can be taken both during and after the asylum process, during a so-called return process or after a previous immigration detention decision. Furthermore, the supervision decision must be reviewed after six months and then extended or terminated.

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8 Return Directive (2008/115/EC).

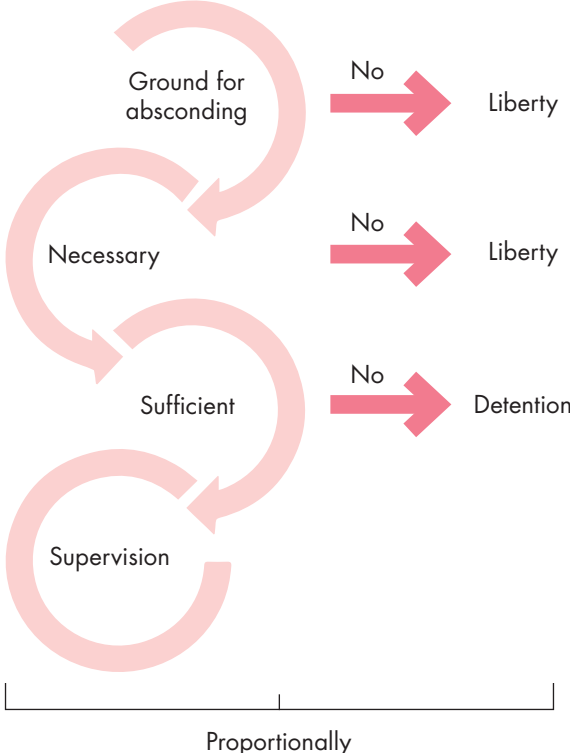
9 Reception Directive (2013/33/EU) article 3.1.

It is stated in Chapter 1. section 8 of the Aliens Act that the liberty of a foreign national may not be restricted more than necessary in each individual case. According to MIG 2006:5, the provision is an expression of the principle of proportionality. From this provision, the assessment of adequacy follows, in reverse so to speak - liberty must not be restricted more than necessary, which means that supervision must be used if it is sufficient. If immigration detention is not necessary, supervision should be chosen as immigration detention is a more intrusive and liberty-restricting measure than supervision. The provision states that in order to choose the more restrictive measure, it must be *necessary*.

**Principles of the Administrative Procedure Act and the conduct of the review**

There are several basic rules/principles in the Administrative Procedure Act that an authority must take into account when making decisions concerning individuals. They must be anchored in the legal order, such as in the law according to the *principle of legality*. The authority must be objective and impartial in its review as well as in its assessment in accordance with the *principle of objectivity*. *The principle of proportionality* also stipulates that the authority may not decide on more intrusive measures than necessary. Furthermore, the authority must ensure that a case is investigated to the extent necessary to take a correct decision in accordance with the *official principle*. Finally, a decision must be justified unless it is evidently not needed. The explanatory justification must state the rule applied and the circumstances or facts which have been decisive for the decision of the authority. Authorities must therefore state the reasons that have determined the outcome of a case. There is therefore a requirement that decisions must be comprehensible to the individual affected by them.

In order to be able to decide to take someone into enforcement detention or to place a person under supervision, it is necessary that the requirements in the legal text are met, i.e., one of the criteria listed as grounds for absconding under the Aliens Act. In addition, the decision-maker must also consider whether it is deemed necessary to detain the



person. There should therefore be no other possibilities for achieving enforcement than with coercion. Then it must be examined whether the purpose can be met by supervision (sufficient), so that the liberty of the person is not restricted more than necessary, according to the *principle of necessity*. Lastly, the decision-maker must always make a proportionality assessment, balancing the interests of the state in carrying out the enforcement against the restrictions on the individual.

In the case of supervision, the review thus follows the same course, since a precondition for supervision is that there is a ground for immigration detention. The decision-maker must therefore first establish that it is possible to detain the person. This means that supervision should not be used until immigration detention becomes relevant, but as an alternative to detention. There are therefore the same number of steps in the process to take a decision on supervision, and the same requirements regarding grounds of absconding.

### **Decision-making structure of the Swedish Migration Agency and Swedish Police**

The Swedish Migration Agency's decisions on immigration detention and supervision are written in the form of a continuous text. There is no limit to the amount of text or its form. However, some text is standardised. This is evident from the fact that the decisions are drafted in a similar way and many sections are identical. The Swedish Migration Agency makes individual decisions, i.e., in a family, each individual, including children, gets a separate decision.

The decisions of the Swedish Police on immigration detention and supervision use forms in which the decision-maker fills in boxes and enters text. The text boxes can be expanded, and thus different amounts of text can be entered. When preparing or implementing a refusal of entry or an expulsion order, an assessment must be made of whether the person will abscond or evade. In the detention form from the Swedish Police, it is stated that the case worker must first consider the grounds for the decision. However, there is no box dealing with the question of whether supervision has been taken into account in the decision-making process. In the template for supervision decisions, the decision-maker must also enter the number of days and time of the week and the place where the reporting will be made. Swedish Police makes joint decisions on supervision and immigration detention for children and their guardians, i.e., on the same form.

## **2.2 Justifications behind immigration detention decisions**

### **The Swedish Migration Agency's immigration detention decisions**

The evaluation shows that the most frequently used justifications behind the Swedish Migration Agency's immigration detention decisions are the risk of absconding, but that the importance given to certain circumstances, such as illegal stay and stated refusal to return, may vary. Several decisions are based on the fact that people have previously evaded law enforcement measures or stayed in the country without permission. Some of these have stayed for days or weeks, while others have stayed for over a decade. Several decisions concern persons who have provided inaccurate information, who have acted under a false identity or who have not helped to prove their identity by submitting an identity document. The justifications also concern people who have made themselves inaccessible to the Swedish Migration Agency or committed crimes in the country. Some people have repeatedly evaded the Swedish Migration Agency or disobeyed summons. In some cases, the person failed to attend at the appointed time on

only one occasion. In another case, the person did not arrive at the appointed time as he was in custody. In one decision, the stated justification is that the person concerned did not answer the phone. In another, that the person has moved out of the Swedish Migration Agency's accommodation without notifying it. Another person is listed as "poste restante" but is said not to have responded to any summons, which may mean that the person was never reached by the summon. Several decisions mention that an application for asylum was made with the aim of delaying enforcement and that the right to seek asylum was thus abused.

In summary, the justifications behind the decisions are based on the assessment that there is a risk of evading or absconding.

### **Immigration detention decisions by the Swedish Police**

The study shows that in several of the immigration detention decisions from Swedish Police, it is stated that the person has not provided an address, has an unknown address or has no permanent address in Sweden. There are also recurring statements that the person does not want to cooperate in accordance with the expulsion order. In one case, the person did not comply with the obligation to report according to a decision on supervision and was therefore detained. Regarding one person, the police wrote that he claimed to be a child, in order to avoid coercive measures. Otherwise, the justifications often concern "illegal" stay, lack of legal residence or visa overstay. A number of people have travelled to another EU country and then been transferred back to Sweden, where the Swedish Police then decides on immigration detention. Travelling to another country is included in the assessment of risk of absconding and evading and is stated as reason for immigration detention. Several of those detained have been convicted of crimes or have criminal charges against them. If there is a risk of a person engaging in criminal activity, this may be an independent ground for detention. If a person has been convicted of a crime, it is one of the listed grounds for absconding.

The Swedish Police thus motivates its immigration detention decisions on the basis of the assessment that there is, for one reason or another, a risk of absconding or evading.

## **2.3 Justifications behind supervision decisions**

### **The Swedish Migration Agency's decisions on supervision**

Of the 178 decisions on supervision from the Swedish Migration Agency upon which the evaluation is based, 90 decisions, i.e., about half, state that there is a basis for immigration detention, but that for various reasons it is considered sufficient to place the person under supervision. Decisions on the need for supervision are justified on the same grounds as immigration detention decisions. Some people have stayed in Sweden "illegally", either after having had a visa or without legalising their stay after entry. The time period for this varies from one month to more than seven years. The decision also states that since the person is presumed to have sought asylum in order to delay deportation, he or she should be placed under supervision.

The justifications behind supervision decisions are mainly that there is a risk of absconding or evading that will make enforcement more difficult or impossible. An overall assessment is often made, which leads to several grounds for absconding or evading being described in the justification. In particular, there are recurring statements that the person has previously avoided to comply with the expulsion order, does not cooperate or has previously not participated in order to complete the expulsion order. What the



word “participate” refers to is generally not clear but is often used in conclusion when the person has not done what authorities have asked them to do, such as contacting the home embassy, attending a meeting or answering a telephone call. There are examples of decisions where the Swedish Migration Agency has taken into account that the person has absconded from an asylum process in another country, which is considered to be grounds for absconding in Sweden.

Another common justification is that the person has provided false information or acted under a false identity, has failed to cooperate with the authorities in submitting or obtaining an identity document. As regards claims of “incorrect identity”, it is also often difficult to discern the basis for this. In the case of identity, it is rarely evident what is meant by “false information”. In some cases, these are people who have submitted new documents or declared a new nationality.

Several decisions describe how the person has stayed “illegally” in Sweden and that there is therefore a risk of absconding. These are people who have not applied for asylum as well as those who have remained after the asylum process has been completed. In a number of cases, persons have been issued with a supervision decision after they have been placed in immigration detention and have applied for asylum there.

The majority of decisions taken during the return process and by the return units of the Swedish Migration Agency indicate that the person has stated that he/she does not want to return, has had a “negative attitude” towards returning or states that he/she does not intend to cooperate in accordance with the expulsion order. In many cases, this is the only basis given for deciding on supervision. It is rarely clear how the person communicated this, whether it was once or repeatedly. Generally speaking, the decisions taken by the return units are very short. They lack reasoning as to whether the Swedish Migration Agency has taken a position on whether there are grounds for detention as should be done in the review.

In cases where persons have previously been issued an immigration detention decision but have since been placed under supervision by a new decision, the basis for this has been that they have expressed a willingness to cooperate in their return process. For example, they themselves have been active and contacted the embassy or a home country authority, provided an address or submitted identification documents. It has also concerned people who have applied for asylum and have been granted a new review following an application of impediment to enforcement or have been granted an inhibition following a decision by an international forum to review the case.

Overall, it can be concluded that the justifications in the Swedish Migration Agency’s decision on supervision are based on the fact that the Swedish Migration Agency considers that there is a risk of absconding or evading. In the absolute majority of the decisions, the nature of this conclusion is stated in very general, and often brief, terms without explaining in more detail how the authority arrived at this conclusion.

### **Supervision decisions from the Swedish Police**

As mentioned above, when deciding on supervision, it must first be established whether there are grounds for immigration detention. Only 2 out of 194 supervision decision from the Swedish Police arrive at this assessment.

The justifications stated in police decisions are often very short, which makes it difficult to get an overview of the person’s background and the basis for the assessment of the

case. It is usually found that, after a final expulsion order, the person has absconded and failed to cooperate with the Swedish Migration Agency, expressed a reluctance to return or cooperate in accordance with the expulsion order. In all decisions, the box declaring a risk of absconding is ticked. This is followed by a short justification. In many cases, the Swedish Police refers to what the Swedish Migration Agency has said about the person and does not make its own justification or assessment of the risk of absconding. Only one of the police regions specifies which of the criteria for the risk of absconding and evading is considered to be present.

To some extent – but not as often as in the Swedish Migration Agency’s decisions - the police will indicate whether the person has identity documents, but usually briefly state when they exist as well as when they do not.

