

From Freedom to Detention: A Systematic Analysis of Swedish Asylum Legislation*

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Abstract

As one of the fundamental human rights that belong to every human being, freedom of movement is prescribed at the international, EU and national level. Every person has the right to move freely and must not be unlawfully deprived of freedom. The right to freedom of movement is the rule and restricting it the exception. Nevertheless, there occasionally do exist justified reasons for restricting certain rights, including the right to freedom of movement. Asylum seekers (ASs), much like all other persons, have the right to freedom of movement, though not always without restrictions. The migration and refugee crisis that began in 2015 brought many a challenge for the EU, a major one being the striking of balance between protecting human rights and protecting the national security of the Member States (MSs). Until the onset of the 2015 migration and refugee crisis, Sweden was a country open to migrants and refugees and highly protective of their rights. Soon after, as a self-protection and – preservation measure, Sweden began increasingly frequently restricting the freedom of movement of and imposing detention on ASs. But did Sweden's newly adopted approach remain in line with international and European legal norms? To determine this, this article offers a systematic analysis of the compliance of Swedish legislation with international and EU standards in regard to restrictions on the freedom of movement of ASs, including minors, with special reference to the imposing of detention.

Keywords

Asylum; Asylum Seeker; Freedom of Movement; Detention; Sweden.

Introduction

The asylum procedure begins with a declaration of will for asylum in a Member State (MS) and the formal application therefor. Following this, in general, the asylum seeker (AS) has the right to move freely within the country in which it applied for asylum, as well as to freely choose a place of residence while awaiting the decision on the application, which may be positive or negative. If positive, the decision grants to the AS international protection in the respective MS. If the decision is negative, the AS is denied such protection,

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and a return or expulsion procedure initiated. Between the submitting of said application and the decision thereon by the determining authority, as a rule, freedom of movement of the AS should not be restricted. Detention – the most severe measure of restriction of the freedom of movement – should only be imposed in a specific set of situations in which it is indispensable, i.e., where other, less coercive alternative measures cannot achieve the intended goal. In brief, detention should only be imposed *ultima ratio*, i.e., when no other measure restricting freedom of movement is applicable.

During the 2015 migration and refugee crisis, Sweden was a country to have received some of the largest numbers of migrants and refugees. Long known as very open to migrants and ASs, and initially retaining this approach in the face of the 2015 crisis, Sweden received through the most straightforward procedures possible all those who needed protection at the time. Very optimistic and positive, Sweden called on other countries to open their borders to third-country nationals seeking asylum and ensure them the conditions for a dignified life. In the face of such overload, unprepared for such developments, the once open Sweden began very soon to introduce measures to slowly close its borders on account of its newly arisen inability to provide conditions for a dignified life to incoming migrants and ASs.

In doing so, has Sweden's legislation regarding restrictions on freedom of movement of ASs remained in line with the EU and international law? To determine this, this article explores the recent developments in Sweden, probes issues and suggests solutions therefor.

1 Asylum Seekers' Right to Freedom of Movement and Grounds for Restriction thereof

The right to liberty and security enshrined in Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms¹ (ECHR) belongs to every human being, irrespective of their status as a migrant, refugee, or AS. No person may be unlawfully deprived of liberty; personal status and conditions should not affect the right to liberty of every human being.² The Convention Relating to the Status of Refugees (Refugee Convention) – the key international document prescribing the protection of refugees – provides inter alia for freedom of movement of refugees. Specifically, State Parties to the Refugee Convention are to grant to refugees lawfully present in their territory the right to choose their place of residence and freedom of movement within their territory, but in accordance with the rules generally applicable to aliens in the same circumstances.³ It is important to emphasize

¹ Adopted in Rome on 4 November 1950, Official Gazette – International Treaties nos. OG 18/97, 6/99 – consolidated text, 8/99 – recast, 14/02, with amendments from Protocol no. 14 to the Convention (2010), Official Gazette – International Treaties no. OG 1/06.

² DI FILIPPO, M. The human right to liberty in the context of migration governance: some critical remarks on the recent practice in the light of the applicable legal framework. In: *Deprivation of Liberty and Armed Conflicts: Exploring Realities and Remedies*. Milano: Franco Angeli, 2019, pp. 241. ISBN 978-88-917-8255-7.

³ Convention relating to the Status of Refugees Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429(V) of 14 December 1950, entered into force on 22 April 1954, and Protocol Relating to the Status of Refugees of 31 January 1967, entered into force on 4 August 1967, Art. 26 (1951 Convention).

that asylum seekers have the right to freedom of movement only within the country in which they applied for asylum. Freedom of movement can be restricted by national states, especially when it comes to protecting the national interest, public order or public health. However, even with restrictions that are possible, national states must adhere to the minimum standards of protection prescribed by international and European law.

The provision's use of the term 'refugee' has been the subject of many a debate on whether these rights apply to refugees only or extend to ASs as well. Per Goodwin-Gill and Hathaway, the rights guaranteed to refugees must inevitably apply to ASs awaiting a status decision.⁴ This view was confirmed in *Adimi*, where the court ruled that Article 31 of the Refugee Convention must also extend to persons who have applied for asylum in good faith.⁵ It follows that persons who have been granted AS status have the right to freedom of movement, but this does not hinge upon a granted refugee status. Further, by deduction, 'lawfully residing' implies that the provision also applies to the status of ASs following their declaration of will for asylum and their application in an MS.⁶ Namely, upon applying for asylum, the status of a third-country national becomes lawful; at that point, the person concerned is granted AS status, pending a decision on the person's application.⁷ Any restriction on freedom of movement must conform to the principle of proportionality, be conducive to the achievement of its goal and protective function, and be the least coercive measure possible that is sufficient and effective in the respective case.⁸ The purpose of the Refugee Convention is to determine international protection of refugees, providing them with the maximum possible enjoyment of human rights and fundamental freedoms.⁹

Restricting the freedom of movement of ASs implies the obligation of the AS to reside at a specific place, i.e., address, as well as the obligation to report to the determining authorities at a prescribed time, surrender travel documents, etc. Detaining ASs is a measure that effectively deprives them of the freedom of movement, which is not merely a restriction

⁴ See more: GOODWIN-GILL, G. Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection. In: *Refugee Protection in International Law, UNHCR Global Consultations on International Protection*. Oxford: Oxford University Press, 2003, pp. 185, 192. DOI: <https://doi.org/10.1017/CBO9780511493973.011>, and HATHAWAY, J. C. *The Rights of Refugees under International Law*. Cambridge: Cambridge University Press, 2005, 389 pp. DOI: <https://doi.org/10.1017/CBO9780511614859>

⁵ See more: Lawfully Staying – A Note on Interpretation. *UN High Commissioner for Refugees (UNHCR)* [online]. 3. 5. 1988 [cit. 19. 5. 2020]. Available at: <https://www.refworld.org/docid/42ad93304.html>, and R v. Uxbridge Magistrates Court and Another, Ex parte Adimi. *UN High Commissioner for Refugees (UNHCR)* [online]. United Kingdom: High Court (England and Wales), 29. 7. 1999, (1999) EWHC Admin 765; (2001) Q.B. 667 [cit. 19. 5. 2020]. Available at: https://www.refworld.org/cases,GBR_HC_QB,3ae6b6b41c.html

⁶ See more: HATHAWAY, J. *The Rights of Refugees under International Law*. Cambridge: Cambridge University Press, 2005, pp. 175–179.

⁷ See more: Case *Celepli vs. Sweden* [1994] Communication no. 456/1991, U.N. Doc. CCPR/C/51/D/456/1991 [cit. 19. 5. 2020]. Available at: <http://hrlibrary.umn.edu/undocs/html/vws456.htm>

⁸ CCPR General Comment No. 27: Article 12 (Freedom of Movement). *UN Human Rights Committee (HRC)* [online]. 2. 11. 1999, CCPR/C/21/Rev.1/Add.9 [cit. 21. 5. 2020]. Available at: <https://www.refworld.org/docid/45139c394.html>

⁹ See more: GOODWIN-GILL, G. L'article 31 de la Convention de 1951 relative au statut des réfugiés: l'absence de sanctions pénales, la détention et la protection. In: *La protection des réfugiés en droit international*. Brussels: Larcier 2008, pp. 223–300.

