



The use of detention  
and alternatives to  
detention in the context  
of immigration policies

Luxembourg

First Focussed Study 2014

European Migration Network  
Luxembourg National Contact Point

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The European Migration Network, created by Council Decision no. 2008/381/EC of 14 May 2008, has the objective of supplying up-to-date, objective, reliable and comparable information on migration and asylum in the Community institutions, to the authorities and institutions of the Member States and to the general public with a view to support policy- and decision-making with the European Union.



## PREFACE

The opinions expressed in this report are those of the author. They do not necessarily reflect the positions of the Luxembourg Ministry of Family, Integration and the Greater Region or the Ministry of Foreign and European Affairs.

The present report was drafted by Fabienne Becker and David Petry with the assistance of Adolfo Sommarribas, staff members of the National Contact Point Luxembourg within the European Migration Network, under the overall responsibility of Ass.-Prof. Dr. Christel Baltes-Löhr. Continuous support was provided by the members of the national network of the National Contact Point Luxembourg: Sylvain Besch (CEFIS), Sylvie Prommenschenkel (Directorate of Immigration, Ministry of Foreign and European Affairs), Germaine Thill (STATEC), and Marc Hayot (OLAI Reception and Integration Agency, Ministry of Family, Integration and the Greater Region).

## METHODOLOGY

National reports are produced by the respective National Contact Points (NCPs) on the legal and policy situation in their Member State according to common specifications. Subsequently, a comparative synthesis report is generated by the European Commission with its service provider giving the key findings from each national report, highlighting the most important aspects and placing them as much as possible within an EU perspective. The various national accounts and the summary report are made publicly available.

The EMN engages primarily in desk research, i.e. it collects and analyzes data and information already available or published at the Member State or international level. As documentary sources legal texts, official documents (such as parliamentary documents), reports and press articles have been used for this study. Jurisprudence was consulted in order to verify if and how the issues which emerged while researching the documentary sources have been treated and interpreted. Indeed, cases of detention are often brought before the courts, therefore, the jurisprudence provided essential information. It allowed to find more information about the indicators for the grounds of placement in detention, several challenges in terms of detention and the respect of fundamental rights as well as ways to balance the decision for an alternative or for detention. The cited jurisprudence has been kept in French to maintain its integrity. Furthermore, semi-structured interviews were conducted with three types of authorities: the detention centre, the Directorate of Immigration of the Ministry of Foreign and European Affairs and the Foreigners Service of the Judicial Police. In addition, interviews with stakeholders from the civil society were held with lawyers, the Ombudsman, a prison chaplain and associations such as ASTI (*Association de Soutien aux Travailleurs Immigrés*), Caritas and the Red Cross. The interviews enhanced the global overview on the subject.



## **EMN FOCUSSED STUDY 2014**

# **The use of detention and alternatives to detention in the context of immigration policies**

### **Top-line "Factsheet" (National Contribution)**

#### *National contribution (one page only)*

*Overview of the National Contribution – introducing the study and drawing out key facts and figures from across all sections of the Focussed Study, with a particular emphasis on elements that will be of relevance to (national) policymakers.*

There is one detention centre in Luxembourg with a capacity of 88 persons, which is located close to the international airport. Furthermore, at the airport is a waiting zone that can be used to detain persons up to a maximum of 48 hours. The detention centre has been created only recently, it has opened on 22 August 2011. Before then, third-country nationals have been detained in prison (Luxembourg Penitentiary Centre). In 2004, the former government announced to build a separate detention centre<sup>1</sup> after national NGOs and associations as well as international networks and organisations had widely criticised the fact to detain prisoners and persons in administrative detention in the same facility. An incident in January 2006, where a fire was set by detainees in administrative detention in the prison, led to a further public outcry and to the acceleration of the establishment of the law on the construction of the detention centre.<sup>2</sup> Compared to the situation in the prison, the conditions for the detainees in the new detention centre have improved substantially, partly due to the specialised staff (such as psychosocial staff) and a better support structure (such as more activities and more freedom of movement within their unit).

The legal framework<sup>3</sup> which regulates detention and alternatives to detention in Luxembourg is laid down in the amended Law of 29 August 2008 on the Free Movement of Persons and Immigration<sup>4</sup>, the amended Law of 5 May 2006 on the Right of Asylum and Complementary Forms of Protection<sup>5</sup>, the Law of 28 May 2009 concerning the Establishment and Organisation of the Detention Centre<sup>6</sup> and the Grand-Ducal Regulation of 17 August 2011 laying down the Conditions and Practical Arrangements of the Detention Centre Regime.<sup>7</sup>

In general, persons who are placed in detention receive a return decision either before (i.e. international protection applicants) or on the day of the placement (apart from persons in Dublin procedures). The placement in detention is based on the amended Law of 29 August 2008 (Immigration Law) for the following categories:

- rejected applicants for international protection;
- rejected applicants of different types of residence permits;
- persons detained at the border to prevent illegal entry, who have not applied for international protection;
- persons found to be illegally present on the territory of the Member State and who have not applied

for international protection.

The amended Law of 5 May 2006 (Asylum Law) allows the placement in detention for the following categories:

- applicants for international protection in ordinary procedures in the case that the application has been filed in order to prevent the removal of the person or if the person refuses to cooperate with the authorities to establish his/her identity;
- applicants for international protection in fast-track procedures;
- applicants for international protection in Dublin procedures.

Persons detained based on the amended Law of 5 May 2006 can be detained for a maximum of 3 months, afterwards the decision can be renewed each time for another 3 months up to 12 months in total. Those detained on the basis of the Law of 29 August 2008 can be detained for 1 month and the decision can be renewed each time for another month up to 6 months in total. In principle, the law does not forbid the placement of detention of vulnerable persons, minors and persons with special needs, but in practice these groups of persons are generally not placed in the detention centre by Luxembourgish authorities.

In Luxembourg no specific individual assessment procedure exists to determine the appropriateness of detention and alternatives to detention. The decision to place in detention or to apply an alternative to detention is taken by the Minister in charge of Immigration based on elements that are contained in the administrative file of the concerned person and can only be taken in specific cases foreseen by the Law of 29 August 2008 and the amended Law of 5 May 2006. The main grounds to place a person in detention are the risk of absconding and the avoidance or hindrance of the preparation of the removal process.

Although detention in Luxembourg is motivated on a case-by-case basis, a quasi-automatism is applied in the placement of detention, in cases where a legal presumption of a risk of absconding exists.

Home custody is the only alternative to detention in Luxembourg and is rarely used. A person can be granted home custody on the basis of Article 120 (1) of the Law of 29 August 2008 if the conditions laid down in Article 125 are fulfilled. The Minister can take the decision to place a person under home custody for a maximum of 6 months if the execution of the obligation to leave the territory was postponed because of technical reasons and if the person can present the necessary guarantees to prevent the risk of absconding. The person is obliged to stay at home during set hours in which a control can be made.

A major challenge during the assessment procedure is the legal presumption of the risk of absconding in nearly all cases where a third-country national has no valid identity, travel or residence documents and which eventually leads to the decision of a quasi-automatic placement in detention.

Even though the majority of executed returns are 'voluntary' returns, i.e. in 2013 87,6% of all returns were 'voluntary', forced returns and Dublin transfers are regularly implemented. However, the practical feasibility of the implementation of return of the concerned person is not sufficiently considered during the assessment procedure. Problems often arise if the countries to which the return should take place do not cooperate with the Luxembourgish authorities and the person therefore cannot be removed.

A challenge with the alternative 'home custody' is the high risk of absconding, which is especially prevailing due to the small size of the country. Also, the burden of proof for the necessary guarantees to prevent the risk of absconding, which are linked to the granting of the alternative, is on the person. Most persons fail to provide this evidence and will therefore not be granted home custody.

A good practice is that families, who cannot be detained for more than 72 hours by law<sup>8</sup>, are in practice usually only detained for up to 24 hours. Furthermore, the government plans to create a specific open reception facility for families (*Maison retour*).

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### Synthesis Report (up to three pages)

*Executive Summary of Synthesis Report: this will form the basis of an EMN Inform, which will have EU and National policymakers as its main target audience.*

### Section 1: Overview of EU *acquis* (Maximum 2 pages)

*This section of the Synthesis Report will briefly outline the EU legal framework guiding national legislation in relation to detention and alternatives to detention. It will provide a mapping of the substantive and procedural provisions in the EU *acquis* that regulate immigration detention and apply to different migration situations. The section will also highlight how the EU *acquis* relates to the broader international legal framework on immigration detention.*

***This section will be developed by the EMN Service Provider and no input from the EMN NCPs is required.***

### Section 2: Categories of third-country nationals that can be detained, national provisions and grounds for detention (Maximum 3 pages)

*This section aims at providing an overview of the categories of third-country nationals that can be placed in detention in (Member) States according to national law and practice. The section also examines whether the possibility to detain each category of third-country national is enshrined in national legislation, the grounds for detention that apply and whether national legal frameworks include an exhaustive list of grounds. EMN NCPs are asked to provide their answers to these questions in the table provided overleaf. The section considers whether special provisions regarding detention are in place for persons belonging to vulnerable groups, including minors, families with children, pregnant women or persons with special needs. Finally, the section examines national provisions on (release) of detention of persons who cannot be returned and/or are granted tolerated stay.*



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Q1. Please complete the table below with regard to the categories of third-country nationals that can be detained in your Member State. Children and other vulnerable groups are not included in this table as they are a cross-cutting category; instead, they are dealt with in a separate question (Q2) after the table.

Categories of third-country nationals	Can third-country nationals under this category be detained? (Yes/No)	If yes, is the possibility to detain laid down in legislation? (Yes/No)	If the possibility to detain third-country nationals exists in your (Member) State but is not laid out in national legislation, please explain whether it is outlined in 'soft law' or policy guidelines	Please list the grounds for detention for each category of migrant that can be detained in your (Member) State. Is there an <u>exhaustive list</u> of grounds outlined in your national framework?
<b>Applicants for international protection in ordinary procedures</b>	Yes, but see explanation in the list of grounds	Yes	N/A	<p>In general, applicants for international protection in ordinary procedures are placed in reception facilities provided by the OLAI (Luxembourg Reception and Integration Agency) of the Ministry of Family, Integration and the Greater Region. Persons who are already placed in the detention centre and who only then decide to submit an application for international protection will continue to stay in detention.</p> <p>Article 10 (1) of the amended Law of 5 May 2006 on the Right of Asylum and Complementary Forms of Protection (Asylum Law) establishes in which cases an international protection applicant can be placed in detention:</p> <p>a) in the case that the application for international protection has been filed in order to prevent the removal of the concerned person, who is staying illegally in Luxembourg.<sup>9</sup></p> <p>b) if s/he refuses to cooperate with the authorities to establish his/her identity or travel itinerary.<sup>10</sup></p>
<b>Applicants for international protection in</b>	Yes	Yes	N/A	Applicants for international protection can be placed in detention when the authorities decide to apply the fast-

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<b>fast-track (accelerated) procedures</b>				<p>track procedure<sup>11</sup> in the following cases:</p> <ul style="list-style-type: none"> <li>➤ The applicant makes false statements or produces false documents or withholds information or documents in regards to his/her identity or nationality which could influence the decision in a negative way;<sup>12</sup></li> <li>➤ the applicant has introduced another application for international protection using other personal information;<sup>13</sup></li> <li>➤ the applicant has not produced information to establish with a reasonable degree of certainty his/her identity or nationality, or it is likely that, in bad faith, s/he has destroyed or disposed of an identity or travel document that would have helped to establish his/her identity or nationality;<sup>14</sup></li> <li>➤ the applicant is making an application merely in order to delay or prevent the enforcement of an earlier or imminent decision which would result in his/her removal;<sup>15</sup></li> <li>➤ the applicant entered the territory of the Grand-Duchy of Luxembourg unlawfully or prolonged his/her stay unlawfully and, without good reason, has either not presented himself/-herself to the authorities and/or failed to file an application for asylum as soon as possible, given the circumstances of his/her entry;<sup>16</sup></li> <li>➤ the applicant is a danger to national security or public order;<sup>17</sup></li> <li>➤ the applicant refuses to comply with an obligation to have his/her fingerprints taken.<sup>18</sup></li> </ul>
<b>Applicants for international protection subject to Dublin procedures</b>	Yes	Yes	N/A	An applicant for international protection subject to Dublin procedures can be detained according to Article 10 (1) d) of the amended Law of 5 May 2006 in order to avoid jeopardising the transfer of the concerned person to the country which is responsible for the

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				application. <sup>19</sup>
<b>Rejected applicants for international protection</b>	Yes	Yes	N/A	Rejected applicants for international protection are one of the main populations that are detained. Their detention is justified by Article 120 (1) pursuant to Article 100 (1) c) of the amended Law of 29 August 2008 on the Free Movement of Persons and Immigration, which considers it as an irregular stay that leads to a return decision of a third-country national if the person does not possess a valid authorisation of stay for a period of more than 3 months or, if required, a work permit. <sup>20</sup>
<b>Rejected family reunification applicants</b>	Yes	Yes	N/A	Family reunification has to be applied for in the country of origin. However, in case the person is on the territory of Luxembourg and does not fulfil the conditions of stay the detention is justified by Article 120 (1) pursuant to Article 100 (1) c) of the amended Law of 29 August 2008, which considers it as an irregular stay that leads to a return decision of a third-country national if the person does not possess a valid authorisation of stay for a period of more than 3 months or, if required, a work permit. <sup>21</sup>  A risk of absconding, which justifies a placement decision, can be suspected on the basis of Article 111 (3). <sup>22</sup>
<b>Other rejected applicants for residence permits on basis other than family reunification (Please provide details)</b>	Yes	Yes	N/A	In case the person is on the territory of Luxembourg and does not fulfil the conditions of stay, their detention is justified by Article 120 (1) pursuant to Article 100 (1) c) of the amended Law of 29 August 2008, which considers it as an irregular stay that leads to a return decision of a third-country national if the person does not possess a valid authorisation of stay for a period of more than 3 months or, if required, a work permit. <sup>23</sup>

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				A risk of absconding, which justifies a placement decision, can be suspected on the basis of Article 111 (3). <sup>24</sup>
<b>Persons detained at the border to prevent illegal entry (e.g. airport transit zone) who have not applied for international protection</b>	Yes	Yes	N/A	A person who has been refused entry on the territory in accordance with Article 99 and 104 of the amended Law of 29 August 2008 <sup>25</sup> and who is ordered to leave the territory <sup>26</sup> will be maintained in a waiting zone. <sup>27</sup> If s/he cannot be removed within the deadline of 48 hours, s/he will be placed in detention. <sup>28</sup>
<b>Persons found to be illegally present on the territory of the (Member) State who have not applied for international protection and are not (yet) subject to a return decision</b>	Yes	Yes	N/A	Persons who are considered as irregular migrants, who have not applied for international protection and who are not (yet) subject to a return decision are not detained. The only case where detention could be applied would be if a person has a residence permit or an authorisation of stay of another Member State, as s/he is obliged to return to the respective Member State and will receive a return decision if s/he does not fulfil this obligation. <sup>29</sup>
<b>Persons who have been issued a return decision</b>	Yes	Yes	N/A	Any person who is considered an irregular migrant in accordance with Article 100 (1) of the amended Law of 29 August 2008 will be subject to a removal decision. <sup>30</sup> Except in urgent cases that are duly substantiated, the irregular migrant is generally granted 30 days after the notification of the return decision to leave voluntarily the territory. <sup>31</sup>  If the person does not leave the territory within the delay given to him/her, the order to leave the territory can be executed in any case. <sup>32</sup>  The irregular migrant is obliged to leave the territory without further delay if:  A. the conduct of the applicant is considered a danger