One decision states that the person has changed their mind and wants to cooperate with the police in accordance with the expulsion order. Further reasoning on this is lacking and a decision on supervision is taken. In another case, the person expresses a wish to get help from the police to obtain a passport document. Despite this, a supervision decision is taken without justifying why a coercive measure is considered necessary. In some cases, the Swedish Police notes that there is a fixed address in Sweden and this circumstance seems to be the basis for the decision to grant supervision instead of immigration detention. On the other hand, some decisions state that there is no fixed address, and the person is nevertheless placed under supervision. This shows the difficulty of drawing conclusions about what de facto determines the final decision. In a couple of decisions, people are placed under supervision despite the fact that it is noted that the obligation to report has been previously mismanaged. In one case, there are two supervision decisions taken on the same day. The decisions are in principle identical but contain partly different case facts. However, the outcome is the same. Four decisions are not entered in full but stop in the middle of a sentence.

In two decisions, the justification refers to an oral hearing. In order to better understand the decisions, the report have been requested. One decision concerns a woman and is very short. It is only established that she has not legalised her stay in Sweden, has a legally binding decision and opposes the expulsion order. It is clear from the report minutes that the hearing takes place in the context of immigration detention. The report is seven pages long and contains a review of the case, statements from both the Swedish Police and the public prosecutor, and a decision that the woman should be placed under supervision. This is followed by a position paper containing a legal regulation with relevant legal provisions, reference to preparatory work and custom. An assessment of the risk of absconding and the relationship with the EU Entry Directive follows. It is concluded that since there is no obstacle to immigration detention, there is no obstacle to supervision. The decision itself, taken two days after the hearing, states that the woman will be taken out of detention and placed under supervision, with the obligation to report twice a week. The justification behind the decision from Swedish Police highlights several risks of absconding and evading, but the assessment nevertheless stops there. A full assessment is not made as to whether coercive measures are necessary and thus whether there is a basis for immigration detention. It is not clear why supervision is sufficient. There is also no proportionality assessment. Thus, even in a case where a verbal hearing has been held and there is a lot of documentation in the case, several important components of the decision are missing. The second case, in which supporting documents were also requested, is structured in a similar way.

The results show that decisions on immigration detention and supervision, in varying detail, list a number of circumstances about what has happened historically in the person's case. The circumstances are, as one can understand, used as the authorities' argumentation for or justification behind the existence of a ground for absconding. However, in the vast majority of cases, it is unclear what grounds are actually decisive for the decision on supervision or immigration detention. Among the justification there are aspects that should be in favour of the individual, such as a willingness to contact the home embassy or to cooperate with the authority. However, there is no discussion of these circumstances, it is just briefly stated that there is a risk of absconding without giving any further justification. The existence of a risk of absconding is a basic condition for discussing immigration detention or supervision, but it is not sufficient for a decision to be taken. The supervision decisions, on the other hand, state only in very few cases that there is an assessment that grounds for immigration detention exist, but that detention is considered disproportionate and therefore supervision is considered sufficient.

## **2.4 Assessment of necessity and proportionality in immigration detention decisions**

As detention is deeply intrusive on the privacy and life of the individual, it must not occur in situations other than those where it is considered necessary. Therefore, authorities must consider restrictiveness in the application of the immigration detention system. The Aliens Act states that the liberty of a foreigner must not be restricted more than necessary in each individual case, a so-called principle of necessity or proportionality. The coercive measure may not be taken if it is not necessary for the purpose of the measure. The principle is about balancing different interests, such as the state's demand for regulated immigration against the individual's right to liberty. Should there be an alternative method to achieve a goal, the least possible intrusion of the liberty and rights of the individual should be made.<sup>10</sup> It follows that if the conditions for immigration detention are fulfilled, a balance must be struck as to whether supervision is sufficient to achieve the same objective. If this is the case, detention is not necessary. Instead, supervision should be chosen because it is less intrusive.

The evaluation highlights how the authorities have made assessments of necessity and proportionality, as this is a fundamental and important part of the review determining whether a person's liberty should be restricted.

### **The Swedish Migration Agency's immigration detention decisions**

In order to detain an individual, it is required that, in addition to grounds for absconding, immigration detention is also considered necessary in accordance with the principle of necessity. The measure must not be more intrusive than necessary. Nevertheless, in most decisions necessity is not mentioned. Out of all 126 immigration detention decisions from the Swedish Migration Agency in the evaluation, only 19 decisions mention the criterion "*necessary*". However, the majority of these 19 decisions do not elaborate on why immigration detention is considered necessary. Six decisions briefly state that immigration detention is to be considered necessary. When there is a reference to necessity, there is no stated justification as to why the authority has arrived at the assessment that has been made. Four of the decisions refer to immigration detention as a necessity due to a "high" or "imminent" risk of absconding, whereby it can be assumed that the decision-maker meant that there is no good prospect of enforcement

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10 SOU (2011:17).

without immigration detention and that immigration detention is therefore necessary. One decision states that it is necessary in view of the fact that two previous expulsion orders, now statute-barred, could not be enforced.

Six decisions mention that supervision is not considered sufficient, and that immigration detention is therefore considered necessary. None of these decisions elaborate on why supervision is not sufficient. These decisions are examples of when the review is done in the wrong order. The question of the necessity of the restriction of liberty should come first and be followed by the conclusion that supervision is not considered sufficient. In total, 78 decisions, including the above 6 decisions, only briefly state that supervision is not sufficient without any further justification. In 32 of the decisions, it is stated that supervision is not sufficient in the light of the circumstances of the case, i.e., the grounds for absconding already identified and which should form the basis of the assessment itself.

In 50 of the 126 decisions included in the evaluation, a proportionality assessment is completely missing. Two decisions briefly state that the measure “*is not disproportionate*”, and a total of eight cases make such statements without any real assessment. 17 decisions discuss proportionality and the trade-offs to be made but lack an individual assessment of the person’s own circumstances. In three decisions, the long “illegal” stay in Sweden is compared to the time spent in immigration detention and the detention period is therefore considered proportionate. This in itself is an incorrect basis for assessing proportionality, as the proportionality assessment should consist of a balance between the individual’s rights and the state’s interest in immigration detention, not a balance between the length of stay in Sweden and the time spent in immigration detention.

In total, there are 78 decisions that do not meet the requirements of a proper proportionality assessment. Of the remaining 48 decisions containing a proportionality assessment, only a few can be considered fully satisfactory.

In three of the Swedish Migration Agency’s decisions on immigration detention, there is no assessment or mention of supervision at all.

Six of the decisions refer to the person’s failure to comply with the fulfilment of the enforcement of the expulsion order, or to obey summons or have otherwise been difficult to reach by the authorities, while three decisions mention that the person has stated that he/she does not intend to leave the country. One decision mentions that the person tried to travel to a country other than the country of origin. Two decisions cite the risk of continued criminality as a reason why supervision is not sufficient. One decision mentions that the person has previously had a supervision decision but has not left the country, so supervision is now not sufficient to ensure enforcement in accordance with the expulsion order. However, it is not clear whether or not the supervision decision has been complied with or what has changed.

Categories	Number	By
Proportionality assessment missing	50	126
No real proportionality assessment available	11	126
Individual proportionality assessment missing	17	126
Requirements for proportionality assessment not met	78	126
Proportionality assessment is mentioned	48	126
Necessity is mentioned	19	126
Supervision "not sufficient"	78	126
Supervision not sufficient in the light of the circumstances of the case	32	126
Supervision deemed insufficient, thus detention is necessary	6	126
No assessment or no mention of supervision	3	126
Other assessments of necessity (does not follow actions, does not intend to leave the country or risk of further criminality)	13	126
<i>The same decision may be represented in several categories</i>		

In summary, the evaluation shows that proportionality assessments in the Swedish Migration Agency's immigration detention decisions are generally deficient. Either the assessment is not included in the decision at all or only parts of the assessment are carried out. The same applies to the justifications as to why immigration detention is considered necessary.

Whether the reason is that these assessments are not carried out correctly or that they are carried out but not declared in the decision, it is still to be considered a deficiency. By reading the decision, the individual must be able to understand what the decision is based on and the considerations that preceded it.

### **Immigration detention decisions by the Swedish Police**

A risk of absconding was found in all 98 of the investigated decisions on immigration detention from the Swedish Police. In some cases, a risk of absconding is identified in combination with a person convicted of a crime or suspected of a crime. One decision shows that the prosecutor in a criminal case in the Court of Appeal alleged that there is a risk of absconding and used it as a basis for the immigration detention decision. Only one decision clearly states that there is a basis for immigration detention.

In 16 decisions, it is briefly stated that supervision is not a sufficiently intrusive or coercive measure. One decision indicates that the person has failed to comply with the obligation to report, which is why a decision on immigration detention is issued.

Ten decisions concluded that the person has no fixed address or a residential address unknown to the Swedish Police. This seems to be one reason why immigration detention decisions are taken.

Two decisions contain some form of proportionality assessment. They state that liberty is not limited more than necessary in relation to the aim of preparing and enforcing the deportation or that the reasons for immigration detention outweigh the intrusion or inconvenience caused to the person. One decision finds that the person's liberty is not restricted more than necessary in relation to the aim of preparing and enforcing the deportation.

In conclusion, the decisions on immigration detention from the Swedish Police are short and do not include a full review of the necessity or proportionality of placing the person under a coercive measure.

## **2.5 Assessment of necessity and proportionality in decisions on supervision**

### **The Swedish Migration Agency's decision on supervision**

Of the 178 decisions on supervision issued by the Swedish Migration Agency covered by the evaluation, only 13 of the decisions stated that supervision was a necessary coercive measure. The majority of the reasons briefly stated that a restriction of liberty was considered necessary or that it was considered sufficient to place the person under supervision in order not to restrict their liberty more than necessary. One decision referred to the principle of necessity and thus considered it sufficient to place the person under supervision. In general, the assessments are brief in relation to the facts presented in the decisions concerning the person's background.

Ninety-one decisions are in some way concerned with what might be called a proportionality assessment, although none of the decisions included in the evaluation fully meet the requirement of how a proportionality assessment should be made. Of these decisions, the word "proportionality" itself is used in only 19 decisions.

Furthermore, two thirds of the decisions where some form of proportionality assessment was still carried out concluded that placing the person under supervision was "*sufficient*". Some of these cases list a comparison of immigration detention versus supervision. It is concluded that immigration detention should be applied restrictively, and that supervision is therefore sufficient.

In one case, it is mentioned that a caretaker of a child (not affected by any decision of his/her own but present in Sweden and attending school) should be placed under supervision in view of this. In another, the reason for supervision is that the person has a small child. In the vast majority of cases, it is not possible to determine how the Swedish Migration Agency arrives at the conclusion that supervision is sufficient in the individual case.

In 18 of the 91 decisions where a proportionality assessment was carried out, some form of time aspect was mentioned as a reason for choosing supervision. Reference is made to the fact that it is unclear when enforcement of the expulsion order may take place. As there was a COVID pandemic during the period covered by the evaluation, in 2020, most of the 18 decisions concern closed borders or uncertainty about when air travel can resume. The COVID pandemic is mentioned in a total of 26 decisions as a reason for supervision instead of detention. Three decisions refer to the fact that it is unclear how long the processing time will be, which is why supervision is considered proportionate in relation to immigration detention.

In three decisions, the fact that the person has a fixed address is a factor in the decision on supervision.

A couple of decisions concern persons who were previously detained, but who now cooperate with the Swedish Migration Agency and have obtained an identification document, which makes it proportionate to place them under supervision instead.

In seven decisions, the Swedish Migration Agency refers to a shortage of immigration detention places or a reduction in the number of immigration detention places due to the COVID pandemic and, as a result, the person should be placed under supervision. The assessments are not based on the requirements of the legislation but on the practical arrangements of the authority.

