



FACULTY OF LAW

LUND UNIVERSITY

Julia Jonsson

Liberty at the Border

*The Swedish Implementation of the EU's New Border
Procedures and Its Compliance with the Right to Liberty*

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Supervisor: Vladislava Stoyanova

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Summary

This thesis examines how the Swedish implementation of the new border procedures, as part of the new EU Pact on Migration and Asylum, may affect asylum seekers' right to liberty under Article 5 of the European Convention on Human Rights. The focus is on the screening procedure, the asylum border procedure and the return border procedure, which together create a new pre-entry phase when arriving to the Union.

The Pact relies on the legal fiction of “non-entry”, meaning that asylum seekers may be physically present in a Member State while legally treated as not having entered the territory. To maintain this fiction, applicants may be required to remain at or near the border, in transit zones or in other designated locations. Although such measures do not automatically amount to detention, they may do so if the person cannot realistically leave or is subject to strict control for a prolonged period. The Swedish implementation reinforces this risk. Sweden has not previously used asylum border procedures in this way, but the memorandum concerning the implementation of the Pact suggests a broad application. During screening, the obligation to remain may last up to 24 hours, without clear rules on how accommodation during this period differs from detention. In border procedures, applicants may be required to stay at a specific location and may also be detained to determine their right to enter the country.

The thesis concludes that the implementation will lead to more far-reaching restrictions on asylum seekers' freedom of movement in Sweden than under the current system. It also increases the risk of both formal detention and *de facto* detention. Whether this results in violations of Article 5 will depend on how the rules are applied in practice. To remain compatible with the Convention, Swedish law must ensure clear and foreseeable legal rules, individual assessments, effective remedies, independent review and genuine consideration of less coercive alternatives.

Sammanfattning

Denna uppsats undersöker hur det svenska genomförandet av de nya gränsförfarandena, som del av EU:s nya migrations- och asylpakt, kan påverka asylsökandes rätt till frihet under artikel 5 i Europakonventionen. Fokus ligger på screeningförfarandet, asylgränsförfarandet och gränsförfarandet för återvändande, vilka tillsammans skapar en ny inresefas vid ankomst till Unionen.

Pakten bygger på den rättsliga fiktionen om ”icke-inrest”, vilket innebär att asylsökande kan befinna sig fysiskt i en medlemsstat samtidigt som de rättsligt behandlas som om de inte har rest in på territoriet. För att upprätthålla denna fiktion kan sökande behöva stanna vid eller i närheten av gränsen, i transitzoner eller på andra särskilt anvisade platser. Sådana åtgärder utgör inte automatiskt förvar, men kan göra det om personen inte har en faktisk möjlighet att lämna platsen eller är föremål för omfattande kontroll under en längre tid. Det svenska genomförandet förstärker denna risk. Sverige har inte tidigare använt gränsförfaranden på detta sätt, men promemorian rörande genomförandet av pakten möjliggör en bred tillämpning av dem. Under screeningförfarandet kan skyldigheten att kvarstanna gälla i upp till 24 timmar, utan tydliga regler om hur boende under denna tid skiljer sig från förvar. I gränsförfaranden kan sökande bli skyldiga att vistas på en särskilt anvisad plats och även tas i förvar för att avgöra deras rätt att resa in i landet.

Uppsatsen visar att genomförandet kommer att leda till mer långtgående inskränkningar i asylsökandes rörelsefrihet i Sverige än enligt dagens system. Det ökar även risken för både formellt förvar och *de facto*-förvar. Om detta leder till överträdelser av artikel 5 beror på hur reglerna tillämpas i praktiken. För att vara förenlig med konventionen måste svensk rätt säkerställa tydliga och förutsebara lagar, individuella bedömningar, effektiva rättsmedel, oberoende prövning och ett uppriktigt övervägande av mindre ingripande alternativ.

Preface

Although this thesis is written in English, this preface will continue in Swedish.

Jag vill rikta ett stort tack till min handledare Vladislava Stoyanova som väckte mitt intresse för ämnet under kursen "Migration Law". Tack för värdefull vägledning, kloka synpunkter och stöd under detta arbete.

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Julia Jonsson

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Abbreviations

CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
Ds	Ministry Publications Series
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EU	European Union
LIBE	European Parliament's Committee of Civil Liberties, Justice and Home Affairs
NGO	Non-Governmental Organisations
PICUM	The Platform for International Cooperation on Undocumented Migrants
Prop.	Government Bill
SOU	Swedish Government Official Reports
The Pact	The Pact on Migration and Asylum
UNHCR	United Nations High Commissioner for Refugees

1 Introduction

1.1 Background

Following a plenary adoption in the European Parliament, the European Council adopted a new Pact on Migration and Asylum (the Pact) on 14 May 2024¹, setting out a new framework for managing migration and establishing a common asylum system at European Union (EU) level.² Managing migration and asylum through the new Pact includes responsibility and solidarity between Member States as well as increased efficiency in procedures, while safeguarding fundamental rights of migrants.³

The new rules introduced through the Pact entered into force on 11 June 2024, and will enter into application after two years, that is June of *this* year.⁴

1.1.1 Arriving in the Union under the Pact

Following the adoption of the Pact, all applicants for international protection who enters the EU will undergo a uniform screening procedure, regardless of the Member State in which they enter. During this process, the individual's identity, health and potential vulnerabilities are assessed, and a security check is conducted. The results are registered in the Eurodac database and form the basis for determining the appropriate and subsequent procedure.⁵

¹ European Council, "Migration and Asylum Pact", 8 December 2025. Available at: <https://www.consilium.europa.eu/en/policies/eu-migration-asylum-reform-pact/>, accessed 20 April 2026.

² European Commission, "Pact on Migration and Asylum", 21 May 2024. Available at: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en, accessed 20 April 2026.

³ European Commission, "Achievements of the von der Leyen Commission – Managing migration responsibility", November 2024. Available at: <https://ec.europa.eu/commission/presscorner/api/files/attachment/879950/7%20Migration.pdf>, accessed 20 April 2026.

⁴ European Commission, (n 2).

⁵ Swedish Migration Agency, "What is the new EU migration and asylum pact about?", 18 June 2025. Available at: <https://www.migrationsverket.se/en/about-the-swedish-migration-agency/the-swedish-migration-agency-answers/2025/2025-06-18-what-is-the-new-eu-migration-and-asylum-pact-about.html>, accessed 20 April 2026.

After screening, the authorities decide which procedure will apply, either an ordinary asylum procedure or an asylum *border* procedure. The latter is used for applicants who, already at the screening stage, are assessed as unlikely to receive a positive decision. Throughout the asylum border procedure, the applicant is legally considered not to have entered the Member State's territory and must remain in designated border facilities while their claim is examined. The process is intended to be carried out near the border and within a short timeframe. It may not exceed 12 weeks, including appeals. If the application is rejected, a return border procedure follows.⁶

1.1.2 The Swedish Implementation of the Pact

It is important to note that EU regulations have general application, are binding in their entirety, and are directly applicable in all Member States. However, regulations might include provisions that require or allow for supplementary national regulation of various kinds. EU directives, in contrast, are binding only as to the result to be achieved, leaving it to each Member State's national authorities to determine the form and method of implementation.⁷

On 24 November 2025 the Swedish Ministry of Justice published a memorandum, in which they submitted proposals for the implementation of, amongst other legal frameworks introduced through the Pact, the Screening Regulation⁸, the Asylum Procedure Regulation⁹ and the Return Border Procedure Regulation¹⁰, into Swedish law. The purpose of the proposals was,

⁶ Swedish Migration Agency, (n 5).

⁷ Article 288 Consolidated Version of the Treaty of the Functioning of the European Union, 2012/C326/01, 26 October 2012, [OJ C 326] (TFEU).

⁸ Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, 22 May 2024, [OJ L 2024/1356]. Hereafter referred to as "Screening Regulation".

⁹ Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, 22 May 2024, [OJ L 2024/1348]. Hereafter referred to as "Asylum Procedure Regulation".

¹⁰ Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148, 22 May 2024, [OJ L 2024/1349]. Hereafter referred to as "Return Border Procedure Regulation".

according to the Ministry of Justice, to enable an effective and legally secure application of the relevant legal acts while ensuring a responsible and restrictive regulatory framework in accordance with the *minimum level* required by EU law.¹¹

The proposals made in the memorandum have been highly criticised by various consultation bodies. A reoccurring critique is the time frame during which the consultation responses should be submitted. On 24 November 2025, The Ministry of Justice published the names of the consultation bodies, stating that the responses should be provided by 7 January 2026, at the latest.¹² The Swedish Refugee Law Centrum is one of the consultation bodies that has criticised both the limited time allocated for preparing the memorandum and the short timeframe provided for submitting consultation responses. They claim that the short timeframe poses a challenge to implement the Pact in the most cautious manner possible. Despite this, Sweden has chosen to introduce far-reaching and comprehensive changes, which according to the Swedish Refugee Law Centrum further complicates a thorough impact assessment by both the memorandum and the consultation bodies. Failing to allow sufficient time to properly analyse the consequences of the proposals increases the risk of human right violations and undermines the rule of law.¹³

1.2 Purpose and Research Question

The purpose of this thesis is to examine how the implementation of the new Pact, specifically its provisions on screening, as well as the asylum- and return border procedures, into Swedish law may affect the right to liberty for asylum

¹¹ Ds 2025:30. *Migrations- och Asylpakten*, p. 38. Hereafter referred to as “Ds 2025:30”.

¹² Swedish Ministry of Justice, “Remittering av promemorian Migrations- och asylpakten (Ds 2025:30), volym 1 och 2”, 24 November 2025, p. 4. Available at: <https://www.regeringen.se/contentassets/76c41f8958c94800a0c33ef08aecc362/re-missinstanser-for-promemorian-migrations--och-asylpakten-ds-202530.pdf>, accessed 25 February 2026.

¹³ Swedish Refugee Law Centrum, “Asylrättscentrums remissvar gällande promemorian Migrations- och asylpakten (Ds 2025:30, volym 1 och 2”, 7 January 2026, p. 7. Available at: <https://www.regeringen.se/contentassets/76c41f8958c94800a0c33ef08aecc362/asyl-rattscentrum.pdf>, accessed 25 February 2026.

seekers as protected under the European Convention on Human Rights (ECHR). By analysing the obligations introduced by the Pact and how it is suggested to be implemented into Swedish legislation and practice, the study aims to assess the potential legal and practical implications for individuals seeking international protection in Sweden. This is particularly relevant given that the Pact introduces procedures that are entirely new to the Swedish asylum system and is therefore expected to significantly reshape how Sweden processes asylum applications and treat asylum seekers at its borders.

In order to fulfil this purpose, the following research question will be answered:

How may the proposed implementation of border procedures under the EU Pact on Asylum and Migration into Swedish law affect asylum seekers' right to liberty?

To answer this question this thesis focuses primarily on the following regulations: the Screening Regulation, the Asylum Procedures Regulation and the Return Border Procedures Regulation. The thesis also focuses on the right to liberty guaranteed under Article 5 ECHR, while also considering, to a lesser extent, the right to freedom of movement under Article 2 Protocol No. 4 to the ECHR.

1.3 Method

To fulfil the purpose of this thesis, namely, to examine how the implementation of the new Pact's legislation on border procedures into Swedish law may affect asylum seekers' right to liberty under the ECHR, the thesis is primarily based on a *legal analytical method*. The distinction between this method and a legal dogmatic method remains debated. Kleineman has argued that legal dogmatics can include critical review and even proposals for improvement.¹⁴

¹⁴ Kleineman, J., "Rättsdogmatisk metod", in Korling, F., and Zamboni, M. (eds), *Juridisk metodlära*, 6th edition, Studentlitteratur, Stockholm, 2013, p. 24.

Jareborg similarly notes that legal dogmatics are not value-neutral¹⁵. Sandgren, by contrast, maintains that such elements fall outside legal dogmatics and instead belongs to the legal analytical method, which permits freer argumentation and weighing of competing considerations, including ethical and value-based reasoning. Furthermore, the legal analytical method allows for a broader selection of sources and is characterised by more open and flexible argumentation. It proceeds from the premise that legal problems do not necessarily have a single correct answer, instead, it aims to identify and evaluate arguments for and against different rules and solutions.¹⁶ This thesis adopts such an approach. Most chapters include critical examination of the Pact and its implementation into Swedish law, and the final chapter allows for more openly evaluative reasoning. Ultimately, whether this is seen as a broader understanding of legal dogmatics or as a distinct legal analytical method is largely a matter of classification rather than substance.

Irrespective of the above, the thesis also includes elements of the *legal dogmatic method*. According to its more traditional definition, this method aims to determine the law as it stands, based on generally recognised sources of law.¹⁷ Consequently, legislation, preparatory works, case law, and legal doctrine have been used to account for the applicable legal framework concerning the right to liberty under the ECHR and EU law, as well as the Pacts legislation on border procedures, including the Screening Regulation, the Asylum Procedure Regulation and the Return Border Procedure Regulation. The legal dogmatic method is intended to be free from value judgments. However, this does not preclude accepted values from influencing the analysis, rather, such values should be taken into consideration when applying the method.¹⁸

Finally, it shall be noted that human rights legal research has been criticized for lacking explicit methodological reflection and for often assuming the

¹⁵ Jareborg, N., "Rättsdogmatik som vetenskap", *SvJT*, 2004, p. 8.

¹⁶ Sandgren, C., *Rättsvetenskap för uppsatsförfattare – Ämne, material, metod och argumentation*, 4th edition, Nordstedt juridik, Stockholm, 2018, p. 50–52.

¹⁷ Kleinman, J., (n 14), p. 21.

¹⁸ Sandgren, C., (n 16), p. 48–50.

coherence and legitimacy of legal norms without sufficient scrutiny.¹⁹ Therefore, it has been an important to incorporate a critical perspective in this thesis, examining not only the content of legal rules but also the assumptions and values underpinning them.

1.4 Material and Previous Contributions on the Topic

There is a substantial body of research concerning both border procedures and migrants right to liberty under the ECHR. Several contributions have also examined, specifically, the new Pact and its implications on migrants' fundamental rights, such as Leon Rauch's article *Hotspots Everywhere? Detention and Restrictions of Freedom of Movement during Border Procedures under the New Pact*.²⁰ This has enabled broad access to material for this thesis.

In the preparation of chapter 2, which addresses the right to liberty in the migration context, case law from the European Court of Human Rights (ECtHR) has been used as the primary source for explaining how the Court has interpreted and applied the relevant article. Given the extensive body of judgments concerning immigration detention, the Court's *Guide on Article 5 of the European Convention on Human Rights*²¹, as well as its *Guide on Article 2 of Protocol No. 4 to the European Convention on Human Rights*²², have been used as tools for identifying relevant case law and delimiting the material in a manageable way.

¹⁹ McInerney-Lankford, S., "Legal methodologies and human rights legal research and opportunities", in A. Andreassen, B. Sano, H., and McInerney-Lankford, S., *Research Methods in Human Rights*, Edward, Elgar Publishing, 14-38, 2017, p. 17-18.

²⁰ Rauch L., "Hotspots Everywhere? Detention and Restrictions of Freedom of Movement during Border Procedures under the New Pact", *European Journal of Migration and Law*, Volume 28, Issue 1, 87-113, 2026.

²¹ European Court of Human Rights, "Guide on Article 5 of the European Convention on Human Rights", 28 February 2026. Available at: https://ks.echr.coe.int/documents/d/echr-ks/guide_art_5_eng, accessed 29 April 2026.