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				<p>to national security or public order;<sup>33</sup></p> <p>B. the application for an authorisation of stay or a residence permit has been rejected because it was declared inadmissible, unfounded or fraudulent;<sup>34</sup></p> <p>C. there is a risk of absconding.<sup>35</sup></p> <p>Article 120 (1) establishes that a decision of detention can be taken especially if a risk of absconding exists or if the third-country national concerned avoids or hampers the preparation of return or the removal process.<sup>36</sup></p>
<p><b>Other categories of third-country nationals: Prisoners approaching the end of their prison sentence<sup>37</sup></b></p>	Yes	Yes	N/A	<p>On a regular basis, third-country national prisoners, who do not have a right of residence in Luxembourg, after having completed their prison sentence, are being placed in detention in order to organise their removal.<sup>38</sup></p>

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*Q2. Is it possible, within the national legal framework of your (Member) State, to detain persons belonging to vulnerable groups, including minors, families with children, pregnant women or persons with special needs? Please indicate whether persons belonging to these vulnerable groups are exempt from detention, or whether they can be detained in certain circumstances. If yes, under which conditions can vulnerable persons be detained? NCPs are asked in particular to distinguish whether children can be detained who are (a) accompanied by parents and (b) unaccompanied.*

National legislation allows the placement in detention of certain vulnerable individuals. In principle, the law does not forbid the placement in detention of minors, handicapped persons, pregnant women, single parents with children, elderly people and persons who have been victims of torture, rape or other serious forms of psychological, physical or sexual violence against whom a removal decision was issued.

a) An unaccompanied minor can be placed in detention in an appropriate place adapted to the needs of his/her age and the best interest of the child is respected.<sup>39</sup> The unaccompanied minor could therefore not be placed in a unit for adult men or women. In the report of the Ombudsman, it is mentioned that the law does not provide any limitations to the length of the detention of unaccompanied minors nor any requirements to use the deprivation of liberty as a measure of last resort.<sup>40</sup> Nonetheless, the Luxembourgish government is not in favour of placing unaccompanied minors in detention.<sup>41</sup> If still the staff of the detention centre finds out that a detainee is an unaccompanied minor, s/he will be released after consultation with the Directorate of Immigration. Unaccompanied minors are then placed into open facilities, such as a reception centre of the Red Cross. The Luxembourgish detention centre only had one case so far, where the staff had doubts about the age of a detainee and where it was possible that it would have been an unaccompanied minor; in this case the Ministry decided to place the possible minor in an adapted reception centre.<sup>42</sup>

b) A family accompanied by a minor cannot be detained for more than 72 hours according to Article 6 (3) of the Law of 28 May 2009 concerning the Establishment and Organisation of the Detention Centre.<sup>43</sup> In practice, families with children are usually detained no longer than 24 hours in order to guarantee the return process.<sup>44</sup>

c) Pregnant women have already been detained in Luxembourg. Decisions on when to return pregnant women are taken case-by-case. Depending on the stage of the pregnancy, a woman is allowed to give birth in Luxembourg, however, the removal decision can be executed afterwards and the fact that she gave birth on the territory does not mean that she will be granted an authorisation for stay.<sup>45</sup>

d) There have been no cases of victims of torture, rape or other serious forms of psychological, physical or sexual violence that have been detained.<sup>46</sup>

*Q3. Concerning persons, who cannot be removed and/or are granted tolerated stay, please provide information on any provisions in your (Member) State regulating the release from detention of this category of third-country nationals.*<sup>47</sup>

A person can only be placed in detention through a motivated decision taken by the Minister in charge of Immigration.<sup>48</sup> This decision can be revoked by the Minister or by the administrative courts. Also, the detention is not indefinitely and the person has to be freed after the maximum length of stay in the detention centre has been reached.<sup>49</sup>

Persons who fall into the categories laid down by Article 10 of the amended Law of 5 May 2006 are detained for a maximum period of 3 months<sup>50</sup>; afterwards the placement has to be reconsidered and a new decision has to be taken by the Minister; the person concerned can be detained each time for another 3 months up to a maximum amount of 12 months in total in the case that the person has not given any information to establish his/her identity or nationality or if s/he has destroyed or disposed of an identity or travel document which would have helped to establish his/her identity or nationality.<sup>51</sup>

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Persons who are detained based on Article 120 of the amended Law of 29 August 2008 can be detained for 1 month, afterwards the decision has to be re-evaluated and can be renewed three times for another month<sup>52</sup>; afterwards if the removal operation has not been finalised, the detention can be renewed two more times each time for a month up to a maximum amount of 6 months. According to Article 120 (3) of the amended Law of 29 August 2008, the detention can only be maintained as long as removal arrangements are in progress and executed with due diligence.<sup>53</sup> The lack of due diligence by the Luxembourgish authorities to identify the persons and to obtain the travel documents can result in the liberation of the person from detention.<sup>54</sup>

In case that the person is able to prove his/her inability to leave the territory because of reasons beyond his/her control, the Ministry can postpone the removal for a specific duration fixed according to the circumstances of the case and until the moment in which the removal can be reasonably executed. In this case the Minister can revoke the decision of placement in detention and free the individual, or postpone the removal and issue a decision of home custody (house arrest).<sup>55</sup>

In case that the Minister decides otherwise the detention can only be extended to the maximum duration established by the law, after which the person has to be freed.

### Section 3: Assessment procedures and criteria for the placement of third-country nationals in detention (Maximum 5 pages)

*This section examines the assessment procedures and criteria/benchmarks that are used by (Member) States in order to decide whether detention is justified in individual cases. It begins with a series of questions which explore the extent to which individual assessment procedures (e.g. interviews) are used in all cases before placing third-country nationals in detention, or whether individual assessment procedures are only used in the case of certain categories of third-country national. Where individual assessments are used, EMN NCPs are asked to describe the procedures involved and whether they include an assessment of the vulnerability of the individual in question. Finally, EMN NCPs are asked to provide information on the challenges associated with the assessment procedures in their Member States and to identify any elements of good practice.*

*Q1. Please indicate whether an **individual assessment** procedure is used to determine the appropriateness of detention in the case of any of the categories of third-country nationals selected in Section 2 (Table Q1). Yes/No.*

*If yes, please list the categories of third-country nationals where individuals are subject to individual assessments.*

*If individual assessment procedures are not used, please indicate the mechanism used to determine the appropriateness of detention e.g. are all individuals within a particular category of third country national automatically placed in detention?*

In Luxembourg there is no specific individual assessment procedure to determine the appropriateness of detention. The decision of placement in detention is based on elements that are contained in the administrative file of the person. However, it is important to mention that even if the law establishes that the order of placement in detention has to be motivated case-by-case, there is a quasi-automatism in the placement in detention when the legal presumption of risk of absconding is present.<sup>56</sup> The decision can only be taken, as mentioned above in specific cases foreseen by the amended Law of 29 August 2008 and the amended Law of 5 May 2006.

International protection application:

As mentioned in Section 1, Question 1 in the international protection process are 4 types of applicants who can be placed in detention:

- A) Irregular migrants, whose application was filed with the intention to prevent their removal;<sup>57</sup>
- B) Applicants, who refuse to cooperate with the authorities on establishing their identity or their

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travel route;<sup>58</sup>

- C) Applicants for international protection in fast-track procedures in the cases foreseen by Article 20 (1) d), e), f), i), k), l) and m) of the amended Law of 5 May 2006;<sup>59</sup>
- D) Dublin cases.<sup>60</sup>

During normal international protection procedures, elements can be discovered that can be used for the decision-making assessment of placing an individual in detention. The international protection procedure starts with the filing of the application and the submission of identity documents of the applicant. The Foreigners Service of the Judicial Police proceeds to all kinds of verifications needed in order to establish the applicant's identity and travel itinerary. After receiving the documents, the Judicial Police will verify the documents and consult EURODAC to see whether a previous application for international protection has already been filed in another Member State.<sup>61</sup> Also, the police will check any other databases to see if the person represents a danger.

The Service may proceed (in case of necessity) to a bodily search of the applicant and a search of his belongings, provided that the search fully respects human dignity and may retain, against receipt, any object relevant to the investigation. As a standard procedure, both the fingerprints and the photograph of the applicant are taken.<sup>62</sup> The Judicial Police then proceeds to an interview with the applicant in order to determine his/her identity and travel itinerary (questions on used transport means, border crossing, used travel documents).

Only in case of doubts on the validity of the presented documents, the Judicial Police transfers the documents to the Expertise Document Section of the Airport Control Service for their verification. This step is not a standardised procedure, but is only done on a case-by-case basis if doubts on the validity of the documents prevail.<sup>63</sup>

A report, stating all procedural steps, is drafted and then transmitted to the Directorate of Immigration.

If the individual was already in a removal procedure and files an international protection application, the grounds for detention are evident.

After the verification made by the Judicial Police, the report can show that:

- 1) The applicant does not want to collaborate with the police to determine his/her identity and the travel route;
- 2) the fingerprints and facial recognition demonstrate that the applicant may have applied for international protection in another Member State;
- 3) the documents and statements made by the applicant are false or that s/he has destroyed his/her documents;
- 4) the applicant is a danger to the national security or public order.<sup>64</sup>

A report, stating all procedural steps, is drafted.

The applicant for international protection has the right to be heard by an official of the Directorate of Immigration and has an obligation to respond when summoned by the Minister. Oral statements made by the applicant may be registered with appropriate technical means, provided that the latter has been informed prior to the registration. The applicant may be submitted to a language test. If the applicant is accompanied by a lawyer, s/he must nevertheless respond personally to questions.<sup>65</sup>

In case of doubts on the identity, the Directorate of Immigration can order different types of tests (linguistic tests, medical tests such as collar bone-, wrist-, pelvic radiography). External experts are seconded to conduct the linguistics tests.<sup>66</sup>

Irregular migrants:

An irregular migrant is a third-country national who does not fulfil the requirements for entry and stay



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on the territory<sup>67</sup>.

This group includes:

- 1) Persons who were refused entry at the external border<sup>68</sup> by the Central Unit of the Police at the Airport<sup>69</sup>;
- 2) visa over-stayers;
- 3) persons who do not have an authorisation to stay;
- 4) rejected international protection applicants.

Normally in the last three cases and if the third-country national is not in a situation where s/he is obliged to leave the territory without further delay<sup>70</sup>, the Minister grants the person a delay of 30 days to leave the territory voluntarily.<sup>71</sup> The return department of the Directorate of Immigration receives the file of the concerned person and will proceed to check if the person is still on the territory<sup>72</sup> after the delay expires. If the person remained on the territory during all this time and still refuses to leave, the Grand-Ducal Police will detain the person and put him/her under the responsibility of the Minister in charge of Immigration. In this case the Minister will issue a decision of placement in detention and the third-country national will be sent to the detention centre.

In case the Grand-Ducal Police finds out during a control that a third-country national is an irregular migrant, they will contact the Foreigners Service of the Judicial Police, who will proceed to interrogate the detainee. They will then file a report and transfer it to the Directorate of Immigration. The Minister in charge of Immigration will take a decision of removal and of placement in detention based on the report.<sup>73</sup> This decision can be taken during office hours and outside office hours. To ensure after-hours service, the Return Department of the Directorate of Immigration has a special staff which is responsible for taking the decisions mentioned above and acts under the mandate of the Minister of Immigration.<sup>74</sup> The ministerial decision (signed by the Minister in charge of Immigration) is communicated to the Police, who notifies the third-country national in a language s/he understands, and explains the conditions and obligations established by the law.<sup>75</sup> S/he is informed of the right to be examined by a medical doctor and to have the legal assistance of a lawyer. All these procedures will be stated in the minutes.<sup>76</sup> The minutes have to be signed by the officer in charge and the third-country national can sign the document as well, however, s/he is not obliged to do so. The third-country national receives a copy of the minutes and of the decision of placement in detention.<sup>77</sup>

Nonetheless, no evaluation is made to determine the appropriateness of detention, the aim of the procedure is solely to discover the identity of the person, if the person is in possession of travel documents, if a crime was committed or if the respective person has violated any law (in this case the immigration law). Therefore, it is not necessarily possible to speak of a specific assessment procedure. In practice, there is a standardised procedure in Luxembourg to place third-country nationals in detention who did not provide any information to establish, with sufficient certainty, their identity; although the placement can be suspended if the identity of the concerned person is established and the detention is proven unnecessary.<sup>78</sup>

*Q2. Where individual assessment procedures are used, and specific criteria exist to help the competent authorities decide whether particular grounds for detention apply, please indicate the **legal basis** on which these individual assessment procedures are exercised (for example legislation, soft law/guidelines).*

As we mentioned above in the case of international protection, the legal basis for the assessment are Articles 8, 9, 10 (1) a), b), c) d) and 20 (1) d), e), f), i), k) l) and m) of the amended law of 5 May 2006.

In the case of irregular migrants the legal basis are Articles 99, 100 (1), 111 (1), (2), (3), 120 (1) and (2) of the amended Law of 29 August 2008.

*Q3. Where individual assessments are used, does the third-country national receive detailed information on the consequences of the interview before the individual assessment procedure? If yes, is there an emphasis on all possible options/outcomes of the assessment?*

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No.

Q4. Where individual assessments are used, please indicate whether the procedure includes an assessment of the **vulnerability** of the individual in question. (Yes/No) If yes, please describe the vulnerability assessment procedure used.

There is no specific assessment procedure in order to reveal the possible vulnerability of a person. However, during the questioning to see if a person is staying illegally on the territory, the Police asks a set of questions including on how the person came to Luxembourg.<sup>79</sup> It is possible to discover signs of vulnerability during this procedure. In this case, the Police must immediately inform the Minister.<sup>80</sup> After the person was placed in detention, the ministry can decide to proceed with a follow-up and ask the Police for an investigation.<sup>81</sup>

Q5. Please provide more detailed information on **the criteria / indicators** used to decide whether particular grounds for detention apply in individual cases. EMN NCPs are asked to answer this question by listing the criteria / indicators that are used to determine the circumstances in which the following grounds for detention, permitted in EU law, apply. However, if the grounds for detention are not applicable in your (Member) State, EMN NCPs may identify the criteria/indicators that are used to determine the circumstances in which other grounds for detention apply.

a) **Ground 1: If there is a risk of absconding**

*Example: The risk of absconding may be measured in your (Member) State on the basis of a previous escape or attempt to escape from detention, a statement about the person's reluctance to return to their home country, a previous breach of temporary release or non-compliance with an alternative to detention, lack of a valid passport, lack of address or residence, previous declaration of false identify, previous violation of voluntary departure or entry ban, etc.*

In Luxembourg the risk of absconding, which is assessed on a case-by-case basis, is determined by Article 111 (3) c) of the Law of 29 August 2008 and is suspected in the following cases:

- if the foreigner does not fulfil the requirements of entry and stay in the territory<sup>82</sup>;
- if the foreigner remains on the territory longer than his/her visa is valid (visa overstayer), or in case no visa is needed, if s/he stays longer than 3 months<sup>83</sup>;
- if the foreigner has withdrawn from the execution of a previous removal decision;
- if an expulsion decision has been taken against the foreigner<sup>84</sup>;
- if the foreigner has counterfeit, falsified or established under a name other than his/her own a residence permit, an identification document or a travel document;
- if the foreigner cannot justify the possession of valid identification or travel documents<sup>85</sup>, or if s/he has hidden elements of his/her identity, or if s/he has not declared the location of his/her actual residence, or does not respect the order to leave the territory or the terms of home custody.

b) **Ground 2: If the third-country national avoids or hampers the preparation of a return or removal process**

According to Article 120 (1) of the amended Law of 29 August 2008, a ground for detention is if the person concerned avoids or prevents the preparation of the return or the return procedure.

In practice, this could be the case if a person hides or gives false information about his/her

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identity on purpose in order to hamper the return<sup>86</sup> or if the person introduces an international protection application in order to prevent the removal while s/he is an irregular migrant on the territory.<sup>87</sup>

It is important to mention that in some cases the grounds for avoiding or hampering the preparation of a return are the same as for the legal presumption of the risk of absconding<sup>88</sup>: i.e. refusal to reveal identity, the fact of not producing valid identification documents, or of returning to Luxembourg after already having been removed from the territory.