Categories	Number	By
Supervision deemed necessary	13	178
Reference to the principle of need	1	178
Proportionality assessment is discussed	91	178
Mentions the word proportionality	19	91
Supervision deemed sufficient = proportionality assessment	60	91
Time aspect crucial for proportionality assessment	18	91
COVID pandemic crucial for proportionality assessment	26	91
Unclear processing period crucial for proportionality assessment	3	91
Lack of places in detention crucial for proportionality assessment	7	91
Fixed address crucial for proportionality assessment	3	91
Cooperation with the Swedish Migration Agency crucial for proportionality assessment	2	91
<i>The same decision may be represented in several categories</i>		

As regards the Swedish Migration Agency's assessments of the necessity of supervision in the individual cases, it can generally be said that there are relatively few reasons why supervision is considered necessary. As regards proportionality, the Swedish Migration Agency makes some form of assessment in just over half of the decisions. It is mainly based on the justification why supervision should be considered sufficient in relation to immigration detention. However, the majority of decisions are still not fully assessed, and it is difficult to fully understand the assessments. It is also interesting that it refers to the practical circumstances of the authority, which are not part of the review.

### **Decisions on supervision from the Swedish Police**

Among the 194 decisions on supervision from the Swedish Police included in the evaluation, there is one decision stating that it is necessary to place the person under supervision, and then in relation to securing enforcement of the expulsion order.

Only nine decisions contain the word proportionate. Either the decisions state that it will take time before enforcement can take place or that it will take time before enforcement can take place, but then also in combination with the circumstances around the COVID pandemic and that it is therefore more proportionate with supervision than immigration detention.

In nine decisions, supervision is deemed sufficient. Two of the decisions refer to the fact that it will take a long time to obtain travel documents from the relevant countries. The other decisions briefly state that supervision is sufficient, or sufficient in relation to immigration detention. One decision states that the person is now cooperating with the police, so it is sufficient to place him under supervision.

The lack of immigration detention facilities in the country means that in three cases supervision is decided upon instead of immigration detention. One decision states that the person is in immigration detention, but no proportionality or necessity assessment is made as to why a decision on supervision is taken instead. Five decisions refer directly to the corona pandemic and that it is grounds for a decision on supervision instead of immigration detention.

Categories	Number	By
Mentions the word proportionality	9	194
Supervision deemed sufficient = proportionality assessment	9	194
Time aspect crucial for proportionality assessment	2	194
Cooperation with the police crucial for proportionality assessment	1	194
Lack of places in immigration detention crucial for proportionality assessment	3	194
COVID pandemic crucial for proportionality assessment	5	194
<i>The same decision may be represented in several categories</i>		

In conclusion, the authorities do not adequately carry out the entire review. A closer examination of the question of necessity and proportionality reveals that the majority of the decisions are not based on such a review at all. In those decisions where this issue is mentioned, the assessments are largely incomplete or inadequate. This means that any assessment of whether deprivation of liberty is actually required is completely omitted and means that any consideration of the proportionality of the measure is overlooked. It is a serious matter that such cornerstones of the review, which are the few legal certainties that should be provided, are excluded from the review.

## 2.6 Obligation to report

Chapter 10. Section 8 of the Aliens Act states that supervision means that the foreigner is obliged to report to the police or to the Swedish Migration Agency at certain times. It is not evident from the law stipulations specifically that a supervision decision must contain the timelines for the obligation to report, but it is stated that the place where the obligation to report must be specified. The foreigner may also be required to hand in his/her passport or other identity documents. SOU 2011:17 states that: repeatedly having to make long journeys just to report with an authority is, for example, more intrusive than being able to register with an authority in one's place of residence.<sup>11</sup>

The Swedish Migration Agency's decision shows where the person lives and thus how far they have to go to report. However, it is not clear from the decision of the Swedish Police where the person is staying or living. For this reason, it is not possible to determine whether the person has to travel far or is close to the police station where the obligation to report is to take place. One decision states that the person should report twice a week to a specific police station, however, the decision states that "X should be available to the police authority every day of the week". No decision indicates that the Swedish Police or the Swedish Migration Agency have taken the travel route into account as part of the assessment during supervision.

11 SOU (2011:17).



## 2.7 Children in immigration detention

Detention of children should be a last resort. This may only be done if the enforcement of an expulsion order is immediate, if there is an obvious risk that the child will otherwise abscond and thereby jeopardise an enforcement which should not be delayed, and if it is not sufficient to place the child under supervision. A child may also be put in immigration detention if the aim is to enforce an expulsion order and if it has not been sufficient to keep the child under supervision in a previous attempt. This previous attempt must be documented. A child may not be separated from his or her guardian by putting the child or guardian into immigration detention. If there are two guardians, one of them can be put in immigration detention but not both, unless the child is also put in immigration detention.

### Best interests of the child and child impact assessment

The Convention on the Rights of the Child has been Swedish law since 2020. However, the principle of the best interest of the child, i.e., that authorities must make an assessment of what is best for the child for each individual decision, has existed in the Aliens Act for some time. Authorities are therefore required to carry out a child impact assessment for every decision that affects children in any way. This is also the case for immigration detention and supervision decisions - whether they concern guardians or children.

Following the Swedish Red Cross' earlier study *Children in detention*, the Swedish Migration Agency began to make separate decisions concerning children, i.e., each family member receives a separate decision. The Swedish Police does not yet make individual decisions for children in families. However, information was received during the drafting of this report that forms used for decisions concerning children are under review. This means that the Swedish Police currently includes the children in the guardian's decision on supervision or immigration detention. In the decision forms analysed in the study, there is no part that specifically draws the attention of the authority to carry out a child impact assessment or an assessment in accordance with the principle of the best interest of the child.

### The Swedish Migration Agency's decisions on children in detention

In eight decisions, children are indirectly affected by the immigration detention decision, but no decision involved immigration detention of a child. Five of these decisions discuss the best interest of the child and how the immigration detention decision may affect the child. A total of three decisions concerns the impact of a minor sibling in the family unit. It may be considered more necessary to carry out a child impact assessment in the case of immigration detention of one of the parents than in the case of adult siblings. This means that only two out of five decisions where the person has children in Sweden contain a child impact assessment. The two decisions where guardians are placed in immigration detention, and there is a child impact assessment, have both been justified on the grounds that the other guardian can meet the child's needs outside immigration detention without the detained person.

In one of the two cases, it is a mother who is detained, and in the other case it is a father. In the decision detaining the mother, the whole family is covered by the expulsion order. The reasons for the mother's detention are not clear. However, the family has a relatively long stay of seven years and has previously received a supervision decision. It is not clear whether or not the supervision decision has been complied with, only that voluntary return has not taken place. In the case where the father is placed in immigration detention, the length of stay is not specified, but the fact that he previously had a

permanent residence permit in the country is. He has since been deported on criminal charges and given a re-entry ban which has been breached. However, it appears that there is a pending case for a residence permit for family members which has not yet been evaluated. From this it can be concluded that the whole family is not covered by the expulsion order.

In three other cases where children are affected by immigration detention, older siblings are detained. The children have carers who are considered capable of meeting their needs. It appears that the whole family is covered by the expulsion order and that reunification can therefore take place in the country of origin. It is also noted that if the detainee changes his/her mind about returning, the period of immigration detention and separation can be expected to be short.

### **Decisions on children in immigration detention by the police**

Six decisions state that the detainee has a family with children in Sweden, but no child impact assessment or other assessment is made based on the best interest of the child.

### **The Swedish Migration Agency's decisions on supervision of children**

In 13 of the 178 decisions of the Swedish Migration Agency on supervision, children are generally affected by supervision, but only four children have been the subject of an assessment concerning supervision. In the four decisions where children in the same family have received their own supervision decisions, the Swedish Migration Agency writes that the best interest of the child has been taken into account, as the guardian has been informed of the consequences and outcome of the decision if it is not followed. It can therefore be concluded that the assessment and pros and cons according to the principle of the best interest of the child are not applied in the way that they should be.

Among the decisions concerning guardians with children in Sweden, but where they are not directly covered by the decision, there are four that do not contain any child impact assessment or any reasoning on the best interest of the child. In one case, the same reasoning as above is used, that since information has been given to the guardian, the best interest of the child has been taken into account. It states that the child is of sufficient age to understand the decision. Another decision argues that it is best for the child if the father is supervised so that he can be present as a parent. Another one briefly states that supervision is in accordance with the best interest of the child. In the fourth decision, the Swedish Migration Agency cannot take a position on the best interest of the child because he or she absconded along with the mother.

### **The decisions on supervision of children by the Swedish Police**

In 17 of the 194 decisions by the Swedish Police, children are generally affected by supervision, but only in 13 of these cases have children been directly subjected to assessment. The children are included in the decision of the guardian and therefore have no decision of their own. No decisions taken by the Swedish Police contain an analysis of the best interests of the child in the individual case.

In eight decisions, the family had to report to the police three times a week, in five cases twice a week and in the remaining decisions once a week. The Swedish Police generally has a higher frequency of reporting for families with children compared to the Swedish Migration Agency, where the frequency is once a week.

## 2.8 Analysis

### Content and justification of decisions

Our review of decisions shows that the decisions of the Swedish Migration Agency and the Swedish Police on immigration detention are to a greater extent better justified on the basis of the risk of absconding and the grounds for this set out in the Aliens Act than are the decisions on supervision. This is particularly true of the Swedish Migration Agency's decisions written in the body of the text, which increases the possibilities for developing a reasoning. In many of the Swedish Migration Agency's decisions on supervision, the individual's own attitude to return seems to carry a lot of weight, with wording about the person's negative statements about returning appearing to a large extent. In some decisions, this appears to be the main basis for the need of a coercive measure. In migration law, it is implied that people wish to settle in Sweden because they have applied for protection. An assessment of the individual's attitude must therefore be made with relative caution. A person's statement that he or she cannot or will not return to his or her country of origin cannot reasonably, without repeated statements or other factual grounds for absconding, be considered grounds for a coercive measure such as supervision.

It can be established that the justifications in the decisions are generally inadequate and the very basis for placing a person under supervision or in immigration detention is unclear. The assessments made are often only part of the review that must be carried out according to the legislator. They include an assessment of the risk of absconding for a person but lack the full review of necessity and proportionality that must be carried out. It can generally be assumed that there is information elsewhere in the case, in the history or from, for example, negotiations or discussions and evaluations, which is not reported in the decision. Therefore, it becomes difficult to understand the reasons why the authorities come to their decision and what the difference actually is between taking a decision on supervision versus immigration detention.

The lack of justifications has consequences for various parties and bodies in society. The lack of reasoning in a supervision decision has consequences for the individual and constitutes a shortcoming on the part of the decision-making authorities. This can make it more difficult to understand the reasons for taking a decision on coercive measures. In cases where there is a public defender, it may be difficult for the public defender to get a grasp of the reasoning and justification for the decision before an appeal. The reasoning for the number of days a person should report during supervision is missing in both the Swedish Migration Agency's and the Police Authority's decisions. For the individual, it matters whether the obligation to report is once or three times a week. This concerns both the time spent and the cost of getting to the place where the person needs to report.

Without sufficient reasoning, the requirements for administrative decisions set forth by the general principles of administrative law and the requirements set forth by the Administrative Procedure Act are not met either. The requirement for a justification means that the reasons for the decision must be clear. It must also be expressed in a way that allows the person concerned to understand the significance of the decision. Furthermore, it is important that the individual understands how to appeal a decision, which is unclear in the decisions on supervision from the Swedish Police.