²² European Court of Human Rights, "Guide on Article 2 of Protocol No. 4 to the European Convention on Human Rights", 28 February 2026. Available at: https://ks.echr.coe.int/documents/d/echr-ks/guide_art_2_protocol_4_eng, accessed 29 April 2026.

The chapter also draws on Cathryn Costello's work, given her extensive contributions to the field of human rights and migration law. It particularly relies on her chapter on immigration detention in her book *The Human Rights Migrants and Refugees in European Law*²³, as well as her article *Immigration Detention: The Grounds Beneath Our Feet*.²⁴

To introduce the subject for this thesis, namely the new Pact on Migration and Asylum, chapter 3 draws mainly on web sources from various EU institutions. The chapter also presents the concept of border procedures, relying primarily on Vasiliki Apatzidou's article *Bordering Asylum: Examining the EU's Border Procedures under the Asylum Procedures Regulation (EU) 2024/1348*.²⁵ Her article is used in particular to explain the concept of border procedures and the legal fiction of "non-entry" applied within them.

Chapters 4 and 5 mainly rely on the relevant EU regulations to explain the new screening, asylum- and return border procedures. They also rely on the Swedish memorandum *Ds 2025:30*, which proposes how these procedures should be implemented into Swedish law. The analytical parts of these chapters draw to a significant extent on analyses and comments by the Platform for International Cooperation on Undocumented Migrants (PICUM)²⁶ and the European Council on Refugees and Exiles (ECRE).²⁷ In the sections

²³ Costello, C., *The Human Rights Migrants and Refugees in European Law*, Oxford University Press, Oxford, 2015.

²⁴ Costello, C., "Immigration Detention: The Grounds Beneath Our Feet", *Current legal Problems*, Vol. 68, Issue 1, 143-177, 2015.

²⁵ Apatzidou, V., "Bordering Asylum: Examining the EU's Border Procedures under the Asylum Procedures Regulation (EU) 2024/1348", *International Journal of Refugee Law*, Volume 37, Issue 2, 201-218, 2025.

²⁶ PICUM, "PICUM Analysis of the Screening Regulation", October 2024, p. 7. Available at: <https://picum.org/wp-content/uploads/2024/11/Analysis-Screening-Regulation.pdf>, accessed 9 March 2026; PICUM, "PICUM Analysis of the Asylum Procedure Regulation and Return Border Procedure Regulation", 2024. Available at: <https://picum.org/wp-content/uploads/2024/12/PICUM-Analysis-of-the-Asylum-Procedure-Regulation-and-Return-Border-Procedure-Regulation.pdf>, accessed 9 March 2026.

²⁷ ECRE, "ECRE Comments on the Regulation of the European Parliament and of the Council Introducing the Screening of Third-country Nationals at the External Borders and Amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817", 2025. Available at: https://ecre.org/wp-content/uploads/2025/02/ECRE_Comments_Screening-Regulation.pdf, accessed 10 March 2026.

concerning the Swedish implementation, critical perspectives are also taken from the responses of consultation bodies to the memorandum.

1.5 Delimitations

This thesis is limited to examining the implications of the screening procedure, the asylum border procedure, and the return border procedure introduced under the new Pact, and their proposed implementation into Swedish law. The analysis is specifically confined to how these procedures may affect the right to liberty as protected under the ECHR. The right to freedom of movement under the ECHR is not analysed in depth but is instead used primarily to clarify Article 5 and distinguish between the two rights.

Accordingly, the thesis does not aim to provide a comprehensive analysis of the Pact in its entirety. It is restricted to the three legislative instruments most directly relevant to the initial processing of asylum seekers at the border, namely the Screening Regulation, the Asylum Procedure Regulation and the Return Border Procedure Regulation. Other instruments forming part of the Pact, as well as broader aspects such as solidarity mechanisms or responsibility-sharing between Member States, fall outside the scope of this thesis. Furthermore, while the Crisis and Force Majeure Regulation²⁸ may be relevant for understanding potential restrictions on liberty in exceptional situations, it will not be examined in depth. The thesis instead centres on the ordinary procedures established under the Pact, as these are expected to have the most consistent and foreseeable impact on asylum seekers in the Swedish context. Relevant provisions concerning detention and restrictions

²⁸ Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, 22 May 2024, [OJ L 2024/1359]. Hereafter referred to as “Crisis and Force Majeure Regulation”.

on freedom of movement in the revised Reception Conditions Directive²⁹ and the Return Directive³⁰ are also discussed to some extent.

It should also be noted that, in March 2026, The European Parliament voted in favour of proceeding to the next stage of the legislative process for the proposed Return Regulation, intended to repeal the Return Directive³¹, the latter which is referenced in several of the regulations analysed in this thesis. However, this new regulation will not be considered, as it has not yet been adopted and therefore does not form part of the current applicable legal framework. The analysis will instead proceed based on the existing Return Directive.

Finally, the thesis is limited to primarily focus on the memorandum *Ds 2025:30*, as this specifically addresses the Swedish implementation of the Pact. While this constitutes the main basis for the analysis, references will also be made to related legislative materials where relevant, including the Detention Inquiry³², the Reception Inquiry³³, and the following Government Bill³⁴.

1.6 Outline

Chapter 2 examines the article of the ECHR governing the right to liberty in the migration context. It explains how to distinguish between deprivation of liberty and restrictions on freedom of movement and outlines the

²⁹ Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection (recast), 22 May 2024, [OJ L 2024/1346]. Hereafter referred to as “Reception Conditions Directive”.

³⁰ 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, 24 December 2008, [OJ L 348]. Hereafter referred to as “Return Directive”.

³¹ European Parliament, “Returns regulation: MEPs ready to start negotiations”, 26 March 2026. Available at: [Returns regulation: MEPs ready to start negotiations | News | European Parliament](#), accessed 27 March 2026.

³² SOU 2025:16. *Ett nytt regelverk för uppsikt och förvar*. Hereafter referred to in footnote as “SOU 2025:16”.

³³ SOU 2024:68. *Mottagandelagen. En ny lag för ordnat asylmottagande och effektivt återvändande*. Hereafter referred to in footnote as “SOU 2024:68”.

³⁴ Prop. 2025/26:229. *En ny mottagandelag*. Hereafter referred to in footnote as “Prop. 2025/26:229”.

requirements of lawfulness and protection against arbitrariness. The chapter then analyses immigration detention under Article 5 § 1 (f) ECHR and highlights the relatively broad discretion given to states. It also addresses issues such as *de facto* detention and the treatment of migrants in transit zones, emphasising inconsistencies in case law particularly between the ECtHR and the Court of Justice of the European Union (CJEU). Finally, it situates these issues within EU law, focusing on the revised Reception Conditions Directive and Return Directive, which set limits and safeguards for the use of detention. It shall be noted that the revised Reception Conditions Directive was implemented through the new Pact, however, the Directive is not discussed in a chapter of its own due to the limits of this thesis.

Chapter 3 introduces the new Pact within the border policy context, highlighting its development and role in reforming the Common European Asylum System (CEAS), particularly considering the increasing securitisation of migration in the EU. It introduces border procedures as a central element of the new framework, describing its purpose and key features, as well as their links to practices such as the “hotspot approach”. The chapter also explains the legal fiction of “non-entry” and its function within the pre-entry phase.

Chapter 4 addresses the new Pact’s Screening Regulation, as the first step when entering the Union, focusing on its purpose, scope and function within the pre-entry phase. It outlines how the screening procedure is structured, including its content, duration, and location, as well as the discretion given to Member States in its implementation. The chapter further discusses the use of detention and restrictions of movement during screening, including the issue of *de facto* detention and the applicable legal frameworks. Finally, it considers the Swedish national implementation of the Screening Regulation.

Chapter 5 has a similar outline to chapter 4 but instead addresses the new Pact’s Asylum Procedure Regulation and Return Border Procedure Regulation.

Finally, *Chapter 6* presents the finding of this thesis concerning the new regulations discussed, with a particular focus on their implementation in Swedish

law and their relationship to the right of liberty under the ECHR, in order to answer the presented research question.

2 The Right to Liberty

This chapter examines the legal framework governing the right to liberty in the migration context. Today, all major human rights treaties acknowledge every person's right to liberty³⁵, and under the ECHR, this protection is guaranteed by Article 5. The chapter therefore begins by analysing Article 5 § 1 (f) ECHR, which permits immigration detention in certain circumstances, and explains the distinction between deprivation of liberty and restrictions on freedom of movement under Article 2 of Protocol No. 4.

The chapter then considers the requirements that must be fulfilled for immigration detention to comply with the ECHR, including lawfulness, protection against arbitrariness, legal certainty and procedural safeguards. It also examines *de facto* detention and relevant case law concerning confinement at land borders and airports, showing that the classification of a measure depends on the individual's concrete situation rather than its formal label in national law. Finally, the chapter situates the ECHR analysis within the broader EU legal framework by addressing the revised Reception Conditions Directive and the Return Directive.

2.1 Article 5 of the ECHR

Article 5 § 1 (f) of the ECHR states the following.

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

³⁵ See Article 9 International Covenant on Civil and Political Rights, Article 5 ECHR, Article 6 African Charter on Human and People's Rights and Article 7 American Convention on Human Rights.

The ECtHR has described that the main purpose of Article 5 is to “prevent arbitrary or unjustified deprivations of liberty”.³⁶ The right to liberty is not guaranteed in an absolute manner, instead, the article contains an exhaustive list of six exceptions to the right. Notably, no deprivation of liberty will be considered lawful unless it falls within one of these exceptions, or permissible grounds in subparagraphs (a) to (f) of the article’s first paragraph.³⁷ Subparagraph (f) regulates *immigration detention* as a permissible ground for deprivation of liberty of its own and has been criticised for having a looser set of normative constraints than the other forms of detention under Article 5 § 1.³⁸

There are two steps when assessing Article 5 § 1 (f). Firstly, the threshold question, which is determining if the situation in question amounts to deprivation of liberty. If the answer is no, that the measure does not amount to deprivation of liberty, Article 5 is not applicable. However, if the answer is yes, a substantive review follows. The question is then, if it is deprivation of liberty, is it lawful and accompanied by procedural safeguards?³⁹

2.1.1 Deprivation of Liberty

Every deprivation of liberty of an individual, conducted by a State, *interferes* with Article 5 § 1. Yet not all measures will constitute such a restriction of movement that will amount to deprivation of liberty within the meaning of Article 5.

Deprivation of liberty contains both the objective element of a person’s confinement to a certain limited space for a not negligible length of time, and the subjective element to that the person, deprived of their liberty, has not validly consented to the confinement in question. Relevant objective factors to

³⁶ *Selahattin Demirtaş v. Turkey* (no. 2), Application No. 14305/17, ECtHR, [GC], 22 December 2020, para. 311.

³⁷ *Khlaifia and Others v. Italy*, Application No 16483/12, ECtHR, [GC], 15 December 2016, para. 88.

³⁸ Costello, C., (n 24), p. 147, 155-159.

³⁹ Grabenwarter, C., *European Convention on Human Rights: Commentary*, Beck/Hart, München, 2014, p. 64.

consider include the possibility to leave the restricted area, the degree of supervision and control over the individual's movement, the extent of isolation, and the availability of social contacts.⁴⁰ When determining whether a measure of restricting one's movement amounts to deprivation of liberty, the starting point is the concrete situation of the individual concerned. Account must then be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.⁴¹ A deprivation of liberty may, however, not be established based on one factor individually, but all elements must be examined cumulatively. It is possible even for a short duration of a restriction to be considered a deprivation of liberty. This is particularly true if other factors are also present, such as if the facility is closed⁴² or if there is an element of coercion⁴³.

2.1.2 Distinction from the Right to Freedom of Movement

The right to freedom of movement in Article 2 of Protocol No. 4 to the ECHR sometimes overlap with Article 5. In other words, the same complaint submitted to the Court can sometimes come under Article 5 as well. A measure that does not amount to deprivation of liberty might still infringe with Article 2 Protocol No. 4 and constitute a restriction on freedom of movement.

In cases where the same complaint concerns both of the articles, the Court usually assess the complaint under one article, being the one that is considered more relevant considering the specific circumstances of the case. Where the Court finds a complaint regarding a given restriction to fall within the scope of Article 5, it will not examine it under Article 2 Protocol No. 4 as well.⁴⁴ However, if Article 5 is found to be inapplicable, the relevant complaint will be examined under Article 2 Protocol No. 4⁴⁵ unless the applicant has

⁴⁰ *Storch v. Germany*, Application No. 61603/00, ECtHR, 16 June 2005, para. 73-75.

⁴¹ *J.A. and Others v. Italy*, Application No. 21329/18, ECtHR, 30 March 2023, para. 71.

⁴² *Nolan and K. v. Russia*, Application No. 2512/04, ECtHR, 12 February 2009.

⁴³ *J.R. and Others v. Greece*, Application No. 22696/16, ECtHR, 25 January 2018, para. 86.

⁴⁴ *Assanidze v. Georgia*, Application No. 71503/01, ECtHR, 8 April 2004, para. 194.

⁴⁵ *De Tommaso v. Italy*, Application No. 43395/09, ECtHR, [GC], 23 February 2017, para. 91.

specifically sought to demonstrate that the given restriction amounts to deprivation of liberty, and not simply a restriction of the right to freedom of movement.⁴⁶

Regarding the difference between Article 5 and Article 2 Protocol No. 4, the Court has stated that a restriction on movement might, under certain circumstances, be serious enough to amount to deprivation of liberty. This may take numerous forms other than the classic case of detention, following conviction or arrest.⁴⁷ In the case of *Khlaifia and Others v. Italy*, the Court clarified the difference between deprivation of liberty under Article 5 and restrictions on freedom of movement as referred to in Article 2 Protocol No. 4 as “merely one of degree and intensity, and not one of nature or substance”. Further, the Court noted that the process of classifying a situation as one or the other is not an easy task. In determining whether an individual has been deprived of their liberty, the starting point shall be their concrete situation. Account must also be taken into criteria such as the type, duration, effects, and manner of implementation of the measure in question.⁴⁸ Crucial criteria to consider when determining whether restrictions on liberty amount to deprivation of liberty are the size and the area around which the concerned individual can move, the degree of supervision over them, their opportunities for social contacts, and the duration of the measure.⁴⁹

In more recent cases, the Court has stated five different factors to be considered when determining the distinction between deprivation of liberty and a mere restriction on liberty of movement in the context of a confinement of foreigners in transit zones and reception centres for the identification and registration of migrants. That is: “(i) the applicants’ individual situation and their choices (ii) the applicable legal regime of the respective country and its purpose, (iii) the relevant duration especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, and (iv) the

⁴⁶ *Terheş v. Romania* (dec.), Application No. 49933/20, ECtHR, 13 April 2021, para. 38.

⁴⁷ *Guzzardi v. Italy*, Application No. 7367/76, ECtHR, 6 November 1980, para 95.

⁴⁸ *Khlaifia and Others v. Italy*, [GC], para 64.