on their rights, but also deprivation of their freedom. As Macovei put it, any restriction of freedom places the person concerned in an exceedingly vulnerable and unfavorable position, and should as such be understood as the exception, and not the rule. The decision on imposing such a measure should be made objectively and stay in force no longer than necessary.¹⁰ To ascertain whether the detention of an ASs is lawful, and considering that detention should be *ultima ratio*, it must pass a proportionality and necessity test on a case-by-case basis. Detention in general has been the subject of many a debate,¹¹ but according to Noll, detention can potentially be linked to any restriction of the freedom of movement of ASs or refugees.¹² The decision on restricting freedom must not be arbitrary and will be considered unreasonable where disproportionate to a legitimate aim, as has been established in *Toonen vs. Australia*.¹³ In addition to establishing rules on necessity, appropriateness and proportionality, the Directive laying down standards for the reception of applicants for international protection¹⁴ (Reception Conditions Directive) also mandates the considering of alternative measures in advance. Apart from the Reception Conditions Directive, the Charter of Fundamental Rights of the European Union prescribes the considering of alternative measures with a view to averting arbitrary deprivation of freedom.¹⁵ Thus, as Peek and Tsourdi point out, it is the obligation of MSs' determining authorities to carry out, for each individual, an assessment of the needs and risks on a case-by-case basis. The needs assessment should analyze vulnerabilities and identify any specific procedural needs of the AS concerned. Risk assessment should analyze whether the AS concerned meets the conditions for detention and, if so, determine the grounds for and duration of such decision.¹⁶ The examining of necessity and appropriateness on a case-by-case basis, as well as anticipation of arbitrariness in detention decisions, ensures the application of the principle

¹⁰ MACOVEI, M. The right to liberty and security of the person: A guide to the implementation of Article 5 of the European Convention on Human Rights. *Human Rights Handbooks* [online]. 2004, No. 5, pp. 6 [cit. 22. 6. 2021]. Available at: <https://www.refworld.org/docid/49f181e12.html>

¹¹ Per the UNHCR, detention means “*confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory. There is a qualitative difference between detention and other restrictions on freedom of movement. Persons who are subject to limitations on domicile and residency are not generally considered to be in detention. When considering whether an asylum-seeker is in detention, the cumulative impact of the restrictions as well as the degree and intensity of each of them should also be assessed.*” Office of the United Nations High Commissioner for Refugees, Geneva, UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999, Guideline 1.

¹² NOLL, G. Article 31 (Refugees Unlawfully in the Country of Refugee). In: *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, A Commentary*. Oxford: Oxford University Press, 2011, pp. 1268.

¹³ See more: Case *Toonen vs. Australia* [1994] Communication no. 488/1992, U.N. Doc CCPR/C/50/D/488/1992, par. 8.3-8.6 [cit. 22. 5. 2020]. Available at: <http://hrlibrary.umn.edu/undocs/html/vws488.htm>

¹⁴ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180/96

¹⁵ Charter of Fundamental Rights of the European Union, Art. 6, in relation to Articles 53(3) and 53.

¹⁶ See more: PEEK, M., TSOURDI, L. Asylum Reception Conditions Directive 2012/33/EU, Article 7. In: *EU Immigration and Asylum Law, A Commentary*. 2. ed. C. H. Beck/Hart/Nomos, 2016, p. 1413. DOI: <https://doi.org/10.5771/9783845259208-1382>

of proportionality through examining the proportionality of detention to the administrative goal to be achieved.¹⁷

Further, as Noll sees it, restriction of the freedom of movement should be grounded in three elements: that the purpose of restriction of freedom is lawful under international law (including human rights law), that the measure is provided for in national legislation and invoked in the decision on freedom restriction, and that the connection between the restriction on freedom and its intended purpose exists and it adheres to the principle of proportionality.¹⁸ The latter represents in practice a relationship between the intended aim and the means therefor. Necessity and proportionality should therefore be grounds for any decision on detention. All too often, detention is equated with restriction of freedom of ASs, contrary to their respective implications upon ASs. Detention should constitute an *ultima ratio* measure, i.e., be a last resort in circumstances when no other appropriate measures exist or when the existing ones are insufficient.

In terms of what determines detention and how it is defined, it is of paramount importance to underline that the Refugee Convention bears no mention whatsoever of detention per se – in spite of detention being the most severe form of restriction on freedom of movement of ASs. What is emphasized in the Refugee Convention is the freedom of movement (Article 26), and the proscription of illegal entry (Article 31(1)). It should nevertheless also be noted that Article 31(2) proscribes Contracting States from restricting movement of refugees to an extent greater than necessary, as well as proscribes such restrictions from staying in force after the refugees' status in the given country is regularized or they obtain admission into another country. In brief, while these provisions evidently dictate that freedom is to be restricted only under exceptional circumstances, they are nevertheless absent of the definition of detention, i.e., deprivation of freedom of movement of ASs.

The 2012 UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012 UNHCR Guidelines) define detention as deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centers or facilities.¹⁹ The purpose of the 2012 UNHCR Guidelines is to guide governments, parliaments, lawyers, decision-makers, including the judiciary, as well as other national and international bodies engaged in matters of detention of ASs and asylum, including NGOs, national human rights institutions, as well as UNHCR staff working on these issues. This UNHCR instrument sets out nine guidelines and rules that states are to adhere to when imposing a detention

¹⁷ FLYNN, M. Who must be detained? Proportionality as a tool for critiquing immigration detention policy. *Refugee Survey Quarterly*. Oxford: Oxford Academic, 2012, Vol. 31, no. 3, p. 40. ISSN 1020-4067. DOI: <https://doi.org/10.1093/rsq/hds008>

¹⁸ NOLL, G. Article 31 (Refugees Unlawfully in the Country of Refugee). In: *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, A Commentary*. Oxford: Oxford University Press, 2011, p. 1270.

¹⁹ Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, replaces 1999 Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers. *United Nations High Commissioner for Refugees (UNHCR)* [online]. 2012, p. 9 [cit. 21. 5. 2021]. Available at: <https://www.refworld.org/docid/03489533b8.html>

measure. To prevent variations in the States' treatment, the 2012 UNHCR Guidelines aim at harmonizing the rules governing the imposing of detention, and at ensuring equal protection of the rights and freedoms of ASs across all States. Contrary to the 2012 UNHCR Guidelines, detention in many countries is not employed *ultima ratio*, but rather as a measure ensuring the presence of an AS whenever necessary in the procedure. Very often no distinction is made between economic migrants (whose arrival merely coincided with the wave of refugees) and persons who are actual holders of the right to international protection. Arbitrary detention is also still present in many states.²⁰

Absent of a definition of detention – but nevertheless dissecting the detention *procedure* (Article 28) – is also Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or stateless person (Dublin III Regulation). Instead, in Article 28(2), the Regulation only stipulates that when there is a significant risk of absconding, MSs may detain the person concerned to secure transfer procedures, on the basis of an individual assessment and only insofar as detention is proportional and other less coercive alternative measures cannot be applied effectively.²¹

Under Article 2 of the Reception Conditions Directive, detention means confinement of an applicant by an MS within a particular place, whereby the applicant is deprived of his or her freedom of movement.²² And while a definition of detention *is* provided in the Reception Conditions Directive, it omits all mention of volition of the AS against which he/she is detained, i.e. deprived of the freedom of movement by the determining authorities. As it is patently clear, detention does take place irrespective of the concerned AS's volition. The AS cannot leave detention of his/her volition, which is assuredly an essential aspect of (the definition of) detention. Yet another instrument eschewing the definition of detention is Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive). Instead, the Return Directive merely stipulates that ASs cannot be detained unless other sufficient but less coercive measures can be applied effectively in a specific case, and that MSs may only keep in detention a third-country national who is being returned in order to prepare the return and/or carry out the removal process, in particular when there is a risk of absconding or the third-country national concerned

²⁰ See more: Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice, Standing Committee of the Executive Committee of the High Commissioner's Programme, 15th Meeting, EC/49/SC/CRP.13, 4. 7. 1999.

²¹ Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, 2013, OJ L 180, Art. 28 (2) (Dublin III Regulation).

²² Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180, Art. 2 (h) (Reception Conditions Directive).

avoids or hampers the preparation of return or the removal process.²³ In addition, the Return Directive also stipulates that decisions on detention are to be made by an administrative or judicial body.²⁴ Generally, such decisions are relegated to MSs' administrative bodies; courts are normally assigned with deciding on the lawfulness of such decisions. Nevertheless, the Return Directive allows for such decisions to be delegated at national level to courts. Decisions on the restriction of freedom of movement of ASs are less restrictive than those on detention; it is thus reasonable to remit those decisions to administrative bodies. On the other hand, decisions on detention, i.e., deprivation of the freedom of movement of ASs are grave decisions that directly affect the fundamental human right to liberty, and as such should fall within the jurisdiction of the courts.