### The review process

As noted, the existence of a risk of absconding is a basic precondition for considering immigration detention, but it is by no means sufficient for deciding on immigration

detention. In addition to absconding, the authority must go further and assess whether immigration detention is necessary. Furthermore, it must be absolutely necessary, i.e., in principle unavoidable, or impossible, to carry out the expulsion order of the person. In addition, after establishing a necessity for immigration detention, a proportionality assessment must also be carried out. A review could therefore lead to the conclusion that there are grounds for absconding and that detention is necessary, but that the measure is not proportionate, and that immigration detention should therefore not take place. It is therefore necessary for the authority to carry out the entire review process in order for an immigration detention decision to be correctly taken. It is not acceptable to stop at a risk of absconding.

It is consistently apparent in the material that the bulk of the review focuses on the risks of absconding. In a very small number of decisions, the review is correctly completed. In few cases a proper assessment is made of the necessity and proportionality of an immigration detention decision. Where necessity is concerned, it is consistently the case that accumulated assessments of the risks of absconding are made, rather than an actual assessment of whether immigration detention is necessary or not.

In many cases, it is difficult to understand why a decision on supervision is not considered sufficiently intrusive. Given that supervision is not a pre-detention assessment, but that supervision also requires that the grounds for immigration detention are met, it is strange to take an immigration detention decision solely on the grounds of absconding. The risk of absconding is a prerequisite for supervision to even be considered. It is then contradictory that the very basis for the possibility of supervision is also the reason why it is not sufficient. In other words, grounds for absconding are given as a reason why supervision is not considered sufficient. It would be easy to conclude that supervision is simply not considered to be an adequate alternative to immigration detention. The Swedish Migration Agency's report "Alternatives to detention - an analysis of pilot activities on how supervision as an alternative to detention can be made more effective" from March 2020 shows that the Swedish Migration Agency has historically used supervision sparingly on the grounds that it is a relatively ineffective tool from a return perspective.<sup>12</sup> According to the report, this view has been widespread within the Agency. This may have led to immigration detention decisions being taken when supervision could have been a sufficiently intrusive measure. Based on the deficient assessments of supervision found in the evaluation, this conclusion is obvious.

In conclusion, the authorities do not adequately carry out the entire review, in particular on the issue of necessity and proportionality. In a majority of the decision documents, this assessment is missing. In those decisions where this issue is mentioned, the assessments are largely incomplete or inadequate. This means that an assessment of whether deprivation of liberty is actually required is completely omitted, which means that any consideration of the reasonableness and proportionality of the measure is overlooked.

If it is true that immigration detention is widely used when supervision would have been a sufficiently intrusive measure, this is a serious flaw in the application of the law, resulting in people being detained when less intrusive measures would be considered sufficient - something which is also required by law.

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12 Swedish Migration Agency (2020).

## **Differences or similarities in supervision and detention decisions**

The evaluation shows that similar circumstances are assessed differently from case to case when deciding on immigration detention and supervision. However, it is important to remember that decisions are rarely based on a single circumstance, but many times several circumstances interact.

A person's identity documents are a clear example of a circumstance that is assessed differently. For those who are granted asylum, the only requirement is that they have made their identity probable. For this reason, many do not have a passport. However, when it comes to return, a valid travel document is required. If a person already has a passport, this will facilitate their return. A person without a passport may be ordered to obtain and submit one, as a sign of cooperating to enforce the expulsion order. For immigration detention decisions, it is clear that the issue of a travel document is a frequent basis for assessment, and that persons who do not cooperate in obtaining it are not considered to be cooperating in their return, which then adds to the grounds for taking a decision on immigration detention. In other cases, however, the person has complied with the task and presented a passport, but this does not change the authority's assessment. For supervision decisions, there is also a relatively high number of references to identity documents in the assessment, and of these, the majority concern people who have not submitted them. They are nevertheless considered to be under a non-custodial coercive measure despite the fact that neither a passport has been submitted nor a request to that effect has been complied with. A decision that supervision is not sufficient can therefore be justified both when the person does not have a passport and when he/she has a passport. If a submitted passport does not change an immigration detention decision to supervision, it is questionable why other persons without passport documents can be granted supervision. This may be because the first immigration detention decision is based, among other things, on the fact that the person has not submitted a passport document and is helping to obtain it in the hope of being placed under supervision. When the submitted document does not change the decision of the authority, it becomes unclear to the individual what weight the passport issue carries. Obviously, this is grounds for immigration detention but not enough for a later release and supervision. It may be perceived as a form of influence used by the authority to persuade people to obtain passports, even though the authority has no intention of releasing the person from detention.

The "illegal stay" also affects the outcome of immigration detention and supervision in different ways. The supervision decisions include a duration of stay from 0 to 18 years, and all of them were able to be placed under supervision. In the immigration detention decisions, the duration of stay is in the same range, but supervision has not been considered sufficient. Several of the cases refer to the long period of illegal stay as a reason for immigration detention, and it seems that this circumstance is given weight. In some immigration detention decisions, the illegal period of stay has been mentioned even when it has been short, in some cases a few weeks and in others less than a year. It may be assumed that an illegal period of stay of a few weeks cannot be compared to eleven years together with an expired visa and working in the country without permission. In the latter case, the person has nevertheless been placed under supervision, partly on the grounds that the person has a fixed address in Sweden. In many other cases, a fixed address has not influenced the assessment of the adequacy of supervision but is mentioned briefly and has not been considered as a reason to place the person under supervision.

The requirement for notification or frequency, i.e., how often the person must appear, varies greatly both within the Swedish Police and the Swedish Migration Agency, but

most importantly between authorities. The Swedish Police is more likely to require more frequent notification than the Swedish Migration Agency. The reason for the difference is not clear from the evidence. In their decisions, the authorities do not consider frequency, travel route or time spent by the individual.

### **Child impact assessments**

As noted, there is a limited evidence base of decisions concerning children. However, it can be concluded from the available evidence that a child impact assessment is not carried out in every case where a child is affected. Furthermore, in cases where a child impact assessment is carried out, there are examples of substandard ones, where there is really no reasoning about the best interest of the child but only the actions of the parent are assessed, or information is given to a guardian and thus it is considered that the best interest of the child has been taken into account.

### **Implications of detention and supervision legislation**

The fact that assessments differ both within and between authorities is problematic as it does not constitute predictability - a requirement for a legally sound review. This makes it difficult for the individual to see what actions or statements might lead to a decision on immigration detention or supervision. One reason contributing to this may be the wording of the legislation itself, or rather that the legislation does not provide sufficient guidance. There are also no clear criteria for when supervision should be decided over immigration detention. The provision on the possibility of immigration detention does not provide explicit guidance on when immigration detention must or should be chosen, but states that supervision may be chosen. Guidance can only be found in the preparatory works to the Aliens Act and in Chapter 1, section 8 of the Aliens Act. This means that there are no fixed or tangible criteria for the authorities to use. It is problematic that the law is not sufficiently clear about when authorities should choose alternatives to detention rather than detention through immigration detention. Assessments of whether immigration detention is to be considered necessary or supervision is to be considered sufficient are therefore relatively arbitrary. The assessments are often broad or declarative rather than reasoning. In balancing immigration detention and supervision, the authorities seem to use the same circumstances as arguments for immigration detention as for supervision, regardless of the outcome of the decision. The fact that the law allows for this arbitrariness cannot be blamed on the authorities alone. A fundamental problem is that the law is designed in such a way that it is easy for the authorities to consider that the grounds for immigration detention or supervision are met. In principle, all those who have not carried out their return voluntarily within the time limit for doing so can be considered to meet the immigration detention criteria. In accordance with the current legislation, it can be assessed as a lack of cooperation with the return process and is considered to be one of the grounds related to the risks of absconding.

# 3. Effects of deprivation of liberty on health and family life

The detrimental effects of deprivation of liberty on people’s family life, well-being and mental health are well documented.<sup>13</sup> Nevertheless, the analysis of the previous chapter shows that these consequences are rarely taken into account in the proportionality assessments of immigration detention and supervision decisions. Rather, the analysis shows that often a balance between the state’s interest in facilitating enforcement and the interference that the coercive measure entails for the individual is often missing. There are a number of factors that should be taken into account in proportionality assessments as they have an impact on the individual in detention, particularly for vulnerable groups such as children and children in families.

## 3.1 Effects of deprivation of liberty on physical health

Living conditions in immigration detention, such as lack of access to fresh air or confinement to a specific location, combined with the psychological stress of detention and the prospect of an imminent deportation, can have detrimental physical health consequences.<sup>14</sup> In particular for detainees who have pre-existing health conditions such as asthma, chronic pain or medical illnesses.<sup>15</sup>

Several reports show that physical health deteriorates with detention.<sup>16</sup> Research shows higher rates of physical and mental health conditions among people in detention that are often caused or aggravated by deprivation of liberty.<sup>17</sup> Physical health deteriorates the longer the time in detention lasts. Negative health effects have also been demonstrated after time spent in detention.<sup>18</sup>

## 3.2 Effects of deprivation of liberty on mental health

Research on health in the context of detention shows the negative and potentially lasting effects of deprivation of liberty on people’s well-being and mental health.<sup>19</sup> The World Health Organisation (WHO) defines mental health as “a state of mental well-being in which each individual is able to realise his or her potential, cope with ordinary stresses, work productively and contribute to the society in which he or she lives. Mental health is therefore not the same as the absence of a mental illness.”<sup>20</sup>

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13 Cleveland et al. (2018). See also Bosworth, M. (2016), Robjant, K. et al. (2009), Swedish Red Cross (2018) and ICRC (2017).

14 Cleveland et al. (2018). See also Bosworth, M. (2016), Robjant, K. et al. (2009), Swedish Red Cross (2018) Children in detention and ICRC (2017).

15 Jesuit Refugee Service (JRS) (2010) p. 9. See also Puthoopparambil et al. (2015a), (2015b) and Hollis (2019).

16 Klein and Williams, (2012); Silverman and Massa, (2012); Coffey et al. (2010).

17 Coffey et al. (2010); Fazel and Silove, (2006); Hollings et al. (2012); Keller et al. (2003); Klein and Williams, (2012); Robjant et al. (2009); Steel et al. (2011); Silverman and Massa, (2012); Coffey et al. (2010). See also Puthoopparambil, S.J., Ahlberg, B.M. and Bjerneld, M. (2015a) p. 74.

18 Coffey, G. J., Kaplan, I., Sampson, R. C., Tocchi, M. M. (2010). See also Steel, Z., Silove, D., Brooks, R., Momartin, S., Alzuhairi, B., and Susljik, I. (2006).

19 Cleveland et al. (2018).

20 Public Health Agency of Sweden (2021).



The interaction between external and individual factors often affects the mental health of detainees.<sup>21</sup>

### External factors

External factors relate to the power and control of the authorities over both the system and the environment of the immigration detention centre.<sup>22</sup> In terms of external factors, there are a number of reasons why mental health may deteriorate.