⁴⁹ *Guzzardi v. Italy*, para. 92-95.

nature and degree of the actual restrictions imposed on or experienced by the applicants.”⁵⁰

2.1.3 Lawfulness

When applying one of the six exceptions, this must, according to the article, be done “in accordance with a procedure proscribed by law”. With “law”, the article mainly refers to *national* law, as well as to other applicable legal standards, including those who have their source in international law⁵¹ or EU law.⁵² It is primarily for national authorities to interpret and apply domestic law. However, where failure to comply with such law entails a breach of the ECHR, where Article 5 § 1 is at stake, the ECtHR must exercise a certain power to review whether national law has been observed.⁵³

Notably, a measure does not comply with the requirement of lawfulness merely because it complies with national law. To do so, national law must in turn be in conformity with the ECHR, including not only the articles, but the general principles expressed or implied in it.⁵⁴ Concerning the right to liberty, national law restricting this right must comply with the principle of the rule of law, legal certainty, the principle of proportionality and the principle of protection against arbitrariness, the latter being the purpose of Article 5.⁵⁵

Legal Certainty

When applying a measure that amounts to deprivation of liberty, it is important to satisfy the principle of legal certainty, or in other words, the law must achieve a certain level of quality. To do so, the conditions for deprivation of liberty must be sufficiently accessible, clearly defined in domestic law

⁵⁰ Ilias and Ahmed v. Hungary, Application No. 47287/15, ECtHR, [GC], 21 November 2019, para. 217; R.R. and Others v. Hungary, Application No. 36037/17, ECtHR, 2 March 2021, para. 74.

⁵¹ Aydın Sefa Akay v. Türkiye, Application No. 59/17, ECtHR, 23 April 2024, para. 115-129.

⁵² Paci v. Belgium, Application No. 45597/19, ECtHR, 17 April 2018, para. 64.

⁵³ Creangă v. Romania, Application No. 29226/03, ECtHR, [GC], 23 February 2012, para. 101.

⁵⁴ Plesó v. Hungary, Application No. 41242/08, ECtHR, 2 October 2012, para. 59.

⁵⁵ Simons v. Belgium (dec.), Application No. 71407/10, ECtHR, 28 August 2012, para. 32.

and the law must be foreseeable in its application, as the standards of “lawfulness” in the Convention requires “[...] that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”.⁵⁶

No Arbitrariness

It is further important that, where deprivation of liberty is concerned, that this is done in keeping with the purpose of protecting the individual concerned from arbitrariness.⁵⁷ This goes beyond lack of conformity with domestic law, meaning that a measure may be lawful in terms of domestic law, yet arbitrary and contrary to the ECHR.⁵⁸ The notion of “arbitrariness” differs somewhat according to the kind of deprivation of liberty, i.e. detention, at issue. The Court has held that detention may be considered arbitrary when the authorities have acted in bad faith or with deception, when the detention order and its enforcement did not genuinely pursue a purpose allowed under the relevant subparagraph of Article 5 § 1, where there was no real link between the stated lawful basis for the deprivation of liberty and the place or conditions of detention, or when the detention was disproportionate to the ground relied upon to justify it.⁵⁹

Procedural Safeguards

Article 5 also provides a number of procedural safeguards for individuals detained in a migration context. First, Article 5 § 2 establishes the right to be promptly informed of the reasons for detention in a language the individual understands.⁶⁰ This safeguard is crucial to enable detained persons to effectively challenge the lawfulness of their detention⁶¹. Second, pursuant to

⁵⁶ *Khlaifia and Others v. Italy*, [GC], para 92; *J.N. v. the United Kingdom*, Application No. 37289/12, ECtHR, 19 May 2016, para. 77.

⁵⁷ *S., v. and A. v. Denmark*, Application Nos. 35553/12, 36678/12 and 36711/12 ECtHR, [GC], 22 October 2018, para. 74.

⁵⁸ *Creangă v. Romania* [GC], para. 84.

⁵⁹ *Saadi v. the United Kingdom*, Application No. 13229/03, ECtHR, [GC], 29 January 2008, para. 68–74.

⁶⁰ Article 5 § 2 ECHR.

⁶¹ *Khlaifia and Others v. Italy*, [GC], para 115.

Article 5 § 4, individuals have the right to a speedy judicial review of the legality of their detention⁶². Where the detention is found to be unlawful, the court must order the person's release. Finally, Article 5 § 5 guarantees the right to compensation in cases of unlawful detention⁶³.

2.2 Immigration Detention

When evaluating whether there has been a breach of Article 5 ECHR it is, after concluding that the measure in question amounts to deprivation of liberty, necessary to consider if one of the exceptions to this right applies. Article 5 § 1 (f) allows Member States to control the liberty of aliens in an immigration context.⁶⁴ The provision is divided into two limbs, further addressed below. Notably, the Court has stated that the principle that detention should not be arbitrary applies under both limbs in the same manner.⁶⁵

Detention to Prevent Unauthorised Entry into the Country

The first limb allows Member States to detain an immigrant prior to the authorisation to enter their territory. Such detention must in turn be compatible with the overall purpose of Article 5, it shall safeguard the right to liberty while also ensuring that no-one should be deprived of their liberty in an arbitrary fashion.⁶⁶

The leading case under the first limb is *Saadi v. the United Kingdom*, where the applicant claimed asylum on arrival to the United Kingdom at Heathrow Airport. At that point, he was temporarily released and requested to return to the airport immigration authorities. He complied with the request and was later detained and transferred to a detention centre. The reason behind his detention, as well as the reason for the detention centre in question, was to facilitate fast-track processing of claims.⁶⁷ The majority in the Court concluded that detention for individuals whose entry had not yet been authorised

⁶² Article 5 § 4 ECHR.

⁶³ Article 5 § 5 ECHR.

⁶⁴ *Khlaifia and Others v. Italy* [GC], para. 89.

⁶⁵ *Saadi v. the United Kingdom* [GC], para. 73

⁶⁶ *Ibid.*, para. 64–66.

⁶⁷ *Ibid.*, para. 23–25.

was a “necessary adjunct” to the “undeniable sovereign right to control aliens” entry into and residence in their territory.⁶⁸ The description of detention as a “necessary adjunct” introduces the assumption that the State’s interests should guide detention practices.⁶⁹ The Court also imported the rejection of a necessity test when assessing a measure under the first limb, further discussed under the second limb. As a result, detention was justified for the purpose of facilitating administrative proceedings.⁷⁰ Further, this implied that there is no legal requirement to demonstrate that detention is a necessary measure to achieve a specific aim in the individual case, that is, no need to establish grounds for detention. Instead, once a migrant is classified as an “unauthorised entrant”, they can become subject to detention. The only safeguards are that the detention must be carried out “in accordance with law” and must not be “arbitrary”, as discussed below.⁷¹

Further, the Court reasoned that until a State has formally authorised a migrant’s entry, it is considered unauthorised, leaving asylum seekers and other migrant in a legally vulnerable position. Consequently, detaining individuals who seek entry without such authorisation is regarded as falling within Article 5 § 1 (f).⁷² However, this statement did not mean that States had an unlimited right to detain. In order to avoid arbitrariness, detention in the context of the first limb still “[...] must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country; and the length of the detention should not exceed that reasonably required for the purpose pursued”.⁷³ After having applied these criteria to the facts of the *Saadi* case, the Courts’ majority concluded that the applicant’s detention for seven days, imposed in appropriate conditions to

⁶⁸ Ibid., para. 64.

⁶⁹ Costello, C., (n 23), p. 288.

⁷⁰ *Saadi v. the United Kingdom* [GC], para. 72, 74.

⁷¹ Costello, C., (n 24), p. 151.

⁷² *Saadi v. the United Kingdom* [GC], para. 65.

⁷³ Ibid., para. 74

ensure the prompt proceedings of his asylum claims, did not violate Article 5 § 1 (f), especially given the significant administrative difficulties caused by the growing influx of asylum-seekers.⁷⁴

Whether the first limb ceases to apply once a person has been formally authorised to enter or stay is primarily determined by domestic law.⁷⁵

Detention with a View to Deportation or Extradition

The second limb allows Member States to detain an immigrant against whom action is being taken with a view to deportation or extradition.

The leading case concerning the second limb is *Chahal v. the United Kingdom*.⁷⁶ In the case, the Court noted that Article 5 § 1 (f) “does not demand that the detention of a person against whom action is being taken with a view of deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing [...]”. The only requirement was that the concerned individual was facing deportation. Whether the expulsion decision was lawful under national law or the ECHR was considered irrelevant for the purpose of Article 5 § 1 (f).⁷⁷ However, the Court also claimed that detention can only be deemed as lawful as long as deportation proceedings are in progress and prosecuted with due diligence.⁷⁸ Regardless of the Courts rejection of a test of reasonable necessity, a necessity-test of detention may still be a requirement under domestic law, and can therefore constitute an infringement with the requirement of compliance with domestic law.⁷⁹

In later judgments the Court has reiterated that any deprivation of liberty under the second limb may only be justified for as long as deportation proceedings are in progress and prosecuted with due diligence. It is also

⁷⁴ Ibid., para. 80

⁷⁵ *Suso Musa v. Malta*, Application No. 42337/12, ECtHR, 23 July 2013, para. 97

⁷⁶ *Chahal v. the United Kingdom*, Application No. 22414/93, ECtHR, [GC], 15 November 1996.

⁷⁷ Ibid., para. 112.

⁷⁸ Ibid., para. 113.

⁷⁹ *J.R. and Others v. Greece*, para. 111.

necessary for detention under the second limb to be “[...] carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued”.⁸⁰

The Court nonetheless considers the specific circumstances of the detained individual, including any vulnerabilities, such as their age or health status, that may make their detention unsuitable.⁸¹

2.2.1 *De Facto* Detention

As discussed above, there are various requirements to be considered by Member States when deciding to place a person in immigration detention. To avoid these safeguards, States sometimes refuse to acknowledge that the measure constitutes detention. Instead, they might argue that the persons freedom of movement has been restricted or that the person has not been detained since it is possible for them to leave for another country, even though this in practice might mean risking their life or security. This practice is called *de facto* detention and can be understood as a measure that, in practice, amounts to a deprivation of liberty but is not formally recognised as such by States. *De facto* detention is unlawful as it deprives applicants of procedural safeguards.⁸²

The ECtHR’s case law suggests that there is no difference between formal detention and *de facto* detention when applying the law.⁸³ States have repeatedly tried to qualify restrictions imposed on migrants as not amounting to deprivation of liberty, i.e. detention, to avoid all legal guarantees if those restrictions are legally qualified. However, this has consistently been struck down by the Court. In the case of *Khlaifia and Others*, the Italian

⁸⁰ A. and Others v. the United Kingdom, Application No. 3455/05, ECtHR, [GC], 19 February 2009, para. 164.

⁸¹ Thimothawes v. Belgium, Application No. 39061/11, ECtHR, 4 April 2017, para. 73, 79-80.

⁸² PICUM, ”Immigration Detention and De Facto Detention: What Does the Law Say?”, 2022, p. 5. Available at: https://picum.org/wp-content/uploads/2022/09/Immigration-detention-and-de-facto-detention_in-focus.pdf, accessed 29 March 2026.

⁸³ See e.g. R.R. and Others v. Hungary, para. 90-92.

government had argued that the applicants of the case had not been deprived of their liberty when taken and held in an Early Reception and Aid Centre in Lampedusa which was designed for “first aid and assistance” and not detention. However, the applicants could not leave the centre, and where therefore found by the Court as being held there involuntarily⁸⁴. Considering that there also was permanent surveillance of the centre, inability to communicate with the outside world and the prolonged confinement practiced in such centres, the Court concluded that the applicants had been deprived of their liberty. The Court importantly stated that “the classification of the applicants’ confinement in domestic law could not alter the nature of the constraining measures imposed upon them” and that “even measures intended for protection or taken in the interest of the person concerned maybe be regarded as deprivation of liberty”.⁸⁵

2.2.2 Detention and Transit Zones

ECtHR

On 21 November 2019 the Grand Chamber of the ECtHR delivered a judgment, *Ilias and Ahmed v. Hungary*, in which it was determined that the confinement of the asylum-seekers, that is, the applicants at the Röszke transit zone in Hungary did *not* amount to deprivation of liberty i.e. detention.⁸⁶ This judgment narrowed the protection afforded to asylum seekers under Article 5 of the ECHR and marks a departure from earlier case law and weakens safeguards against immigration detention.⁸⁷

The case concerned two Bangladeshi asylum seekers who were held for 23 days in Hungary’s transit zone at the Serbian border while their asylum claims were examined and subsequently rejected on “safe third country”

⁸⁴ Khlaifia and Others v. Italy, para. 68.

⁸⁵ Ibid., para. 71.

⁸⁶ Ilias and Ahmed v. Hungary [GC].

⁸⁷ Stoyanova, V., “The Grand Chamber Judgement in Ilias and Ahmed v Hungary: Immigration Detention and How the Ground beneath Our Feet Continues to Erode”, *Strasbourg Observers*, 23 December 2019. Available at: <https://strasbourgobservers.com/2019/12/23/the-grand-chamber-judgment-in-ilias-and-ahmed-v-hungary-immigration-detention-and-how-the-ground-beneath-our-feet-continues-to-erode/>, accessed 2 March 2026.

grounds.⁸⁸ The Grand Chamber found that Hungary violated Article 3 ECHR procedurally, as it failed to properly assess the risks the applicants might face before removing them to Serbia. However, it did not examine whether they faced a substantive risk of *refoulement*.⁸⁹

The most controversial aspect of the judgment concerns Article 5 ECHR. In its earlier Chamber judgment ruling, the Court had unanimously found that confinement in the transit zone amounted to a deprivation of liberty, particularly because the applicants' detention lacked a legal basis in Hungarian law. In practice, the applicants could not leave the transit zone for Serbia without facing serious and adverse consequences: they would have had to abandon their asylum claims and expose themselves to the risk of *refoulement*. The Court reasoned that not concluding that the applicants had been deprived of their liberty would undermine the protection of Article 5 by forcing the applicants to choose between their liberty and the pursuit of an asylum procedure designed to protect them from *refoulement* contrary to Article 3.⁹⁰

The Grand Chamber disagreed. It reasoned that because the applicants were free to leave towards Serbia, their situation did not constitute detention.⁹¹ In reaching this conclusion, the Court adopted what it described as a “practical and realistic” approach, emphasising States’ right to control borders and prevent circumvention of immigration restrictions. It also accepted Hungary’s characterisation of the situation as part of a migration “crisis.”⁹² Furthermore, the Court distinguished the case from *Amuur v. France*, where the possibility of leaving was considered merely hypothetical because no safe alternative destination was realistically available. This reasoning, however, must be read in close relation to the factual and legal context of the case. In *Amuur*, the applicants could not leave “without authorisation to board an airplane and without diplomatic assurance concerning their only possible

⁸⁸ Ilias and Ahmed v. Hungary [GC], para. 23.

⁸⁹ Ibid., para. 163.

⁹⁰ Ilias and Ahmed v. Hungary, Application No. 47287/15, ECtHR, 14 March 2017, para. 55-56.

⁹¹ Ilias and Ahmed v. Hungary [GC], para. 236-237.

⁹² Ibid., para. 228.

destination, Syria, a country not bound by the Geneva Convention Relating to the Status of Refugees”.⁹³ In *Ilias and Ahmed* on the other hand, the Grand Chamber considered that the applicants could physically walk into Serbia, a State bound by the Refugee Convention, and that their fears did not concern an immediate threat to life or health.⁹⁴

This reasoning effectively broke the link between Articles 3 and 5 ECHR. While the Court acknowledged procedural deficiencies under Article 3, it nevertheless held that the applicants were not deprived of liberty under Article 5.⁹⁵ The judgment thus creates tension within the Court’s own logic.