2 The Right to Asylum and Protection of Asylum Seekers' Rights in Sweden

Sweden is one of the countries to have received a great number of refugees and migrants during the 2015 migration and refugee crisis. Owing precisely to its openness to migrants and ASs, Sweden has drawn the said population for many years. In keeping with such attitude, Sweden embraced the 2015 crisis, receiving through as straightforward procedures as possible all those who needed protection at the time. On a highly optimistic and positive note, Sweden called on other countries to open their borders to asylum-seeking third-country nationals, and to provide them with conditions for a dignified life. In 2015, 16.5% of the Swedish population was foreign-born.²⁵

Before 2015, Sweden had a 75% asylum application approval rate,²⁶ and its open-to-all migration and asylum policy was historically a draw for migrants and refugees. Up to the 2015 crisis, Sweden's system of receiving ASs was well-established, as were the conditions it provided to the ASs within its territory.²⁷ Following the onset of the 2015 crisis, the pressure on Sweden's state borders increased greatly, as did the number of persons seeking protection therewithin. In the face of such overload, unprepared for such developments, the once open Sweden began very soon to introduce measures to slowly close its borders on account of its newly arisen inability to provide conditions for a dignified life to incoming migrants and ASs.

²³ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, Art. 15(1) (Return Directive).

²⁴ Return Directive, Art. 15(2).

²⁵ See more: Statistics, Sweden. *SBC* [online]. [cit. 19. 2. 2021]. Available at: <http://www.sbc.se/>

²⁶ Source: EU Member States granted protection to more than 330 000 asylum seekers in 2015. *Eurostat* [online]. Press release 75 [cit. 19. 2. 2021]. Available at: <http://ec.europa.eu/eurostat/documents/2995521/7233417/3-20042016-AP-EN.pdf/>

²⁷ See more: PARUSEL, B. *Das Asylsystem Schwedens*, Bertelsmann Stiftung, Gütersloh, 2016, pp. 10–12.

In Sweden, asylum and migration are regulated primarily by the Aliens Act,²⁸ the Act on Reception of Asylum Seekers and Others,²⁹ and the Act on Temporary Restrictions on the Granting of Permanent Residence Permits for Asylum Seekers.³⁰ Subsidiary legislation regulating Sweden's asylum policy includes the Aliens Ordinance,³¹ the Ordinance on the Act on Reception of Asylum Seekers,³² and the Ordinance with Instructions for the Migration Agency.³³ The Council Directive 2003/9/EC of laying down minimum standards for the reception of asylum seekers³⁴ has been transposed to Swedish legislation as part of the Act on Reception of Asylum Seekers and Others that has been in force since 1994.³⁵ The Swedish Migration Agency is Sweden's central administrative agency for migration and asylum affairs (competent inter alia for residence and work permits, visas, receiving and returning ASs, acquisition of citizenship and similar). Further, in the Swedish legal system, migration and asylum affairs are decided by the Migration Courts, the Migration Court of Appeal, the Police Administration, the Swedish Prison and Probation Service, Swedish missions abroad and the Employment Service.

The definition of a refugee, as well as of a subsidiary protection beneficiary and of an AS, is provided in the Aliens Act. Under Chapter 4, Section 1 of the Aliens Act, a refugee is an alien who is outside the country of citizenship due to a well-founded fear of persecution based on race, nationality, religion, political belief, gender, sexual orientation, or other belonging to a particular social group, who is unable or unwilling to use the protection of that country on grounds of a well-founded fear. Provisions on refugee status will to a certain extent also apply to stateless persons in relation to the country in which the person concerned last had permanent residence. Under Chapter 4, Section 2, persons under subsidiary protection are those aliens who do not hold the right to asylum on the grounds stated in Chapter 4, Section 1, but who have a well-founded fear of suffering death penalty or corporal punishment, torture or other inhumane or degrading treatment or punishment, or who on grounds of external or internal armed conflict or other severe conflicts in the country of origin have a well-founded fear of being subjected to serious abuse, or who cannot return to their country of origin due to environmental disaster. Provisions on subsidiary

²⁸ Asyllagen (2005:716), With amendments: up to and including Swedish Code of Statutes (2009:16), entered into force on 31. 3. 2006.

²⁹ Lag (1994:137) om mottagande av asylsökande [cit. 12. 8. 2021]. Available at: <https://bit.ly/2ES88Ne>

³⁰ Lag (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige. *Sveriges riksdag* [online]. [cit. 12. 8. 2021]. Available at: <https://bit.ly/2udG0xy> and <https://bit.ly/2PP4glQ>

³¹ Regelbok om utläningar (2006:97), With amendments: up to and including Swedish Code of Statutes (2008:982), entered into force on 23. 2. 2006.

³² Förordning (1994:361) om lagen om mottagande av asylsökande [cit. 12. 8. 2021]. Available at: <https://bit.ly/2jMHsV9>

³³ Förordning (2019:502) med instruktion för Migrationsverket [cit. 12. 8. 2021]. Available at: <https://bit.ly/2L7YbPr>

³⁴ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31.

³⁵ Mottagande av asylsökande m.m. (1993/94:94), The 1994 Act replaced the previous Act on assistance to asylum seekers and more (1988:153).

protection also apply to a certain extent to stateless persons where it concerns the state of affairs in the country of their last permanent residence.

Once the decision on an asylum application has been made, two scenarios are possible. If the application is successful, the Migration Agency's reception unit facilitates the AS' settlement in a certain municipality. If the application is unsuccessful or if the AS's residence permit is denied, the AS is returned to the country of origin. In Sweden, asylum decisions in the first instance are issued following an administrative procedure before the Migration Agency, and appeals are considered at two instances by administrative courts. The appeal at first instance may be lodged with one of the four Migration Courts (specialized departments of the county administrative courts (Förvaltningsrätten)) in Stockholm, Gothenburg, Luleå and Malmö. Appeals may also be brought at second instance to the Migration Court of Appeal (Migrationsöverdomstolen), which is part of the Administrative Court of Appeals in Stockholm (Kammarrätten i Stockholm). The highest court of appeal is the Supreme Administrative Court (Högsta förvaltningsdomstolen). The Supreme Court of Sweden (civil and criminal divisions) does not adjudicate on asylum applications per se, but rather on appellate cases concerning the safety of the return of persons convicted of a crime to their country of domicile.

Asylum applications can only be submitted at selected offices of the Migration Agency. In 2016, the Migration Agency reorganized case processing, only to re-update it in 2018 in response to a government order to shorten the processing time of asylum applications. Per the Migration Agency, the protection procedure in Sweden consists of three parts: initial, appeal and enforcement procedures. It begins with the asylum application and ends with either the granting of asylum or the return to the country of domicile.³⁶ Curiously, the Swedish system provides for the issuing of a certificate of refugee status at the request of the AS where such certificate is necessary for the obtaining of a residence permit or exercising the right to compensation. The certificate may later be withdrawn if the person, i.e., AS concerned does not meet the conditions for confirming refugee status.³⁷

Under Chapter 5, Section 1 of the Aliens Act, refugees, and subsidiary protection beneficiaries in Sweden may be entitled to the right to a permanent residence permit. According to Parusel, until recently, persons who were denied asylum or subsidiary protection while in employment and awaiting a decision were entitled to temporary residence (based on applications that at the time they subsequently submitted as foreign workers). This provided a unique opportunity for asylum seekers to change their status and become legal migrants.³⁸ After applying for asylum in Sweden, aliens may opt either to be placed in the Migration Agency's reception center or to find dwelling on their own. In the latter case, aliens must inform the Migration Agency of their address and remain in contact with the Agency.

³⁶ See more: Regleringsbrev för budgetåret 2016 avseende Migrationsverket. *Swedish National Financial Management Authority* [online]. 2015 [cit. 12. 8. 2021]. Available at: <http://goo.gl/Kvt5rD>

³⁷ Asylagen, Chapter 4, Section 3.