The immigration detention decision and the information about immigration detention have an impact on the mental health of detainees. Detainees often feel that the authorities have no reason to detain them and express a lack of understanding of the reasons why they have been detained in the first place, especially for those who have not committed a crime.<sup>23</sup> There may be various reasons why a person does not understand or absorb the information given when the immigration detention decision/ is presented. Detainees are often under great psychological pressure and an immigration detention decision, as a step towards deportation/refusal of entry, can, among other things, trigger feelings of anxiety, shock and powerlessness. Moreover, many detainees may find it difficult to understand decisions that do not clearly state the reasons justifying their detention. The Swedish Red Cross has repeatedly highlighted shortcomings in the justification of immigration detention decisions.<sup>24</sup>

The physical environment of the immigration detention centre also has an impact on physical and mental health. In Sweden, the legislator's intention was that immigration detention centres should be designed to resemble the reception units of the Swedish Migration Agency. The idea was that immigration detention should be designed in a way that minimises the intrusion on the person's integrity and rights.<sup>25</sup> However, research shows that detainees perceive the environment in immigration detention as prison-like and that they often feel imprisoned in immigration detention centres.<sup>26</sup> In Cleveland et al. (2018), the participants in the study describe that they found it humiliating as well as shocking that they were held in detention, as if seeking asylum was a crime and that they were being unfairly punished for it.<sup>27</sup>

Studies show that the forced transfer from liberty to detention generates many feeling that they are losing control of their lives. Many feel that the sense of lack of control

21 Herbert, T. (2017).

22 Ibid.

23 Swedish Red Cross (2012).

24 Swedish Red Cross (2012), (2018) and chapter 2 of the current report.

25 Aliens Act Chapter 11. 1 § 2 st.

26 Puthooppambal, S J, Ahlberg B M, Bjerned M, (2015a). See also Blanchard, C. (2018).

27 Australian Human Rights Commission (2014).



is due to the restrictions imposed within immigration detention, which are often perceived as random.<sup>28</sup> A person held in immigration detention has limited opportunities to be outdoors, to engage in activities and exercise, and will be fed at set times. The social context of immigration detention leads to enforced isolation and involuntary separation from relatives, colleagues, friends and other relationships built up during the time in the new country, resulting in the loss of several contexts.<sup>29</sup> Immigration detention also implies an enforced presence of other people and a feeling of being watched.<sup>30</sup> Language barriers further contribute to the feeling of loss of control.

External factors may also include access to healthcare. A Swedish study shows that lack of access to healthcare has been a contributing factor to the deterioration of mental health.<sup>31</sup>

In Sweden, for example, detainees have different access to healthcare depending on which immigration detention centre they are in. The number of hours of availability of healthcare workers in the centres varies, as well as the type of healthcare workers available. It also includes access to psychological and psychotherapeutic support. There are also variations in the interpretation of the term “treatment that cannot be deferred”, i.e., the definition of which healthcare that includes persons without a permit to stay in Sweden. Differences in the way detainees’ healthcare is handled in the different immigration detention centres of the Swedish Migration Agency are noted in reports from previous inspections by the Parliamentary Ombudsmen.<sup>32</sup>

Detainees shall also be offered a health examination as soon as is reasonably practicable. There are still variations in access to healthcare screening. The health assessment is essential for identifying the healthcare needs of the individual in immigration detention.<sup>33</sup> It is also crucial for identifying vulnerable groups such as torture survivors and detainees with substance abuse problems.

Uncertainty about the future is a strong contributing factor to the deterioration of psychological well-being in immigration detention. Immigration detention has been described as worse than prison, because a person in prison knows how long the sentence is and can therefore count down the days until it is served. This concerns both the uncertainty about how long the period in immigration detention will be and what will happen after enforcement of the expulsion order. Several detainees say they fear persecution in their home country if they return. Some also feel fear and anxiety about returning to a country where they have not lived before. Family separation as a result of enforcement is also a major source of anxiety and stress. For some, the uncertainty leads to a fear of not doing enough to convince the authorities to allow them to stay in the country. After some time, this can lead to feelings of powerlessness.<sup>34</sup> Detainees live in a kind of limbo, waiting for others to make crucial decisions about their lives while their daily lives are restricted and controlled.<sup>35</sup>

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28 Puthooppambal, S J, Ahlberg B M, Bjerned M. (2015a).

29 Cleveland, J., Kronick, R., Gros, H., & Rousseau, C. (2018).

30 Herbert, T. (2017). See also Katz, I., Powell, A., Gender, S., Deasy, T., & Okerstrom, E. (2013).

31 Puthooppambal, S. J. (2016).

32 For example, Parliamentary Ombudsmen 4831-2016 p. 9. See also Parliamentary Ombudsmen 52-2019, Parliamentary Ombudsmen 1000-2017 p. 7, p. 10.

33 Ibid.

34 Cleveland, J., Kronick, R., Gros, H., & Rousseau, C. (2018).

35 Turnbull, S. (2016). See also Cleveland, J., Rousseau, C., & Kronick, R. (2012).

Lack of autonomy and the possibility to control one's life can lead to depression and passivity or anger. Powerlessness is about loss of control, that the individual can no longer decide about their life. Mental health, in turn, influences an individual's ability to activate themselves to feel competent.<sup>36</sup>

### **Individual factors**

There are a number of individual factors that influence how a person is psychologically affected by being detained. It concerns what a person brings to the table in terms of personality and experience. These may include factors such as previous education, trauma, reasons for fleeing the country of origin and concerns about the family and relatives the person has been forced to leave behind.<sup>37</sup> A further factor may be how the person is used to dealing with difficulties in life, i.e., what "coping strategies" the person has.<sup>38</sup>

A person's past mental health is an important factor in when being deprived of one's liberty. The health of those who were already traumatised when they were detained deteriorated particularly in that environment.<sup>39</sup> Those who are traumatised are more vulnerable to further stress, particularly when memories of frightening events are evoked.<sup>40</sup>

Detention itself often bears similarities to events from which detainees have previously fled.<sup>41</sup> Being held in immigration detention against one's will can evoke traumatic memories of the time before or during the flight, such as having been imprisoned in one's former home country or in one of the countries through which the person fled.<sup>42</sup> There is thus a high risk of retraumatisation, i.e. a renewed or repeated traumatisation, which may exacerbate previous symptoms of trauma during the time in immigration detention.<sup>43</sup>

Another factor is how well detainees can communicate with others in languages they speak. The results show that detainees understand only a limited part of the information they receive in immigration detention.<sup>44</sup> Decisions are written in Swedish and then explained to them orally, often with the help of an interpreter. Many detainees live under great psychological pressure and an expulsion order can, among other things, trigger feelings of anxiety, which can make it more difficult for the person to absorb the information.

### **3.3 Mental health consequences during and after immigration detention**

The interaction between external and individual factors has consequences for mental health during and after the time in immigration detention. Even a short time in immigration detention can have a major impact on a person's psychological well-being.<sup>45</sup> A study by Cleveland et al. (2012) showed that more than three quarters of detainees met the criteria for depression after just 18 days.<sup>46</sup> Research examining differences in mental well-being between migrants in immigration detention and migrants living in

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36 Katz, I., Powell, A., Gender, S., Deasy, T., & Okerstrom, E. (2013).

37 Ibid.

38 Herbert, T. (2017).

39 Blanchard, C. (2018). See also Pourgourides, C. (1997).

40 Cleveland, J., Kronick, R., Gros, H., & Rousseau, C. (2018). See also Pourgourides, C. (1997).

41 Robjant, K., Robbins, I., & Senior, V. (2009).

42 Blanchard, C. (2018). See also Cleveland, J., Kronick, R., Gros, H., & Rousseau, C. (2018).

43 Schauer M., Neuner F., Karunakara U., Klaschik C., Robert C., & Elbert T (2003).

44 Puthoopparambil, S, J., Bjerneld, M., & Källestål, C. (2015).

45 Cleveland, J., Kronick, R., Gros, H., & Rousseau, C. (2018).

46 Cleveland, J., Rousseau, C., & Kronick, R. (2012).

the community found that more detainees met criteria for post-traumatic stress disorder (PTSD) than the other group.<sup>47</sup> This difference was significant after only 31 days in one of the studies, suggesting, according to the authors, that even a short period in immigration detention may be linked to a sharp increase in psychiatric symptoms.<sup>48</sup>

Feeling powerless in immigration detention is considered to be the factor most strongly associated with the severity of symptoms in the diagnoses of PTSD, depression and anxiety.<sup>49</sup> Research shows that detention increases the risk of developing depression, anxiety and PTSD, leading to impaired functioning as a result of poorer mental health.

In addition to PTSD, studies show that anxiety and depression are higher among migrants in immigration detention.<sup>50</sup> In an interview study conducted in Sweden, 66% had reported either mental or physical illness upon arrival in immigration detention. A total of 93% of the participants had experienced new mental health problems after coming to the immigration detention centre.<sup>51</sup> A threefold increase in psychiatric diagnoses among adults in immigration detention has been reported by Steel et al. (2004) compared to adults not living in detention.<sup>52</sup> In Australian immigration detention centres, the rates of suicidal behaviour for men and women were 41 and 26 times higher, respectively, than in the normal population.<sup>53</sup> Psychosomatic problems such as loss of appetite, stomach upset and sleep problems, as well as self-harm behaviour, have been identified in detainees.<sup>54</sup>

Several studies have shown that the length of detention has a significant impact on health, particularly mental health. Even short periods of immigration detention have a negative effect on mental health and the longer a person is detained, the worse they feel mentally.<sup>55</sup> The risk of serious psychological consequences increases over time while the chance of recovery decreases.<sup>56</sup> Longer time in immigration detention has been linked to increased feelings of hopelessness, depression, intrusive thoughts, bodily stress reactions and outbursts of rage. Detainees often show a deterioration in mental health after six months, but in some cases after only three months.<sup>57</sup> The people affected are described as apathetic and passive, losing hope and generally having more negative thoughts about themselves and others. Not knowing when or how the time in immigration detention will end affects the motivation to be active.<sup>58</sup> Some people feel too unwell to participate in activities.<sup>59</sup> This can lead to a negative spiral of depression and inactivity.<sup>60</sup> Seeing the health of others deteriorate can lead to concerns about one's own health.<sup>61</sup>

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47 Robjant, K., Robbins, I., & Senior, V. (2009). See även Cleveland, J., & Rousseau, C. (2013).

48 Ibid.

49 Ibid.

50 Cleveland, J., Rousseau, C., & Kronick, R. (2012). See also Robjant, K., Robbins, I., & Senior, V. (2009).

51 Zimmerman, E. S., Chatty, D., Nørredam, M. L. (2012).

52 Steel, Z., Momartin, S., Bateman, C., Hafshejani, A., Silove, D. M., Everson, N., Roy, K., Dudley, M., Newman, L., Blick, B., Mares, S. (2004).

53 Dudley, M. (2003).

54 Katz, I., Powell, A., Gender, S., Deasy, T., & Okerstrom, E. (2013).

55 Cleveland, J., & Rousseau, C. (2013). See also Robjant, K., Hassan, R., & Katona, C. (2009).

56 Cleveland, J., Rousseau, C., & Kronick, R. (2012).

57 Katz, I., Powell, A., Gender, S., Deasy, T., & Okerstrom, E. (2013).

58 Turnbull, S. (2016).

59 Blanchard, C. (2018).

60 Andersson, G., Bergström, J., Holländare, F., Lenndin, J., & Vernmark, K. (2007).

61 Katz, I., Powell, A., Gender, S., Deasy, T., & Okerstrom, E. (2013).

These consequences can persist for three years after leaving immigration detention, and in some cases four years.<sup>62</sup> One long-term study showed that symptoms and social isolation remained higher amongst persons who were detained and later released than amongst those who were not detained.<sup>63</sup>

### **3.4 The impact of deprivation of liberty on vulnerable groups**

Research shows that detention is particularly harmful for children and other vulnerable groups, such as the elderly, pregnant women, victims of torture or human trafficking, LGBTQ persons, persons with disabilities, mental or physical illness.<sup>64</sup> The special circumstances and needs of these groups should be taken into account when considering a possible detention measure.