More broadly, the Grand Chamber reformulated the criteria for determining whether confinement amounts to deprivation of liberty, incorporating the following factors into the definitional stage of Article 5 analysis: “i) the applicants’ individual situation and their choices, ii) the applicable legal regime of the respective country and its purpose, iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by the applicants pending the events, and iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants”.⁹⁶ These criteria was later applied in an airport case, namely *Z.A. and Others v. Russia*. In this case however, the Court found that the confinement of the concerned asylum seekers at an airport in Moscow, for between 5 and 21 months, under constant police surveillance, and without a concrete possibility to leave, did amount to deprivation of liberty.⁹⁷ The Court also concluded that, to leave the transit area towards a third country “would have required planning, contacting aviation companies, purchasing tickets and possibly applying for a visa depending on the destination”⁹⁸, which meant that the applicants had no “practical and real possibility” to leave.⁹⁹ This suggests that the

⁹³ *Ilias and Ahmed v. Hungary* [GC], para 240; *Amuur v. France*, Application No. 19776/92, ECtHR, 25 June 1996.

⁹⁴ *Ilias and Ahmed v. Hungary* [GC], para. 241-242.

⁹⁵ *Ibid.*, para. 164, 249.

⁹⁶ *Ibid.*, para 217.

⁹⁷ *Z.A. and Others v. Russia*, Application Nos. 61411/15, 61420/15, 61427/15, 3028/16, ECtHR, [GC], 21 November 2019, para. 140–156.

⁹⁸ *Ibid.*, para 154.

⁹⁹ *Ibid.*, paras 152–155.

absence of a clear and practical possibility to leave the airport for a third country is more crucial for the determination of deprivation of liberty in airport cases rather than land border cases.¹⁰⁰

Overall, *Ilias and Ahmed* reflect a continued erosion of Article 5 safeguards in the migration context, granting states greater discretion when it comes to restricting the liberty of migrants, while narrowing the practical scope of protection for asylum seekers. It suggests that the holding of asylum seekers in transit zones do not always constitute deprivation of liberty if there is a theoretical possibility to leave towards another country.¹⁰¹

CJEU

Although this thesis primarily focuses on case law from the ECtHR, the following judgement from the CJEU is included as a particularly relevant example. The case concerned the same transit zone as the one at issue in *Ilias and Ahmed* and the Court explicitly referred to that judgement yet reached a different conclusion.

On 14 May 2020 the CJEU found, in a case named *FMS and Others*, in contrast to the *Ilias and Ahmed* case, that the confinement of the applying asylum-seekers at the Röske transit zone *did* amount to detention, and reached the threshold for deprivation of liberty set out in the 2013 Reception Conditions Directive¹⁰².¹⁰³ The Court did refer to the judgment of *Ilias and Ahmed* but claims that the facts of the two cases differ because the applicants were placed in different zones of the Röske transit zone. The judgment concerned the joint cases of an Afghan couple, FMS and FNZ, and an Irani father with his infant child, SA and SA junior. All applicants had been placed in the section of the transit zone designated for third-country nationals whose asylum

¹⁰⁰ Rauch L., (n 20), p. 112–113.

¹⁰¹ Stoyanova, V. (n 87).

¹⁰² 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), 29 June 2013, [OJ L 180].

¹⁰³ C-924/19, C-925/19, FMS & FNS, SA & SA Junior v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság, CJEU, [GC], 14 May 2020.

application had been rejected. Unlike the applicants in the *Ilias and Ahmed* case, they were not asylum seekers.¹⁰⁴

In the judgment, the CJEU commented on the definition of detention as stated in Article 2(h) of the Reception Conditions Directive¹⁰⁵. The concept of detention extends “[...] to any confinement of an applicant for international protection by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement”. This also includes that the applicant, through the confinement, is isolated from the rest of the population through a requirement to permanently remain within a restricted a closed area. In other words, for something to be classified as detention, deprivation is necessary. A mere restriction of freedom of movement is not to be classified as detention.¹⁰⁶ The CJEU concluded that the applicants of the case did not have an effective possibility to leave the Röszke transit zone as they would be considered illegal and be exposed to penalties upon entry in Serbia.¹⁰⁷

Difference in the Courts’ Assessments

As the ECtHR and CJEU came to different conclusions when assessing whether the different applicants stay in the Röszke transit zone amounted to detention, it becomes clear that the definition of detention lacks clarity and that it varies between the different European Courts. It is to be further examined how this unclarity may affect asylum seekers right to liberty and freedom of movement.

In the latter presented case, the CJEU specifically referred to the *Ilias and Ahmed* case by clarifying that the facts differed to the cases of *FMS and Others*.¹⁰⁸ The main difference seems to be that the applicants were placed in different sections in the Röszke transit zone: Ilias and Ahmed in a section for asylum seekers and the others in the sector for third country nationals whose asylum request were denied. Ilias and Ahmed entered the transit zone

¹⁰⁴ FMS and Others, para. 71–72.

¹⁰⁵ Corresponds to Article 2 (9) of the revised Reception Conditions Directive.

¹⁰⁶ FMS and Others, para. 216–217, 223.

¹⁰⁷ Ibid., para. 229.

¹⁰⁸ Ibid., para. 71–72.

voluntarily and had a possibility of leaving towards Serbia, while the others were not placed in the sector voluntarily but by authorities, and could not lawfully leave the transit zone except by departure by air to their countries of origin.¹⁰⁹ It seems as if the difference in the cases are their interpretation of a “voluntary departure”. The fact that the applicants in the different cases entered the transit zone under different circumstances and had different opportunities of leaving might be true from a legal point of view. It is however clear that Ilias and Ahmed could not leave for fear of discontinuation of their asylum proceedings. Having this in regard, commentators argue that the distinction between a restriction in movement in the two sectors of the Rötszke transit zone is clearly based on a strictly legal approach, rather than a “practical and realistic” as the ECtHR argues in *Ilias and Ahmed*.¹¹⁰

The CJEU wields a stricter interpretation of detention, and in doing so also offers stronger protection to asylum seekers, than the ECtHR, which appears rather strange as the latter is a human rights court. Unlike the ECtHR the CJEU also attaches more importance to Serbia’s behaviour as they refuse to readmit third country nationals or sanction returning persons, while the ECtHR put more emphasis on that the applicants fears in regards of returning to Serbia was not one of direct threat to their life or health.¹¹¹

2.3 The Reception Conditions Directive

The following section addresses the revised Reception Conditions Directive from 2024, that is a part of the new legislation, presented through the new Pact.

The Reception Conditions Directive applies for applicants for international protection in Member States¹¹² and as a general rule, these individuals can

¹⁰⁹ Ibid., para. 74.

¹¹⁰ Bombay, A., and Heynen, P., ”The ECtHR’s Ilias and Ahmed and the CJEU’s FMS-case: a difficult reconciliation?” *sui generis*, 255-260, 2021, p. 259.

¹¹¹ Progin-Theuerkauf, S., “Defining the Boundaries of the Future Common European Asylum System with the Help of Hungary?”, *European Papers*, Volume 6, No. 1, 7-15, 2021. Available at: <https://www.europeanpapers.eu/europeanforum/defining-boundaries-future-common-european-asylum-system-help-of-hungary>, accessed 3 March 2026; Ilias and Ahmed v. Hungary, para. 242.

¹¹² Article 1, 3 Reception Conditions Directive.

move freely within the territory of the concerned Member State.¹¹³ Member States are however allowed to impose restrictions on to this general rule.¹¹⁴

Article 9 allows Member States to impose restrictions on the movement of applicants that do not constitute detention such as, residence requirements or regular reporting obligations. Any decision to apply these restrictions must be taken on an individual basis, with due regard to proportionality and the relevant circumstances of the individual concerned, including any special reception needs.¹¹⁵ Additionally, applicants must be informed, in a language they understand, of this decision in writing, detailing the reasons in fact and law, the consequences of non-compliance and procedures for challenging the decision.¹¹⁶ Decisions on restricting freedom of movement should not result in detention.¹¹⁷

The Reception Conditions Directive defines detention as the “confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement”¹¹⁸. There is a clear distinction between detention, as a measure of deprivation of liberty, and a restriction of freedom of movement in Article 9, as the latter does not completely limit the concerned individuals’ physical access outside the respective place.

Member States shall not hold an individual detained for the sole reason that they have applied for international protection or based on the nationality of the applicant. Detention should never be used as a putative measure and may only be applied under one of the exhaustive grounds listed in Article 10 § 4¹¹⁹, one of which is “to decide, in the context of a border procedure in accordance with Article 43 of [the Asylum Procedures Regulation], on the applicant’s right to enter the territory.”¹²⁰ The Reception Conditions Directive does not include maximum duration of detention but states that an applicant

¹¹³ Article 7 Reception Conditions Directive.

¹¹⁴ Article 7–10 Reception Conditions Directive.

¹¹⁵ Article 9 § 4 Reception Conditions Directive.

¹¹⁶ Article 9 § 5 Reception Conditions Directive.

¹¹⁷ Recital (19) Reception Conditions Directive.

¹¹⁸ Article 2 (9) Reception Conditions Directive.

¹¹⁹ Article 10 §§ 1 and 4 (a-g) Reception Conditions Directive.

¹²⁰ Article 10 § 4 (d) Reception Conditions Directive.

shall be detained only for as short period as possible. Administrative procedures relevant to the grounds for detention shall be executed with due diligence. Delays in these procedures, not attributed to the applicant, cannot justify continuation of detention.¹²¹ Detention must also comply with the principle of necessity and may only be used if no other less coercive measure can be applied effectively.¹²² Here we find the necessity criterion that is absent in the ECtHR case law. Detention shall only be used as a measure of last resort, and therefore only after all non-custodial alternatives to detention have been considered.¹²³

Member States must lay down “alternatives to detention”.¹²⁴ These may include the deposit of a financial guarantee, the obligation to stay at an assigned place, to report to a current address, or to surrender identity documents, community management programmes, regular reporting requirements, or electronic monitoring.¹²⁵ Such alternative measures may only be imposed if a detention ground is applicable.¹²⁶ It should be noted, however, that there is a clear overlap with restrictions on movement, as the same measure may, depending its legal basis, be applied either as an alternative to detention or as a movement restriction.¹²⁷

Although the inclusion of specific detention grounds, together with the requirements of necessity and consideration of alternatives to detention, may limit the use of detention, its practical effect will naturally depend largely on the intensity of judicial review and how the rules are applied by authorities. However, by including such a broad list of grounds, the framework leaves considerable discretion to judges to determine *when* detention might be

¹²¹ Article 11 § 1 Reception Conditions Directive.

¹²² Article 10 § 2 Reception Conditions Directive.

¹²³ Recital (33) Reception Conditions Directive.

¹²⁴ Article 10 § 5 Reception Conditions Directive.

¹²⁵ European Union Agency for Asylum, “Guidelines on Alternatives to Detention”, December 2024, p. 43. Available at: <https://www.euaa.europa.eu/publications/guidelines-alternatives-detention>, accessed 22 April 2026.

¹²⁶ *Ibid.*, p. 12-15.

¹²⁷ *Ibid.*, p. 9.

necessary.¹²⁸ This may give rise to substantial differences in application between Member States.

Articles 11-13 address safeguards provided for applicants in detention. Procedural safeguards are covered by Article 11. This article gives applicants the right to be informed in writing, in a language they understand, of the reasons for their detention, as well as the right to appeal the detention decision and access free legal assistance. It also states that detention orders must be reviewed *ex officio* within 15 days of issuance and at reasonable intervals thereafter.¹²⁹ Article 12 entitles applicants to specific reception conditions when detained, including access to open-air spaces, the right to receive information in a language they understand, and the ability to receive visits and maintain communication with representatives of the United Nations High Commissioner for Refugees (UNHCR), family members, legal advisors, counsellors, and representatives of non-governmental organisations (NGO) recognised by the Member State.¹³⁰ Article 13 covers provisions regarding applicants with special reception needs in detention.

2.4 The Return Directive

As mentioned further under “Delimitations”¹³¹, this section addresses the Return Directive from 2008, as this directive is referred to in the discussed Regulations.

The Return Directive applies to third-country nationals staying illegally on the territory of a Member States.¹³² However, some of its provisions are also applicable during the new return border procedure.¹³³

The CJEU has through its judgment *FMS and Others* confirmed that the definition of detention set out in the Reception Conditions Directive also

¹²⁸ Costello, C., (n 23), p. 296.

¹²⁹ Article 11 §§ 3-4 Reception Conditions Directive.

¹³⁰ Article 12 §§ 2-5 Reception Conditions Directive.

¹³¹ See section 1.5.

¹³² Article 2 Return Directive.

¹³³ See section 5.3.

applies under the Return Directive.¹³⁴ Article 15 addresses grounds for detention as well as procedural safeguards.¹³⁵ Third-country nationals should only be kept in detention if they are subject to return procedures to prepare the return and/or carry out the removal process, when there is a risk of absconding or if they avoid or hamper the preparation of return or the removal process. Detention may only be applied if no other less coercive measure can be applied effectively, and only as long as grounds for detention are fulfilled and it is necessary and proportionate with regard to the means used and objectives pursued¹³⁶.

Detention shall be ordered in writing with reasons being given in fact and in law. The time in detention may, however, not exceed six months and not be extended more than an additional 12 months.¹³⁷ According to the CJEU, a right to be heard by the administration applies before a decision is taken to extend the period of detention¹³⁸. Peers argues, however, that this right is of limited practical effect, since the Court held that a breach of the right does not require the release of the person concerned unless the breach affected the substance of the decision to extend detention. Nor does the judgement mention any alternative remedies.¹³⁹ Individuals may remain in detention even though the procedure was flawed, unless they can prove that the flaw affected the outcome. This weakens judicial protection and may allow unlawful or unfair detention to continue longer than it should.

Article 16 sets the conditions for detention. As a rule, this should take place in specialised detention facilities, where the third-country nationals can establish contact with legal representatives, family members and competent consular authorities in due time. Relevant and competent national, international and NGOs and bodies should have the possibility to visit. While in detention, third-country nationals shall be systematically provided with

¹³⁴ FMS and Others, paras. 224-225.

¹³⁵ Article 15 §§ 2-6 Return Directive.

¹³⁶ Recital (16) Return Directive.

¹³⁷ Article 15 Return Directive.

¹³⁸ C-383/13, M.G. and N.R. v. Staatssecretaris van Veiligheid en Justitie, CJEU, 10 September 2013.

¹³⁹ Peers, S., *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum*, 5th edition, Oxford University Press, Oxford, 2023, p. 538-539.

information which explains the rules applied in the facility and sets out their rights and obligations.¹⁴⁰

¹⁴⁰ Article 16 Return Directive.

3 The New Pact on Migration and Asylum

This chapter examines the development and objectives of the new Pact, with particular focus on the expansion of border procedures and their legal implications. It begins by outlining the broader policy context in which the Pact emerged, before analysing how border procedures have become a central feature of the EU's migration management framework.

The chapter then explores the legal fiction of “non-entry” and its role in structuring the treatment of asylum seekers at the EU's external borders. Finally, it considers the underlying objectives of the Pact, highlighting its emphasis on control, efficiency, and returns, as well as the broader tensions and critiques surrounding this approach.

3.1 Background

Migration is often framed as a threat to the stability and cohesion of Europe. This securitisation of migration law becomes evident as EU policy is increasingly shaped by a collective sense of fear and a perception of ongoing crisis, leading to an overemphasis on security-based responses to what are fundamentally complex social and political issues.¹⁴¹

The EU has long faced difficulties in reforming its asylum framework to establish a more coherent and effective system for managing migration. A major revision of EU asylum legislation was completed in 2013. However, it was soon proved inadequate when the so-called 2015-2016 refugee “crisis” exposed significant shortcomings and disparities among Member States. These developments underscored the need for a further overhaul of the CEAS.¹⁴² After several unsuccessful attempts to reach consensus on the necessary reforms, the Commission presented the EU Pact on Migration and

¹⁴¹ Moraru, M., Adel-Naim, R., “Evading EU Law Through Summary Returns at International Borders: Practice, Legality and the Role of Courts”, *Common Market Law Review*, Volume 63, Issue 2, 413-454, 2026.