The courts recognised the utility of using EURODAC and CCPD systems<sup>89</sup> for identification purposes. There are cases that dealt with persons who tampered their fingerprints to avoid being recognised through EURODAC files.<sup>90</sup> Furthermore, there are cases in which the authorities arranged meetings with the diplomatic missions to identify the person, where the person refused to assist.<sup>91</sup>

The courts furthermore have been confronted with cases where the diplomatic officials were willing to cooperate with Luxembourgish authorities, but where the person refused to recognise his/her nationality.<sup>92</sup>

c) **Ground 3: If required in order to protect national security or public order**

A third-country national who represents a threat to national security or public order<sup>93</sup> and cannot be removed without further delay, can be placed in detention in accordance with Article 111 (3) a) in relation with Article 120 (1) of the Law of 29 August 2008. Also, an international protection applicant can be placed in detention in accordance with Article 10 (1) c) in relation with Article 20 (1) l) of the Law of 5 May 2006.

d) **Ground 4: Please indicate any other ground(s) and the respective criteria/indicators considered in the assessment**

Ground 4: Refusal to leave within the deadline granted by the authorities to leave the territory

In case that the person refuses to leave the country within the deadline granted by the Minister, the latter can order the placement of the person to prepare his/her expulsion to the country of origin (Article 120 (1) of the Law of 29 August 2008).<sup>94</sup>

Ground 5: Using false documents

The administrative courts have been confronted with situations in which third-country nationals were arrested using false documents.

For example, a Somali national was arrested during a transit stop at the International Airport of Luxembourg with a false British passport while trying to reach the United Kingdom.<sup>95</sup> In this case there was no intention to apply for international protection in Luxembourg.

Ground 6: Filing applications for international protection under different identities or different nationalities

There are also cases where a person first stated being a national of a certain third-country and declared afterwards another country as his/her country of origin.<sup>96</sup>

Ground 7: Lack of cooperation of diplomatic missions of third-countries to establish an identity or to obtain travel documents

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There are some diplomatic missions which refuse to cooperate with the Luxembourgish authorities to establish the identity of a detainee or refuse to issue travel documents even if the applicant accepts to leave the country. In these cases, the courts have considered that the lack of cooperation of the diplomatic mission is in principle the legal basis to justify the extension of the detention.<sup>97</sup> However, if the lack of cooperation persists for a long period of time and there is no perspective that any positive results will be produced, the detention will be revoked.<sup>98</sup>

Also, the authorities are confronted with cases in which, even if the diplomatic authorities of the third-country are willing to cooperate, the procedure takes a lot of time.<sup>99</sup>

Ground 8: Existence of a request to take charge of the asylum applicant or the acceptance by an other Member State to take charge of the asylum seeker<sup>100</sup>

In case of the enforcement of the Dublin regulation, the existence of an agreement by another Member State to take charge of a person and a decision of inadmissibility to treat the application for international protection appear often in the grounds of a decision of placement in detention.<sup>101</sup>

If EURODAC reveals that the person has already filed an application in another Member State in application of Article 10 (1) d), the Minister of Immigration can order the placement in detention to organise the effective transfer to the other Member State.<sup>102</sup> However, the courts have considered that, in case the duration of the transfer is too long and not justified, the order of placement in detention can be revoked.<sup>103</sup>

*Q6. Is the **possibility to provide alternatives to detention** systematically considered when assessing whether to place a person in detention in your (Member) State?*

Home custody is the only alternative to detention foreseen by the amended Law of 29 August 2008 (Article 120 (1) of the Law). According to Article 125 (1) of the Law, which sets the conditions of home custody, it is only possible to use home custody if the execution of an obligation to leave the territory has been postponed for technical reasons<sup>104</sup> and if proper guaranties to avoid the risk of absconding can be presented.<sup>105</sup> This measure is coupled with regular reporting to the authorities.

While taking the decision to place a person in detention, the Directorate of Immigration can then consider home custody if the person has a fixed address.<sup>106</sup> The assessment of the possibility to provide alternatives to detention is taken on a case-by-case basis considering the special conditions established by the Law. This assessment is taken by the Minister in charge of Immigration as established in Article 125bis of the Law of 29 August 2008. This is very rarely done because of the risk of absconding.<sup>107</sup>

In the written decision to detain a person, it is often notified that home custody is not an option for the concerned person – the counter-argument used is the risk of absconding.<sup>108</sup> However, the Administrative Court has indicated how to balance these two arguments for taking a decision.<sup>109</sup>

Experience shows that home custody as an alternative measure in a country like Luxembourg is problematic. According to the Judicial Police, during controls of persons who had been granted home custody, they did not reside anymore at the fixed address and had absconded.<sup>110</sup> Therefore, the precaution has been taken more often lately to argue against home custody using the risk of absconding and to record this in the notification for the detention of the concerned person.<sup>111</sup>

*Q7. Please indicate which **national authorities** are responsible for (i) conducting individual assessment procedures (where these exist) and (ii) deciding on the placement of a third-country national in detention.*

The individual assessments are done through the interviews conducted by the Foreigners Service of the Judicial Police and by the staff of the Directorate of Immigration. See Section 3, Question 1.

The decision on the placement of a third-country national in detention is taken by the Minister in charge of Immigration and Asylum. See Section 3, Question 1.

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Q8. Please indicate whether **judicial authorities** are involved in the decision to place a third-country national in detention, and if so, at which stage(s) of the decision-making process and in what capacity? (e.g. do judicial authorities make the final decision, do they only make a recommendation, do they only come in if the third-country national appeals against a decision?)

Judicial authorities only come in if the third-country national appeals against a decision. The decision of placement in detention can be appealed to the First instance Administrative Court within a month that the decision has been notified to the person.<sup>112</sup> Against the decision of the First instance Administrative Court an appeal can be filed within 3 days with the Administrative Court.<sup>113</sup>

Q9. Please identify any **challenges** associated with the implementation of existing assessment procedures in your (Member) State.

#### 1. Risk of absconding

- A major challenge is the legal presumption of the risk of absconding in nearly all cases where a third-country national has no valid identity, travel or residence documents and which eventually leads to the decision of a quasi-automatic placement in detention<sup>114</sup>, as it is mentioned in some decisions by the First instance Administrative Court.<sup>115</sup>

- The Luxembourgish Refugee Council (*Lëtzebuenger Flüchtlingsrot - LFR*) in its opinion on the bill n°6218, said that the terms of Article 111 (3) c) allow the placement in detention of a person on the sole basis of its irregular situation by equating the situation of a person in an irregular migration situation to the one of a person representing a risk of absconding.<sup>116</sup>

-In its opinion to bill n°6218, the Consultative Commission on Human Rights (*Commission Consultative des Droits de l'Homme - CCDH*) noted that the bill does not define the concept of 'risk of absconding' and that the authors limited themselves to assume its existence in six situations they list in the Article 111 (3). According to the *CCDH*, this approach would differ from the requirements the 'Return' Directive had laid down. The *CCDH* concluded that the bill should define 'objective criteria' in order to establish the existence of the risk of absconding.<sup>117</sup>

#### 2. Assessment procedure

-According to several stakeholders, there is no in-depth case-by-case evaluation during the assessment procedure, which always must take into account the practical feasibility of the implementation of return of the concerned person. This problem emerges especially in cases where the diplomatic missions of the countries of origin of the persons to be returned do not cooperate with the Luxembourgish authorities in the identification of the person or where they do not facilitate the obtaining of the necessary travel documents to execute the return decisions (e.g. Algerian nationals, where the non-cooperation of Algerian authorities is such that the feasibility of a return is nearly impossible to implement).<sup>118</sup>

#### 3. Assessment of vulnerability and special needs of the detainee

There is no formal mechanism for assessing the vulnerability before and after the decision of placement.

In 2011, the *CCDH* highlighted already the non-existence of mechanisms or detection systems for situations of vulnerability in the Luxembourgish legislation in its opinion on the bill mentioned above.<sup>119</sup>

#### 4. Start of identification procedure and the obtaining of travel documents for third-country nationals coming out of prison

A recurring problem, shown by the jurisprudence<sup>120</sup>, concerns prisoners having completed their prison sentence, which are being placed in detention in order to organise their removal. In general, the organisation of the removal procedure of the concerned persons starts only when they have come to the end of the sentence. This extends unnecessarily the privation of freedom of the detainee, as the procedure could have started before the transfer to the detention centre.<sup>121</sup> In its report on the detention centre, the Ombudsman notes that in several cases detainees have not been informed about their transfer to the detention centre after having completed their prison sentence until shortly before the removal. The Ombudsman recommends

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to inform detainees about their transfer to the detention centre as early as possible in order to prevent psychological stress situations.<sup>122</sup>

*Q10. Please identify any **good practices** in relation to the implementation of assessment procedures (e.g. cited in existing evaluations/studies/other sources or based on information received from competent authorities)*

The good practices that have been implemented by the Grand-Duchy of Luxembourg are:

1. Dublin procedures

In Luxembourg persons in Dublin procedures are mostly not detained until the responsible Member State accepts to receive the person and the removal of the person can be organised.<sup>123</sup> This good practice avoids an overload in the detention centre as well as an unnecessary detention of the concerned persons.

2. Vulnerable persons, minors and persons with special needs

Even though there is no assessment procedure to determine the vulnerability of detainees, it is important to mention that, in practice, generally Luxembourgish authorities do not place vulnerable persons, minors and persons with special needs in the detention centre.<sup>124</sup>

3. Families

Although the Law provides the possibility to detain families for 72 hours, in practice, they are often only detained for 24 hours prior to their departure.<sup>125</sup>

4. Third-country nationals from non-safe countries

In Luxembourg, the authorities avoid as much as possible to place persons in detention, who are identified as nationals from non-safe countries (e.g. Somalia) or from countries where the authorities know that the diplomatic authorities of these countries will systematically refuse to cooperate for the return of the persons.<sup>126</sup>

#### Section 4: Types of detention facilities and conditions of detention (Maximum 5 pages)

*This section of the Synthesis Report will provide a factual, comparative overview of the types of immigration detention facilities that exist in the EU and the conditions of detention associated with these. It examines whether there are specialised immigration detention facilities and explores whether different types of detention facilities are available for different categories of third-country national. The section also reviews the conditions of third country nationals in these detention facilities, including average surface per person, existence of separate facilities for families, visitation rights, access to medical care and legal assistance.*

*Q1. Are there specialised immigration detention facilities in your (Member) State, which are not prisons? (Yes/No) If yes, please indicate how many exist and how they are distributed across the territory of your (Member) State.*

Luxembourg has one detention centre which is located in Findel next to the international airport. This detention centre depends administratively on the Ministry of Foreign and European Affairs, but is under the competence of the Ministry in charge of Immigration and Asylum. Furthermore, the airport of Luxembourg has one waiting area where persons can be detained for a maximum of 48 hours<sup>127</sup>, which in practice has not been used so far.

*Q2. Are there different types of specialised immigration detention facilities for third-country nationals in different circumstances (e.g. persons in return proceedings, applicants for international protection, persons*

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who represent a security risk, etc.)? (Yes/No). If yes, please provide a brief overview of the different types of immigration detention facilities.

No.

*Q3. Which authorities/organisations are responsible for the day-to-day running of the specialised immigration detention facilities in your (Member) State?*

The detention centre is run by its administration. The director of the centre is the head of administration and assumes the administrative and hierarchical responsibility. S/he is assisted by an assistant director who assumes, under his authority, the responsibility of the domains entrusted to him/her and replaces the director in case of impediment.<sup>128</sup> There are about 70 staff members working in the detention centre, such as psychosocial staff, security staff, administrative staff and manual workers.<sup>129</sup> The security agents of the centre are responsible for the internal security, but the external security of the centre is assured by the Grand-Ducal Police.<sup>130</sup> To ensure medical services and special care in the detention centre, the Minister in charge of Immigration can seek the services of doctors and experts in the health sector.<sup>131</sup>

*Q4. Please describe any measures taken by your (Member) State to deal with situations where the number of third country nationals to be placed in detention exceeds the number of places available in the detention facilities.*

In case there is no space in the respective unit of the detention centre, the Minister in charge of Immigration is responsible for taking the decision not to detain a person.<sup>132</sup> However, in practice, if there is a real need to detain the person, it will be verified if there is a possibility to release another person.<sup>133</sup>

Since its opening, the detention centre has not been overcrowded. Before 22 August 2011, third-country nationals were detained in prison (Luxembourg Penitentiary Centre in Schrassig).

Until 2006, there have been times when the unit was overcrowded. On 30 January 2006, an incident occurred at the Block P2 (where persons in administrative detention were held) inside the prison of Schrassig, where detainees set fire to their cells<sup>134</sup>, causing one immediate death<sup>135</sup>, (a second person died later) and several wounded.<sup>136</sup> Following this, the Luxembourgish Refugee Council (*LFR*) recalled its proposals already transmitted in 2005 to create a detention centre in accordance with the international legal framework.<sup>137</sup> After the incident, which led to a public outcry, the government met several times with the *LFR* and the decision was taken not to place more detainees in the unit than the maximum capacity allowed (24 persons).<sup>138</sup>

The Detention Centre has a maximum capacity of 88 persons, however, as there are 4 units (two for single men with a total capacity of 44, one for single women with a capacity of 16, one for families with a capacity of 28) and e.g. men cannot be placed in a women's unit, it is very unlikely that the maximum capacity is reached. Also, even though many rooms are foreseen for 2 persons, only one person is detained per room. Therefore, in practice, there are only between 25 and 30 persons in the detention centre at a time.<sup>139</sup>

The family and women units are often completely empty and the two blocks for men do not always reach their maximum capacity.

*Q5. Are third-country nationals detained in prisons in your (Member) State? (Yes/No) If yes, under which circumstances?*

The detention centre in Luxembourg opened on 22 August 2011. Since then, no more third-country nationals subject to administrative detention are detained in prison.