³⁸ See more: PARUSEL, B. The Swedish U-turn on Asylum and its Consequences. In: *Nordic Perspectives on the European Asylum System, The Cases of Sweden and Finland*. Baden-Baden: Tectum Verlag, 2017, p. 67. DOI: <https://doi.org/10.5771/9783828867383-63>

Where an AS was granted a residence permit, he/she may get employment and reside at the address of his/her choosing in Sweden (if it is within the AS's means). Where the AS has no means of subsistence, he/she may be entitled to a daily allowance. In Sweden, ASs are entitled to emergency medical and dental interventions.³⁹

Following the migration and refugee crisis of late 2015 and early 2016, Sweden was forced to amend part of its regulations and revise the Aliens Act in regard to residence permits and the right to family reunification.⁴⁰ Internal border controls were also introduced. These amendments took effect in June 2016. In October 2019, the internal border control measure was extended for another six months. As of writing, such controls remain in place.⁴¹ The decision is based on the government's assessment that there continues to exist a threat to public order and homeland security in Sweden. The Police Administration also believes the terrorist threat level remains high. Speaking in favor of Sweden's introduction of internal border control (and the extension thereof) are also the deficiencies in the control of the external borders of the Schengen area. In Sweden, controls are concentrated in southern and western Sweden and around the Öresund Bridge. Per its 2020 instructions on funds allocation to the Police Administration, the Swedish government will prioritize the taking of measures necessary for ensuring a fully functional regular border control at Sweden's external border throughout the year.⁴²

The integration policy also slowly began to change and provide fewer and fewer rights to aliens, all with a view to reducing migration flows to Sweden. Unlike the Aliens Act, which provides for permanent residence permits, under the Act on Temporary Restrictions international protection, beneficiaries may only be granted a temporary permit. Currently, refugees receive three-year permits, and subsidiary protection beneficiaries 13-month permits. Persons who can support themselves may be granted a permanent permit. In addition, the Act on Temporary Restrictions narrowed down the chances of obtaining a residence permit on humanitarian grounds. The national humanitarian status can currently only be granted to children and families with children who have applied for asylum before 24 November 2015, provided that the child concerned is under 18 at the time of the decision.⁴³

As shown above, Sweden amended its legislation in opposition to the migration and refugee crisis. However, per Demker, Sweden has retained a positive attitude toward migrants and refugees regardless of the developments within its territory and the adopting of more strict

³⁹ See more: Country Report: Sweden, FARR, European Council of Refugees and Exiles. *Asylum Information Database* [online]. 2017, pp. 60–66 [cit. 16. 8. 2021]. Available at: https://www.asylumineurope.org/sites/default/files/report-download/aida_se_2016update.pdf

⁴⁰ Lag (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige, entered into force on 20. 7. 2016.

⁴¹ See more: Fortsatt gränskontroll vid inre gräns. *Government Offices of Sweden* [online]. 2019 [cit. 18. 8. 2021]. Available at: <https://bit.ly/2NXznvF>

⁴² See more: Regleringsbrev för budgetåret 2020 avseende Polismyndigheten. *Government Offices of Sweden* [online]. Department of Justice [cit. 19. 8. 2021]. Available at: <https://bit.ly/2TB8h0V>

⁴³ See more: EMN Annual Report on Migration and Asylum 2016 – Sweden. *Migrationsverket* [online]. Swedish Migration Agency, 2017 [cit. 12. 8. 2021]. Available at: https://ec.europa.eu/homeaffairs/sites/homeaffairs/files/27a_sweden_apr2016_part2_final_en.pdf

measures in the field of policies related thereto.⁴⁴ Between December 2018 and December 2019, the average processing time for first-instance cases decreased from 507 days (16.9 months) to 288 days (9.6 months). Applications submitted by unaccompanied minors are processed significantly faster than earlier. Between December 2018 and December 2019, the average processing time decreased from 513 days (17.1 months) to 215 days (7.2 months).⁴⁵ Below are the statistics on received asylum applications and the number of positive and negative first-instance decisions thereon in Sweden between 2015 and 2020.

Table no. 1: *Asylum applications submitted in Sweden between 2015 and 2020*⁴⁶

		Adults		Accompanied children		Unaccompanied children		Total number of asylum applications
Valid	2015	85,388	57.3	31,406	21.1	32,180	21.6	148,974
	2016	18,030	62.3	8,710	30.1	2,199	7.6	28,939
	2017	17,159	66.9	7,171	27.9	1,336	5.2	25,666
	2018	15,173	70.6	5,385	25.0	944	4.4	21,502
	2019	15,523	70.6	5,556	25.3	905	4.1	21,984
	2020	8,925	68.7	3,566	27.4	500	3.8	12,991
	Total	160,198	61.6	61,794	23.8	38,064	14.6	260,056

As Table 1 clearly shows, the number of ASs in Sweden (which was open to and had received large numbers of refugees and migrants before 2015) has been in significant decline since 2016. Between 2015 and 2016, the number of ASs decreased by 85.09% (from 194,028 to 28,939). Compared to 2015, the number of asylum applications in 2017 (25,666) decreased by 82.78%, and in 2018 (21,502) by 85.58%. In 2019, the number of asylum applications (21,984) decreased by 85.25% compared to 2015, and in 2020 (12,991) by 91.29%.

⁴⁴ See more: DAMKER, M. Positive attityd till invandring trots mobilisering av invandringsmotstånd. In: *I framtidens skugga*. Göteborg, 2012, pp. 95–105.

⁴⁵ Country Report 2019: Sweden, European Council of Refugees and Exiles. *Asylum Information Database (AIDA)* [online]. P. 24 [cit. 19. 8. 2021]. Available at: https://www.asylumineurope.org/sites/default/files/report-download/aida_se_2019update.pdf

⁴⁶ Processing based on statistics and annual reports for Sweden for the period 2015–2019 available at: Country Report 2015–2019: Sweden, European Council of Refugees and Exiles. *Asylum Information Database (AIDA)* [online]. [cit. 25. 8. 2021]. Available at: <https://www.asylumineurope.org/reports/country/sweden>, and Tillförlitliga kriterier. *Swedish Refugee Advice Centre* [online]. 2019 [cit. 25. 8. 2021]. Available at: <https://www.asylumineurope.org/sites/default/files/resources/tillforlitliga-kriterier-webb.pdf>. Country Report 2020, Sweden, European Council of Refugees and Exiles. *Asylum Information Database (AIDA)* [online]. [cit. 25. 8. 2021]. Available at: https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-SE_2020update.pdf, and SWEDISH RED CROSS. Barn i förvar, 2018. *Asylum Information Database (AIDA)* [online]. [cit. 25. 8. 2021]. Available at: https://www.asylumineurope.org/sites/default/files/resources/181126_rapport_barn.pdf

Legal Position on age assessment, 2018. *Asylum Information Database (AIDA)* [online]. [cit. 25. 8. 2021]. Available at: <https://www.asylumineurope.org/sites/default/files/resources/180604101.pdf>, and Du har inte förmått göra din underårighet sannolik, 2017. *Asylum Information Database (AIDA)* [online]. [cit. 25. 8. 2021]. Available at: https://www.asylumineurope.org/sites/default/files/resources/farr_rapport_nov2017.pdf

Table no. 2: Decisions granting international protection in Sweden between 2015 and 2020⁴⁷

		Positive decisions		Negative decisions		Other decisions		Total number of first-instance decisions
Valid	2015	31,819	60.2	15,432	29.2	5,632	10.6	52,883
	2016	67,258	77.1	19,669	22.6	270	0.3	87,197
	2017	27,852	47.1	31,312	52.9	0	0.0	59,164
	2018	11,217	31.6	20,332	57.3	3,963	11.2	35,512
	2019	9,546	38.9	14,829	60.4	194	0.8	24,569
	2020	4,922	28.6	12,270	71.4	0	0.0	17,192

Importantly, in terms of efficiency and functionality of Sweden's asylum system, as Table 2 shows, first-instance decisions made up 35.48% (52,883) of the total number of applications in 2015. Of those decisions, 60.16% (31,819) were positive and 29.18% (15,432) negative. In 2016, of the total number of first-instance decisions (87,197), 77.13% (67,258) were positive and 22.55% (19,669) negative. Overall, positive decisions on international protection traditionally outnumbered the negative ones. This reversed in 2017, to great change. In 2017, of all first-instance decisions (59,164), 47.07% (27,852) were positive, and 52.92% (31,312) negative. In 2018, of all first-instance decisions (35,512), 31.58% (11,217) were positive and 68.4% (20,332) negative. Of all first-instance decisions in 2019 (24,569), 38.85% (9,546) were positive and 14,829 (60.35%) negative. Of the 2020 first-instance decisions (17,192), 28.63% (4,922) were positive and 71.37% (12,270) negative.