¹⁴² Apatzidou, V., (n 25), p. 201.

Asylum in 2020, aiming to create a more “effective and unified” approach to asylum and migration across the Union.¹⁴³

Following additional years of negotiation, the European Council and Parliament finally reached an agreement to reform the EU’s legal framework on migration and asylum management, resulting in the Pact. Through this a series of new legislative acts were adopted on 14 May 2024, and will enter into application after two years, on 12 June 2026.¹⁴⁴

3.2 The Objectives of the Pact

The EU Pact is largely driven by the perception that migration flows have become more “mixed” since the so-called refugee “crisis” of 2015–2016, with a higher proportion of applicants considered unlikely to qualify for protection. Based on this premise, the Pact prioritises efficiency, control, and returns. It introduces pre-entry screening and expands border procedures to quickly filter applicants, while linking asylum decisions more closely to return mechanisms.¹⁴⁵

At the same time, the Pact seeks to address political tensions between Member States through flexible solidarity and to curb onward movements by reinforcing responsibility rules. However, the evidence underpinning these objectives is contested. Migration flows are highly variable and difficult to predict, while recognition rates and return figures provide only a partial picture. Critics argue that the Pact places disproportionate emphasis on deterrence and returns, without sufficiently addressing structural issues such as

¹⁴³ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final, 23 September 2020.

¹⁴⁴ European Council, “The Council adopts the EU’s Pact on Migration and Asylum”, 14 May 2024. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2024/05/14/the-council-adopts-the-eu-s-pact-on-migration-and-asylum/>, accessed 11 February 2026.

¹⁴⁵ Brouwer, E., Campesi, G., Carrera, S., Continovis, R., Karageorgiou, E., Vedsted-Hansen, J., Volsyliute, L., “The European Commission’s Legislative Proposals in the New Pact on Migration and Asylum”, Study, Policy Department for Citizen’s Rights and Constitutional Affairs: Directorate General for International Policies, European Parliament, PE 697.130, 2021, p. 40-42.

disparities between national asylum systems, protection needs, and fundamental rights concerns.¹⁴⁶

The new policy on migration and asylum, the Pact, from 2024 consists of four pillars, including:

- secure external borders,
- fast and efficient procedures,
- effective system of solidarity and responsibility, and
- embedding migration in international partnerships.¹⁴⁷

The legislation adopted to execute these are as follows: the Regulation on Asylum and Migration Management¹⁴⁸, the Asylum Procedure Regulation, the Return Border Procedure Regulation, the Crisis and Force Majeure Regulation, the Eurodac Regulation¹⁴⁹, the Screening Regulation, the Qualification Regulation¹⁵⁰, the Reception Conditions Directive, and the Union Resettlement Framework¹⁵¹.

¹⁴⁶ Ibid, p. 42-46.

¹⁴⁷ European Commission, (n 2).

¹⁴⁸ Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013, 22 May 2024, [OJ L 2024/1351].

¹⁴⁹ Regulation (EU) 2024/1358 of the European Parliament and of the Council of 14 May 2024 on the establishment of ‘Eurodac’ for the comparison of biometric data in order to effectively apply Regulations (EU) 2024/1351 and (EU) 2024/1350 of the European Parliament and of the Council and Council Directive 2001/55/EC and to identify illegally staying third-country nationals and stateless persons and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, amending Regulations (EU) 2018/1240 and (EU) 2019/818 of the European Parliament and of the Council and repealing Regulation (EU) No 603/2013 of the European Parliament and of the Council, 22 May 2024, [OJ L 2024/1358]. Hereafter referred to as “Eurodac Regulation”.

¹⁵⁰ Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council, 22 May 2024, [OJ L 2024/1347].

¹⁵¹ Regulation (EU) 2024/1350 of the European Parliament and of the Council of 14 May 2024 establishing a Union Resettlement and Humanitarian Admission Framework, and amending Regulation (EU) 2021/1147, 22 May 2024, [OJ L 2024/1350].

However, this thesis focuses on selected legislation arising from the EU's objective to *secure its external borders*, namely the Screening Regulation, the Asylum Procedure Regulation, the Return Border Procedure Regulation, and to a lesser extent, the Crisis and Force Majeure Regulation.

3.3 Border Procedures

There is no uniform definition of border procedures in EU law. Cornelisse defines border procedures as a procedure where an applicant for international protection is not granted entry while authorities examine their application.¹⁵² Border procedures differ from regular asylum procedures as they are marked by short timeframes and swift processing of asylum applications. They are also normally accompanied by diminished procedural safeguards.¹⁵³

3.3.1 Earlier Experiences

Border procedures have been a part of EU regulatory frameworks governing asylum since 2005.¹⁵⁴ The 2013 Asylum Procedures Directive, which is repealed through the Pact, allowed for Member States to apply asylum border procedures either to determine the admissibility of an application or, if the application falls within the scope of accelerated procedures, to decide on its merits. It did, however, not require border procedures to be conducted.¹⁵⁵

Most Member States currently apply border procedures, either at airports or at the EU's external land and sea borders, with the latter accounting for the majority of applications. To keep individuals from moving further into the territory, confinement of applicants for international protection has become a

¹⁵² Cornelisse, G., "Territory, Procedures and Rights: Border Procedures in European Asylum Law", *Refugee Survey Quarterly*, Volume 35, Issue 1, 74-90, 2016, p. 74.

¹⁵³ Apatzidou, V., (n 25), p. 203.

¹⁵⁴ Article 35 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, 13 December 2005, [OJ L 326].

¹⁵⁵ Articles 43(1), 33, and 31(8) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, [OJ L 180]. Hereafter referred to as "Asylum Procedures Directive".

common practice and has led to both restrictions of liberty, as well as freedom of movement. This has been well documented and challenged before the ECtHR and the CJEU.¹⁵⁶ A study commissioned by the European Parliament has identified several shortcomings in the existing system, including lengthy procedures¹⁵⁷, situations amounting to *de facto* detention¹⁵⁸, inadequate reception conditions¹⁵⁹, and insufficient procedural safeguards¹⁶⁰. Rauch suggests that these prior experiences give rise to concerns that Member States will frequently resort to detention rather than mere restrictions on freedom of movement, with the risk of violating the right to liberty.¹⁶¹

3.3.2 The New Pact

The new Pact introduces an expanded use of border procedures for processing asylum claims within the EU and constitutes a comprehensive reform of the CEAS. It establishes a new border procedure consisting of three elements. First, a mandatory *screening* for all individuals who enter the Union irregularly or apply for asylum at the border. Second, where applicable, an *asylum border procedure* in which claims are examined in an accelerated manner. For those whose applications are rejected in the asylum border procedure, a third border procedure applies, through which they will be returned, namely the *return border procedure*.¹⁶² According to the European Commission, border procedures are essential to tackle irregular secondary migration within the Union while also increasing the return rate of migrants who are refused entry at the external border.¹⁶³

¹⁵⁶ Baeyens, P. and Ott, J., “The Implementation of Article 43 of Directive 2013/32/EU in Practice: Comparative Analysis”, *Asylum Border Procedures at the Borders European - Implementation Assessment*, European Parliamentary Research Service, PE 654.201, 2020, p. 164-168; See chapter 2.

¹⁵⁷ Ibid., p. 177-178.

¹⁵⁸ Cornelisse, G., and Reneman, M., “Border Procedures in the Member States – Legal Assessment”, *Asylum Border Procedures at the Borders European - Implementation Assessment*, European Parliamentary Research Service, PE 654.201, 2020, p. 76-84.

¹⁵⁹ Ibid., p. 91-94.

¹⁶⁰ Ibid., p. 104-107, 112-116.

¹⁶¹ Rauch L., (n 20), p. 89.

¹⁶² Rauch L., (n 20), p. 88.

¹⁶³ European Commission, Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals

The authors of the above-mentioned study commissioned by the European Parliament echo concerns from civil society organisations that the widespread implementation of border procedures in the Union would replicate the “hotspot model” and would lead to an increased use of both *de facto* and *de jure* detention.¹⁶⁴ “Hotspots” were introduced in 2015 as a response to the immediate pressures faced by frontline Member States following the increase arrivals of third country nationals at the EU’s external borders. The approach established facilities for the identification, registration, and fingerprinting of applicants, with operational support on the ground from European Asylum Support Office (EASO), Europol and Frontex.¹⁶⁵

Another author argues that by making border procedures a standard part of EU asylum processing, the Asylum Procedure Regulation effectively transforms the “hotspot approach” from an exceptional mechanism into a general model across the Union. In turn, this may negatively affect how national authorities understand and apply asylum seekers’ rights in practice.¹⁶⁶

3.3.3 The Legal Fiction of “Non-Entry”

The Pact establishes, through the new screening procedure, asylum border procedure, and return border procedure, a “pre-entry” phase.¹⁶⁷ During this

at the external orders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 COM(2020) 612 final, 23 September 2020, p. 1, 6; European Commission, Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU COM(2020) 611 final, 23 September 2020, p. 1-2.

¹⁶⁴ Cornelisse, G., and Reneman M., “Border Procedures in the Commission’s New Pact on Migration and Asylum: A Case of Politics Outplaying Rationality”, *European Law Journal*, Volume 26, Issue 3-4, 181-198, 2021, p. 193-194.

¹⁶⁵ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration, COM(2015) 240 final, 13 May 2015, p. 2, 6.

¹⁶⁶ Chetail, V., and Ferolla Vallandro do Valle, M., “The Asylum Procedure Regulation and the Erosion of Refugee’s Rights”, *EU Immigration and Asylum Law and Policy*, 23 May 2024. Available at: <https://eumigrationlawblog.eu/the-asylum-procedure-regulation-and-the-erosion-of-refugees-rights/>, accessed 13 March 2026.

¹⁶⁷ Cornelisse, G., “Border Control and the Right to Liberty in the Pact: A False Promise of ‘Certainty, Clarity and Decent Conditions?’” in Thym, D., and A. O. A. N. (eds.), *Reforming the Common European Asylum System: Opportunities, Pitfalls and Downsides of the Commission Proposals for a new ‘Pact’ on Migration and Asylum*, *Schriften zum Migrationsrecht*, Vol. 38, 61-80, 2022, p. 63.

phase, individuals are not considered as having formally entered the Union, despite their physical presence there.¹⁶⁸ This reflects a continued reliance on the legal fiction of “non-entry”, which will continue to shape the legal reality for individuals arriving at the Union’s external borders.

The fiction of “non-entry” refers to a legal concept used by States in border management whereby third-country nationals are treated as though they have not legally entered the country, even if they are *physically* present on its territory. The concept is most applied in transit zones at international airports, located between the arrival gates and passport control. Individuals in these areas are physically within the country but are not legally considered to have entered its territory until they complete the required entry procedures and receive official clearance.¹⁶⁹ The legal fiction creates a legal framework that separates physical presence from the legal protections tied to it.¹⁷⁰ Apatzidou argues that, by applying this “non-entry” fiction, States can effectively carve out certain (usually border) areas from the full scope of the legal guarantees afforded to asylum seekers under regular procedures. Through border procedures, the “non-entry” fiction, has been institutionalised by the EU Commission and thereby normalising a regime of rights at the borders.¹⁷¹

To effectuate this fiction, Member States will have to prevent the applicants from entering further into the territory. This will be further discussed in chapters 4 and 5 when describing the Screening Regulation, the Asylum Procedure Regulation and the Return Border Procedure Regulation.

¹⁶⁸ Orav, A., with Barlaoura N., “Legal fiction of non-entry in EU asylum policy”, Briefing, European Parliamentary Research Service, PE 760.347, 2024; ECRE, “An Analysis of the fiction of ‘non-entry’ as appears in the Screening Regulation”, 2022. Available at: <https://ecre.org/wp-content/uploads/2022/09/ECRE-Commentary-Fiction-of-Non-Entry-September-2022.pdf>, accessed 12 February 2026.

¹⁶⁹ Ibid.

¹⁷⁰ Thym, D., *European Migration Law*, Oxford University Press, Oxford, 2023, p. 414-415.

¹⁷¹ Apatzidou, V., (n 25), p. 212-213.

4 Screening Regulation

This chapter examines the screening procedure introduced by the Pact's new Screening Regulation as the first step in the pre-entry phase for third-country nationals arriving in the Union. It outlines the purpose and main elements of the procedure, including the checks carried out and the referral to subsequent procedures. The chapter also analyses key issues relating to the duration and location of the screening, the obligation for Member States to ensure that individuals remain available to authorities during the procedure, and the potential use of detention or detention-like measures. Finally, it examines the proposed implementation of the screening procedure in Sweden and highlights the legal and practical challenges that may arise in this context.

4.1 Background

In contrast to other legal instruments in the Pact, the Screening Regulation does not modify already existing rules. Instead, it codifies practices that have been used informally or formalised in national law or policy. The Regulation was created as a way for meeting a “need” in situations when Member States face unauthorised border crossings by third-country nationals avoiding border checks despite existing border surveillance measures.¹⁷² The screening process is in turn designed as a complement to external border checks or as a way of compensating for their absence during border crossings.¹⁷³ The Regulation also establishes rules to help border authorities manage large-scale arrivals, as well as prevent applicants of international protection from absconding and hinder secondary movements.¹⁷⁴

4.2 Subject Matter

The first step in the pre-entry phase, when a third-country national arrives in a Member State irregularly or as an applicant for international protection, will be to undergo a *screening procedure*. The purpose of the screening is to

¹⁷² Recital (2) Screening Regulation.

¹⁷³ ECRE, (n 27), p. 18-19.

¹⁷⁴ Recital (5) Screening Regulation.

identify applicants and refer them to the appropriate procedure, while also strengthening the control of persons entering the Union.¹⁷⁵

The screening procedure will apply to third-country nationals at the external borders of the Member States who do not fulfil entry conditions, have crossed the external border in an unauthorised manner, have applied for international protection during border checks, or have been disembarked after search and rescue operation, as well as third-country nationals illegally staying within the territory of the Member States where there is no indication that they have been subject to controls at the external borders.¹⁷⁶

The screening includes a preliminary health check¹⁷⁷, a preliminary vulnerability check¹⁷⁸, identification or verification of identity¹⁷⁹, the registration of biometric data¹⁸⁰, a security check¹⁸¹, the filling out of a screening form¹⁸² and referral to the appropriate procedure¹⁸³. The results from the screening are then registered through a form and serve as a basis for determining the appropriate and subsequent procedure.¹⁸⁴

4.3 Location and Detention

According to the Regulation third-country nationals, subject to screening at the external border, shall *not* be authorised entry into the territory of a Member State, meaning that the procedure will take place in the fiction of “non-entry”.¹⁸⁵ For these individuals, the screening must be carried out at an appropriate and adequate location, typically situated at or in proximity to the external border, or alternatively, in another designated place within the Member State’s territory. However, it is each Member State that determine

¹⁷⁵ Article 1, recital (6) Screening Regulation.

¹⁷⁶ Article 1, 5, 7 Screening Regulation.

¹⁷⁷ Article 12 Screening Regulation.

¹⁷⁸ Article 12 Screening Regulation.

¹⁷⁹ Article 14 Screening Regulation.

¹⁸⁰ Article 15, 22 and 24 Eurodac Regulation.

¹⁸¹ Article 15, 16 Screening Regulation.

¹⁸² Article 17 Screening Regulation.

¹⁸³ Article 18 Screening Regulation.