The policy of mixing administrative and criminal detention together in the same institution of the *CPL* (Luxembourg Penitentiary Centre) (which used the same staff to treat both sets of detainees) was widely



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criticised by national and international institutions<sup>140</sup> as well as Human Rights associations.<sup>141</sup> In its opinion on the bill on the construction of a detention centre, the Council of State qualified this situation as a violation of human dignity of the detainees.<sup>142</sup>

The legitimacy and detention conditions of foreigners in a situation of irregular stay were therefore raised on several occasions in 2010. The Administrative Court in its decision of 2 April 2009 ordered that the detention centre at the CPL should be closed and fixed as a deadline 1 October 2010.<sup>143</sup> A decision by the First instance Administrative Court<sup>144</sup> ordered the immediate release of a person, who was placed in the unit for administrative detention in the prison arguing that the deadline fixed by the Administrative Court had expired.<sup>145</sup> The Government appealed against the decision of the Administrative Court by assessing that placement of persons within the Penitentiary Centre in a unit separate from that of the detainees was in accordance with Article 16 (1) of the 'Return Directive'. On 15 October 2010, the Administrative Court<sup>146</sup> revoked the First instance Administrative Court's decision by declaring that the detention center unit inside the Penitentiary Centre responded in principle to the requirements of Article 120 (1) of the Law of 29 August 2008, reforming its own decision of 2 April 2009 saying that the Court established the date of 1 October 2010 only as a reference date and not as a fixed date.<sup>147</sup>

*Q6. If third-country nationals are detained in prisons in your (Member) State, are they held separately from general prisoners? If yes, please provide information on the mechanisms to separate third-country nationals under immigration detention from general prisoners?*

As mentioned above, third-country nationals are not detained in a prison anymore. Before 22 August 2011, when irregular migrants were detained in prison, they were placed in a special unit (Block P2), which was separated from the units intended for persons with criminal charges. No women were detained<sup>148</sup>, as the unit meant for detention based on immigration and asylum purposes was only for men.<sup>149</sup> There was a separate facility at the airport, called AIDA, where families could be detained for a maximum of 72 hours.<sup>150</sup> Women could be detained there as well, but this was very rarely done and only for 1-2 days.<sup>151</sup>

The conditions of detention in the prison were not as good as they are in the detention centre. Since the fire in 2006, the conditions in the prison improved (such as the limitation to one person per room), but as detainees always had to be kept separated from prisoners, they had only limited access to an outdoor space (one hour a day from 8h00-9h00<sup>152</sup>), they were not allowed to work, they did not have any access to education programmes, they could rarely do sports (one hour a week on Friday mornings<sup>153</sup>) and they had only twice a week activities provided by NGOs in the afternoon.<sup>154</sup> In the morning, the detainees had to stay in their cells and were only allowed to move freely within the hallway in the afternoon.<sup>155</sup> They had access to television, free of charge and also to public phones free of charge.<sup>156</sup>

*Q7. Please provide the following information about the conditions of third-nationals who have been placed in an immigration detention facility in your (Member) State: (Please indicate if the facilities in question are prisons or specialised immigration detention facilities).*

Conditions of detention	Statistics and/or comments
Please provide any statistics on the average available surface area per detainee (in square meters)	<p>The available surface for detainees is 7,5 m<sup>2</sup> for single rooms, respectively 9,6 m<sup>2</sup> for double rooms.<sup>157</sup> There are also two isolation rooms, used for disciplinary<sup>158</sup>, security or health reasons<sup>159</sup>, with an available surface of around 10m<sup>2</sup> each.<sup>160</sup></p> <p>In its report on the detention centre, the Ombudsman notes that the rooms are 'very small'. Therefore, the Ombudsman suggested to reduce</p>



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	<p>the time of detainees locked in their rooms from 21h30 until 7h00 to 23h00 until 7h00.<sup>161</sup> The detention centre plans to leave the rooms open over night, so that the detainees are able to move freely within their unit at any time, but this project could not yet be realised as the detention centre has not enough staff members to do so.<sup>162</sup></p>
<p>Please provide any statistics on the average number of detainees placed in one room per detention facility</p>	<p>There are no statistics available on the average number of detainees placed in one room.</p> <p>Nevertheless, even though there are double rooms, the management of the centre ensures, on informal agreement with the government, that rooms are for single use only, except in the case of a family or a couple. As a consequence of this intern policy, actual capacity of the centre is much less than the theoretical maximum capacity of 88. In extreme cases, rooms could get a double occupation. To date, this has not yet proved to be necessary.<sup>163</sup></p>

<p>Are families accommodated in separate facilities?</p>	<p>No, there is no separate facility for families.</p> <p>As provided by the law though, the detention centre is divided into several units<sup>164</sup> in order to separate single men (two units), single women (one unit) and families (one unit). This is also applied in practice.</p> <p>Article 7 of the Grand-Ducal Regulation of 17 August 2011 laying down the Conditions and Practical Arrangements of the Detention Centre Regime states that the director can place the detainee within the unit which seems most appropriate to him.<sup>165</sup> It should also be noted that the directorate of the detention centre applies a case-by-case policy in regard to the placement of detainees to the different units in order to maintain some flexibility for special cases. Thus, if e.g. a woman finds herself alone in the unit dedicated to single women, it may be that, and provided that the latter agrees, the directorate places her within the family unit, in order to ensure that she maintains a minimum of social interaction.<sup>166</sup></p> <p>The family unit has 14 double rooms to its disposal, with each room having the possibility to add a children's bed. In this unit, a door always combines two rooms, so that if the door stays open a family room for 4 persons results. This unit as well as the</p>
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	<p>unit for single women are never fully occupied or even completely empty and it is rare that the detention centre accommodates families or single women.<sup>167</sup> The units for men are sometimes full (however, it is important to note that only one person is detained per room, even if the rooms are designed for two persons), but it is not possible to dedicate another, not used, unit (the women's unit is often empty) to men because there are not enough staff members to manage these units at once.<sup>168</sup></p> <p>According to Article 6 (3) of the Law of 28 May 2009, families with children aged under 18 years are detained for a maximum of 72 hours.<sup>169</sup></p>
<p>Can children be placed separately from their parents? (e.g. in a childcare facility). Under what circumstances might this happen?</p>	<p>According to Article 125bis (2) of the Law of 29 August 2008, the family unit, with family members present on the territory, is maintained to the extent possible.<sup>170</sup></p> <p>As families with children aged under 18 years are not held in detention for longer than 72 hours<sup>171</sup>, there are no reasons that the above mentioned provision should create any problems in practice. Also, in most cases, families with children are only placed for 24 hours.<sup>172</sup></p>
<p>Are single women separated from single men?</p>	<p>Yes. As already mentioned above, the detention centre is divided into several units in order to separate men (two units), women (one unit) and families (one unit).</p> <p>Detainees of opposite sex are thus separated, except married couples and partners as defined by the Law of 9 July 2004 on Legal Effects of Certain Partnerships.<sup>173</sup> In practice, couples that are not bound by a legal union are also not separated if they wish to stay together.<sup>174</sup></p>
<p>Are unaccompanied minors separated from adults?</p>	<p>Unaccompanied minors may be placed in detention, in an appropriate place adapted to the needs of their age. Consideration is given to the best interests of the child.<sup>175</sup> Under the current legislation, it is therefore possible to place unaccompanied minors in the detention centre.</p> <p>However, both, the Directorate of Immigration as well as the directorate of the detention centre do not consider a detention centre as an appropriate place for minors. In practice, they are therefore usually accommodated in open reception facilities. The detention centre accommodated an unaccompanied minor only once to date and this</p>

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	was just for a few hours. The minor was placed in a single room within the family unit. <sup>176</sup>
Do detainees have access to outdoor space? If yes, how often?	<p>Detainees have free access to a secured outdoor space attached to their respective unit during daytime<sup>177</sup>, except during mealtime.<sup>178</sup> The surface of each outdoor space of each unit is 10m X 8,5m and they all have benches; furthermore, the outdoor space of the family unit has a playground for children.<sup>179</sup> Detainees can exit their rooms during daytime and can spend time in the kitchen/common room, where they can prepare themselves food (only limited cooking is allowed due to hygienic reasons, e.g. no meat), and they can access the recreational outdoor areas within their unit. However, if a detainee has been subject to a disciplinary measure, the director may limit free access to less than one hour per day.<sup>180</sup> Furthermore, detainees can take up sports and access the premises equipped with gear for physical exercise.<sup>181</sup></p>
Are detainees allowed to have visitors? If yes, which visitors are allowed (for example, family members, legal representatives, etc.) and how often?	<p>As specified in the Holding Centre rules and regulations (Internal Rules of the detention centre), detainees may receive visitors freely and without supervision from Monday to Saturday between 8h30 and 11h30, as well as between 13h30 and 16h30.<sup>182</sup> The director may however order supervision, except for visits of lawyers and doctors, in case there is a serious evidence of abuse, a risk of absconding or an endangering of the safety of the centre. There is no restriction regarding the type of visitors that are allowed, but visitors who refuse to submit to security check are denied access to the centre. The director may also refuse entry to visitors whose behaviour is likely to endanger the safety of the centre, its staff or its occupants. Lawyers and doctors do not have to undergo a security check.<sup>183</sup></p> <p>The arrangements for visits are determined by the Grand-Ducal Regulation of 17 August 2011.<sup>184</sup> The detainee may not receive more than three adults per visit and minors have to be accompanied by an adult. The director determines schedules and duration of visits, but the frequency of visits may not be restricted to less than 2 per week and per detainee.<sup>185</sup> Visits can take place 7 days a week from 8h00 to 12h00 and from 13h00 to 18h00. Normally, a visit is planned for an hour, but if the room for the visit is not needed afterwards for another person, the staff of the detention centre is</p>

	<p>flexible and lets the visitors stay longer.<sup>186</sup></p> <p>The visitors have to present an identification document at the entry of the detention centre and are only allowed to enter if they possess a residence permit.<sup>187</sup> In practice, exceptions are made the day before a detainee is removed; in that case persons with a right of residence (such as applicants for international protection) are allowed to see the detainee before s/he is returned.<sup>188</sup></p> <p>There are several representatives of organisations active in the field of guidance and support of detainees, which are approved by the Minister in charge of Immigration, who have access to the centre within the limits and under the conditions prescribed by the Director.<sup>189</sup> The authorisation is granted for an unlimited term and can be granted to an unlimited number of representatives per association. However, a representative can lose his/her right of access for 3 reasons:<sup>190</sup></p> <ul style="list-style-type: none"> <li>- if the Minister in charge of Immigration withdraws, under a motivated decision, his authorisation to an NGO;</li> <li>- if the Director of the holding facility withdraws its authorisation to the NGO's representative because s/he has committed a violation of the law or regulations concerning the centre;</li> <li>- if the association or its representative ask for a withdrawal of the authorisation.</li> </ul> <p>Theoretically, an unlimited number of members of the NGOs can visit the centre simultaneously. In practice, the NGOs try to come with at least two persons at a time to the detention centre.<sup>191</sup></p> <p>The agreed visitors can access the centre without prior information at any time from Monday to Sunday, 8h00 to 12h00 and from 13h00 to 18h00. As mentioned above the Ombudsman and the Ombuds-committee for the rights of children may access the centre at any time, night and day. The Ombudsman and the Ombuds-committee, as well as the agreed NGOs and their members, can make remarks and comments to the Ministry or to the Director of the holding facility at any time and by any means.<sup>192</sup></p> <p>Laywers can also visit the detainees every day of the week, between 8h00 and 18h00. There is one visitor room that is slightly bigger than the others and that is intended for family visits<sup>193</sup> and 3 other visitor rooms, one of which is only for visits from</p>
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	lawyers. <sup>194</sup>
<p>Are detainees allowed contact with the outside world via telephone, mail, e-mail, internet? If yes, are in- and/or out-coming messages screened in any way?</p>	<p>Article 14 (1) of the Law of 28 May 2009 states that the detainee is allowed to communicate freely per written mail, phone, fax or email.<sup>195</sup> Access to the phone is limited from 8h00 to 11h30, 13h00 to 18h00 and from 19h00 to 21h00.<sup>196</sup> In case of serious risk of presence of dangerous or unlawful objects, risk of absconding or danger for the security of the centre, the use of means of communication can be banned, except for the communication with lawyers and doctors in accordance with Article 14 (2) of the same law.<sup>197</sup> However, this has never been applied in practice. Article 24 of the Grand-Ducal Regulation of 17 August 2011 states that the director can limit communication to reasonable amounts, that s/he can limit or forbid the use of means of communication if they are being abused, and can allow, under conditions that s/he lays down, the detainees to use cellphones if these have no camera.<sup>198</sup></p> <p>There are 5 phones per unit, one that is meant to call lawyers (free of charge), out of which one is for incoming calls and two are for outgoing calls. Each detainee receives 10€ credit per week to make calls; furthermore they can use their daily allowance (3€) for more phone credits if necessary. The detainees are not allowed to keep their own phone, as only phones without cameras are allowed and the phone reception is not the same throughout the centre. Therefore, it was decided, in order not to discriminate anyone, that the same rules count for all the detainees and that the common phones have to be used. There have been no complaints from detainees on this matter. The detainees have access to the internet every day for 1,5 hours (there are 8 computers). The centre provides paper, pens, envelopes and stamps.<sup>199</sup></p> <p>No messages, independent of the means of communication, are being read. Written mail is scanned for security risks. Only in case of serious doubt, such as for drugs, the detainee can be asked to open the mail in front of a staff member (this happened only twice), but even in this case it will not be read.<sup>200</sup></p>
<p>Are education programmes provided (e.g. school courses for minors and language classes for adults)?</p>	<p>As minors can only be detained for a maximum of 72 hours, there is no need for education programmes for minors. Language classes are</p>

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	<p>provided for adults, English classes (in collaboration with the Ministry of Education with an external teacher) and French classes (taught by one of the staff members) are held. The courses are adapted to individual needs; in practice, this consists mostly of alphabetisation and of computer skills improvement. Material for German and Luxembourgish courses exists as well and those courses can be held on demand.<sup>201</sup></p>
<p>Do detainees have access to leisure activities? If yes, which leisure activities are provided in the detention facility? And if yes, how often?</p>	<p>Article 12 (3) of the Law of 28 May 2009, Article 11 of the Grand-Ducal Regulation, as well as the Holding Centre rules and regulations lay down that the detention centre offers intellectual, artistic, cultural, educational, formative, recreational and spiritual activities in which the detainees can participate under the conditions set by the director.<sup>202</sup></p> <p>In practice, lots of leisure activities exist for the detainees. They have access to table soccer, darts, a sports hall with sports gear, a fitness room, pool tables, table tennis, a library with books in many languages, board games, televisions (every detainee has a television in their room), and newspapers in several languages. Every 6-8 weeks the staff of the detention centre organises cooking activities with the detainees, where they can decide what they want to cook and the centre provides the food. The detainees have the possibility to celebrate traditional/religious feasts of their culture where they are able to save money to buy special food and the centre provides the more basic food. The cooking activities get positive feedback from the detainees, also because they provide an opportunity for a further exchange between the staff and the detainees, where the detainees can give/show a part of their own culture.<sup>203</sup></p> <p>The Red Cross holds paint workshops every two weeks. For a while, volunteers from the University of Luxembourg held workshops for the detainees. The detention centre just started a cooperation with an association that will come to the detention centre to offer activities for the detainees, such as soccer games. All activities are on a voluntary basis; no detainee is forced to participate in any activity.<sup>204</sup></p>
<p>Can persons in detention leave the facility and if yes, under what conditions? Can persons move freely within facility or are their movements restricted to some parts/rooms of the facility?</p>	<p>Detainees cannot leave the facility unless for health reasons (in case they have to go to the hospital, where they have to be kept under surveillance by the Police for the first 24 hours<sup>205</sup>).</p>

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	<p>The detainees can move freely within their unit, except if there are restrictions set by the director<sup>206</sup>, and apart from their rooms, detainees have access to a communal space as well as an outdoor space during daytime. At night, from 22h00 to 7h00, the detainees are locked in their rooms.</p>
<p>Are detainees entitled to legal advice / assistance? If yes, is it free of charge?</p>	<p>Detainees have the right to obtain legal advice. They can call a lawyer every day between 7h00 and 21h15 and if they do not have the resources, the costs for the lawyer will be covered for them. When arriving at the detention centre, each detainee receives a list with lawyers<sup>207</sup> who are specialised in detention matters and who are willing to take on files. The detainees are also allowed to contact lawyers whose names are not provided on the list; the list is only meant as a guidance.<sup>208</sup> According to Article 123 of the Law of 29 August 2008, an appeal to the Administrative Court can be made.<sup>209</sup></p> <p>In addition to the list of persons that are entitled to provide legal assistance, upon arriving, the detainees receive a list with the organisations active in the field of guidance and support of persons who are submitted to return procedures. Detainees have the right to inform a person of their choice of their arrival at the centre.<sup>210</sup></p>
<p>Are detainees entitled to language support (translation / interpretation services)? If yes, is it free of charge?</p>	<p>The detention centre has an agreement with the interpretation department of the Luxembourgish Red Cross, who is able to provide translations in almost all languages needed. The translations can either be done per phone, or, which is preferred by the detention centre, in person. The staff of the detention centre speaks a wide range of languages, therefore they can use their knowledge for interpretation as well. If other detainees speak the language needed, the detainee who needs translation can be asked if he agrees having the translation done by the other detainee. If not, the detention centre makes use of the professional interpreters. The rules and information, which are important for the stay of a detainee, are displayed in the unit in several languages.<sup>211</sup></p> <p>The internal rules are handed to the detainee in a language, where it is reasonable to assume that the person understands it.<sup>212</sup> These internal rules are currently available in French, English, German, Italian, Spanish, Farsi, Russian, Serbo-Croatian,</p>