The Swedish Red Cross has previously stated that immigration detention has a profound and negative impact on children's health and development, even for short periods and even when children are in immigration detention together with their families. The life of children who have been detained is often interrupted, with lasting effects that increase their vulnerability after release. The UN Committee on the Rights of the Child concluded in 2012 that detention for administrative reasons can never be in the best interest of the child and that it is harmful to the child's physical and psychological well-being and has adverse effects on the child's development.<sup>65</sup>

Detention/Deprivation of liberty is traumatic in itself as it is unpredictable and threatening, especially for a child. Children have been described as frightened and confused in immigration detention, and many believe they are in prison.<sup>66</sup> Both adults and children describe the surveillance as intrusive and that it makes them feel like criminals.<sup>67</sup> The manner in which they were taken into immigration detention can be perceived as traumatic.<sup>68</sup> Suddenly losing your school, home and friends in the process and ending up in a locked place is frightening.<sup>69</sup>

Detention also has a negative impact when children are placed in immigration detention with their families. The child becomes part of an environment that is unfamiliar and limited, uncertain and marked by stress reactions of adults. In immigration detention, the availability of the parent is at risk of being subject to mental illness and is an environment that is threatening for the adult as well.<sup>70</sup> Going into immigration detention with untreated depression affects the ability of parents to care for, comfort and protect their children.<sup>71</sup> It also hampers the parents' ability to help the child develop a secure attachment to them.<sup>72</sup>

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62 Steel, Z., Silove, D., Brooks, R., Momartin, S., Alzuhairi, B., and Susljik, I. (2006). See also Coffey, G. J., Kaplan, I., Sampson, R. C., Turchi, M. M. (2010).

63 Steel, Z., Momartin, S., Silove, D., Coello, M., Aroche, J., Tay, K. W. (2011).

64 International Committee of the Red Cross (2017) s. 3.

65 Swedish Red Cross (2018).

66 Lorek, A., Ehntholt, K., Nesbitt, A., Wey, E., Githinji, C., Rossor, E., Wickramasinghe, R. (2009). See also Mares, S., Newman, L., Dudley, M., & Gale, F. (2008).

67 Kronick, R., Rousseau, C., & Cleveland, J. (2015).

68 Cleveland, J., Rousseau, C., & Kronick, R. (2012).

69 Lorek, A., Ehntholt, K., Nesbitt, A., Wey, E., Githinji, C., Rossor, E., Wickramasinghe, R. (2009). See also Mares, S., & Jureidini, J. (2004).

70 Swedish Red Cross (2018).

71 Mares, S., Newman, L., Dudley, M., & Gale, F. (2008).

72 Mares, S., & Jureidini, J. (2004). See also Australian Human Rights Commission (2014).

Research reports a high level of mental illness among children in immigration detention, partly due to the trauma that occurs there.<sup>73</sup> One study shows that children are ten times more likely to suffer from psychiatric disorders as a result of immigration detention, compared to how they were doing before.<sup>74</sup> Children who have experienced trauma earlier in life are at risk of being traumatised again.<sup>75</sup> They witness their parents' powerlessness, anxiety and other reactions to being in immigration detention.<sup>76</sup> It is considered harmful for children to live among adults who are mentally unwell.<sup>77</sup> Lack of stimulating activities and opportunities to meet other children, as well as isolation from the rest of society, affects their mental health.<sup>78</sup> Immigration detention thus has serious consequences for children's mental health.<sup>79</sup> Unaccompanied minors may be seen as more vulnerable than other children and in need of extra support when they do not have a parent with them. There is therefore a high risk of deteriorating mental health and self-harm behaviour among this group of children in immigration detention. Being in immigration detention hampers their ability to rehabilitate from PTSD.<sup>80</sup>

### 3.5 Family separation and contact with relatives

Family separation can occur both at the time of being put in immigration detention and at the time of enforcement of the expulsion order. The ability to maintain contact with people outside the immigration detention centre is of great importance for detainees and their well-being.<sup>81</sup>

Separating children from their parents leads to great suffering for both children and parents.<sup>82</sup> Separation from family members in the context of detention is an additional separation and strain for some, as they have also lost or left other important people close to them as a result of flight.<sup>83</sup> Parents who have a partner in immigration detention have reported behavioural changes in their children who have been separated from a parent. While some get angry and fight a lot, others become quiet and withdrawn. Children may have problems with eating and sleeping. Their parents report depressive symptoms, anxiety and stress about missing their partner and not being able to support the family alone.<sup>84</sup>

The Adverse Childhood Experiences (ACE) study also highlights the particular circumstances of families with only one parent in detention, where consequences such as depression and anxiety are more common. This is particularly the case for children whose parent has been in detention for a long period of time without a clear criminal offence.<sup>85</sup> Family members of detainees are negatively affected in several ways. When a family member is taken to immigration detention, they often suffer from loss of income,

73 Ibid.

74 Steel, Z., Momartin, S., Bateman, C., Hafshejani, A., Silove, D. M., Everson, N., Roy, K., Dudley, M., Newman, L., Blick, B., Mares, S. (2004).

75 Australian Human Rights Commission (2014).

76 Andersson, G., Bergström, J., Holländare, F., Lenndin, J., & Vernmark, K. (2007). See also Gros, H., & Song, Y. (2016) and Lorek, A., Ehntholt, K., Nesbitt, A., Wey, E., Githinji, C., Rossor, E., Wickramasinghe, R. (2009).

77 Australian Human Rights Commission (2014).

78 Cleveland, J., Rousseau, C., & Kronick, R. (2012). See also Lorek, A., Ehntholt, K., Nesbitt, A., Wey, E., Githinji, C., Rossor, E., Wickramasinghe, R. (2009).

79 Crawley, H., & Lester, T. (2005).

80 Australian Human Rights Commission (2014).

81 Blanchard, C. (2018). See also Katz, I., Powell, A., Gender, S., Deasy, T., & Okerstrom, E. (2013).

82 Cleveland, J., Rousseau, C., & Kronick, R. (2012).

83 Kronick, R., Rousseau, C., & Cleveland, J. (2015).

84 Capps, R., Chaudry, A., Pedroza, J. M., Castañeda, R. M., Santos, R., & Scott, M. M. (2016).

85 Swedish Red Cross (2018).

financial difficulties and housing instability. In addition, their own fear of detention and deportation also increases, discouraging them from accessing, for example, healthcare or education.<sup>86</sup> Many have family, including children, far away from the immigration detention centre, which makes it difficult for family members to see each other. Long distances may mean that family members cannot afford or do not have the opportunity to make these trips. Some detainees may also have relatives in other countries and have problems with getting in touch with them.

When the authorities decide to detain one or both of the guardians of a child, there are two options to consider: to detain the whole family or only one of the guardians and then separate the child from one of its parents. Both practices are contrary to established knowledge about child health and development in general and the health of detained children and adults in particular.<sup>87</sup>

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86 Red Cross EU Office Migration Unit (2016).

87 Swedish Red Cross (2018).

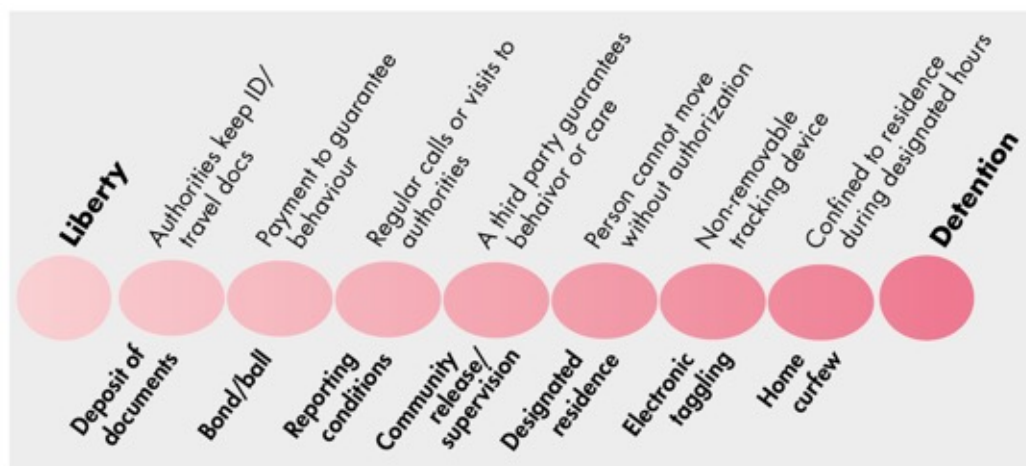
# 4. Use of alternatives to detention

There is good practice regarding the use of alternatives to detention based on current research and experience from other countries. Knowledge of this will provide a better understanding of when and how alternatives to detention can be effective. In addition, there are a number of arguments for using alternatives to detention instead of detention.

## 4.1 Alternatives to detention

There is no established legal or generally accepted definition of alternatives to detention.<sup>88</sup> Various terms such as “non-custodial measures” or “less intrusive measures” are often used in reference to alternatives to detention.<sup>89</sup>

As alternatives to detention also impose conditions or restrictions on a person’s liberty of movement, they should not be confused with liberty per se, which should always be the norm. Liberty is a fundamental right and decisions on immigration detention and alternatives to detention should only be taken in the light of the circumstances of each individual case and should be time limited. Alternatives to detention may only be used if there are grounds for detention and if there are no less intrusive measures to achieve the same objective, i.e., a less intrusive alternative to detention. The main alternatives to detention should be non-custodial and must not become alternative forms of detention. There is a wide range of alternatives to detention that are more or less intrusive depending on what they are and how they are implemented. The figure below shows some of the alternatives available around the world.<sup>90</sup> The only alternative measure to detention that Swedish legislation allows is supervision.



88 De Bruycker, Philippe (ed.), Bloomfield, Alice, Tsourdi, Evangelia, and Pétin, Joanna (2014) p. 59.

89 Alternatives to detention are defined as “any legislation, policy or practice that allows migrants to reside in the community subject to a number of conditions or restrictions on their freedom of movement. The definition is based on that of UNHCR (2014) but is broadened to include migrants based on the IFRC migration policy.

90 The figure below has been adapted from the figure in Edwards (2011) p.53. Please also see UNHCR (2015), De Bruycker (ed.) (2014), Council of Europe (2014).

## 4.2 Alternatives to detention in Sweden: Supervision

The alternative measure to detention that Swedish legislation provides for is supervision.<sup>91</sup> The preparatory works to the Aliens Act underline the importance for the implementing authorities to exercise restraint when assessing immigration detention, as a detention decision involves a serious interference with personal privacy and the individual's liberty of movement. It also states that immigration detention should not be used if the purpose of a coercive measure can be served by placing a foreign national under supervision.<sup>92</sup> Implicit in this is, among other things, that an assessment should always be made as to whether the measure of supervision can be used for the individual instead of immigration detention. In the case of children, this is explicitly stated in the Aliens Act.<sup>93</sup>

In the period covered by this report, i.e., 2020, 711 persons were placed under supervision, including 11 children by the Swedish Police. This compares to 2,528 placements in immigration detention, i.e., people who have been discharged from there. A person may receive several decisions in one year, when the placement is extended. This shows that immigration detention is still the most common option for decision-makers in Sweden and that supervision is used to a limited extent.<sup>94</sup>

	Swedish Migration Agency	Swedish Police	Both authorities		
	Supervision	Supervision	Supervision	Detention, decisions	Detention, placements
<b>2018</b>	892			7,593	3,816
<b>2019</b>	732			8,465	4,295
<b>2020</b>	240	471	711	5,084	2,528
<b>2021</b>	103	449	552	4,569	

Several stakeholders have pointed out in recent years that supervision is not used to the extent it is intended. All the reports of the Swedish Red Cross on immigration detention and supervision show that decision-making authorities often consider that supervision is not a sufficient measure to achieve the same purpose as immigration detention.<sup>95</sup> Therefore, it is important to understand how supervision is applied.