¹⁸⁴ Recital (15, 30) Screening Regulation.

¹⁸⁵ Article 6 Screening Regulation; ECRE, (n 27), p. 12.

where the screening will take place, considering geographical conditions and existing infrastructure to ensure that the process can be conducted without delay.¹⁸⁶ Member States shall also lay down provisions in their national law to ensure the presence of those subjected to the screening to prevent absconding.¹⁸⁷

It is likely that only official border crossing points will fully meet the objectives of the screening procedures set out in the Regulation in regard to locations situated “at” the border. It is however, not required for the screening to be conducted exclusively at such locations. This leaves Member States with considerable discretion. ECRE suggests that this discretion leaves open the possibility that individuals may be held in other unofficial locations following apprehension, disembarkation, or the lodging of an asylum application, before being transferred to facilities where the screening procedure can formally take place. Furthermore, the Regulation allows screening to be carried out “in proximity” to the border, a concept that remains undefined. This lack of clarity raises concerns about where individuals may be held and under what conditions during the screening phase. In practice, the designation of specific screening locations appears, according to ECRE, to reflect an effort to formalise the “hotspot approach” previously implemented in Greece and Italy. That approach has been widely criticised, particularly due to reports of inadequate living conditions and the treatment of individuals held in these facilities.¹⁸⁸

Based on an individual assessment, Member States may detain a person undergoing screening if no less coercive measure can be effectively applied. Any detention must comply with the principles of necessity and proportionality, be used only as a last resort, be subject to effective remedies, and with full respect to national, EU, and international law.¹⁸⁹ Despite these limitations to the use of detentions, the Regulation requires Member States to ensure that individuals remain at the disposal of the competent authorities

¹⁸⁶ Recital (10) Screening Regulation.

¹⁸⁷ Recital (11) Screening Regulation.

¹⁸⁸ ECRE, (n 27), p. 18-19.

¹⁸⁹ Recital (11) Screening Regulation.

during the screening procedure.¹⁹⁰ In practice, this creates a parallel system of restrictions which, while not necessarily being formally classified as detention, may nevertheless amount to deprivation of liberty. Drawing on experience, where screening procedures previously have been applied, there has been a widespread use of *de facto* detention¹⁹¹, why the mandatory implementation of screening procedures risks increasing the use of *de facto* detention significantly. PICUM argues that this is particularly evident considering the operational realities of border management, where individuals are likely to be held in closed or remote facilities with limited freedom of movement. Such arrangements enable authorities to circumvent the procedural safeguards that would normally apply to formal *de jure* detention.¹⁹²

The risk of a widespread use of *de facto* detention is further compounded by the uncertainty surrounding the applicable legal framework during screening. For applicants for international protection, the Reception Conditions Directive applies during the screening, while the Return Directive applies for those who have not made an application for international protection.¹⁹³ However, it remains unclear at what point the Return Directive regime becomes applicable, given that an asylum application is only formally registered after the screening procedure has been completed.¹⁹⁴ As a result, it is uncertain whether, and how, Member States will implement two distinct regimes within the same screening facilities.¹⁹⁵ The lack of explicit rules on *if* and *when* detention can be applied in the Regulation further reinforces the risks of the use of *de facto* detention, without legal basis and necessary legal safeguards.¹⁹⁶

¹⁹⁰ Article 9, recital (11) Screening Regulation.

¹⁹¹ De La Orden Bosch, G., “Pre-entry Screening Procedures and Border Procedures as new Detention Landscape in the EU Pact on Migration and Asylum. The Spanish Borders as a Laboratory for Immobility Policies”, *Peace & Security – Paix et Sécurité Internationales*, No. 12, 2024, p. 8.

¹⁹² PICUM, *Screening* (n 26), p. 7.

¹⁹³ Article 8(7), 4(1)(b); Recital (11) Screening Regulation.

¹⁹⁴ Recital (15) Screening Regulation.

¹⁹⁵ PICUM, *Screening* (n 26) p. 5.

¹⁹⁶ Civil Rights Defenders, ”En rättighetsbaserad granskning av EU:s Asyl och Migrationspakt”, 20 June 2024, p. 10. Available at: https://crd.org/wp-content/uploads/2025/09/En-rattighetsbaserad-granskning-av-EUs-asyl-och-migrationspakt_Civil-Rights-Defenders.pdf, accessed 16 March 2026

Moreover, due to the close link between the screening procedure and subsequent border or return procedures¹⁹⁷, ECRE argues that Member States are likely to establish multi-purpose facilities at or near external borders. Within these facilities, individuals may be directly channelled from screening into either a return procedure or an asylum border procedure. Both processes operate under the legal fiction of “non-entry”¹⁹⁸, further limiting individuals’ legal position and access to safeguards. Even in the absence of formal detention, ECRE suggests that the likely use of remote, closed or highly controlled facilities means that individuals will, in practice, have little or no freedom to leave. Taken together, these structural features create a strong likelihood that screening will result in the widespread use of *de facto* detention for new arrivals.¹⁹⁹

4.4 Duration

Screening at the external border should be carried out no longer than within seven days from the apprehension in the external border area, the disembarkation in the territory of the Member State or the presentation at the border crossing point.²⁰⁰ Considering the concerns for the conditions in which individuals subject to screening may be held under, it is positive that the period for the screening has a strict time limit. This, however, raises concerns regarding whether the provided time is sufficient to effectively conduct the procedure.²⁰¹

¹⁹⁷ See chapter 5.

¹⁹⁸ See subsection 3.3.3.

¹⁹⁹ ECRE, (n 27) p. 19-20.

²⁰⁰ Article 8 § 3 Screening Regulation.

²⁰¹ ECRE, (n 27) p. 20.

4.5 The Swedish Implementation

As for other Member States, screening is legally new to Sweden and requires certain adjustments in its implementation.

4.5.1 Location

The memorandum on the implementation of the Pact proposes that a note is added to Chapter 1 Section 5 of the Swedish Aliens Act²⁰², stating that individuals subject to screening procedures shall *not* be authorised entry into the territory. Such a note is necessary since the current general rule does not apply the legal fiction of “non-entry”, that an alien is considered to have entered the country once they have crossed the border into Swedish territory.²⁰³

Another provision will also be added to the Swedish Aliens Act stating that the government, or an authority designated by the government, may issue more detailed regulations specifying the location at the external border where screening will take place. Thus, it is not stated more specifically *where* the screening procedures will be carried out.²⁰⁴ Not proposing any provisions on where the screening procedure should be carried out and allowing these locations to be decided later, could lead to unequal treatment of people undergoing screening as different locations might be applied unevenly. People may be placed in more remote locations during the screening and others may not. Where the screening takes place could potentially affect access to legal assistance, detention conditions and procedural safeguards. In turn, this risks affecting asylum seekers’ chances of successful asylum applications.

4.5.2 Use of Detention

To ensure that the third-country nationals subjected to the screening remain available for the competent authorities throughout the procedure the

²⁰² SFS 2005:716. *Utlänningslag*.

²⁰³ Ds 2025:30, p. 498–499.

²⁰⁴ *Ibid.*, p. 499.

memorandum notes that detention shall only be used exceptionally and that less intrusive measures should be applied as a first choice.²⁰⁵

It is therefore proposed that the “obligation to remain” in Chapter 9 Section 11 of the Swedish Aliens Act shall be extended to include an obligation to remain for the implementation of the screening. It is noted in the memorandum that the obligation to remain may constitute a restriction on the freedom of the individual and that the distinction between a deprivation of liberty and other interferences with freedom of movement is not always clear. The rules in Chapter 9 Section 11 of the Swedish Aliens Act must however be considered an involuntary restriction of liberty. The measures may also be enforced by coercion. However, the restrictions do not entail placement in custody or any other equivalent alternative to confinement, such as detention. The memorandum further notes that although it could be argued in some cases that extending the obligation to remain to also include the screening constitutes an infringement with the protection against deprivation of liberty, the measure cannot be considered too intrusive, as the interest in being able to carry out the screening in an effective and appropriate manner is considered to outweigh the individual’s right to liberty.²⁰⁶

The time limit for how long a person can be held pursuant to Chapter 9 Section 11 of the Swedish Aliens Act is six hours. If this time needs to be prolonged, there needs to be a decision on detention issued. However, because the screening procedure may exceed this time limit in some cases, it is proposed that the six-hour time limit should be extended to a 12-hour time limit, to avoid a more intrusive measure, like detention, to complete the screening. This time limit may also be extended a further 12 hours if there are special reasons. Such reasons can be that there has been an increased influx of people who are to undergo screening on a single occasion.²⁰⁷ It is also stipulated that the holding of individuals in accordance with Chapter 9 Section 11 of the Swedish Aliens Act may last 24 hours, as a person subject to this might “need

²⁰⁵ Ibid., p. 501.

²⁰⁶ Ibid., p. 505-506.

²⁰⁷ Ibid., p. 503-508.

a few hours of sleep”. The Swedish Migration Agency is proposed to be responsible to meet this need and accommodate these individuals. However, as the Equality Ombudsman notes, it is not explained how this type of accommodation differs from detention, in what way it is less restrictive, what rules apply to it, nor what consequences it might have.²⁰⁸ The Swedish Institute for Human Rights is critical to the memorandum’s idea that the extension of the time limit in Chapter 9 Section 11 of the Swedish Aliens Act would be a way of avoiding more coercive measures such as detention or supervision. Instead, this highlights a lack of analysis regarding alternative measures for keeping individuals available.²⁰⁹

If it is not possible to complete the screening within the 24 hours provided through Chapter 9 Section 11, the obligation to ensure the presence of the individuals during the procedure, shall be fulfilled through the opportunity to decide on *supervision* or *detention*. The considerations for the use of supervision and detention during screening are based on the proposals from the Detention Inquiry regarding a new Chapter 10 in the Swedish Aliens Act about supervision and detention.²¹⁰ A general rule set forth in the inquiry is that specific provisions should be added to clarify that a foreign national may only be detained if supervision is not a sufficient measure.²¹¹

Third-country Nationals not Applying for International Protection

For this category of third-country nationals the grounds for detention in the Return Directive applies. However, these are not exhaustive and allows Member States to introduce additional grounds. The Detention Inquiry has proposed a new legal basis for this category of people. Such persons may be detained or placed under supervision according to the new Chapter 10 Section

²⁰⁸ Ibid., p. 509–510; Equality Ombudsman, “Yttrande över Migrations- och asylpakten, Ds 2025:30”, DO 2025:8648, 7 January 2026. Available at: <https://www.regeringen.se/contentassets/76c41f8958c94800a0c33ef08aecc362/diskrimineringsombudsmannen.pdf>, accessed 5 March 2026.

²⁰⁹ The Swedish Institute for Human Rights, “Remissvar Migrations- och asylpakten Ds 2025:30”, Dnr 3.1.2-814/2025, 23 December 2025, p. 16-18. Available at: <https://www.regeringen.se/contentassets/76c41f8958c94800a0c33ef08aecc362/institutet-for-manskliga-rattigheter.pdf>, accessed 6 May 2026.

²¹⁰ SOU 2025:16.

²¹¹ Ds 2025:30, p. 268; SOU 2025:16 p. 190.

2 of the Swedish Aliens Act if, 1. It is necessary to investigate their identity or right to remain in Sweden, or 2. It is likely that they will be refused entry or deported and there is a risk of criminal activity, absconding, evasion, or obstruction of proceedings. Since these individuals are apprehended while attempting to enter the country irregularly, there is generally a risk that they may not comply with the screening process and may abscond. Considering the purpose of the Screening Regulation, it is therefore further proposed that Chapter 10 Section 2 should be supplemented to explicitly include situations where a person must undergo screening under the Screening Regulation. Correspondingly, Chapter 1 Section 15 of the Swedish Aliens Act should be amended so that the obligation to undergo screening is considered when assessing the risk of absconding.²¹²

Third-country Nationals Applying for International Protection

For this category, the permissible grounds for detention in the Reception Conditions Directive applies instead, and the proposals in the Detention Inquiry are, in principle, consistent with these. Article 10 Reception Conditions Directive regulates detention but does not provide specific grounds linked to the screening process itself. Therefore, Swedish law cannot allow detention solely because a person must undergo screening. However, under the proposal implementing Article 10 § 4 (f), detention or supervision may be used where necessary to protect national security or public order. The requirement to undergo screening, and thus remain available, may in individual cases justify detention or supervision on these grounds. This means, according to the memorandum, that detention or supervision during screening can still be applied to applicants for international protection in line with the Detention Inquiry.²¹³ The Swedish Institute for Human Rights criticises the memorandum for not sufficiently considering less restrictive alternatives to detention or supervision. While acknowledging that such measures cannot be imposed solely because a person is subject to screening, it does not identify any alternative measures once the obligation to remain has expired.²¹⁴ This is problematic

²¹² Ds 2025:30, p. 510-517.

²¹³ Ds 2025:30, p. 519-526.

²¹⁴ The Swedish Institute for Human Rights, (n 209), p. 20-21.

because, in the absence of such alternatives, for those who do not pose a threat to public order or national security, the practical need to keep individuals available during screening may increase the risk of detention-like measures.

5 Asylum Procedure Regulation and Return Border Procedure Regulation

This chapter examines the border procedures introduced by the Asylum Procedure Regulation and the Return Border Procedure Regulation as the second and third step in the pre-entry phase for third-country nationals arriving in the Union. It outlines the purpose and main elements of both the asylum and return border procedure, including the circumstances under which they must be applied and the link between the two.

The chapter further analyses key issues relating to the scope of application, the mandatory nature of the procedures, and the discretion granted to Member States. It also addresses questions concerning the duration and location of the procedures, the requirement for applicants to remain at or near the external border, and the potential use of detention or detention-like measures. Finally, the chapter examines the proposed implementation of these border procedures in Sweden and highlights the legal and practical challenges that may arise in this context.

5.1 Background

Together, the Asylum Procedure Regulation and Return Border Procedure Regulation, sets up a mandatory border procedure under certain circumstances for both the asylum and the return procedure at the external border. The aim of the regulations is to ensure a fair and efficient process in the EU for examining and deciding on an asylum application, while limiting abuse and removing incentives for secondary movements across the Union.²¹⁵ The return part of the border procedure is set out in a separate Regulation, that is the Return Border Procedure Regulation, for legal reasons, to reflect the fact that the return rules at EU-level build on the Schengen rules.²¹⁶ There is,

²¹⁵ European Union, “European Union asylum procedures (from 2026)”, 3 November 2025. Available at: [European Union asylum procedures \(from 2026\) | EUR-Lex](#), accessed 9 March 2026.

²¹⁶ European Commission, “Legislative files in a nutshell”, 4 June 2024. Available at: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum/legislative-files-nutshell_enaccessed, accessed 9 March 2026.

however, a strong link between the asylum and return border procedures in these two Regulations. That is also why these are examined in the same chapter. Member States shall, according to Article 37 Asylum Procedure Regulation, issue a return decision as a part or at the decision rejecting an application for international protection. Individuals not qualifying for asylum in the context of the asylum border procedures should be channelled into return border procedures.²¹⁷

5.2 Subject Matter

Asylum Border Procedure

Following the screening, a third-country national who has made an application for international protection, may be channelled into an asylum border procedure.²¹⁸ It is expected that the use of asylum border procedures will increase through the new framework as the Asylum Procedure Regulation expands the scope of application for such.²¹⁹

Firstly, a significant change is introduced in Article 45, establishing the mandatory application of asylum border procedures under three acceleration grounds. This differs from the Asylum Procedures Directive, earlier handling these procedures, which did not obligate Member States to impose border procedures but rather gave them the alternative.²²⁰ According to the Asylum Procedure Regulation it is mandatory to apply asylum border procedures if, the applicant have mislead the authorities through false information or documents, is considered a threat to national security or public order, or originates from a third country with an international protection recognition rate of 20 percent or lower according to the latest available yearly Union-wide Eurostat data.²²¹ There are two exceptions to the latter. That is, if there has been a

²¹⁷ Article 1 Return Border Procedure Regulation.