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	Chinese, Portuguese, Albanian, and Arabian. <sup>213</sup>
<p>Is medical care available to detainees inside the facilities? Is emergency care covered only or are other types of medical care included?</p>	<p>The detention centre has a convention with the CHL (<i>Centre Hospitalier de Luxembourg</i>) for somatic care and with the CHNP (<i>Centre Hospitalier Neuro-Psychiatrique</i>) for psychiatric care.<sup>214</sup> The doctors working for the detention centre are civilian physicians. A doctor examines every detainee within 24 hours of his/her arrival at the detention centre. During their stay at the detention centre, detainees have free access to medical care in the interest of their health and necessary treatment of their illnesses. Medical care is free of charge for the detainees. However, dental treatment is limited to urgent and necessary care.<sup>215</sup></p> <p>If a detainee wants to see a doctor or a psychiatrist, he may register for an appointment. A nurse is present from Monday to Friday 4 hours a day.<sup>216</sup> Five general practitioners are present twice a week, in general for 4 hours, from 9h30 on. An additional consultation can be organised on Friday mornings.<sup>217</sup></p> <p>Article 12 of the Grand-Ducal Regulation of 17 August 2011 lays down that the director of the detention centre can have a detainee to be examined by medical staff if it is in his/her interest or in the interest of the other detainees or staff members. The doctor decides on the treatment of the detainee and can have him/her transferred to a hospital if necessary. In general, the detainee is allowed to manage his/her prescribed medication, however, the doctor can request that the medical staff distributes the medications.<sup>218</sup> A detainee is not allowed to keep the medication s/he has with him/her on arrival at the detention centre, but medication is newly prescribed by the doctor of the detention centre.<sup>219</sup></p> <p>The information concerning the health of a person is registered in an individual medical file, which is managed by the doctor in collaboration with the medical staff. At departure, the detainee receives a copy of his/her medical file.<sup>220</sup></p> <p>The Ombudsman criticises that it can take up to 24 hours until a newly arrived detainee will be examined by a doctor. Especially in case the person is in need of a continuous treatment this timeframe might be too long. The Ombudsman suggests that a person needs to present a very recent health certificate, along with a prescription if needed, in order to be admitted to the detention centre.<sup>221</sup></p>



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<p>Are there special arrangements for persons belonging to vulnerable groups? Please describe</p>	<p>According to Article 7 (2) of the Law of 28 May 2009, special attention is paid to the situation of vulnerable persons, such as minors, unaccompanied minors, handicapped persons, elderly persons, pregnant women, single parents with minor children and persons, who have been victims of torture, rape or other serious forms of psychological, physical or sexual violence.<sup>222</sup> In practice, the only categories of vulnerable persons that have stayed in detention have been pregnant women, who receive special care from the medical staff. For further information see Section 2, Question 2.</p> <p>The oldest person that has been detained, where his/her age was known, was 56 years of age.<sup>223</sup></p>
<p>Are there special arrangements for persons considered to be security risks for others and/or themselves? Please describe</p>	<p>According to Article 6 (1) of the Law of 28 May 2009, a specific unit is dedicated to detainees with a risky behaviour.<sup>224</sup> In practice, there is no specific unit for these persons, however, there are 2 isolation rooms that can be used for security measures in order to calm down a person (for a maximum 24 hours) or for sanctioning measures (for a maximum of 5 days – in this case a certificate from the doctor is needed, which attests that the person is capable to be held in isolation).<sup>225</sup> In general, the staff of the detention centre tries to place persons with a risky behaviour within units with other persons in order to have a mixed group. According to the directorate of the detention centre, they treat every person in the same way, and they only rarely had to interfere because of the behaviour of a person.<sup>226</sup> Article 29 of the Grand-Ducal Regulation of 17 August 2011 lists the acts and omissions for which there may be sanctions that are foreseen by the law.<sup>227</sup></p>

## Section 5: Availability and practical organisation of alternatives to detention

### (Maximum 6 pages)

*This section explores the availability of different types of alternatives to detention for different categories of third-country national. It further explores the practical organisation of the alternatives to detention, including information on the authorities/organisations responsible for administering the alternatives; the conditions that must be met by the third-country national who has been provided an alternative to detention; and information on the mechanisms in place in order to monitor the third-country national's compliance with these conditions. EMN NCPs are further requested to provide information on the challenges associated with the implementation of the alternatives, and any examples of good practice in their (Member) State that they may wish to share.*

*Q1. Please indicate whether any alternatives to detention for third-country nationals are available in your (Member) State and provide information on the practical organisation of each alternative (including any*

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mechanisms that exist to monitor compliance with/progress of the alternative to detention) by completing the table below.

<b>Alternatives to detention</b>	<b>Yes/ No (If yes, please provide a short description)</b>
Reporting obligations (e.g. reporting to the policy or immigration authorities at regular intervals)	<p><i>Example: Third-country nationals subject to reporting obligations are required to report regularly to a monitoring authority once a week. When reporting, the person has to present an identification document and sign the reporting protocol. The third-country national can reside in an address of his/her own or s/he can be accommodated in an open reception centre. If the person fails to comply with reporting obligations, s/he will be placed in detention facilities.</i></p> <p>No, however, a person held in home custody has to respond personally when summoned by the Minister.<sup>228</sup></p>
Obligation to surrender a passport or a travel document	No, however, a person held in home custody has to surrender his/her travel documents. <sup>229</sup> See below.
Residence requirements (e.g. residing at a particular address)	<p>Yes, Article 125 of the Law of 29 August 2008 lays down the possibility for home custody. With regard to Article 120, the Minister can take the decision to place a person under home custody if the execution of the obligation to leave the territory was postponed because of technical reasons and if the person can present the necessary guarantees to prevent the risk of absconding. The decision can be taken for a maximum duration of 6 months and is notified. The person receives a copy of the notification.</p> <p>Home custody carries 3 obligations:</p> <ul style="list-style-type: none"> <li>- The person is required to reside in a specific place established by the Minister.</li> <li>- The person must present himself/herself at the Directorate of Immigration when summoned by the Minister.</li> <li>- The withholding of travel documents.</li> </ul> <p>The decision for home custody is revoked if the person does not fulfil the conditions fixed by the Minister or if there is a risk of absconding.<sup>230</sup></p> <p>The person in home custody is not obliged to stay at home 24 hours a day, 7 days a week, but during set hours in which a control can be made.<sup>231</sup></p> <p>The legal framework for this alternative exists, but there is no Grand-Ducal Regulation yet that defines the exact procedure.<sup>232</sup></p>
Release on bail (with or without sureties) <i>If the alternative to detention "release on bail"</i>	No.

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<i>is available in your (Member) State, please provide information on how the amount is determined and who could be appointed as a guarantor (e.g. family member, NGO or community group)</i>	
Electronic monitoring (e.g. tagging)	No.
Guarantor requirements <i>If this alternative to detention is available in your (Member) State, please provide information on who could be appointed as a guarantor (e.g. family member, NGO or community group)</i>	No, however, to be granted home custody a person has to present the necessary guarantees to prevent the risk of absconding.
Release to care worker or under a care plan	No.
Community management programme	No.
Other alternative measure available in your (Member) State. Please specify.	As families are only detained for 72 hours, the government plans to create a specific open reception facility for families where they can stay until their return can take place ( <i>Maison retour</i> ). <sup>233</sup>

Q2. For each of the alternatives to detention that are available in your (Member) State, please indicate the categories of third country nationals that may be provided an alternative to detention, making use of the list provided below and adding any additional categories as applicable. If there are variations in the practical organisation of any of the alternatives to detention provided to different categories of third country national, please indicate this is the case and briefly illustrate the variations.

- Applicants for international protection in ordinary procedures;
- Applicants for international protection in fast-track (accelerated) procedures;
- Applicants for international protection subject to Dublin procedures;
- Rejected applicants for international protection;
- Rejected family reunification applicants;
- Persons found to be illegally present on the territory of the (Member) State who have not applied for international protection and are not (yet) subject to a return decision)
- Persons who have been issued a return decision;
- Other categories of third-country nationals;
- Vulnerable persons (such as minors, families with very young children, pregnant women and persons with special needs).

Irregular migrants that can be placed in detention in accordance with Article 120 (1) of the Law of 29 August 2008 can be provided the alternative (home custody).<sup>234</sup>

Q3. For each of the alternatives to detention that are available in your (Member) State, please indicate the legal basis on which they may be granted to particular categories of third country nationals (for example legislation, soft law/guidelines, other).

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Article 125 (1) of the Law of 29 August 2008 defines the conditions under which home custody can be granted.<sup>235</sup>

*Q4. For each of the alternatives to detention that are available in your (Member) State, please indicate the authorities/organisations responsible for (a) deciding and (b) administering the alternative. Please indicate in particular whether the responsible organisation is a non-governmental organisation.*

The Minister in charge of Immigration takes the decision to grant a person the alternative to detention (home custody).<sup>236</sup> In accordance with Article 133 of the Law of 29 August 2008, the Minister may proceed with or initiate controls.<sup>237</sup> In practice however, it is the Directorate of Immigration, which is in charge of administering the alternative.

*Q5. For each of the alternatives to detention that are available in your (Member) State, please provide information on any consequences if the third-country national does not follow the conditions of the alternative to detention.*

If the third-country national does not follow the conditions of the alternative to detention, the benefit will be revoked and the person will be placed again in detention.<sup>238</sup>

*Q6. Please indicate any challenges associated with the implementation of the alternatives to detention in your (Member) State. (based on existing studies/evaluations or information received from competent authorities)*

There are practical challenges with the alternative. Home custody is problematic because the risk of absconding is high. Furthermore, if a person absconds, the small size of the country makes it very improbable to find the person again. As soon as the person crosses a border, the Police is not able to search for the person anymore.<sup>239</sup>

The First instance Administrative Court noted that relevant Luxembourgish legislative provisions have not transposed the principle retained by the Directive according to which a detention measure can only be ordered on a subsidiary basis and under the condition that no applicable less coercive measures exist in a specific case.<sup>240</sup> Furthermore, both the *CCDH* and the *LFR* regret that the legislator only chose 'home custody' as an alternative to detention, while noting that detention should be the exception rather than the rule. According to the *CCDH*, detention should be regarded as a measure of last resort and should only be applied if other measures, which are less coercive, prove to be ineffective in a particular case.<sup>241</sup> It seems however, that the placement in detention is the rule rather than the exception and that the alternative is not automatically considered during the assessment procedure.<sup>242</sup> In the same vein, the *LFR* recalls that international human rights standards limit the use of detention for the purpose of immigration control, insisting that such a measure can only be taken if necessary and proportional, when a less restrictive is found to be insufficient. As a consequence, national authorities, if they want to prove that detention is necessary and proportionate, in accordance with international legal standards, should implement and make use of alternative measures, both in law and in practice.<sup>243</sup>

Another challenge consists in the linkage of granting the alternative 'home custody' to the guarantee to prevent the risk of absconding.<sup>244</sup> A major challenge is also to define the guarantees to avoid the risk of absconding of the concerned person. The scope under which the benefit can be granted is indeed very limited as the evaluation to determine whether there is a risk of absconding or not is based in most cases on situations specified in the legislation. The guaranteed legal representation is not defined in the law and the burden of proof is on the person. In most cases, the applicant fails to provide the evidence enabling to reverse the legal presumption of the existence of a risk of absconding, which has allowed the Minister to use a detention measure instead of another less coercive measure.<sup>245</sup>

*Q7. Please provide any examples of good practices regarding the implementation of the alternatives to detention in your (Member) State. Please specify the source (e.g. cited in existing evaluations/studies/other sources or based on information received from competent authorities)*

No good practices could be found through this study, however, it is important to mention the position of the

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Council of State on 'home custody'. The Council of State in its opinion on the bill n°6218 noted that the authors were right not to have linked home custody to the payment of a guarantee, as most foreigners under home custody would need their savings to organise their return. Nevertheless, the Council of State recommended to include, in addition to the 3 obligations which home custody carries<sup>246</sup>, as a fourth condition the obligation to reside *de facto* in the place of residence between midnight and six in the morning for example.<sup>247</sup> During the vote of the bill approving the 'Return' Directive, on 09 June 2011, two motions have been introduced, of which one has been adopted unanimously. This motion urges the government to apply, in accordance with international law and Directive 2008/115/EC, the administrative detention for expulsion purposes only as a measure of last resort, to implement alternatives to detention apart from 'home custody' and to study the opportunities to introduce the 'electronic bracelet' as an alternative measure to detention.<sup>248</sup>

## Section 6: Assessment procedures and criteria used for the placement of third-country nationals in alternatives to detention (Maximum 5 pages)

*This section explores the type of assessments made by the competent authorities when considering whether to place a third-country national in an alternative to detention. It includes a number of questions which explore the timing of this assessment – in particular whether the assessment is conducted on all third-country nationals who are apprehended, or only on those third-country nationals who have completed a period in detention. It also includes questions about the practical implementation of the assessment procedure, in particular whether an individual assessment is conducted, what this involves and which organisations are involved in the assessment procedure.*

*Q1. In Section 2, Q1, you have identified the grounds on which detention can be authorised for particular categories of third-country national. In what circumstances can those grounds be displaced in favour of an alternative to detention in your (Member) State? Please provide answers in relation to each of the relevant categories of third-country national. If there is a separate set of grounds for providing third-country nationals an alternative to detention in your (Member) State, please indicate this is the case.*

There is no separate set of grounds for providing third-country nationals an alternative to detention. To be granted home custody, the concerned person has to have a fixed official address.<sup>249</sup> If the Ministry knows where to find the person, it can decide to either let the person go or to place him/her in home custody.<sup>250</sup> The conditions to be granted home custody are that the execution of the removal had to be postponed because of technical reasons and that the person provides sufficient guarantees to prevent a risk of absconding.<sup>251</sup>

*Q2. Which other considerations are made before deciding whether to provide the third-country national concerned an alternative to detention, e.g. considerations regarding the availability of alternatives, the cost of alternatives, and vulnerabilities of the third-country national?*

The alternative to detention can only be provided if the risk of absconding is relatively low and it can only be considered if the person has a fixed address.<sup>252</sup> See also Section 3, Question 6.

*Q3. Please indicate whether an individual assessment procedure is used to determine whether the grounds on which detention can be authorised can be displaced in favour an alternative to detention. Yes/No. If yes, please list the categories of third-country nationals where individuals are subject to individual assessments.*

No, there is no individual assessment procedure with the sole aim to determine if a person should obtain home custody. Only in the case that the conditions established by Article 125 (1) of the amended Law of 29 August 2008 are fulfilled<sup>253</sup>, the Minister can decide to grant a person home custody.

*Q4. Where individual assessments are used, please indicate whether the procedure includes an assessment of the vulnerability of the individual in question. Yes/No. If yes, please describe the vulnerability assessment procedure used.*

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No.

Q5. Are assessment procedures for providing alternatives to detention conducted on all third-country nationals who are apprehended, or only on those third-country nationals who have already completed a period in detention?

No. It only applies under the conditions laid down by Article 125 (1) of the Law of 29 August 2008 and the Minister has the possibility of the Minister to grant it; it is not an obligation.<sup>254</sup>

Q6. Please indicate which national authorities are responsible for (i) conducting individual assessment procedures (where these exist) and (ii) deciding on alternatives to detention

The Minister in charge of Immigration decides if a person is provided the alternative to detention (home custody).<sup>255</sup>

Q7. Please indicate whether judicial authorities are involved in the decision to provide an alternative to detention, and if so, at which stage(s) of the decision-making process and in what capacity? (e.g. do judicial authorities make the final decision, do they only make a recommendation, do they only come in if the third-country national appeals against a decision?)