Apart from the analysis made in the official report of the Swedish Government from 2011 on detention (SOU 2011:17), there is no research on the use and actual application of alternatives to detention in Sweden.<sup>96</sup> The Detention Inquiry identified a number of implementation problems with regard to immigration detention and supervision of children and families with children. Among other things, the evaluation stated that the police often refrain from making a supervision decision in the case of a child and their family, and that no attempt is made to arrange a voluntary return. This is partly to avoid unsuccessful enforcement attempts, and partly to avoid that the family will be absconding and then going into hiding for a long time.<sup>97</sup>

91 According to Chapter 10, supervision entails section 8 of the Foreign Nationals Act states that a foreign national is obliged to report at certain times to the local Swedish Police or to the Swedish Migration Agency. A supervision decision may also require a person to surrender his or her passport or other identity document.

92 Prop. (1981/82:146) p. 37. See also Prop. (2011/12:60). Article 17(1) of the Return Directive states that unaccompanied children and families with children must only be held in detention as a last resort and for the shortest possible period of time.

93 Foreign Nationals Act Chapter 10 section 2, first paragraph 3.

94 European Migration Network (2014) p. 27.

95 Swedish Red Cross (2012) p. 59. Please also see Zamacona Aguirre, M (2013).

96 SOU (2011:17).

97 SOU (2011:17) p. 93-94.



In 2018, the Swedish Migration Agency carried out an analysis of how the need for supervision and immigration detention is assessed within the Agency, whether there are differences in the assessment and whether the decisions have the desired effect.<sup>98</sup> The results show that the Swedish Migration Agency makes immigration detention decisions in almost nine out of ten cases out of the total number of immigration detention and supervision decisions analysed in the report.<sup>99</sup> This is despite a general attitude, reflected in the analysis report, that the current shortage of immigration detention places leads to more supervision decisions being made. The analysis report states that part of the explanation lies in the perception that the supervision system is an ineffective tool, especially in cases where the right to assistance has been terminated and the individual is therefore discharged from the welfare system.

This view is also confirmed in the Swedish Migration Agency's report from 2020 on the pilot project at the reception units in Örebro and Karlskrona.<sup>100</sup> The Swedish Migration Agency's Central Region and Southern Region carried out a pilot study at these reception units with the aim of evaluating how supervision as an alternative to detention can be made more effective. The pilot study ran from 1 September 2018 to 30 June 2019. The report states that the Swedish Migration Agency has historically used supervision sparingly, arguing that supervision is a rather ineffective tool from a return perspective.<sup>101</sup> This is despite the fact that there is no evidence to either confirm or refute the claim. According to the report, the perception that supervision is not a viable tool has been widespread in the Agency and may therefore have led to immigration detention decisions being taken when supervision could have been a sufficiently intrusive measure.

The aim of the pilot study was to make decisions on supervision in all cases where there was a basis for doing so and to hold structured and motivational talks. The Swedish Migration Agency presented the results in the report *Alternatives to detention - an analysis of pilot activities on how supervision as an alternative to detention can be made more effective*, which is based on the above-mentioned pilot activities.<sup>102</sup> The scope of the pilot activities is too small to draw broad conclusions about its effectiveness. In addition, the reception units did not receive increased resources when the pilot study was launched. It appears from the report that, due to lack of resources, it was complicated to conduct the interviews on a regular basis. However, it is not clear whether the Swedish Migration Agency has tailored the processing of these cases to each person's individual circumstances and specific conditions. This is of great importance when dealing with vulnerable groups, such as children and families with children, who were included in the selection.

The limited use of supervision goes hand in hand with the lack of evaluation of existing alternatives. Most EU Member States lack reliable statistics on alternatives to detention, which makes it difficult to assess their levels of application. In Sweden, statistics on supervision exist but without systematic and qualitative evaluation of its effectiveness and actual application. Qualitative data would better illustrate how and why certain measures encourage or hinder compliance with alternatives to detention.

The application of alternatives to detention, such as supervision, is crucial in assessing the intrusiveness of the coercive measure. The analysis in this report shows that the frequency of reporting or surveillance ranges from one to three times a week. In 43%

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98 Swedish Migration Agency (2018). See also EMN (2014).

99 Swedish Migration Agency (2018) p. 3.

100 Swedish Migration Agency (2020) p. 3.

101 Swedish Migration Agency (2020) p. 3.

102 Swedish Migration Agency (2020).

of the decisions, people were required to report twice a week. In 29% they would report once a week and in 28% three times a week. More than a quarter of the decisions require people to report three times a week, which can be considered a major interference in the individual's life. It is important that supervision is applied in such a way that the person's liberty is not restricted more than necessary and should be proportionate in each individual case. Coercive measures such as supervision, depending on how they are applied and how intrusive they are, can have an impact on people's well-being, mental health and family life. Alternatives to detention should respect the principle of minimum interference and comply with the principle of the best interest of the child, together with the child's rights to liberty, family life and privacy. This report indicates that this is not the case in several of the decisions analysed.

Sweden is not unique in this respect. EU countries largely choose to focus on "traditional" coercive alternatives to detention, such as supervision. It is therefore important to explore more alternatives to detention, beyond supervision, that are both more humane and effective. This becomes even more relevant when it concerns children and families with children.

Research also shows that the use of coercive alternatives to detention may risk expanding the use of coercive measures in real life without leading to a real reduction in immigration detention.<sup>103</sup> In Sweden, the use of supervision, despite its limited use, has not contributed to a reduction in immigration detention. It is therefore important that immigration detention does not occur in situations other than where it is strictly necessary, and that supervision is used as an alternative to detention and not in addition to it.

### 4.3 Good practice on alternatives to detention

Research shows that alternatives to detention are more humane, effective and cost-effective than immigration detention.<sup>104</sup> The Swedish Red Cross does not endorse any specific alternatives to detention. However, we advocate an approach to implementing alternatives to detention that is participatory and not coercive.

The use of participatory alternatives to detention has proven to be a more successful approach than "traditional" alternatives to detention, which focus on a range of restrictions or conditions imposed on the individual, such as supervision, residence requirements and bail. This approach is based on social work methods and "tailored management to allow the individual to explore the different options available".<sup>105</sup> Research suggests that these alternatives are more effective. If people feel that they have gone through a fair process and their basic needs have been met, they are more likely to stay involved and comply with the return requirements. This also applies when people have to accept possible negative decisions about their status. A participatory approach to alternatives to detention entails:

- **Good understanding of the asylum and return process, its outcomes and the obligations of the asylum seeker.** Experience shows that information on the consequences of a negative decision at an early stage improves cooperation, including in the return process.<sup>106</sup>
- **Access to legal advice.** Legal advice or guidance for returnees aims to exhaust all available legal options. This has been shown to increase the number of voluntary returns.<sup>107</sup>

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103 International Detention Coalition (2017).

104 International Detention Coalition (2017). Please also see Swedish Red Cross, (2018) p. 36.

105 Ibid.

106 Swedish Red Cross (2016).

107 International Detention Coalition, (2017).

- **Access to a full range of social and healthcare services, including social welfare and education.** This should continue to be provided even if the child or family has not complied with an expulsion order. Experience shows that access to community services, such as access to education for children, even during the return process, can improve cooperation between individuals and relevant authorities. Current practice in Sweden and in other EU countries shows that lack of access to community services can hinder the application of alternatives to detention.<sup>108</sup>
- **Holistic and tailor-made handling of the case.** Alternatives to detention should be tailored to each person's individual circumstances and specific conditions. This involves a process that identifies options for individuals as a result of an individual assessment process. This is of great importance when dealing with vulnerable groups such as children and families with children, including in cases where there are practical obstacles to enforce an expulsion order, so-called "unreturnables" and stateless persons.
- **Appropriate options for vulnerable groups.** Research shows that family-based and participatory options are the most suitable for children and families with children. Whether the implementation of alternatives to detention is driven by the authorities in state accommodation, by non-governmental organisations or by them jointly, there are several important factors that contribute to the successful implementation of alternatives to detention for children and families with children.<sup>109</sup>
- **Application of alternatives to detention with respect for fundamental rights.** The main alternatives to detention should be non-custodial and must not become alternative forms of immigration detention. There are alternatives to detention, such as designated accommodation and ankle bracelets, which are not recommended for children and families with children.<sup>110</sup> Depending on how these alternatives are implemented, they may in some cases be considered as forms of detention.<sup>111</sup>

#### **4.4 The importance of return interviews for a good understanding of the return process, its outcomes and the responsibilities of the applicant.**

The Swedish Migration Agency has an obligation to arrange an informative meeting in the event of an expulsion order. However, the applicant does not have the right to a so-called return interview, instead it is up to the Swedish Migration Agency to decide what type of communication procedure they consider appropriate to inform about the conditions of return. In other words, it may be considered enough to call or send a letter.

In recent years, the number of pending cases at the Swedish Migration Agency has increased by 290 percent. One explanation is the introduction of the possibility of obtaining a temporary residence permit through the so-called Secondary School Act. Over the same period, the number of caseworkers has decreased, which means that the remaining workers have to process more cases. As a result, they spend more of their time on administrative tasks and less time on motivational talks, among other things.<sup>112</sup>

During a so-called return interview, information is usually provided on the return conditions in each individual case, whether voluntary or coercive. The caseworker will also

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108 European Alternatives to Detention Network (2018).

109 Swedish Red Cross (2018) p. 36.

110 Bruycker et. al. (ed.) (2014) pp. 102-104.

111 Detention Action, (2016) p. 60.

112 See Swedish Agency for Public Management (2022) Work of the agencies and people returning to their home country - analysis and proposals for improving the efficiency of operations, (2022:1) p. 38.

evaluate the person's so-called attitude to return. The experience of the Swedish Red Cross shows that people sometimes express an unwillingness to return to their home country in conversations with the Swedish Migration Agency or the police after an expulsion order has been issued.<sup>113</sup>

There are cases where only the person's statements about his/her unwillingness to return to his/her home country during interviews with the Swedish Migration Agency or the police have been decisive in the assessment of an immigration detention decision or its extension. In these cases, no overall assessment has been made, but the primary focus in the assessment of the risk of absconding has been given to these statements.<sup>114</sup> Many asylum seekers often live under great psychological pressure and an expulsion order can, among other things, trigger feelings of anxiety, shock or powerlessness. This does not automatically mean that the person is unwilling to cooperate in the enforcement of the expulsion order. However, there is a risk that statements made during this interview could form the basis for a possible decision on immigration detention at a later stage.

The experience of the Swedish Red Cross shows that persons are sometimes not informed that a negative answer to the question about participation in enforcement can possibly be the basis for a decision on supervision or immigration detention. What is then said in the heat of the moment can have far-reaching consequences in the individual case. It happens that persons have submitted an application of impediment to enforcement.<sup>115</sup> In these cases, it is highly contradictory to express a willingness to return to the country of origin and to cooperate in the enforcement of the expulsion order.

Persons already in immigration detention or under supervision may also express a reluctance to cooperate in their enforcement process in conversations with the Swedish Migration Agency or the police. This can then form the basis for a reassessment of their immigration detention decision. It may also be the basis for an extension of the supervision decision or lead to a possible immigration detention decision.

The individual's attitude towards return is crucial for voluntary return, according to the latest proposal from the City Office. If a person accepts the decision, the conditions for enforcing the decision are in place. It requires methods that help motivate people to work together. This involves providing information early on about possible decisions in the process, what different decisions may lead to and what the conditions are for actually being allowed to stay in Sweden. This can be done through several return interviews.<sup>116</sup> Therefore, it is of great importance how return interviews are conducted and what information the individual receives about the return throughout the process. An assessment of risks of absconding that places so much weight on statements from the interview with the relevant authorities requires a well-informed return interview.<sup>117</sup>

#### **4.5 Arguments for the use of alternatives to detention instead of immigration detention**

According to research and the experience of the International Red Cross and Red Crescent Movement, there is a strong case for working with governments to prevent

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113 Swedish Red Cross (2012) p. 57.