The prevalence of positive decisions over the negative ones in Sweden in 2015 and 2016 coincides with the peak of the migration and refugee crisis. The incidence of negative decisions between 2017 and 2020 reflects the Swedish government's reaction to major waves of refugees and migrants. Legislative changes had effected fewer requests and procedures, as well as the dominance of negative decisions on asylum applications over the positive. Pursuant to Chapter 5, Section 1(b) of the Swedish Aliens Act, an application

⁴⁷ Processing based on statistics and annual reports for Sweden for the period 2015–2019 available at Country Report 2015–2019: Sweden, European Council of Refugees and Exiles. *Asylum Information Database (AIDA)* [online]. [cit. 28. 8. 2021]. Available at: <https://www.asylumineurope.org/reports/country/sweden>, and Swedish Refugee Advice Centre, Tillförlitliga kriterier, 2019. *Asylum Information Database (AIDA)* [online]. [cit. 28. 8. 2021]. Available at: <https://www.asylumineurope.org/sites/default/files/resources/tillforlitliga-kriterier-webb.pdf>, Country Report 2020, Sweden, European Council of Refugees and Exiles. *Asylum Information Database (AIDA)* [online]. [cit. 28. 8. 2021]. Available at: https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-SE_2020update.pdf, and Swedish Red Cross, Barn i förvar, 2018. *Asylum Information Database (AIDA)* [online]. [cit. 28. 8. 2021]. Available at: https://www.asylumineurope.org/sites/default/files/resources/181126_rapport_barn.pdf Migration Agency, Legal Position on age assessment, 2018. *Asylum Information Database (AIDA)* [online]. [cit. 28. 8. 2021]. Available at: <https://www.asylumineurope.org/sites/default/files/resources/180604101.pdf>, and Du har inte förmått göra din underårighet sannolik, 2017. *Asylum Information Database (AIDA)* [online]. [cit. 28. 8. 2021]. Available at: https://www.asylumineurope.org/sites/default/files/resources/farr_rapport_nov2017.pdf

may be rejected as inadmissible where the applicant is already a beneficiary of international protection in another EU MS or comes from a first country of asylum or from a safe third country. Under the Dublin III Regulation, specifically, the first-country-of-entry principle that applies upon asylum application submission, ASs are to return to the first country through which they gained entry to EU territory or the country where they first entered it irregularly. The provisions of the Dublin III Regulation are clear and, if applied as intended, the safe third country concept affects the success of such a system. But can the Dublin system survive if the safe third country concept remains in use by EU MSs concurrently with the Dublin provisions? As confirmed by the critique of its doctrine, the Dublin system is dysfunctional and “incompatible” with mass migration. This has already been recognized by the EU legislator through the newly proposed Migration and Asylum Package that would entirely change the very design of EU asylum policy.

Table no. 3: *International protection granted (by category) in Sweden between 2015 and 2020*⁴⁸

		Refugee status		Subsidiary protection		Humanitarian protection		Other decisions		Total Positive decisions
Valid	2015	12,394	39.0	17,132	53.8	2,293	7.2	0	0.0	31,819
	2016	17,114	25.4	47,344	70.4	1,882	2.8	918	1.4	67,258
	2017	13,464	48.3	12,494	44.9	1,894	6.8	0	0.0	27,852
	2018	5,993	53.4	3,984	35.5	992	8.8	248	2.2	11,217
	2019	3,487	36.5	5,955	62.4	104	1.1	0	0.0	9,546
	2020	2,913	59.2	1,415	28.7	41	0.8	553	11.2	4,922

As the above table clearly shows, of the positive international protection (IP) decisions in 2015 and 2016 in Sweden, those granting subsidiary protection accounted for the largest share: 53.8% and 70.4%, respectively. This changed in 2017, when the decisions granting

⁴⁸ Processing based on statistics and annual reports for Sweden for the period 2015–2019 available at Country Report 2015–2019: Sweden, European Council of Refugees and Exiles. *Asylum Information Database (AIDA)* [online]. [cit. 28. 8. 2021]. Available at: <https://www.asylumineurope.org/reports/country/sweden>, and Swedish Refugee Advice Centre, Tillförlitliga kriterier, 2019. *Asylum Information Database (AIDA)* [online]. [cit. 28. 8. 2021]. Available at: <https://www.asylumineurope.org/sites/default/files/resources/tillforlitliga-kriterier-webb.pdf>, Country Report 2020, Sweden, European Council of Refugees and Exiles. *Asylum Information Database (AIDA)* [online]. [cit. 28. 8. 2021]. Available at: https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-SE_2020update.pdf, and Swedish Red Cross, Barn i förvar, 2018. *Asylum Information Database (AIDA)* [online]. [cit. 28. 8. 2021]. Available at: https://www.asylumineurope.org/sites/default/files/resources/181126_rapport_barn.pdf Migration Agency, Legal Position on age assessment, 2018. *Asylum Information Database (AIDA)* [online]. [cit. 28. 8. 2021]. Available at: <https://www.asylumineurope.org/sites/default/files/resources/180604101.pdf>, and Du har inte förmått göra din underärighet sannolik, 2017. *Asylum Information Database (AIDA)* [online]. [cit. 28. 8. 2021]. Available at: https://www.asylumineurope.org/sites/default/files/resources/farr_rapport_nov2017.pdf

refugee status accounted for the largest share of all positive IP decisions, i.e., 48.3%. In 2018, their share grew to 53.4%. For comparison, of all positive IP decisions, those granting subsidiary protection in 2017 accounted for 44.9%, and in 2018 for 35.5%. Of the positive IP decisions in 2019, 62.4% granted subsidiary protection, and 36.5% refugee status. In 2020, 59.2% of all positive IP decisions granted refugee status, and 28.7% subsidiary protection. Humanitarian protection was granted only rarely. Of all positive IP decisions, in 2015 only 7.2% granted humanitarian protection, in 2016 2.8%, in 2017 6.8%, in 2018 8.8%, in 2019 1.1%, and in 2020 only 0.8%.

After analyzing the Swedish legislation, it can be concluded that the change in legislation after the migration and refugee crisis led to a different approach in practice and that Sweden wanted to protect the national system at all costs, even at the cost of violating international and European standards for the protection of asylum seekers. Administratively, Sweden has covered itself, but the purpose of the existence of Swedish legal regulations has not been realized in the spirit of protecting asylum seekers.

2.1 Restriction of Freedom of Asylum Seekers in Swedish Legislation

In Swedish literature, the term *förvar* – while translatable as *confinement* – is used as semantically equivalent to *detention*. Specifically, it signifies deprivation rather than restriction of freedom, as it denotes forcible confinement of a person in a certain place of residence without the person being able to leave willingly.⁴⁹

Under Article 8 of the Instrument of Government – one of the four fundamental laws comprising Sweden's Constitution – all persons are protected in their relations with the public institutions against deprivations of personal liberty. However, freedom of movement within Sweden is guaranteed only to Swedish nationals.⁵⁰ And while the sum of Swedish legislation (Aliens Act included) does not provide for lawful restriction on the freedom of movement of ASs per se, it does prescribe that ASs whose income is insufficient to secure housing must be placed by the Migration Agency in a reception center, effectively restricting their freedom of movement.⁵¹ Detention of ASs may be ordered at any time during the asylum procedure as well as after the application has been rejected at the highest instance. Deprivation of liberty may be ordered only for reasons set out in national law. Further, aliens may be detained where their right to remain in Sweden requires investigation, where denial of entry or removal are probable, and/or where necessary for preparing or carrying out deportation.

⁴⁹ *Detention*, as used in legal texts and literature in English and as it relates to refugees, asylum seekers etc., means the act or condition of being officially forced to stay in a place (Cambridge Dictionary). In effect, *detention* means deprivation of freedom, and, at that, not only of freedom of movement. By way of analogy, in German, *Haft* is used as fully semantically equivalent to *detention*. In Hungarian, *örizet* is used as a synonym for detention, although it de facto translates as *arrest*.”

⁵⁰ Constitutional Documents of Sweden: the Instrument of Government, the Riksdag Act, the Riksdag Regulations. Stockholm: Swedish Riksdag, 1972, Art. 8.

⁵¹ EMN Annual Report on Migration and Asylum 2016 – Sweden. *Europa Commission* [online]. P. 60 [cit. 31. 8. 2021]. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/27a_sweden_apr2016_part2_final_en.pdf

Detention preceding expulsion or deportation may be ordered only where reasons exist on account of which an alien might abscond or pursue criminal activities in Sweden, i.e., attempt to prevent deportation in any other manner.⁵² Where an asylum application is denied, the AS may submit a subsequent application, but only on valid grounds, i.e., prospect that it would result in a different outcome. However, as the Migration Court of Appeal concluded in April 2019, where there exist reasonable grounds to assume that in the country of domicile the alien could face being sentenced to death or subjected to corporal punishment, torture or other inhumane or degrading treatment or punishment, the applicant (AS) might not be required to present a reasonable ground for admitting his/her subsequent application.⁵³

The 2016 legislative changes made it mandatory for all municipalities to place ASs in reception centers within their territories.⁵⁴ Exceptions to the rule of the right to freedom of movement are prescribed in case of detention, in case the alien's identity requires establishing, and in case the alien's right to remain in Sweden is under assessment.⁵⁵ ASs over 18 may also be detained where necessary for the investigation of the ASs' right to remain in Sweden, where the AS's entry is likely to be refused or the AS is likely to be expelled, and/or where required for the purpose of enforcement of refusal of entry or deportation order.⁵⁶ Detention of ASs may also be imposed in the so-called Dublin cases, in accordance with Article 28 of the Dublin III Regulation. In 2015, the Migration Court of Appeal ruled that in the Dublin procedure cases the provisions of the Aliens Act on the detention of ASs do not apply, i.e., that the grounds for detention set out in the Dublin III Regulation apply.⁵⁷ In a 2017 ruling, the Migration Court of Appeal also concluded that the applicable provisions on detention under the Dublin III Regulation cannot be interpreted as impeding to transfers to other EU MSs and that the provisions of the Dublin Regulation provisions on the duration of the detention must be read in line with the preamble of the Regulation and national law.⁵⁸

Decisions on detention are usually issued by the Migration Agency, migration courts or the police authority. In some cases, the Swedish Security Service may be authorized to take decisions on detention.⁵⁹ The Police Administration may decide on detention prior to an AS's claim for asylum via registration at the Migration Agency, as well as in cases where aliens are illegally present in the country or are expelled on grounds of criminal behavior

⁵² Asyllagen (2005:716), with amendments: up to and including Swedish Code of Statutes (2009:16), entered into force on 31 March 2006, Chapter 10, Section 1 (3).