Judicial authorities are not involved in the decision to provide an alternative to detention. The administrative courts only participate in the appeal procedure. It has to be noted that the wide majority of the detainees appeal against the decision to be placed in detention<sup>256</sup>, however, only few lawyers request an alternative to detention for their client.<sup>257</sup>

## Section 7: Impact of detention and alternatives to detention on the effectiveness of return and international protection procedures (Maximum 5 pages)

*This section aims at exploring the impact of detention and alternatives to detention on the effectiveness of (Member) State return and international protection procedures. The questions are formulated as a comparison between the impact of detention and alternatives to detention; they do not attempt to compare the impact of detention (or alternatives to detention) on the effectiveness of return and international protection procedures in the case of third country nationals whose freedom of movement is not restricted at all.*

*Four specific aspects of effectiveness are considered: (i) effectiveness in reaching prompt and fair decisions on the immigration status of the individuals in question, and in executing these decisions; (ii) cost-effectiveness; (iii) respect for fundamental rights; and (iv) effectiveness in reducing the risk of absconding.*

*Whilst an attempt is made to compare the impact of detention and alternatives to detention on each of these dimensions of effectiveness, it is recognised that the type of individuals placed in detention and in alternatives to detention (and their corresponding circumstances) are likely to differ significantly and therefore the comparisons made need to be treated cautiously.*

### **7.1. Effectiveness in reaching prompt and fair decisions on the immigration status of the individuals in question, and in executing these decisions**

#### **7.1.1. Effectiveness in reaching decisions on applications for international protection**

Q1. Have any evaluations or studies (including studies of the views of detainees of alternatives to detention) in your (Member) State considered the impact of detention and alternatives to detention on the efficiency of reaching decisions on applications for international protection? (for example, by affecting the time it takes to decide on international protection status). Yes/No.

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If Yes, please summarise the main findings here and include a reference to the evaluation or study in an annex to your national report.

No, there are no evaluation or studies in Luxembourg on the impact of detention and alternatives to detention on the efficiency of reaching decisions on applications for international protection.

Q2. Please provide any statistics that might be available in your (Member) State on the average length of time needed to determine the status of applicants for international protection who are held in detention and who are in an alternative to detention. Please provide the statistics for the latest year(s) available (for example "2013" or "2011-2013") and, if possible, distinguish between the different types of alternatives to detention that are available in your (Member) State (The different alternatives are listed as A1, A2, A3 in the table below; please explain what these represent in a key underneath the table).

Where statistics can be disaggregated by categories of third-country nationals, please do so. Please provide information on the methodology and data collection.

Where no information is available, please indicate "No information" and briefly state why no information is available.

Where it is not applicable, please indicate "Not applicable" and briefly state why.

2013	Detention	Alternatives to detention			
		A1	A2	A3	A4
Average length of time in determining the status of an applicant for international protection	200 days <sup>258</sup>				

Q3. Please provide any other evidence that may be available in your (Member State) on the impact of detention and alternatives to detention on effectiveness in terms of reaching decisions on applications for international protection and provide any examples of good practice in this regard. (e.g. cited in existing evaluations/studies/other sources or based on information received from competent authorities)

N/A, as there is no further evidence on this available in Luxembourg.

### **7.1.2 Effectiveness in reaching decisions regarding the immigration status of persons subject to return procedures and in executing returns**

Q4. Have any evaluations or studies in your (Member) State considered the impact of detention and alternatives to detention on:

- The length of time from apprehending an irregular migrant to issuing a return decision? Yes/No
- The length of time that transpires from issuing a return decision to the execution of the return? Yes/No
- The share of voluntary returns out of the total number of returns? Yes/No
- The total number of removals completed? Yes/No

If Yes, please summarise the main findings here and include a reference to the evaluation or study in an annex to your national report

In Luxembourg there are no evaluations or studies on the effectiveness in reaching decisions regarding the



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immigration status of persons subject to return procedures and in executing returns, nor for the 4 above mentioned points.

In general a return decision is taken immediately when the application for international protection has been rejected.<sup>259</sup>

If an irregular migrant is ordered to leave the territory and s/he is given a delay to fulfil this obligation no order of detention will be issued.<sup>260</sup> If the third-country national does not fulfil this obligation, the order of placement in detention will be issued.

In the case of expulsion<sup>261</sup> or in the case that the person is considered a risk for public safety, public order or national security<sup>262</sup>, not only the return decision is issued but also simultaneously an entry ban.<sup>263</sup>

No general data exists on the length of time that transpires from issuing a return decision to the execution of the return. Data on this only exists for persons in detention (see Section 7, Question 5).

In 2013, the total number of return was 679, out of which 595 opted for a 'voluntary' return.<sup>264</sup> The share of 'voluntary' returns is 87,6%.

From the 595 persons opting for 'voluntary' return, 116 have been assisted by OIM under the AVVR programme<sup>265</sup>.

*Q5. Please provide any statistics that might be available in your (Member) State on (i) the average length of time that transpires from the decision to return a person in detention, and in (different) alternatives to detention, to the execution of the return procedure; (ii) the proportion of voluntary returns and (iii) the success rate in the number of departures among persons that were placed in detention and in alternatives to detention. Please provide the statistics for the latest year(s) available (for example "2013" or "2011-2013") and, if possible, distinguish between the different types of alternatives to detention that are available in your (Member) Stat.(The different alternatives are listed as A1, A2, A3 in the table below; please explain what these represent in a key underneath the table).*

*Where statistics can be disaggregated by categories of third-country nationals, please do so. Please provide information on the methodology and data collection.*

*Where no information is available, please indicate "No information" and briefly state why no information is available.*

*Where it is not applicable, please indicate "Not applicable" and briefly state why.*

*Statistics on the success rate in the number of departures should be provided as the number of persons who were issued a return decision and who have returned to their country of origin, and the number of persons who were issued a return decision and who have not returned to their country of origin. Please provide both the numbers and the share they represent out of the total number of persons issued a return decision.*

2013	Detention	Alternatives to detention			
		A1	A2	A3	A4
<i>Average length of time from apprehending an irregular migrant to issuing a return decision</i>	In general, a return decision is taken when the irregular stay is noticed, so before or on the day of the placement in detention. <sup>266</sup> In case of detention in the waiting zone, the maximal length	N/A The alternative (home custody) is			



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	of time until the person is placed in detention and the return decision is taken is 48 hours. <sup>267</sup>	used very rarely.			
<i>Average length of time from issuing a return decision to the execution of the return</i>	21 days. <sup>1</sup> (19 days for forced returns, respectively 23 days for 'voluntary' returns assisted by IOM.)	N/A The alternative (home custody) is used very rarely.			
<i>Number of voluntary returns (persons who opted to return voluntarily)</i>	12 <sup>268</sup>	N/A			
<i>Success rate in number of departures</i>	80 persons were returned to their country of origin or provenance. <sup>269</sup> The success rate is 48.5%. <sup>2</sup>  There have been 78 Dublin transfers. <sup>270</sup>	N/A			

*Q6. Please provide any other evidence that may be available on the effectiveness in reaching decisions regarding the immigration status of persons subject to return procedures and executing the return, and provide any examples of good practice in this regard. (e.g. cited in existing evaluations/studies/other sources or based on information received from competent authorities)*

There is no other evidence on this available in Luxembourg.

## 7.2. Costs

<sup>1</sup> This number counts only for those, who did not receive a return decision a long time before coming to the detention centre, e.g. rejected applicants for international protection in first instance, which are not placed in the detention centre immediately when receiving the return decision. For those who are staying irregularly on the territory and are placed in detention, the issuing of a return decision is generally taken the day of the placement or at least within 48 hours, the length of time that transpires from issuing a return decision to the execution of the return should then be very close to 21 days. The mentioned 21 days are calculated from the moment of entry into the detention centre until the removal of the person.

<sup>2</sup> This calculation is done with the total number of persons who have been issued a return decision that was provided by the Directorate of Immigration (243 persons), which is used in this study. This number is different from the number provided by the detention centre (283 persons), where they calculate a person twice if s/he leaves and re-enters the detention centre.

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Q7. Have any evaluations or studies on the costs of detention and alternatives to detention been undertaken in your (Member) State?

No evaluation or study on the costs of detention and alternatives to detention has been undertaken. However, the draft budget of 2013 provides some statistics with regards to costs of detention.<sup>271</sup>

Q8. Please provide any statistics available on the costs of detention and alternatives to detention in the table below. Please provide the statistics for the latest year(s) available and, if possible, distinguish between the different types of alternatives to detention that are available in your (Member) State (The different alternatives are listed as A1, A2, A3 in the table below; please explain what these represent in a key underneath the table).

Where costs can be disaggregated by categories of third-country nationals, please do so. Please provide information on the methodology and data collection to measure the costs.

Where no information is available, please indicate "No information" and briefly state why no information is available.

Where it is not applicable, please indicate "not applicable" and briefly state why

2013 (Draft budget for 2013)	Detention	Alternatives to detention			
		A1	A2	A3	A4
Total costs	2.397.992 €	N/A			
Staffing costs	No information	N/A			
Medical costs	342.000 €	N/A			
Food and accommodation costs	237.457 € (Food) and 3.000 € (Accommodation and Travel costs)	N/A			
Legal assistance	No information	N/A			
Other costs (This could include any additional costs that do not fall into the categories above e.g. costs of technical tools for administering alternatives to detention, such as electronic tagging). Please specify	Operational costs for vehicles: 7.625 € Office expenses: 20.000 € Procurement of goods and postal services and telecommunications: 21.150 € Rental and maintenance of telecommunication facilities: 2.000 € Rental and maintenance of computer equipment: 5.000 € Buildings: exploitation and maintenance: 1.611.000 € Training and support of detainees: 35.000 € Training of staff and consultancy costs: 30.000 € Maintenance of detainees: clothing,	N/A			

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	shoes and bed sheets: 21.100 €				
	Maintenance of detainees: out-of pocket costs; diverse expenses: 7.500 €				
	Purchase and maintenance costs of individual protection materials; security material; purchase of anti-fire material: 5.000 €				
	Provisions for detainees: 50.160 €				

*Q9. Please provide any other evidence that may be available in your (Member) State on the cost-effectiveness of detention and alternatives to detention, and provide any examples of good practice in this regard. (e.g. cited in existing evaluations/studies/other sources or based on information received from competent authorities)*

There is no other information on this available in Luxembourg.

### **7.3. Respect for fundamental rights**

*Q10 Have evaluations or studies been conducted in your (Member) State on the impact of detention and alternatives to detention on the fundamental rights of the third-country nationals concerned (for example, with regard to the number of complaints of detainees or persons provided alternatives to detention)?*

There is no evaluation or study on the impact of detention and alternatives to detention on the fundamental rights of concerned third-country nationals. However, an external report on the detention centre has been drafted by the Ombudsman of the Grand Duchy of Luxembourg (External control service of places of deprivation of liberty in 2014).<sup>272</sup> In its report, the Ombudsman analyses the compliance of national acts with international standards and gives its recommendations based on an on-site inspection carried out within the detention centre on the arrangements and conditions.

In litigation matters, it happens often that detainees contest their detention as being a disproportionate measure and claim less coercive measures than the detention, given their specific situation.<sup>273</sup>

There are cases where detained persons contest the fact that they have been handcuffed during the execution of the placement measure. The Court said that even if the wearing of handcuffs during the placement is humiliating, one has to note that no serious nature contrary to Article 3 of the ECHR is implied.<sup>274</sup>

According to the governmental programme 2014, the detention centre will be subject to a first report on its operation. The objective will be to reduce its use as much as possible and to guarantee a transit period as short as possible.<sup>275</sup>

*Q11. Please provide any statistics that might be available in your (Member) State on the number of complaints regarding violations of human rights and the number of court cases regarding fundamental rights violations in detention as opposed to alternatives to detention. Please provide the statistics for the latest year available and, if possible, distinguish between the different types of alternatives to detention that are available in your (Member) State (The different alternatives are listed as A1, A2, A3 in the table below; please explain what these represent in a key underneath the table). Please do the same with any statistics that may be available in your (Member) State on the number of voluntary returns.*

*Where statistics can be disaggregated by categories of third-country nationals, please do so. Please provide information on the methodology and data collection.*

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Where no information is available, please indicate "No information" and briefly state why no information is available.

Where it is not applicable, please indicate "Not applicable" and briefly state why.

Applicable year	Detention	Alternatives to detention			
		A1	A2	A3	A4
Number of complaints of violations of fundamental rights <b>lodged</b> with non-judicial bodies (e.g. Human Rights Commissioners/ Ombudspersons) (where possible, please disaggregate by types of complaints and by categories of third-country nationals).	No information	No information			
Number of complaints of violations of fundamental rights <b>upheld</b> by non-judicial bodies (e.g. Human Rights Commissioners/ Ombudspersons) (where possible, please disaggregate by types of complaints and by categories of third-country nationals).	No information	No information			
Number of court cases in which there have been <b>challenges</b> to the decision to detain / place in an alternative to detention based on violations of fundamental rights (where possible, please disaggregate by types of violation and by categories of third-country national)	While proceeding to a brief research of the jurisprudence on administrative detention from 2009 until the end of April 2014, the following can be found: 18 decisions with reference to Article 12 of the Constitution; <sup>276</sup> 17 decisions with reference to Article 5 of the ECHR; <sup>277</sup> 15 decisions with reference to	No information			

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	Article 3 of the ECHR. <sup>278</sup>				
<i>Number of court cases in which challenges to the decision to detain / place in an alternative to detention based on violations of fundamental rights have been <b>upheld</b> (where possible, please disaggregate by types of violation and by categories of third-country national)</i>	No information	No information			

*Q12. Please indicate if studies exist in your (Member) States which show negative effects of the alternatives to detention in practice. (For example, ankle bracelets can be socially stigmatising and cause physical and emotional distress.)*

No.

*Q13. Please provide any other evidence that may be available in your (Member) State on the impact of detention and alternatives to detention on the fundamental rights of the third-country nationals, and provide any examples of good practice in this regard. (e.g. cited in existing evaluations/studies/other sources or based on information received from competent authorities)*

N/A

#### **7.4. Rate of absconding and compliance rate**

*Rate of absconding* is the share of persons who have absconded from all third-country nationals placed in detention or provided an alternative to detention.

*Compliance rate* is the share of persons who have complied with the alternative to detention.

*Q14. Have evaluations or studies on the compliance rate and rate of absconding of third-country nationals in detention and in alternatives to detention been undertaken in your (Member) State? Please provide details.*

There are no evaluations or studies on the compliance rate and the rate of absconding of third-country nationals in detention and in alternatives to detention. In 2013, 2 persons absconded from the detention centre with there being a total of 243 entries/exits. Since the opening of the detention centre 13 persons out of a total of 776 entries/exits absconded.<sup>279</sup>

*Q15. Please provide any statistics that might be available in your (Member) State on the rate of absconding and the compliance rate of third-country nationals in detention as opposed to alternatives to detention. Please provide the statistics for the latest year available and, if possible, distinguish between the different types of alternatives to detention that are available in your (Member) State (The different alternatives are listed as A1, A2, A3 in the table below; please explain what these represent in a key underneath the table).*

*Where statistics can be disaggregated by categories of third-country nationals, please do so. Please provide information on the methodology and data collection.*

*Where no information is available, please indicate "No information" and briefly state why no information is available.*

*Where it is no applicable, please indicate "Not applicable and briefly state why.*

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2013	Detention	Alternatives to detention			
		A1	A2	A3	A4
Rate of absconding	2 <sup>280</sup> out of 243				
Compliance rate					

Q16. Please provide any other evidence that may be available of the impact of detention and alternatives to detention on the rate of absconding and compliance rate of third-country nationals in detention and in alternatives to detention.

N/A

### Section 7: Conclusions (Maximum 2 pages)

The Synthesis Report will outline the main findings of the Study and present conclusions relevant for policymakers at national and EU level.