²¹⁸ Recital (57) Asylum Procedure Regulation.

²¹⁹ Vedsted-Hansen, J., “Admissibility, Border Procedures and Safe Country Notions”, in Carrera, S. and Geddes, A. (eds.), *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees: International Experiences on Containment and Mobility and their Impacts on Trust and Rights*, Centre for European Policy Studies (CEPS), Bruxelles, 170-179, 2021.

²²⁰ Article 31 § 8 Asylum Procedures Directive.

²²¹ Article 45 and 42 § 1 (c, f, j) Asylum Procedure Regulation.

significant change in the third country concerned since the publication of the relevant Eurostat data, or that the applicant belongs to a category of persons whom from the proportion of 20 percent recognition rate cannot be considered representative for their protection needs.²²²

Considering the above, it shall also be noted that the Crisis and Force Majeure Regulation, allows in times of crisis or force majeure, Member States to broaden the scope of application of border procedures. During these exceptional circumstances Member States may apply asylum border procedures to individuals who originates from a third country with an international protection recognition rate of 50 percent or lower according to the latest available yearly Union-wide Eurostat data. This means that the Member States can extend the application of border procedures to those who come from third countries where the Union-wide recognition rate is above 20 percent but under 50 percent.²²³

The third ground is of significance as it is an additional ground that was absent from the 2016 proposal for an Asylum Procedure Regulation.²²⁴ Consequently, the Asylum Procedure Regulation endorses decisions and assessments being based on nationality rather than personal circumstances, which may result in certain asylum seekers being denied a thorough examination of their claims. A low recognition rate, however, does not in itself indicate that an individual claim lacks merit. This approach therefore raises significant concerns, as it risks introducing bias against applicants from particular countries and may give rise to discriminatory outcomes.²²⁵ Moreover, considerable disparities in recognition rate persist between Member State, a point expressly acknowledged in Recital (3) of the Asylum Procedure Regulation.²²⁶ The safeguard provided through the exceptions also appears rather insufficient. The Regulation does not clarify who is responsible for determining

²²² Article 42 § 1 (j) Asylum Procedure Regulation.

²²³ Recital (47) Crisis and Force Majeure Regulation.

²²⁴ European Commission, Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU COM(2016) 467 final.

²²⁵ Apatzidou, V., (n 25), p. 208-209.

²²⁶ Recital (3) Asylum Procedure Regulation.

representativeness or the criteria to be applied in making such an assessment, thereby leaving unresolved concerns regarding fairness and potential discrimination.²²⁷

Secondly, the Asylum Procedure Regulation broadens the personal scope granting Member States the discretion to extend the use of asylum border procedures in other cases.²²⁸ The border procedure *may* be imposed on third-country nationals applying for international protection at the external border crossing or in a transit zone. It may also take place following the apprehension in connection with an unauthorised crossing of the external border, following disembarkation in the territory of a Member State after a search and rescue operation or following relocation.²²⁹

Return Border Procedure

According to Article 1 of the Return Border Procedure Regulation, the return border procedure applies to third-country nationals and stateless persons whose application has been rejected in the context of the asylum border procedure provided for in the Asylum Procedure Regulation.²³⁰

5.3 Location and Detention

Asylum Border Procedure

Similar to the screening procedure, applicants for international protection shall not be authorised to enter the territory of a Member State during the asylum border procedure, applying the fiction of “non-entry”.²³¹ Member States shall instead require these individuals to, pursuant to the restrictions of freedom of movement and without prejudice to the grounds for detention in the Reception Conditions Directive²³², reside at or in proximity of the external border or in a transit zone. It is also possible to require individuals to reside

²²⁷ Apatzidou, V., (n 25), p. 208-209.

²²⁸ Article 43.1 Asylum Procedure Regulation.

²²⁹ Article 43 § 1 Asylum Procedure Regulation.

²³⁰ Article 1 Return Border Procedure Regulation.

²³¹ Article 43 § 2 Asylum Procedure Regulation.

²³² Article 9-10 Reception Conditions Directive.

in other designated location within the State territory, to assess the admissibility of their applications.²³³ This wording suggests that the residence requirement equals a restriction of movement, but still foresees that detention might be necessary during the procedure.

Member States may also process applications at a different point along the external border than where the application was made, by transferring applicants to designated facilities either near the border or, where appropriate, to other locations within their territory. While Member States retain discretion to determine where such facilities are set up, they should minimise the need for transfers by establishing sufficient capacity at the border crossing points or border sections where most applications are lodged. They must also notify the European Commission of the specific locations where the border procedures will be carried out. However, necessary arrangements, in accordance with the Reception Conditions Directive should be ensured by each Member State while accommodating the applicants in these designated locations.²³⁴

The Asylum Procedure Regulation states that it is not necessary to use detention as a measure while examining border procedures, but, *possible* for the Member States to apply in order to decide on the right of the applicant to enter the territory. Recital (69) stipulates that it should only be possible to detain *minors* under exceptional circumstances, as a measure of last resort and if it has been established that no other less coercive measure can be effectively applied.²³⁵ Specifically, referring to minors suggests that this does not apply to others. However, if detention is used, on whoever, during an asylum border procedure, the provisions of the Reception Conditions Directive apply. This includes the guarantees for detained applicants, conditions of detention, judicial control, and the necessity of an individual assessment of each case.²³⁶

²³³ Article 54, recital (58) Asylum Procedure Regulation.

²³⁴ Recital (65) Asylum Procedure Regulation.

²³⁵ Article 11 § 2 and Recital (69) Reception Conditions Directive; see section 2.3.

²³⁶ Recital (69) Asylum Procedure Regulation.

Although detention cannot be imposed automatically simply because someone is subject to border procedures²³⁷, the Horizontal Substitute Impact Assessment of the Pact on Migration and Asylum from 2020, requested by the European Parliament's Committee of Civil Liberties, Justice and Home Affairs (LIBE), notes that the holding of applicants at the external border or transit zones will, in most cases, constitute detention.²³⁸ In 2013, the European Commission also underlined that border procedures should not be employed as they imply detention.²³⁹ The latter is difficult to reconcile with the claim now being that border procedures *can* be carried out without resorting to detention.

Although it is expected that the mandatory and broader personal scope of the border procedure will result in an increased use of migrant-detention²⁴⁰ it is not addressed how border procedures will be conducted without recourse to large scale detention, but rather just stated that it is *possible* to apply border procedures without recourse to detention.²⁴¹ However, it is worth mentioning that the EU Commission, in the first proposal to the Asylum Procedure Regulation published in 2016, stated that border procedures normally require the use of detention²⁴², which makes this claim questionable. PICUM warns that the use of detention may not be a matter of last resort as the border procedures are designed to facilitate the automatic detention of large groups of people. Detention is always harmful, disproportionate and ineffective, and shall for this reason be ended.²⁴³

²³⁷ Recital (26), Article 10 §§ 1 and 4 Reception Conditions Directive; Recital (69) Asylum Procedure Regulation.

²³⁸ Cornelisse, G., and Campesi, G., "The European Commission's New Pact on Migration and Asylum: Horizontal Substitute Impact Assessment", European Parliamentary Research Service, PE 694.210, 2021, p. 63.

²³⁹ European Commission, Communication from the Commission to the European Parliament pursuant to Article 294(6) of the Treaty of the Functioning of the European Union Concerning the Position of the Council on the Adoption of the Proposal for a Directive of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection, COM(2013) 411 final, 10 June 2013, p. 4.

²⁴⁰ Den Heijer, M., "The Pitfalls of Border Procedures", *Common Market Law Review*, Volume 59, Issue 3, 641-672, 2022, p. 663.

²⁴¹ Recital (69) Asylum Procedure Regulation.

²⁴² European Commission, (n 224).

²⁴³ PICUM, *Asylum- and Border Procedure* (n 26), p. 9.

Return Border Procedure

The Return Border Procedure Regulation states that third-country nationals and stateless persons whose applications have been rejected following an asylum border procedure are not authorised to enter the territory of the Member State concerned, applying the fiction of “non-entry”. Member States are required to ensure that individuals subject to return border procedures remain in locations generally at or in proximity to the external borders or transit zones. If it is not possible to accommodate such individuals in those locations, Member States may resort to the use of other locations within its territory. However, this does not mean that the concerned individual is authorised to enter the State territory. Regardless of the location, accommodations where individuals are placed during the return procedure must comply with standards set out in Reception Conditions Directive regarding material reception conditions and healthcare.²⁴⁴

It is also possible for Member States to impose detention on persons subject to return border procedures, as a measure of last resort if it proves necessary and if a less coercive measure cannot be effectively applied. Individuals who were detained during the asylum border procedure and no longer have the right to remain may continue being detained for the purpose of preventing their entry into the Member State concerned, preparing their return or of carrying out the removal process. Those who were not previously detained and no longer have the right to remain may be detained if there is a risk of absconding according to the Return Directive, avoid or hinder the preparation of return or removal process or pose a risk to public policy, public security or national security.²⁴⁵

When applying the return border procedure, certain provisions of the Return Directive should also apply, as they govern aspects not addressed in this Regulation. These include, in particular, provisions relating to definitions, more favourable standards, the principle of *non-refoulement*, the best interests of the child, family life and health, the risk of absconding, the

²⁴⁴ Article 4 §§ 1 and 2 Return Border Procedure Regulation.

²⁴⁵ Article 5 Return Border Procedure Regulation.

obligation to cooperate, the period for voluntary departure, return decisions, removal and its postponement, the return and removal of unaccompanied minors, entry bans, safeguards pending return, detention and detention conditions, the detention of minors and families, and emergency situations.²⁴⁶

5.4 Duration

Asylum Border Procedure

The regulation stresses that although the border procedure should be completed as swiftly as possible, this must not compromise a fair and thorough examination of applications. The total duration of the procedure may not exceed 12 weeks, counted from the registration of the application until the point at which the applicant no longer has, nor is permitted to exercise, a right to remain (that is, not including the time of the screening). If the person is relocated from one Member State to another and the receiving Member State is applying the border procedure, the 12-week deadline can be extended to 16 weeks.²⁴⁷ In situations of crisis and force majeure, another six weeks is possible to apply to finish the asylum border procedure.²⁴⁸

Through the new Asylum Procedure Regulation, the time frame within which applications for asylum at the borders must be examined is extended from a maximum four weeks²⁴⁹ to 12 weeks, acknowledging that border procedures often face delays due to large number of arrivals, limited capacity at borders, and insufficient personnel.²⁵⁰

Return Border Procedure

Those whose application for international protection is rejected in the asylum border procedure can be held in return border procedures for 12 weeks, starting from the moment the applicant no longer has the right to remain in the

²⁴⁶ Article 4 § 3, Recital (9) Return Border Procedure Regulation.

²⁴⁷ Article 51 § 2, recital (68) Asylum Procedure Regulation.

²⁴⁸ Article 11 § 1 Crisis and Force Majeure Regulation

²⁴⁹ Article 43 § 2 Asylum Procedures Directive.

²⁵⁰ Apatzidou, V., (n 25), p. 215-216.

territory.²⁵¹ In situations of crisis and force majeure the time frame may be extended to 18 weeks in total.²⁵²

If a return decision cannot be enforced within the set time limit, Member States must continue the return procedures in accordance with the Return Directive.²⁵³ According to Article 5 § 4, when consecutive detention is imposed, following the return border procedure, that period of detention must be counted towards the maximum detention periods specified in the Return Directive, that is 18 months in some limited cases.²⁵⁴ The regulation, however, does not clearly define if, in the event of a gap between the two detention periods, the counting should restart. PICUM notes that this unclarity risks leading to the detention periods under return border procedures and the Return Directive being combined, potentially resulting in the total duration of detention being extended.²⁵⁵

The border procedure, comprising screening, the asylum border procedure, and the return border procedure, may last for up to 41 weeks if all extended time frames are applied. This includes up to seven days for screening; a 12-week asylum border procedure, which may be extended by four weeks in the context of relocation from another Member State and by a further six weeks in situations of crisis or force majeure; followed by a 12-week return border procedure, which may likewise be prolonged by an additional six weeks in such exceptional circumstances.²⁵⁶

Individuals subject to return border procedures may, regardless of the 12-week time limit for the procedure, *voluntarily* return at any time. However, they shall, without prejudice to this, be granted a period for “voluntary departure” if certain conditions are met. Such a period will not be granted if there is a risk of absconding, if the asylum application was rejected as manifestly unfounded during the asylum border procedure, or if the individual

²⁵¹ Article 4 § 2 Return Border Procedure Regulation.

²⁵² Article 6 § 1 (a) Return Border Procedure Regulation.

²⁵³ Article 4 § 4 Return Border Procedure Regulation.

²⁵⁴ Article 5 § 4 Return Border Procedure Regulation; Article 15 §§ 5-6 Return Directive.

²⁵⁵ PICUM, *Asylum- and Border Procedure* (n 26) p. 10-11.

²⁵⁶ *Ibid.*, p. 10-11.

poses a threat to public policy, public security, or national security of the Member State. The period for voluntary departure is granted only upon request, must not exceed 15 days, and does not indicate a right to enter the territory of the Member State concerned. To prevent absconding, the individuals concerned may also be required to surrender any valid travel documents in their possession to the competent authorities for as long as necessary.²⁵⁷

5.5 The Swedish Implementation

The possibility to apply border procedures when examining an application for international protection already exists under the current recast Asylum Procedures Directive that has been incorporated into Swedish law.²⁵⁸ However, Sweden has not made use of this option and therefore does not currently operate any such specific border procedures. As a result, a person who applies for asylum at a Swedish border crossing point is not held at the border or in a transit zone.²⁵⁹ This makes Sweden an interesting example in the context of border procedures, as this is something that will, due to the new regulations, be completely different when applying for international protection in Sweden.

5.5.1 Asylum Border Procedure

Under the new Asylum Procedure Regulation, Member States are *required* to apply border procedures in specific circumstances.²⁶⁰ They are also further granted the discretion to extend their use in other cases.²⁶¹ The memorandum suggests that supplementary national provisions are to be added in the Swedish Aliens Act, stipulating that an application for international protection shall be examined through the border procedure in *all* cases where the regulation permits it. That is, both in the cases where the Asylum Procedure Regulation obligates and in those where it is voluntary. However, this applies only unless *exceptional circumstances* justify refraining from its

²⁵⁷ Article 4 § 5 Return Border Procedure Regulation.

²⁵⁸ Prop. 2016/17:17. *Genomförande av det omarbetade asylprocedurdirektivet*.

²⁵⁹ Ds 2025:30, p. 386.

²⁶⁰ Article 45 § 1 Asylum Procedure Regulation.