⁵³ Migration Court of Appeal, No. UM 12194-18, Ruling of 10 April 2019, MIG 2019:5 [cit. 30. 8. 2021]. Available at: <https://bit.ly/2XBNzg0>

⁵⁴ Lag (2016:38) om mottagande av vissa nyanlända invandrare för bosättning, Official Journal (2016:38).

⁵⁵ Asyllagen, Chapter 10, Section 1.

⁵⁶ Asyllagen, Chapter 10, Section 1.

⁵⁷ Migration Court of Appeal, No. UM9855-14, Ruling of 3 July 2015, MIG 2015:5 [cit. 30. 8. 2021]. Available at: <https://lagen.nu/dom/mig/2015:5>

⁵⁸ Migration Court of Appeal, No. UM6209-15, Ruling of 5 October 2017, MIG 2017:23 [cit. 30. 8. 2021]. Available at: <https://lagen.nu/dom/mig/2017:23>

⁵⁹ Aliens Act (2005:716) With amendments: up to and including Swedish Code of Statutes (2009:16), entered into force on 31 March 2006, Chapter 10, Section 13 (3).

and have served their sentence, but are still present in the country.⁶⁰ The police authority is also responsible for taking decisions on detention where the Migration Agency remits a case to it. This happens when the Migration Agency no longer considers that the person concerned will leave the country voluntarily in spite of their appeal having been rejected. Migration Courts issue detention decisions within an appeals procedure. In case of a detention decision, the AS concerned is entitled to appeal to the Migration Court of Appeal.⁶¹ The police authority is also authorized to impose detention on ASs and aliens, even where it is not formally their responsibility, but circumstances so require (e.g., where there is a clear risk of an AS absconding). Even the coast guard and the customs authority may detain an AS and an alien where there is a risk of absconding. However, in such cases, detention must be reported immediately to the police, who then conduct a competence establishment procedure.⁶²

As an alternative to detention, Sweden provides for supervision as a milder form of restriction on freedom of movement.⁶³ Prior to taking a decision on detention, Swedish authorities must first consider other measures, i.e., the decision on detention must be *ultima ratio*.⁶⁴ Although this is and should remain the domain of the decision-making body, there have been concerns over the lack of comprehensive and qualitative reasoning as to why, *inter alia*, supervision is not used instead of detention.⁶⁵ Supervision requires regular reporting to the police authority or the Migration Agency, depending on which authority is competent or has issued the decision. The measure may involve the surrendering of passports or other personal documents.⁶⁶ In the context of asylum, supervision – similarly to detention – is rarely used during ongoing asylum procedures. When used, it is mainly employed in relation to ASs in Dublin procedures or ASs in procedures following a subsequent application. To employ supervision instead of detention, there must exist grounds for detention in accordance with the Aliens Act, which is in line with EU law. Under the Aliens Act and the application of the Return Directive, such grounds exist, e.g., where an alien detained during the return procedure under the Return Directive applies for asylum only to delay or prevent the enforcement of the return decision.⁶⁷ Once grounds for detention in such a situation exist, so do the grounds for supervision. Contrary to international recommendations, victims of torture and otherwise vulnerable persons are not excluded from detention.

⁶⁰ Asyllagen, Chapter 10, Section 13 and 17.

⁶¹ Asyllagen, Chapter 10, Section 16.

⁶² Asyllagen, Chapter 10, Section 17.

⁶³ Asyllagen, Chapter 10, Section 6.

⁶⁴ See more: Förvar under lupp. See also comparative study on use of alternatives to detention, where Sweden was one of the studied countries: Odysseus Network, Alternatives to immigration and asylum detention in the EU. Time for implementation, 2015. *Swedish Red Cross* [online]. [cit. 30. 8. 2021]. Available at: <http://bit.ly/1jX4hMm>

⁶⁵ *Ibid.*

⁶⁶ Asyllagen, Chapter 10, Section 8.

⁶⁷ Migration Court of Appeal, No. UM6323-19, Ruling of 2 May 2020, MIG 2020:2 [cit. 30. 8. 2021]. Available at: https://www.domstol.se/globalassets/filer/domstol/kammarratten_stockholm/mig-2020-2.pdf. See also: Case C357 / 09 *Kadzoev* [2009] EU:C:741, and: Case C-534/11 *Arslan* [2013] EU:C:343.

Under Chapter 10, Section 2 of the Aliens Act, a child may be detained if it is probable that the police will be the authority enforcing the expulsion order or the child will be refused entry with immediate enforcement and there is an obvious risk that the child will abscond the enforcement, or for the purpose of enforcing a refusal of entry or an expulsion order. In both cases, it is expressly prescribed that that detention alternatives are not deemed sufficient to meet the purpose pursued.⁶⁸ Children may not be detained for longer than 6 days.⁶⁹ Children may not be separated from their guardians through the detention of either the guardian or the child.⁷⁰ Where the child is unaccompanied, detention may only be imposed in exceptional circumstances.⁷¹ The number of unaccompanied minors in Sweden in 2015 increased significantly compared to 2014, reaching 35,000 children or 40% of the total number of applications of unaccompanied minors in the EU.⁷² The Aliens Act prescribes a mandatory review of the detention decision: within two weeks for those concerning ASs already in procedure, within two months for those awaiting removal. The review of decisions on alternative measures, i.e., supervision, is to be reviewed within 6 months. Where these deadlines are not observed, the detention decision ceases to be valid and have effect.⁷³ Most transfers under the Dublin procedure take place on a voluntary basis. However, a significant number of ASs (unaccompanied minors included) most often abscond prior to the transfer. ASs were not detained after receiving notification that another EU MS was responsible for their asylum application. However, instead of being allowed to settle anywhere of their own accord in Sweden, ASs awaiting transfer under the Dublin procedure are placed in short-term accommodation facilities nearby an airport. In 2019, Sweden received 6,474 incoming requests under the Dublin III Regulation, and sent 3,641 outgoing requests to other Member States to take responsibility for processing the asylum application. A total of 3,002 transfers and other relocations of ASs (including those ASs who were granted asylum in another MS) took place in 2019. Of that, the Migration Agency was responsible for 2,302 (who left Sweden voluntarily) and the police for 700 (includes voluntary and forced removal).⁷⁴ The average processing time for cases under the Dublin procedure in 2019, i.e., up to the transfer decision, was 58 days. In 2018, the processing time was 72 days.⁷⁵ In October 2019, in a case involving the detention of an AS, the Migration Court of Appeal ruled that a period of 12 months is the maximum time that an alien can be detained pending the enforcement of a deportation order. This also applies in cases of failed deportation upon

⁶⁸ Asyllagen, Chapter 10, Section 2.

⁶⁹ Asyllagen, Chapter 10, Section 5.

⁷⁰ Asyllagen, Chapter 10, Section 3.

⁷¹ Asyllagen, Chapter 10, Section 3.

⁷² Source: Asylum applicants considered to be unaccompanied minors by citizenship, age and sex. *Eurostat database* [online]. [cit. 4. 9. 2021]. Available at: http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asyunaa&lang=en

⁷³ Asyllagen, Chapter 10, Section 9 and 10.

⁷⁴ Annual Report 2019. *Migration Agency* [online]. [cit. 4. 9. 2021]. Available at: <http://bit.ly/382Zbh6>

⁷⁵ Country Report 2019: Sweden, European Council of Refugees and Exiles. *Asylum Information Database (AIDA)* [online]. [cit. 4. 9. 2021]. Available at: https://www.asylumineurope.org/sites/default/files/report-download/aida_se_2019update.pdf

which the person concerned was returned to Sweden and subsequently detained. As it is not a new detention measure, it may not exceed 12 months.⁷⁶ The average duration of detention in 2019 was 27.8 days, compared to 29.1 days in 2018. The average duration of detention for men was 28.3 days, and for women 21.4 days.⁷⁷ Setting a precedent, the said Court also ruled that the provisions of the Reception Conditions Directive on detention do not apply when the AS is ordered deportation in respect of a crime or for the purpose of preparing or enforcing a deportation decision.⁷⁸ The provisions of the Aliens Act on detention of ASs do not offer the same detention options as the Reception Conditions Directive. Thus, where not provided for by the Aliens Act, the grounds for detention of ASs under the Reception Conditions Directive (establishing and confirming identity or nationality or determining the factors on which the application is based) cannot apply in Sweden. In confirming this position, the Migration Court of Appeal warned of the shortcomings in the implementation of the Reception Conditions Directive, which may lead to misinterpretation and violation of ASs' rights provided by EU and international standards of refugee law.⁷⁹

Below is an analysis and a statistical overview of decisions restricting freedom of movement of ASs, as well as decisions imposing detention in Sweden between 2015 and 2019.