Since the 1990's, Luxembourg has been confronted with a significant increase of people searching for international protection due to the Balkan crisis. In the last years, the situation has become problematic because most of the applications have been rejected by the Ministry in charge of Immigration and the administrative courts. On the other hand, Luxembourg is confronted with irregular migrants attracted to the country for different reasons ( e.g. economic stability, standard of living, links with family or acquaintances). As these large amounts of migrants without a right to stay have put a great burden on the Luxembourgish authorities, the Luxembourgish government has used several options in order to find appropriate solutions, such as the implementation of a 'one-shot' regularisation and the development of a return policy, which has been further specified during the transposition of the 'Return' Directive. Although the numbers of 'voluntary' returns represented the large majority of all removals to countries of origin/provenance (with or without OIM assistance), forced returns as well as Dublin transfers are regularly implemented.

However, the procedure of placing an individual in detention is highly sensitive from a political, social and human rights point of view, especially when detention measures take place in the penitentiary centre.

The detention, as it implies a privation of freedom of an individual who has not committed a crime, is highly controversial. Different stakeholders question the appropriateness and efficiency of administrative detention of persons and note that this has to be considered as a measure of last resort when returning an irregular migrant.

The Minister in charge of Immigration can take the decision to place a person in detention based on the file of the concerned person in cases foreseen by the Law of 29 August 2008 on immigration and the amended Law of 5 May 2006 on asylum.

No specific individual assessment procedure is applied to determine the appropriateness of detention and alternatives to detention, even if the decision of placement is motivated on a case-by-case basis.

A quasi-automatism exists for determining the placement of detention in the case that there is a legal presumption of a risk of absconding, which exists e.g. for all third-country nationals that have no valid identity, travel or residence documents. The decision is based only on the elements contained in the administrative file, it is not motivated in detail and there is no assessment of the personality of the individual and the feasibility of the return.

Although several grounds allowing the placement in detention exist, the most prevailing ones are the risk of absconding and the avoidance or hindrance of the preparation of the removal process.

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If the detainee does not collaborate with the authorities in order to carry out his removal, in the long run and after the maximum delay of detention authorised by the law expires, the authorities will be compelled to free the individual.

No detection mechanism for assessing the vulnerability before the decision of placement exists in Luxembourg and the law does not forbid the placement of detention of vulnerable persons. In practice, however, they are generally not detained.

Only one alternative to detention exists in Luxembourg. A person can be granted home custody if the conditions laid down in the legislation are fulfilled. However, the alternative only applies in the case that the return decision cannot be executed due to technical decisions and if the individual can prove sufficient guarantees to prevent the risk of absconding. The Administrative Court has established a balancing test between the proportionality of detention and the guarantees given when granting home custody. The alternative, however, is rarely applied, which is partly due to the fact that a high risk of absconding is suspected in most cases. Also, there are difficulties for the persons to provide the necessary guarantees to prevent the risk of absconding.

During discussions on the bill intended to transpose the 'Return' Directive into national Law, the Parliament approved a motion to conduct a study on the possibility of introducing the 'electronic bracelet' as an alternative to detention. To date, no follow-up has been given to this motion.

Most stakeholders recognise an improvement of the detention regime since the opening of the new detention centre in comparison to the detention within the prison. This is particularly the case regarding leisure activities, communication with the outside world, the possibility for visits, the access for NGOs to the centre as well as psychosocial support and guidance. Furthermore, even though the maximum capacity of the detention centre is 88 persons, this has never been reached and the units have not been overcrowded.

In Luxembourg, data only exists on the length of detention. No data exists on the length of time that transpires from issuing a return decision to the execution of the return, nor are there studies on the efficiency or other aspects of detention and alternatives to detention. However, the Ombudsman has published a report on the arrangement and conditions of the detention centre and gave recommendations based on an on-site inspection.

The main challenges detected by the study were:

1. To establish guidelines for the assessment of the need to place a person in detention on a case-by-case basis and to try to avoid the systematic use of the legal presumption of a risk of absconding which leads to a quasi-automatic placement in detention.
2. The lack of guidelines for assessing vulnerability of persons who are going to be placed in detention.
3. There is no systematic ad-hoc feasibility assessment of the viability of the return of the detainee. In cases where the authorities know that they cannot return an individual to a country because it is not a safe country or because the diplomatic authorities are not going to collaborate to identify the person or to facilitate the granting of travel documents, it does not make sense to recure to detention.
4. The lack of or slow collaboration of certain diplomatic missions who make the identification in a first phase nearly impossible. Even in case that, in a second phase, the authorities succeed to identify the persons, they often do not collaborate in granting their nationals the travel documents needed for the execution of the return decision.
5. The need to harmonise the Asylum Law and the Immigration Law, particularly regarding the length of detention to avoid a discriminatory treatment between international protection applicants and irregular migrants.<sup>281</sup>
6. The lack of technical, scientific and economic studies on the subject to determine the real efficiency of the actual system and to determine possible alternatives and solutions if the system is found to be ineffective.

As good practices, the study determined that even though there are no guidelines for establishing vulnerability, in practice, the Luxembourgish authorities generally do not place vulnerable persons in detention. Families are placed in detention only for the purpose of the execution of the return decision and for no longer than 72 hours. Also, third-country nationals coming from non-safe countries are not placed in detention, seen the impossibility of the

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execution of the return decision. Furthermore, the study shows that the Luxembourgish system allows detainees to challenge the placement of detention before the administrative courts and that it provides legal assistance to the detainees free of charge. This possibility has allowed that the administrative courts have been developing jurisprudence that gives certain guidelines on the application of detention and of alternatives to detention.

Even though only one alternative exists so far in Luxembourg, discussions on further alternatives are held and there is a political will to implement other alternatives. In this respect, the government plans to create a specific open reception facility for families (*Maison retour*).



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Statistics from EU-harmonised sources, such as Eurostat and the EMN Annual Policy Report, on inter alia the outcome of international protection applications and return, including voluntary return will be used in the Synthesis Report to contextualise the statistics provided in this annex.

**Table 1: Statistics on number of third-country nationals in detention and provided alternatives to detention per category**

**Please provide the cumulative figures (the number of all third-country nationals that have been detained during the year).**

	2009	2010	2011	2012	2013	Source / further information
<b>Statistics on number of third-country nationals in detention per category</b>						
Total number of third-country nationals in detention	177	200	207 <sup>282</sup>	305	243	Information provided by the Directorate of Immigration
Number of third-country national applicants for international protection in ordinary procedures in detention	No information	No information	No information	No information	No information	No information
Number of third-country national fast-track international protection applicants (accelerated international protection procedures) in detention	No information	No information	No information	No information	No information	No information
Number of applicants for international protection subject to Dublin procedures in detention	39	69	102	63	78	Information provided by Directorate of Immigration
Number of rejected applicants for international protection in detention	99	81	45	141	92	Information provided by the Directorate of Immigration



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	tion	tion	ion	on	on	
<i>Statistics on number of third-country nationals provided alternatives to detention</i>						
Total number of third-country nationals provided alternatives to detention	N/A (alternative did not exist yet)	N/A (alternative did not exist yet)	1	0	2	Information provided by the Directorate of Immigration
Number of third-country nationals applicants for international protection in ordinary procedures provided alternatives to detention	N/A	N/A	N/A	N/A	N/A	Applicants for international protection in ordinary procedures cannot receive an alternative as they fall under the Asylum Law
Number of third-country nationals fast-track international protection applicants (accelerated international protection procedures) provided alternatives to detention	N/A	N/A	N/A	N/A	N/A	Persons in fast-track procedures cannot receive an alternative as they fall under the Asylum Law
Number of international protection applicants subject to Dublin procedures provided alternatives to detention	N/A	N/A	N/A	N/A	N/A	Dublin cases cannot receive an alternative as they fall under the Asylum Law
Number of rejected applicants for international protection provided alternatives to detention	No information	No information	No information	No information	No information	No information
Number of rejected applicants for family reunification provided alternatives to detention	N/A	N/A	N/A	N/A	N/A	In Luxembourg this group of persons is not categorised as

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						such
Number of other rejected applicants for residence permits on basis other than family reunification (Please specify)	N/A	N/A	N/A	N/A	N/A	In Luxembourg this group of persons is not categorised as such
Number of persons found to be illegally present on the territory of the (Member) State (i.e. such as those who have not applied for international protection and are not (yet) been issued a return decision) provided alternatives to detention who have not applied for international protection	No information	No information	No information	No information	No information	No information
Number of persons issued a return decision provided alternatives to detention	No information	No information	No information	No information	No information	No information
Number of vulnerable persons part of the aforementioned categories of third-country nationals - Please, where possible, disaggregate by type of vulnerable persons (for example, minors, persons with special needs, etc.) and by category provided alternatives to detention	No information	No information	No information	No information	No information	No information
Number of other third-country nationals provided alternatives to detention (Please specify the category(ies))	No information	No information	No information	No information	No information	No information

**Table 2: Average length of time in detention**

Please provide information on the methodology used to calculate the average length of time in detention, including whether the mean or the median was used to calculate the average.

<b>Average length of time in detention</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>Source / further information</b>
Average length of time in detention of all categories of third-country nationals in detention	No information	No information	21 days (from 22.08.2011)	33.5 days	36.5 days	Information provided by the detention

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			on)			centre <sup>3</sup>
Average length of time in detention of applicants for international protection in ordinary procedures	No information	No information	No information	No information	No information	No information
Average length of time in detention of fast-track (accelerated) international protection applicants (accelerated international protection procedures)	No information	No information	No information	No information	No information	No information
Average length of time in detention of applicants for international protection subject to Dublin procedures	24.9 days	19.8 days	21.6 days	19.8 days	24 days	Information provided by the Directorate of Immigration
Average length of time in detention of rejected applicants for international protection	No information	No information	No information	No information	No information	No information
Average length of time in detention of rejected family reunification applicants	N/A	N/A	N/A	N/A	N/A	In Luxembourg this group of persons is not categorised as such
Average length of time in detention of other rejected applicants for residence permits on basis other than family reunification (Please specify)	N/A	N/A	N/A	N/A	N/A	In Luxembourg this group of persons is

<sup>3</sup> The average number of days includes all detainees, also families. As families can only be detained for a maximum of 72 hours and in general are not detained longer than 24 hours, the average length of detention is less long if one counts the families. The average length of detention without counting families from the opening of the detention centre until December 2013 is 58 days. This information is provided by the Detention Centre.

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						not categorised as such
Average length of time in detention of persons detained to prevent illegal entry	0	0	0	0	0	This information is only on persons detained in the waiting area at the airport and is provided by the airport control service
Average length of time in detention of persons found to be illegally present on the territory of the (Member) State (i.e. such as those who have not applied for international protection and are not (yet) been issued a return decision) who have not applied for international protection	No information	No information	No information	No information	No information	No information
Average length of time in detention of persons who have been issued a return decision	No information	No information	No information	No information	No information	No information
Average length of time in detention of vulnerable persons part of the aforementioned categories of third-country nationals - Please, where possible, disaggregate by type of vulnerable persons (for example, minors, persons with special needs, etc.) and by category	No information	No information	No information	No information	No information	No information
Average length of time in detention of other third-country nationals placed in immigration detention	No information	No information	No information	No information	No information	No information

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- <sup>1</sup> Gouvernement statement of M. Jean-Claude Juncker, Prime Minister, Minister of State, on the governmental programme, 04 August 2004,
- <sup>2</sup> Hansen Josée, *Sur le fil du rasoir*, D'Lëtzebuenger Land, 25.01.2007, <http://www.land.lu/2007/01/25/sur-le-fil-du-rasoir/> [accessed 15.05.2014].
- <sup>3</sup> First instance Administrative Court, 2<sup>nd</sup> Chamber, n°29525 of 5 December 2011. Concerning the placement in detention, « la Constitution ne fait ...que consacrer le principe de la possibilité de placer une personne en rétention en précisant que ce placement est à effectuer conformément aux dispositions légales et en laissant de ce fait la détermination des modalités, donc des conditions et des formes du placement, au législateur ».
- <sup>4</sup> Amended Law of 29 August 2008 on the Free Movement of Persons and Immigration, Official Journal, Memorial A, No. 113, 03.07.2013, <http://www.legilux.public.lu/leg/a/archives/2013/0113/a113.pdf> [accessed: 14.04.2014].
- <sup>5</sup> Amended Law of 5 May 2006 on the Right of Asylum and Complementary Forms of Protection, Official Journal, Memorial A, No. 113, 03.07.2013, <http://www.legilux.public.lu/leg/a/archives/2013/0113/a113.pdf#page=21> [accessed: 14.04.2014].
- <sup>6</sup> Law of 28 May 2009 concerning the Establishment and Organisation of the Detention Centre, Official Journal, Memorial A, No. 119, 29.05.2009, <http://www.legilux.public.lu/leg/a/archives/2009/0119/a119.pdf> [accessed: 15.04.2014].
- <sup>7</sup> Grand-Ducal Regulation of 17 August 2011 laying down the Conditions and Practical Arrangements of the Detention Centre Regime, Official Journal, Memorial A, No. 180, 22.08.2011, <http://www.legilux.public.lu/leg/a/archives/2011/0180/a180.pdf> [accessed: 18.04.2014].
- <sup>8</sup> Article 6 (3) of the Law of 28 May 2009.
- <sup>9</sup> Article 10 (1) a) of the amended Law of 5 May 2006.

The First instance Administrative Court, 1st Chamber, n° 30723 of 2 July 2012 said : « ...en ce qui concerne la question de savoir si le demandeur rentre dans les conditions de l'article 10 (1) a) de la loi du 5 mai 2006, force est de constater que le demandeur n'a déposé sa demande de protection internationale qu'après avoir fait l'objet d'une décision de retour en date du 14 juin 2012, c'est-à-dire plus de 10 jours après avoir été placé le même jour en rétention au Centre de rétention en vue de l'organisation de son éloignement.

Le tribunal constate encore que lors de son interpellation par la police grand-ducale en date du 3 juin 2012 le demandeur n'a nullement mentionné son désir de déposer une demande de protection internationale, mais il a au contraire fait état de son intention de chercher du travail au Luxembourg. Ainsi, il ne se dégage pas du procès-verbal n° 51256 de la police grand-ducale du 3 juin 2012 que le demandeur, à l'occasion de son contrôle d'identité, ait d'une manière quelconque fait comprendre ou du moins essayé de faire comprendre aux agents de police qu'il aurait fui son pays d'origine et qu'il aurait l'intention de déposer une demande de protection internationale. Il résulte d'ailleurs encore de ses

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déclarations qu'il se trouvait déjà depuis plusieurs jours en Europe, le demandeur étant entré illégalement en Espagne, pour ensuite se rendre en France, où il serait demeuré quelques jours pour y travailler clandestinement, pour ensuite arriver au Luxembourg après avoir transité par la Belgique, sans qu'il n'apparaisse qu'il ait déposé dans l'un de ces pays une demande de protection internationale, de sorte qu'il est douteux que sa présence au Luxembourg se justifie par le souhait d'y solliciter la protection internationale.

Dans ces conditions, le tribunal est amené à retenir que le ministre pouvait à bon droit retenir que la demande de protection internationale avait été déposée par le demandeur dans le but de prévenir son éloignement, de sorte que le moyen afférent laisse d'être fondé. »

See also First instance administrative Court, n° 28932 of 17 August 2011- The court said : « Or, le fait d'attendre que le ministre ait entamé les démarches en vue d'assurer l'éloignement du demandeur en séjour irrégulier pour déposer une demande de protection internationale doit être considéré comme manœuvre dilatoire destinée, comme relevé par le ministre, à prévenir son éloignement, cette conclusion étant encore renforcée par les explications du demandeur selon lesquelles il n'aurait pas été au fait de la procédure à engager pour introduire une demande en protection internationale, mais qu'il aurait dû attendre les conseils de son avocat et des services sociaux, de telles explications, compte tenu du fait que le demandeur avait précédemment déjà déposé près d'une dizaine de demandes de protection internationale, dont une récemment au Luxembourg, ne soulignant que sa mauvaise foi. »

See also First instance Administrative Court, 1st Chamber, n° 30200 of 5 April 2012, First instance Administrative Court, 1st Chamber, n° 30199 of 5 April 2012, First instance Administrative Court, 3<sup>rd</sup> Chamber, n° 30008 of 23 March 2012.