²⁶¹ Article 43 § 1 Asylum Procedure Regulation.

application.²⁶² The Swedish Institute for Human Rights opposes the use of border procedures even in situations where it is optional and considers that border procedures will, in practice, result in far-reaching restrictions on movement. When combined with the fiction of “non-entry”, that is applied in border procedures, there is a risk of a situation in which fundamental rights safeguards are eroded.²⁶³

Like for the screening procedure, a note in Chapter 1 Section 5 of the Swedish Aliens Act will be added that the Asylum Procedure Regulation contains a provision stating that third-country nationals and stateless persons subject to asylum border procedure are not authorised to enter the territory of the Member State concerned.²⁶⁴

The memorandum states that it suggests legislative measures to enable a “responsible and restrictive legal framework in accordance with EU minimum standards”.²⁶⁵ Regarding this, the Equality Ombudsman critiques that there is no analysis about the number of individuals which are expected to be covered by the rules on the border procedures. It is therefore unclear if the competent authorities will be able to uphold the strict time frames applicable to the procedures. They also note that the memorandum lacks clarification as to when so called “exceptional circumstances” may be deemed to exist. These circumstances are said to cover the situations in the Asylum Procedure Regulation which stipulates that the border procedure may not be applied or must cease to be applied, as well as to consider both individual circumstances relating to the applicant and practical or organisational. However, it appears unclear what “individual circumstances” may amount to exceptional circumstances.²⁶⁶

According to Article 54 Asylum Procedure Regulation, in conjunction with Article 9 Reception Conditions Directive, the Member States should generally require applicants in border procedures to stay at or at proximity to the

²⁶² Ds 2025:30, p. 363.

²⁶³ The Swedish Institute for Human Rights, (n 209), p. 11.

²⁶⁴ Ds 2025:30, p. 288-291.

²⁶⁵ Ibid., p. 38-39.

²⁶⁶ Equality Ombudsman, (n 208), p. 5.

external border. Restrictions on freedom of movement shall therefore be applied systematically on all applicants in border procedures. Consequently, it is proposed that a provision shall be added that regulates the restrictions on the freedom of movement for these individuals. The proposed provision will specify that applicants in border procedures during the examinations of their applications are *only* allowed to stay at a specific location, designated by the Swedish Migration Agency. This will be done by adding a section to the provision about residency requirement in certain situations proposed through the Reception Inquiry²⁶⁷.²⁶⁸ This residency requirement has now been adopted²⁶⁹ through the subsequent Government Bill²⁷⁰ and allows the Swedish Migration Agency to decide, in individual cases, that an asylum seeker over the age of 16 may reside only at a specific place, where this is necessary for reasons of public order or if there is a risk of absconding.²⁷¹ The Agency may also require the person to report to it at certain times. Under the new rules asylum seekers in border procedure will not be permitted to leave the county where their assigned asylum accommodation is located.

Overall, these measures entail more extensive restrictions on asylum seekers' freedom of movement than before. They are justified by reference to the need for a more efficient asylum procedure, improved control over reception, and a reduced risk of absconding, and are presented as being compatible with the conditions for restrictions on movement under the Reception Conditions Directive.²⁷² The Swedish Refugee Law Centrum consider that the memorandum in this regard implies that persons subject to border procedures are likely to be regarded as deprived of their liberty within the meaning of Article 5 ECHR, that is, that they are in *de facto* detention. At the very least, the memorandum does not explain why this would not be the case. The residence and reporting obligations, which are based on Article 9

²⁶⁷ SOU 2024:68.

²⁶⁸ Ds 2025:30, p. 809–811.

²⁶⁹ The Swedish Parliament, "En ny ordning för asylsökandes boende", 29 January 2025. Available at: https://www.riksdagen.se/sv/dokument-och-lagar/dokument/betankande/en-ny-ordning-for-asylsokandes-boende_hc01sfu11/, accessed 6 May 2026.

²⁷⁰ Prop. 2025/26:229.

²⁷¹ Ibid., p. 109–113.

²⁷² Ibid., p. 95–109.

Reception Conditions Directive, entail extensive restrictions on freedom of movement. Unlike asylum seekers who are not in the border procedure and are subject to residence and reporting obligations, no individual decisions will be made for persons in the border procedure. The fact that these obligations are applied generally exacerbates the negative effects and intensifies the experience of deprivation of liberty, as it does not allow for sufficient individual consideration.²⁷³

The grounds on detention set forth in Article 10 § 4 (a-b) and (e-f) in the Reception Conditions Directive are proposed by the Detention Inquiry to be incorporated into the Swedish Aliens Act. Through the new proposal, Article 10 § 4 (d) shall also be incorporated as it allows for applicants of international protection to be taken into detention as a part of a border procedure in accordance with Article 43 Asylum Procedure Regulation to determine the applicants right to enter the country. This shall not be applied automatically to applicants referred to the border procedure, but only following an individual assessment and, in particular, if there is a risk of absconding.²⁷⁴

The memorandum further notes that regarding border procedures, it is essential that the authorities are able to detain the applicant throughout the entire duration of the examination procedure so that the assessment of the applicant's right to enter the country is not jeopardised. The maximum duration of detention should therefore be aligned with the provisions of the Asylum Procedure Regulation stipulating that the border procedure shall last no longer than 12 weeks.²⁷⁵

5.5.2 Return Border Procedure

Another note will be added to Chapter 1 Section 5 of the Swedish Aliens Act but instead addressing that the Return Border Procedure Regulation contains a provision stating that third-country nationals and stateless persons whose applications have been rejected following an asylum border procedure are not authorised to enter the territory of the Member State concerned.

²⁷³ Swedish Refugee Law Centrum, (n 13), p. 42.

²⁷⁴ Ds 2025:30, p. 826-828.

²⁷⁵ Ibid., p. 840-841.

This is added because the current general rule in the provision is that an alien is considered to have entered the country once they have crossed the border into Swedish territory. The new addition to the provision will add the legal fiction of “non-entry” to return border procedures.²⁷⁶

The proposal notes the Return Border Procedure Regulation does not contain any directly applicable provisions that Member States can use to ensure that individuals remain in the designated areas. Since detention should only be used in exceptional cases it further noted that supervision constitutes an alternative to detention under Swedish law and that a decision on supervision shall take precedence over detention in a situation where the conditions for detention are met. Following this, a possibility to place persons covered by the applicable rules on detention in Article 5 §§ 2 and 3 Return Border Procedure Regulation under *supervision* instead of deciding on detention, is proposed.²⁷⁷

²⁷⁶ Ds 2025:30, p. 954-955.

²⁷⁷ Ibid., p. 955–957.

6 Conclusions

The purpose of this thesis has been to examine how the proposed implementation of border procedures under the EU Pact on Migration and Asylum into Swedish law may affect asylum seekers' right to liberty under Article 5 ECHR. To do so, the analysis has focused on the Screening Regulation, the Asylum Procedure Regulation and the Return Border Procedure Regulation.

It is difficult to give a definite answer to the research question. The regulations are new, their practical application in Sweden has not yet been tested, and several central concepts remain unclear. This includes what it means for applicants to "remain available" to the authorities, what types of accommodation or designated locations may be used, and when restrictions on movement become deprivation of liberty. These uncertainties are important because the ECtHR has repeatedly emphasised that the distinction between deprivation of liberty and restrictions on freedom of movement is one of degree and intensity, not of nature or substance. The decisive issue is therefore not the formal label attached to a measure, but the concrete situation of the individual and the conditions under which the border procedures are carried out.

6.1 The Pact and Border Procedures

The new border procedures introduced through the Pact may affect asylum seekers' liberty and freedom of movement because they create a structured pre-entry phase. This phase consists of screening, the asylum border procedure and, where an application is rejected, the return border procedure. All three procedures are connected by the legal fiction of "non-entry", meaning that the applicant is physically present on the territory of a Member State but is legally treated as not having entered it. This fiction creates a practical need to prevent applicants from moving freely into the territory. The regulations therefore allow or require different forms of movement control. Under the Screening Regulation, Member States must ensure that persons subject to screening remain available to the authorities. Under the Asylum Procedure Regulation, applicants may be required to reside at or near the external border, in a transit zone, or in another designated location. Under the Return Border

Procedure Regulation, rejected applicants can remain subject to similar requirements during the return border procedure.

The first question is therefore whether these measures may amount to deprivation of liberty within the meaning of Article 5 ECHR. Earlier experiences with border procedures suggest that this risk is real. Studies of existing border procedures have identified lengthy procedures, poor reception conditions, reduced procedural safeguards and situations amounting to *de facto* detention. Scholars and civil society organisations have also warned that the Pacts regulations' risks reproducing the "hotspot model" more broadly across the EU. This concern is strengthened by the fact that border procedures have often, in practice, involved detention or detention-like conditions, even where the legal framework presents them as procedures that can be carried out without detention.

The risk is especially clear when considering the duration and location of the procedures. Screening may last up to seven days. The asylum border procedure could last up to 12 weeks, and in some circumstances longer. If the application is rejected, the return border procedure may follow for a further 12 weeks. During this time, applicants will be required to remain in designated locations at or near the border, in transit zones, or in other places within the Member State. If these locations are closed, remote, heavily supervised, or if the applicant has no genuine possibility to leave, the measure may cross the threshold from a restriction on movement under Article 2 of Protocol No. 4 to deprivation of liberty under Article 5.

The ECtHR's case law confirms that this assessment must be practical and fact-specific. In *Khlaifia and Others*, the Court held that the applicants had been deprived of their liberty even though the centre was not formally classified as a detention facility. What mattered was that they could not leave, were under surveillance and were isolated from the outside world. Similarly, the Court has made clear that domestic classification cannot alter the nature of the measure. This is directly relevant to the Pact, because obligations to remain available, residence requirements and placement in designated locations

may formally be described as restrictions on movement, while in practice operating as detention.

The case law on transit zones further illustrates the uncertainty. In *Ilias and Ahmed*, the ECtHR found that the applicants' stay in the Röszke transit zone did not amount to deprivation of liberty, partly because they could leave towards Serbia. The judgment has been criticised for relying heavily on a theoretical possibility of leaving and for weakening Article 5 protection. By contrast, in *FMS and Others*, the CJEU held that confinement in the same transit zone amounted to detention, placing greater emphasis on whether the individuals had a genuine and lawful possibility to leave. These cases show that the legal classification of border procedures remains uncertain, especially where the applicant can theoretically leave but cannot practically do so without serious consequences.

If the measures amount to deprivation of liberty, the second question is whether they are lawful under Article 5 § 1 (f). This provision permits detention to prevent unauthorised entry or where action is being taken with a view to removal. The ECtHR has given states relatively broad discretion in immigration detention and has not required a general necessity test in the same way as in some other detention contexts. However, detention must still be lawful, non-arbitrary, closely connected to the permitted immigration purpose, carried out in appropriate conditions and not last longer than reasonably required. EU law also requires detention to be necessary, proportionate, based on an individual assessment and used only where less coercive measures cannot be effectively applied.

This is where the Pact creates a particular risk. The regulations contain safeguards, but the structure of the pre-entry phase may still encourage detention-like arrangements. The combination of “non-entry”, designated locations, short deadlines, long cumulative duration, and the aim of preventing absconding risks blurring the line between freedom of movement restrictions and deprivation of liberty. The most serious risk is *de facto* detention: situations where applicants are detained in practice but where the measure is not formally recognised as detention. Such detention is particularly problematic

because it may lack a clear legal basis and may bypass the safeguards required under Article 5, including individual assessment, judicial review and protection against arbitrariness.

6.2 The Swedish Implementation

The proposed Swedish implementation reinforces these concerns. Sweden has not previously used border procedures in this way. The memorandum presents an implementation of the discussed regulations, where border procedures would become a central part of the Swedish asylum system. This marks a significant shift from the current system where asylum seekers applying at the border are not generally held at or near the border while their claims are examined. The memorandum also suggests a broad use of the discretion allowed under the Asylum Procedure Regulation. Asylum border procedures would be applied not only where EU law requires them, but also where their use is optional, unless exceptional circumstances justify another approach. This means that Sweden proposes to use border procedures to the widest extent permitted. As a result, more asylum seekers will be subjected to the pre-entry framework and to the restrictions on movement connected with it.

During screening, the memorandum proposes extending the obligation to remain from six hours to 12 hours, with the possibility of a further 12-hour extension. Although this is not formally classified as detention, it may involve coercion and require the individual to remain in a specific place for up to 24 hours. The memorandum does not clearly explain how this differs from detention, what rules apply or what safeguards are available. This lack of clarity creates a risk that the measure could amount to *de facto* detention.

The same problem arises in the asylum border procedure. Applicants may only stay at a specific location designated by the Swedish Migration Agency and would not be permitted to move freely within Sweden. These measures are presented as residence requirements or restrictions on freedom of movement. However, under the ECHR, their classification will depend on their practical effects. If the designated locations are closed, remote, heavily supervised, or if leaving them has serious legal consequences, the measures may

amount to deprivation of liberty. There is also a risk that restrictions will apply generally to persons in border procedures. This is problematic because Article 5 requires an assessment of the individual's concrete situation. Generalised restrictions may weaken the requirement of individual assessment and make it harder to ensure that restrictions remain necessary and proportionate in each case, as required by EU law.

The proposed rules on detention during the asylum border procedure also raise concerns. The memorandum proposes incorporating a detention ground allowing applicants to be detained in order to decide on their right to enter the territory. Formally, such detention should not be automatic and must be based on an individual assessment. However, the memorandum also states that authorities must be able to detain applicants throughout the examination procedure so that the assessment of the right to enter is not jeopardised. This risks normalising detention as a practical tool for conducting border procedures, rather than treating it as a measure of last resort.

The return border procedure may extend these restrictions further. A person whose application is rejected in the asylum border procedure may remain subject to the fiction of “non-entry” and be required to stay in designated locations during the return phase. If the screening procedure, the asylum border procedure and the return border procedure are combined, the person may be subject to restrictions for several months. The longer these restrictions continue, the greater the risk that they will be considered deprivation of liberty rather than mere restrictions on movement.

The Swedish implementation therefore raises concerns regarding both questions of the Article 5 assessment. First, the proposed rules may, depending on their practical application, amount to deprivation of liberty. Secondly, if they do, their lawfulness depends on whether they are clearly recognised as detention and accompanied by the safeguards required by Article 5 and EU law. If detention-like measures are instead treated merely as residence requirements or obligations to remain, there is a risk of unlawful *de facto* detention.

6.3 Final Remarks

The answer to the research question is therefore that the proposed implementation may significantly restrict asylum seekers' freedom of movement and may, depending on how the rules are applied in practice, interfere with their right to liberty under Article 5 ECHR.

The main risk is not that the Pact, or the Swedish implementation of it, automatically violates Article 5. Rather, the risk lies in how the procedures are structured and may be applied. How Member States effectuate the fiction of "non-entry", the use of designated locations, the obligation to remain available, the possibility of formal detention and the long cumulative duration of the procedures may together create conditions that resemble detention. This risks blurring the line between restrictions on freedom of movement and deprivation of liberty.

If applicants have a genuine and practical possibility to leave, access to legal assistance, maintain social contacts and live under conditions that are not comparable to confinement, the measures may remain within Article 2 of Protocol No. 4. However, if applicants are placed in closed or highly controlled facilities for prolonged periods, without a genuine possibility to leave and without sufficient safeguards, the measures may amount to deprivation of liberty under Article 5. In such cases, detention must satisfy Article 5 § 1 (f). It must have a clear legal basis, fall within a permitted immigration purpose, be non-arbitrary, be connected to that purpose, take place in appropriate conditions and last no longer than reasonably required. It must also comply with the requirements under EU law, including necessity, proportionality, individual assessment and consideration of less coercive measures, to be lawful.

The greatest concern is therefore *de facto* detention. If measures that are detention in practice are not recognised as detention in law, the safeguards required by Article 5 may be bypassed. For the Swedish implementation to comply with the ECHR, it must therefore include clear legal limits, individual assessments, effective judicial review and safeguards ensuring that administrative efficiency does not take precedence over the right to liberty.

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