114 Swedish Red Cross (2012) p. 57. See also Swedish Red Cross (2018).

115 Ibid p. 57.

116 Swedish Agency for Public Management (2022) p. 39f.

117 Ibid, pp. 56-57.

unnecessary detention, promote liberty and ensure that alternatives to detention are developed and implemented in a participatory manner.<sup>118</sup>

### **a) The humanitarian argument**

The negative and potentially lasting effects of detention on people's well-being and mental health are well documented. As shown in this report, the mental health of detainees is a result of individual, or pre-existing, factors and external factors, such as detention and treatment in detention. Immigration detention can exacerbate trauma experienced in the country of origin or on the flight route, including for those who have previously been detained. The main mental health problems caused by detention are depression, anxiety and PTSD. Moreover, being deprived of liberty for reasons that may not be understood creates a strong sense of injustice and alienation.<sup>119</sup>

The longer the detention period, the stronger the negative impact on people's mental health. Detention of particularly vulnerable groups, and children in particular, is particularly harmful. Even short-term immigration detention affects the child's physical and psychological well-being. The negative effects do not disappear the moment the child is released. On the contrary, they are likely to continue for a long time. The life of children who have been detained is often interrupted, with lasting effects that increase their vulnerability after release.<sup>120</sup>

### **b) The legal argument**

States have the right to regulate immigration, but this right is not absolute. Laws, policies and practices must always uphold the rights of migrants and respect international law, where liberty is the starting point. There is an obligation under EU law for authorities to explore alternatives to detention before resorting to detention and to have this obligation clearly enshrined in law. The aim is to avoid the arbitrary imposition of restrictions on liberty or freedom of movement. Authorities should only apply alternatives to detention that protect the rights, dignity and well-being of individuals.

In recent years, several international organisations have become more vocal on the issue of immigration detention being applied to children solely on the basis of their migration status and its compatibility with existing international law. For example, the UN has expressed that immigration detention of children for reasons relating to their or their parents' migration status should be "prohibited by law" and this prohibition should be "implemented in practice". When children are together with their guardians, the need to keep the family together is not a valid reason to motivate the child's detention. When the principle of the best interest of the child requires that the family be kept together, the requirement not to put the child in detention extends to the child's parents.

Therefore, the authorities should choose solutions that do not involve detention for the whole family.<sup>121</sup>

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118 Red Cross EU Office Migration Unit (2016), ICRC (2017) and PERCO (2017).

119 Bruycker et.al. (ed). (2014) p. 26.

120 See also chapter 3 of this report.

121 Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, para. 11, <http://www.refworld.org/docid/5a12942a2b.html>. See also European Parliament resolution of 3 May 2018 on protecting migrant children (2018/2666 [RSP] ), which stresses "that children must not be detained for immigration purposes and calls on Member States to house all children and families of children in a non-custodial, community-based manner while their migration status is being processed".

### **c) The efficiency argument**

States often use detention based on the perception that it is more efficient for the enforcement of expulsion orders, reduces absconding and puts the individual at the disposal of the authorities.

Research suggests that detention reduces migrants' confidence in the system and hinders access to the type of support and assistance that the migrant needs to follow during the migration process.<sup>122</sup> While the implementation of alternatives to detention can sometimes be problematic, it is important to recognise that such alternatives, when implemented with a participatory approach, also meet the states' compliance and efficiency objectives.<sup>123</sup> To increase compliance, several alternatives to detention should be made available to the decision-maker to ensure that the type of alternative chosen matches the profile of the individual. Early access to support, advice and information contributes to maintaining the individual's cooperation with the authorities, and ultimately the enforcement of an expulsion order.

### **d) The cost-effectiveness argument**

Both the short-term and long-term costs of immigration detention are well documented. In addition to the lasting impact immigration detention can have on people's ability to live meaningful lives, it is also costly in economic terms. These costs are paid by individuals, but also by communities. In the vast majority of cases, liberty and alternatives to detention are not only better for the well-being of migrants, they are also generally much more cost-effective than detention.<sup>124</sup> Several studies at EU level have shown that immigration detention is costly for the state, and that alternatives are up to 80% cheaper.<sup>125</sup>

The cost of immigration detention includes the costs of having physical structures in place, such as staff, materials, food, repairs etc., but also hidden costs such as legal costs, transport to and from detention centres, police custody etc.

### **e) The comparative argument**

It is also important to examine how Sweden compares with other EU countries in terms of children in immigration detention. Half of the EU Member States prohibit immigration detention of unaccompanied minors.<sup>126</sup> The significant number of Member States that prohibit immigration detention of unaccompanied minors suggests that it is possible to implement effective asylum and return procedures without depriving them of their liberty.

Ireland is the only EU Member State that completely bans immigration detention of children in the asylum process as well as on return. Other Member States do not allow immigration detention in principle, but do not prohibit it completely either.<sup>127</sup> In Italy, Portugal and Spain, for example, the practice is not to detain children in the asylum or return process.

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122 Edwards (2011) p. 34.

123 Please see chapter 4.2. for more details.

124 IDC (2015), JRSE (2011), JRSE (2012), UNHCR (2014), UNHCR (2015).

125 De Bruycker, Philippe (ed.) p. 23. IDC (2015) p. III.

126 European Union Agency for Fundamental Rights (2017) p. 38.

127 European Union Agency for Fundamental Rights (2017) p. 34–36.

# 5. Concluding reflections and recommendations

## 5.1 Concluding reflections

In previous reports from 2012 and 2018, the Swedish Red Cross has highlighted the shortcomings in the law enforcement by the immigration detention and supervision system that are also highlighted in the current report. It is therefore worrying that these shortcomings still exist. High standards of legal certainty must be applied to a decision concerning deprivation or restriction of liberty. Several stakeholders, including the Swedish Red Cross, have previously proposed a codification of the principle of proportionality, which we believe will mean that implementing authorities will have to reason and justify their decisions more in accordance with the principles of the current legislation. Even the shortcomings that we see in this evaluation show that this need continues to exist.

The results of this evaluation, as well as previous evaluations, show the difficulties of analysing and responding to decisions that do not explain the real reasons justifying the measure. It is therefore not sufficient to merely state that there is reason to believe that the foreign national will abscond. The legal and factual grounds for an authority to detain a person or to place a person under supervision should be carefully justified and clearly stated in the decision. This is of great importance for the individual, for an effective review and, in the long run, for legal certainty.

Deprivation of liberty is a deeply intrusive measure and the negative consequences of detention for the individual, in particular for vulnerable groups, are rarely taken into account in proportionality assessments of immigration detention decisions. This is despite the fact that the harmful and potentially lasting effects of detention on family life, physical and mental health are well documented. A broader knowledge base on the effects that detention may have on the individual is important for decision-makers to take into account in their assessments and implementing authorities should therefore increase their knowledge and expertise in this area.

This report identifies shortcomings in the application of the supervision system. Supervision has been applied without systematic and qualitative evaluation of its effectiveness, leading to immigration detention often being used instead, based on the perception that it is more efficient for the enforcement of expulsion orders, reduces non-compliance and that the individual is then at the disposal of the authority. In Sweden, the use of supervision, although limited in scope, has not contributed to a reduction in immigration detention. Research also shows that the use of coercive alternatives to detention may risk in practice expanding the use of coercive measures without leading to a real reduction in immigration detention. It is therefore important that immigration detention does not occur in situations other than where it is strictly necessary, and that supervision is used as an alternative to detention and not as a supplement to immigration detention. Research shows that alternatives to detention are more humane, more effective and more cost-efficient. Therefore, the report has presented arguments for alternatives to detention to be developed and implemented in a participatory manner, in line with international good practice.

In conclusion, the experience and evidence of the Swedish Red Cross, together with the present report, show that both the legislation on immigration detention and alternatives to detention as well as the application of these coercive measures must be changed, improved and legally certain. It cannot be considered reasonable to detain persons without fulfilling basic principles of legal certainty and when it is considered unavoidably necessary. At the same time, the legislator needs to ensure that options are available that both provide implementing authorities with options that allow them to fulfil their missions while respecting personal integrity and the specific needs of the individual.

## 5.2 Recommendations

### Strengthen legislation

- The legislator must ensure that legislation enables alternatives to detention that are humane, cost-effective and less harmful to the individual are available. In order to achieve this, an evaluation should be set up to propose more alternatives to detention to be implemented in legislation that are both humane, but at the same time meet the legislator's intention of immigration detention. The legislator should also clarify when alternatives to detention, including supervision, should be applied. The evaluation must also ensure that there is a focus on vulnerable groups, including children and families with children.
- Codify the principle of proportionality in order to make it clear in the legislation that an evaluation of pros and cons of interests must precede both the decision on, and the implementation of, a control or coercive measure.
- Revise the Aliens Act in order to introduce a prohibition on the immigration detention of children. The extensive evidence and experience of the Red Cross and Red Crescent Movement shows that detention of vulnerable groups, such as children, is particularly harmful - even for short periods of detention. There is clear evidence of the severe consequences of deprivation of liberty, particularly for children's mental health and development. For this reason, we believe that decisions on the detention of children should be avoided altogether.

### Ensure legal certainty in implementation

- The Swedish Migration Agency and the Swedish Police must ensure that immigration detention decisions are made only after other options have been considered. The legal and factual grounds for detention must be carefully justified and clearly stated in the decision. The decision must also explicitly state why alternative forms of detention are not considered sufficient, in accordance with an assessment of necessity and proportionality.
- The Swedish Migration Agency and Swedish Police must ensure that the design and reasoning of supervision decisions are quality assured and that the legal and factual grounds for placing a person under supervision are carefully justified and clearly stated in the decisions, in order to ensure effective repeat review and, by extension, legal certainty.
- The Swedish Migration Agency and the Swedish Police should strengthen expertise on the effects of detention, the application of the principle of proportionality and alternatives to detention. The negative consequences of detention for the individual, in particular for vulnerable groups, are rarely taken into account in proportionality-



ty assessments. A broader knowledge base on the effects that detention may have on the individual is important for decision-makers and needs to be taken into account in their assessments. Implementing authorities should also ensure that alternatives to detention do not become alternative forms of detention and that their application generally results in a reduction in the use of immigration detention.

- The Swedish Migration Agency and the Swedish Police should strengthen expertise on the best interests of the child and child impact assessments in so far as the authorities detain children or that children are otherwise affected by decisions on immigration detention and supervision. This is in order to ensure that it is done only if the intervention is proportionate to its purpose in the individual case, taking into account the best interest of the child, and that a child impact assessment has been carried out.
- The Swedish Migration Agency and the Swedish Police should develop procedures regarding supervision as an alternative to detention, as the scope of the obligation to report differs considerably when deciding on supervision. This can have different and profound consequences depending on the facts of the individual case. Therefore, authorities should develop internal guidelines on how the obligation to report should be formulated, taking into account individual aspects such as, for example, whether there are children attending school, travel route, cost of travel or similar.
- The Government should instruct the Swedish Migration Agency and the Swedish Police to review how the rights of vulnerable groups, including the rights of children, can be strengthened in the return process and in immigration detention work, with a focus on gender equality and the principle of the best interest of the child. The mission should also include how to move from coercive alternatives to a more participatory approach that seeks to involve individuals in the return process when it comes to detention to effect removal.

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We promote migration opportunities by running a project co-financed by Asylum, Migration and Integration Fund.

**Alternative detention – under scrutiny**



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