Table no. 4: Restrictions on freedom of movement of ASs and detention in Sweden between 2015 and 2020⁸⁰

		Detention		Detention alternative		Restriction of freedom (total)
Valid	2015	3524	89.3	421	10.7	3945
	2016	3714	100.0		0.0	3714
	2017	4379	86.6	675	13.4	5054
	2018	4705	80.3	1156	19.7	5861
	2019	4144	100.0		0.0	4144
	2020	2528	100.0		0.0	2528

⁷⁶ Migration Court of Appeal, MIG 2019:17.

⁷⁷ Migration Agency, Annual Report 2019, pp. 77 [cit. 4. 9. 2021]. Available at: <http://bit.ly/382Zbh6>

⁷⁸ Migration Court of Appeal, No. UM3640-20, Ruling of 2 July 2020, MIG 2020:15 [cit. 5. 9. 2021]. Available at: https://www.domstol.se/globalassets/filer/domstol/kammarratten_stockholm/ovrigt-innehall/mig-2020-15.pdf

⁷⁹ Migration Court of Appeal, No. UM2352-20, Ruling of 30 June 2020, MIG 2020:14 [cit. 5. 9. 2021]. Available at: https://www.domstol.se/globalassets/filer/domstol/kammarratten_stockholm/ovrigt-innehall/mig-2020-14.pdf

⁸⁰ Processing based on statistics and annual reports for Sweden for the period 2015–2019 available at Country Report 2015–2019: Sweden, European Council of Refugees and Exiles. *Asylum Information Database (AIDA)* [online]. [cit. 4. 9. 2021]. Available at: <https://www.asylumineurope.org/reports/country/sweden> and <https://www.asylumineurope.org/sites/default/files/resources/tillforlitliga-kriterier-webb.pdf>; Swedish Red Cross, Barn i förvar, 2018. *Asylum Information Database (AIDA)* [online]. [cit. 28. 8. 2021]. Available at: https://www.asylumineurope.org/sites/default/files/resources/181126_rapport_barn.pdf; Legal Position on age assessment, 2018. *Asylum Information Database (AIDA)* [online]. [cit. 9. 9. 2021]. Available at: <https://www.asylumineurope.org/sites/default/files/resources/180604101.pdf>; Country Report 2020, Sweden, European Council of Refugees and Exiles. *Asylum Information Database (AIDA)* [online]. [cit. 9. 9. 2021]. Available at: https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-SE_2020update.pdf

As the above tables show, in 2015 restriction of freedom of movement of ASs was imposed in 3,945 cases in Sweden, i.e., on 2.64% of all ASs that year. Of these, detention was imposed in 3,524 (89.32%) cases, and a detention alternative in 421 (10.67%) cases. Of the 3,524 cases of detention, 63 (1.78%) involved children accompanied by family and 17 (0.48%) unaccompanied minors.⁸¹ In 2016, 3,714 persons were restricted freedom of movement, accounting for 12.83% of all submitted applications that year. Data on detention alternatives imposed in 2016 are not available. Of the 3,714 decisions on detention in 2016, 108 (2.9%) concerned children.⁸² In 2017, restriction of freedom of movement was imposed in 5,054 cases, accounting for 19.69% of the total number of ASs in 2017. Of those, detention was imposed in 4,379 (86.64%) cases, and detention alternative in 675 (13.35%) cases. Of the detention cases, 78 (1.78%) involved children.⁸³ In 2018, freedom of movement was restricted in 5,861 cases, accounting for 27.25% of the total number of ASs in 2018. Of those, detention was imposed in 4,705 (80.27%) cases, and detention alternative in 1,156 (19.72%). Of the detention cases in 2018, 13 (0.27%) involved children.⁸⁴ In 2019, detention was imposed in 4,144 cases, accounting for 18.85% of the total number of ASs that year. Data on detention alternatives imposed in 2019 are not available. Of the 4,144 decisions on detention, 3 (0.07%) related to children.⁸⁵ In 2020, 2,528 ASs were detained; data on detention alternatives imposed are not available. Of the 2,528 detention decisions, 7 (0.27%) concerned children.⁸⁶ Bringing major challenges in 2020 was the COVID-19 pandemic. Per the Migration Agency, accommodation space in detention facilities became scarce, reducing their capacity by almost 50% on account of the newly required social distancing. Visitations were reduced to video calls.⁸⁷

As the above has demonstrated, detention in Sweden between 2015 and 2020 was a frequent occurrence. In terms of restriction on the freedom of movement of ASs, detention was imposed each year in over 80% of cases. Such an incidence resolutely contradicts the *ultima ratio* principle and constitutes a violation of international and EU standards of the imposing of detention, which measure de facto deprives ASs of their freedom of movement,

⁸¹ Source: EMN, The use of detention and alternatives to detention in the context of immigration policies in Sweden, Report EMN Sweden 2014:1, pp. 14 [cit. 4. 9. 2021]. Available at: <http://bit.ly/1BBDPAP>

⁸² Country Report 2016: Sweden, European Council of Refugees and Exiles. *Asylum Information Database (AIDA)* [online]. P. 55 [cit. 11. 9. 2021]. Available at: https://www.asylumineurope.org/sites/default/files/report-download/aida_se_2016update.pdf

⁸³ Source: Migration Agency, Annual Report 2017. *European Commission* [online]. P. 61 [cit. 11. 9. 2021]. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/17a_sweden_arm_part2_2017_en.pdf

⁸⁴ Source: EMN Annual Report on Migration and Asylum 2017 – Sweden. *Asylum Information Database (AIDA)* [online]. P. 70 [cit. 11. 9. 2021]. Available at: https://www.asylumineurope.org/sites/default/files/report-download/aida_se_2016update.pdf

⁸⁵ Source: EMN Annual Report on Migration and Asylum 2019 – Sweden. *Asylum Information Database (AIDA)* [online]. P. 73 [cit. 11. 9. 2021]. Available at: https://www.asylumineurope.org/sites/default/files/report-download/aida_se_2019update.pdf

⁸⁶ Country Report 2020, Sweden, European Council of Refugees and Exiles. *Asylum Information Database (AIDA)* [online]. [cit. 11. 9. 2021]. Available at: https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-SE_2020update.pdf

⁸⁷ Swedish Migration Agency, Annual Report on Migration and Asylum, EMN Policy Report 2020 – Sweden, Migrationsverket, 2021, pp. 55.

precisely because Sweden did not state that in all these cases the condition for detention was met, and equally it did not state the reasons why the application of alternative measures was not possible in any of these cases. Such information does not exist in their practice, and thus the very application of the *ultimo ratio* principle is violated. If something is an *ultima ratio*, it is assumed that alternative measures have been taken into account, it is emphasized why it is not possible to apply them and specific reasons for applying detention as the strictest measure are given. There is no such information in the analysis of the Swedish legislation and none of the above data is available. Worse still, detention is imposed on children in not all too negligible a percentage. Such practice with children should be avoided at all costs, especially where unaccompanied minors are involved. The Swedish system must be amended to strengthen legal provisions on asylum and restriction on freedom of movement of ASs. More specifically, the provisions should set out grounds for detention more clearly and anticipate mass influx of refugees and migrants, as well as the protocol in such situations. This would provide a clear roadmap for contingencies; detention would cease being used as penalty for illegal entry or as a temporary measure pending a decision.

A case before the Swedish authorities involving restriction of the freedom of movement of an AS and the employing of less restrictive measures revealed shortcomings in EU legislation. It caused contradicting interpretations and decisions on several levels. Namely, in the case, as brought to the Migration Court of Appeal,⁸⁸ MA's asylum application of 8 March 2018 was denied by the Swedish Migration Agency, as was the residence permit petition, resulting in an order to transfer MA to Italy. Additionally, MA was ordered detention under the Dublin III Regulation on grounds of prior behavior, i.e., absconding from asylum procedures in Sweden, Italy, and Germany. Taking the view that supervision would be an insufficient measure, the Migration Agency proceeded to order detention. In a surprise move, the Agency revoked the detention decision on 16 May 2018, and instead ordered to place MA under supervision provided for under the Aliens Act. The Agency stated that the ground for such decision was MA's pledge to be cooperative in regard to the transfer to Italy. MA proceeded to appeal the supervision decision before the administrative court in Malmö. The Migration Court overturned the Migration Agency's supervision decision on the grounds of the Agency misapplying the Aliens Act when MA was covered by a transfer decision under the Dublin III Regulation, the provisions of which applied to all matters of the case. The Swedish Migration Agency appealed the ruling, asking that the Migration Court of Appeal revoke the Migration Court's ruling and uphold the Agency's decision on supervision. The Swedish Migration Agency took the view that detention should not be imposed where there exist less restrictive measures that would be effective. Further, as the matter of detention alternative is not directly regulated under the Dublin III Regulation, it is the Agency's position that the Aliens Act applies in its stead. MA considered that the appeal should be dismissed on grounds of his pledge to not abscond along with the fact that the supervision decision is based on incorrect legislation. The Court of Appeal

⁸⁸ Migration Court of Appeal, No. 10152-18, Ruling of 17 December 2017, MIG 2018:23 [cit. 11. 9. 2021]. Available at: <https://www.domstol.se/globalassets/filer/domstol/migrationoverdomstolen/avgoranden/2018/referat-i-mal-um-10152-18.pdf>

in Stockholm emphasized that the Dublin III Regulation must have a general validity and be binding in all respects and directly applicable in each MS. The Court concluded that there was in principle no place for national legislation in this case. Further, where a significant risk of absconding exists, MSs may detain the AS to ensure the transfer procedure, in accordance with the Dublin III Regulation, based on a case-by-case assessment, and only if detention is proportionate and other, less restrictive measures cannot be effectively applied. In an earlier case (MIG 2015:5), the Migration Court of Appeal ruled that the Aliens Act may prevail only where a matter is not regulated by the Dublin III Regulation or where the Regulation explicitly provides that supplementary national rules apply in a particular case. Thus, in accordance with the principle of primacy of EU law over national law, detention cannot have been ordered under the Aliens Act in a procedure falling under the Dublin III Regulation.

Under Article 28 (2) of the Dublin III Regulation, to ensure transfer, MSs may opt for measures less coercive than detention. An identical phrasing of the concept is found in Article 15(1) of the Return Directive and Article 8(2) of the Reception Conditions Directive. Unfortunately, neither of the three instruments expand on the concept of “less coercive measures.” Further, there is also the matter of supervision within the meaning of the Swedish Aliens Act. As a less coercive measure, it falls within the allowable scope under Article 28 (2) of the Dublin III Regulation. Under the Aliens Act, supervision means that an alien is required to report to either the Police Administration or the Swedish Migration Agency. The supervision decision must specify the place at which the obligation to report may be fulfilled. The alien may also be required to surrender his/her passport or other identification documents. With regard to detention, which is a form of deprivation of freedom, supervision ought to be viewed as an example of a less coercive measure within the meaning of the Dublin III Regulation. Moreover, as the Court of Appeal also stated, the option to appeal a supervision decision is a form of additional protection of ASs. In the matter of provisions that should be applied to the supervision decision in order to ensure the transfer in accordance with the Dublin III Regulation, the Migration Court of Appeal ruled that, since the Dublin III Regulation does not prescribe special procedural rules for less coercive measures such as supervision, the provisions of the Aliens Act on supervision thus apply and as such supplement the provisions of the Dublin III Regulation.⁸⁹

In the opinion of the Migration Court of Appeal, the Migration Court cannot be considered to have justifiably revoked the decision on grounds of being based on incorrect legislation. The Court should itself examine whether the actual conditions for supervision of an AS are met. The supervision decision of the Swedish Migration Agency had not been reviewed within six months and was thus vitiated.⁹⁰ The Migration Court of Appeal dismissed the case. This case clearly shows that the Swedish asylum and migration authorities’ mutually varying interpretations of EU legislation led to mutually varying decisions imposing restriction on the freedom of movement of ASs. It is true that the provisions of the Dublin III Regulation, the Return Directive and the Reception Conditions Directive

⁸⁹ Cf. Migration Court of Appeal, MIG 2015:5.

⁹⁰ Asyllagen, Chapter 10, Section 9 (2); Section 10.

do not detail the concept of “less coercive measures” and what it entails. As a result, absent of definitions in EU legislation, MSs have resorted to national provisions, effecting a combination of EU and national law with regard to alternatives to restriction of the freedom of movement of ASs. It follows that the Dublin III Regulation, the Return Directive and the Reception Conditions Directive need to be amended; specifically, they should detail what “less coercive measures” constitute, what forms thereof may exist, and specify whether they may be taken during transfer preparation under the Dublin procedure. This would prevent further issues and controversy thereover. Moreover, as MSs’ courts are not bound by the decision of one another, such amendments to the said EU instruments would also prevent the MSs’ courts (not infrequent) mutually conflicting decisions. It is therefore necessary to approach these changes to ensure legal certainty and the functioning of the Common European Asylum System (CEAS).

After the analysis of the Swedish regulations on detention, presented statistics, European and national judicial practice, it can be clearly concluded that Sweden used the measure of detention contrary to the principle of *ultima ratio*, expressed in the practice of European courts that are considered a source of law, as well as certain regulatory standards for determining detention, that are mentioned earlier, and the principles of necessity and proportionality.

It is clear that states can adopt certain measures restricting human rights as the freedom of movement, especially if it concerns the protection of the national interest, public order and public health, and thereby justify a series of measures that they adopt or have adopted in a certain period. However, Sweden has not emphasized either in legislation or in the practice of national courts in the explanations of judgments that it is about the application of the exemption on any of the aforementioned grounds. Thus, it cannot be considered that the decisions were made in accordance with the protection of the national interest, public order and public health. The established legislation is currently unchanged in Sweden as is the practice of the courts which makes it clear that Sweden has no intention of changing its procedures. In the background, Sweden aims to protect the national interest, but legislation and practice are not officially based on these reasons. In this way, Sweden partly adopted measures that correspond to the protection of the national interest, but on the other hand, it did not enter the statistics of countries that officially declared the rejection of certain institutes for the protection of asylum seekers due to the protection of national interests, such as Hungary or Poland.

Conclusion

Restriction on freedom of movement in Sweden between 2015 and 2019 was all too frequent an occurrence: detention was imposed in more than 80% of cases each year. A non-negligible percentage thereof were imposed on children. For obvious reasons, such practice with children should be avoided at all costs, especially where unaccompanied minors are involved. The Swedish system must be amended to strengthen legal provisions

on asylum and restriction on freedom of movement of ASs. More specifically, they should delineate grounds for detention more clearly and anticipate mass influx of refugees and migrants, as well as the protocol in such situations. This would provide a clear roadmap for contingencies. This would ensure detention would cease being used as penalty for illegal entry or as a temporary measure pending a decision. Excessive imposing of detention is decidedly against the *ultima ratio* principle and constitutes a violation of international and EU standards of the imposing of detention, which measure de facto deprives ASs of their freedom of movement. Further, as the analysis of a portion of the Swedish courts' case-law has shown, the Swedish asylum and migration authorities' interpretation of EU legislation led to mutually varying decisions imposing restriction on the freedom of movement of ASs and the application of alternative measures. The provisions of the Dublin III Regulation, the Return Directive and the Reception Conditions Directive do not detail the concept of "less coercive measures" and what it entails. As a result, absent of definitions in EU legislation, MSs have resorted to national provisions, effecting a precarious combination of EU and national law with regard to alternatives to restriction of the freedom of movement of ASs. It follows that the New Pact on Migration and Asylum needs to be amended to detail what "less coercive measures" constitute, as well as to differentiate between restriction on freedom of movement and deprivation of freedom of movement, i.e., detention. This would prevent further controversy over the issue. Moreover, it would also prevent mutually contradicting decisions of MSs' courts (who are not bound by the decision of one another, i.e., may issue mutually conflicting decisions). It is therefore necessary to approach these changes to ensure legal certainty and the functioning of the CEAS.

In addition to the national regulations that Sweden changed in order to clearly protect the national interest, the practice of the Swedish courts went a step further than such regulations and adopted a detention measure without adhering to the standards in decision-making on detention, the practice of European courts and essential principles of protection. It can be clearly concluded that such an approach and a practice led to the violation of European and international standards for the protection of asylum seekers, especially in terms of detention. It is necessary to harmonize the Swedish legislation, and thus the practice of the courts, with the clearly established principles of European and international law when it comes to detention. Freedom of movement is a fundamental human right, detention is an exception under specific conditions when applicable. These conditions must be harmonized in all member states, but also in their practice, because otherwise the purpose of the existence of such principles and standards of protection is lost.

The analysis of Swedish legislation offered here clearly points to inconsistencies, as well as to legal amendments and court attitudes that are contrary to EU and international legal standards, clearly answering the questions initially asked herein.