However, the jurisprudence has indicated that if the person had tried to file an international protection application and was not allowed to do so, the placement is against the law. See First instance Administrative Court, n° 29420 of 4 November 2011. The Court said: « Il suit des éléments qui précèdent que, même si le demandeur n'a pas signalé immédiatement lors de son interpellation le 22 octobre 2011 son intention de déposer une demande de protection internationale, son intention de déposer une telle demande ressort clairement de son récit ainsi que de ses déclarations faites par la suite, dans la mesure où il s'est notamment adressé à un agent du Centre de rétention, à savoir le psychologue pour déclarer vouloir déposer une demande de protection internationale au Luxembourg. Ainsi, le demandeur a mis en œuvre les moyens mis à sa disposition pour signaler son intention de déposer une demande de protection internationale et il aurait partant appartenu aux autorités ministérielles conformément à l'article 6 (1) de la loi précitée du 5 mai 2006 de lui indiquer les démarches à suivre en vue de mener à bien le dépôt de sa demande de protection internationale.

S'y ajoute qu'entre le 25 octobre 2011, date de l'établissement du certificat par le psychologue du Centre de rétention et le jour des plaidoiries, un délai raisonnable s'est écoulé pendant lequel la demande de protection du demandeur aurait pu être enregistrée et qu'en l'absence de toute précision quant à l'audition effectuée en date du 26 octobre 2011 par la police judiciaire avec le demandeur, le tribunal est mis dans l'impossibilité de vérifier si entretemps le demandeur a pu effectivement déposer sa demande de protection internationale.

Il suit des considérations qui précèdent que si au jour où le tribunal statue, il n'est pas établi si le demandeur a effectivement pu déposer une demande de protection internationale, son intention manifeste de déposer une telle demande ressort cependant à suffisance du contexte général de ses déclarations, notamment relatives aux raisons l'ayant poussé à quitter son pays d'origine et son itinéraire pour arriver au Luxembourg, ainsi que de son intervention auprès d'un agent du Centre de rétention.

Dès lors, le ministre n'a pas valablement pu placer le demandeur en rétention sur base des articles 111 à 120 et 123 de la loi précitée du 29 août 2008, relative au placement en rétention afin de préparer l'exécution d'une mesure d'éloignement d'un étranger en situation irrégulière au



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Luxembourg, mais le cas échéant uniquement sur base de l'article 10 de la loi du 5 mai 2006 relatif au placement dans une structure fermée d'un demandeur d'une protection internationale. »

<sup>10</sup> Article 10 (1) b) of the amended Law of 5 May 2006.

See Administrative Court, n° 29235 of 25 October 2011 which says: « S'il est vrai que les pointes des doigts de Monsieur ... n'accusent actuellement ni blessures, ni coupures, ni cicatrices, il subsiste cependant toujours - ... - une différence flagrante de profil et partant de la lisibilité entre la peau des pointes des doigts et celle du restant des mains dont notamment les paumes, tel que la Cour avait déjà pu le constater dans son arrêt du 30 juin 2011. Il s'y ajoute que de prise en prise d'empreintes digitales, le profil de la peau des pointes des doigts de l'intéressé apparaît comme étant différent, ainsi que le souligne la partie publique, tandis que celui du restant des mains de l'intéressé, tel que documenté dans les différents procès-verbaux de prise d'empreintes EURODAC, n'apparaît guère comme étant sujet à variations. Dès lors, au stade actuel des éléments du dossier, y compris le rapport du consultant, la Cour est amenée, par réformation du jugement entrepris, à retenir que le ministre a valablement pu prolonger à travers sa décision critiquée du 13 septembre 2011 le placement de Monsieur ... au Centre de rétention sur base des dispositions de l'article 10 (1) b) de la loi modifiée du 5 mai 2006.... »

See also Administrative Court n° 28769 of 30 June 2011 « ... la Cour partage entièrement la conclusion des premiers juges que le comportement de l'appelant est à qualifier de défaut de collaboration de sa part aux fins d'établir son identité et son itinéraire de voyage au sens de l'article 10 (1) b) de la loi du 5 mai 2006, défaut qui se trouve vérifié tant lors de la décision de mise en rétention initiale du 16 février 2011 qu'à la date de la décision de prorogation entreprise du 16 mai 2011. »

<sup>11</sup> Article 10 (1) c) of the amended Law of 5 May 2006.

<sup>12</sup> Article 20 (1) d) of the amended Law of 5 May 2006.

<sup>13</sup> Article 20 (1) e) of the amended Law of 5 May 2006. See Administrative Court n° 29931 of 8 March 2012.

<sup>14</sup> Article 20 (1) f) of the amended Law of 5 May 2006.

See First instance Administrative Court, 3<sup>rd</sup> Chamber, of 16 June 2011. The court said: « Dans la mesure où, d'après les éléments du dossier ... le demandeur a manipulé les pointes de ses doigts en rendant volontairement impossible l'identification de ses empreintes, il y a lieu de retenir que le demandeur n'a pas produit les informations nécessaires pour permettre, avec une certitude suffisante, d'établir son identité et qu'il rentrait ainsi dans le cas visé à l'article 20 (1) f) de la loi du 5 mai 2006... autorisant le ministre à reconduire la mesure de placement. »

<sup>15</sup> Article 20 (1) i) of the amended Law of 5 May 2006.

See Administrative Court n° 29558 of 8 December 2011. This judgment addressed the issue of the refusal of the first application filed by an asylum seeker, who later files a second application, while he is in detention and there the court had not ruled on the admissibility of the application. The court stated: « En effet, admettre que seulement une décision ministérielle d'irrecevabilité devenue définitive puisse faire perdre la qualité de demandeur d'une protection internationale, reviendrait à admettre que tout demandeur d'une protection internationale définitivement débouté qui entend se soustraire aux mesures d'éloignement – de sorte à justifier sous cet aspect une mesure de placement – puisse court-circuiter toute mesure de placement et provoquer sa libération par le simple fait de déposer une nouvelle demande d'asile, tel n'ayant manifestement pas été la volonté du législateur. »

<sup>16</sup> Article 20 (1) k) of the amended Law of 5 May 2006.

<sup>17</sup> Article 20 (1) l) of the amended Law of 5 May 2006.

<sup>18</sup> Article 20 (1) m) of the amended Law of 5 May 2006.

<sup>19</sup> Article 10 (1) d) of the amended Law of 5 May 2006.

See First instance Administrative Court, 1<sup>st</sup> Chamber, n° 29756 of 1 February 2012. On this issue the Court said: « En l'espèce, il résulte du dossier administratif que Monsieur ... dispose d'un passeport algérien avec un visa bulgare émis au mois de mai 2011 et valable pour une durée de 6 mois. ...il est marié avec une ressortissante bulgare et a sollicité un titre de séjour en Bulgarie en date du 21 juillet 2011. C'est dès lors à bon droit que le ministre a pris une décision d'incompétence à l'égard du demandeur sur base de l'article 15 de la loi du 5 mai 2006 et de l'article 9§4 du règlement (CE) n°343/2003 du Conseil du 18 février 2003,....

Force est encore de constater que les autorités bulgares, ayant reconnu être responsables de l'examen de la demande de protection internationale du demandeur, ont donné leur accord de reprise en charge de Monsieur ... en date du 22 décembre 2011 et qu'un jour après ledit accord de réadmission, le ministre a ordonné le placement de Monsieur ... au Centre de rétention sur base de l'article 10 d) de la loi du 5 mai 2006, .... Par ailleurs en ce qui concerne le moyen que le ministre n'aurait pas rapporté la preuve qu'en l'absence d'une mesure de placement dans son chef, son transfert vers la Bulgarie serait compromis, force est de rappeler que Monsieur ... a fait l'objet d'un ordre de quitter le territoire en date du 23 décembre 2011, pris sur base des articles 100 et 109 à 115 de la loi du 29 août 2008, - arrêté d'ailleurs non entrepris par le demandeur en l'état actuel du dossier. ».

<sup>20</sup> Article 100 (1) c) of the amended Law of 29 August 2008.

<sup>21</sup> Article 100 (1) c) of the amended Law of 29 August 2008.

<sup>22</sup> Article 111 (3) of the amended Law of 29 August 2008.

<sup>23</sup> Article 100 (1) c) of the amended Law of 29 August 2008.

<sup>24</sup> Article 111 (3) of the amended Law of 29 August 2008.

<sup>25</sup> Article 99 and 104 of the amended Law of 29 August 2008.

<sup>26</sup> Article 111 of the amended Law of 29 August 2008.

<sup>27</sup> Article 119 (1) of the amended Law of 29 August 2008.

<sup>28</sup> Article 119 (2) of the amended Law of 29 August 2008. This order of detention has to be in accordance with Article 120.

<sup>29</sup> Article 100 (2) of the amended Law of 29 August 2008.

<sup>30</sup> Article 111 (1) of the amended Law of 29 August 2008.

<sup>31</sup> Article 111 (2) of the amended Law of 29 August 2008.

<sup>32</sup> Article 111 (3) c) 6. of the amended Law of 29 August 2008.

<sup>33</sup> Article 111 (3) a) of the amended Law of 29 August 2008.

<sup>34</sup> Article 111 (3) b) of the amended Law of 29 August 2008.

<sup>35</sup> Article 111 (3) c) of the amended Law of 29 August 2008.

<sup>36</sup> Article 120 (1) of the amended Law of 29 August 2008.

<sup>37</sup> See Administrative Court n° 29558 of 8 December 2011 : « ...Le 22 septembre 2011, le ministre ... prit une décision de retour à l'encontre de Monsieur ..., et en date du 13 octobre 2011, soit à la fin de l'accomplissement par Monsieur ... de sa peine de prison, le ministre rendit encore un arrêté ordonnant son placement au Centre de rétention pour une durée d'un mois à partir de la notification... »

<sup>38</sup> Detention Centre, Interview, 01.04.2014 and Judicial Police, Foreigners Service, Interview, 02.04.2014. One of the major problems is that the identification procedure and the procedure for obtaining travel documents only begins after the transfer from the prison to the detention centre, which leads to the extension of the duration of the procedure. See First instance Administrative Court, 3<sup>rd</sup> Chamber n° 30009 of 14 March 2012, First instance Administrative Court, n° 29845 of 20 February 2012.

<sup>39</sup> Article 120 (1) of the amended law of 29 August 2008.

<sup>40</sup> Ombudsman 2014. *Rapport du contrôleur externe relatif au Centre de rétention*, Luxembourg, p.12, [http://www.celpl.lu/doc/doc\\_accueil\\_147.pdf](http://www.celpl.lu/doc/doc_accueil_147.pdf) [accessed 14.04.2014].

<sup>41</sup> Detention Centre, Interview, 01.04.2014 and Directorate of Immigration, Interview, 02.04.2014.

<sup>42</sup> Detention Centre, Interview, 01.04.2014.

<sup>43</sup> Article 6 (3) of the Law of 28 May 2009.

<sup>44</sup> Information provided by the Detention Centre.

<sup>45</sup> Detention Centre, Interview, 01.04.2014.

<sup>46</sup> Directorate of Immigration, Interview, 02.04.2014.

<sup>47</sup> According to Article 15(4) of the Return Directive, in situations when it appears that a reasonable prospect of removal no longer exists for legal or other considerations detention ceases to be justified and the person concerned shall be released immediately.

<sup>48</sup> Article 120 (1) of the amended Law of 29 August 2008 and Article 10 (1) of the amended Law of 5 May 2006.

<sup>49</sup> The decision of placement in detention can be appealed in front of the First instance Administrative Court within a month that the decision has been notified to the person. Against the decision of the First instance Administrative Court an appeal can be filed within a deadline of 3 days with the Administrative Court. See Article 123 of the amended Law of 29 August 2008.

<sup>50</sup> Article 10 (1) of the amended Law of 5 May 2006.

<sup>51</sup> Article 10 (2) in relation to Article 20 (1) f) of the amended Law of 5 May 2006.

<sup>52</sup> See First instance Administrative Court, Vacation 2<sup>nd</sup> Chamber, of 20 July 2011. The court said: “La durée légale de rétention est fixée à l’article 120, (1) de la loi du 29 août 2008, qui permet au ministre, dans l’hypothèse où l’exécution d’une mesure d’éloignement est impossible en raison de circonstances de fait, de placer l’étranger concerné en rétention dans une structure fermée pour une durée maximale d’un mois, étant entendu que le paragraphe (3) du même article permet au ministre de reconduire, en cas de nécessité, la décision de placement à trois reprises, chaque fois pour la durée d’un mois. ... Une impossibilité de procéder à l’éloignement immédiat d’un étranger en raison de circonstances de fait est vérifiée notamment lorsque ce dernier ne dispose pas des documents d’identité et de voyage requis pour permettre son éloignement et que des démarches doivent être entamées auprès d’autorités étrangères en vue de l’obtention d’un accord de reprise de l’intéressé. C’est précisément afin de permettre à l’autorité compétente d’accomplir ces formalités que le législateur a prévu la possibilité de placer un étranger en situation irrégulière en rétention. »

<sup>53</sup> Article 120 (3) of the amended Law of 29 August 2008. See Administrative Court n° 30349C of 27 February 2014. The Court said: « Partant, les démarches entreprises en l’espèce auprès des autorités libyennes et tunisiennes correspondent à des efforts qui doivent être qualifiés de raisonnables, eu égard aussi au manque de collaboration flagrant de l’intimé et en considération des contraintes des usages diplomatiques, en vue d’obtenir les documents sollicités dans les meilleurs délais. »

In this sense the First instance Administrative Court, 2<sup>nd</sup> Chamber, n° 28845 of 20 July 2011 had said: « Il ressort des pièces du dossier administratif que le ministre a décidé de proroger la décision de placement du demandeur au Centre de séjour provisoire pour étrangers en situation irrégulière afin de pouvoir poursuivre les démarches précédemment entamées en vue de faire établir l’identité du demandeur et de se faire délivrer les documents de voyage, lesquelles ont été rendues difficiles en raison du comportement du demandeur qui a, à un certain moment de la procédure, introduit une demande d’asile, retirée quelques jours plus tard. En l’espèce, force est de constater qu’il ressort des pièces du dossier que les autorités ministérielles ont sollicité dès le 3 mai 2011 des renseignements de la part du Consulat de la République Algérienne Démocratique et Populaire quant à l’identité du demandeur. Cette première démarche a été suivie d’une réponse dudit Consulat en date du 13 mai 2011 accusant réception de la demande et informant qu’un suivi y sera réservé. Des rappels téléphoniques et écrits ont été adressés par le ministre au consulat en dates des 24 mai, 8 juin, 29 juin et 12 juillet 2011. A cette dernière date, le Consulat répondit que les recherches en vue de l’identification du demandeur étaient toujours en cours. Au vu des diligences ainsi concrètement entreprises par les autorités luxembourgeoises auprès des autorités algériennes, qui ont raisonnablement pu être supposées compétentes et du fait que les démarches des autorités ont été ralenties par le défaut de collaboration du demandeur, le reproche d’un défaut de diligences formulé par le demandeur à l’appui de son recours laisse d’être fondé. Dans l’attente de résultats de la part desdites autorités, la prorogation de la mesure initiale de placement constitue une nécessité de sorte que le moyen tiré de la violation de l’article 120 (3) de la loi du 29 août 2008 laisse d’être fondé. »

See also First instance administrative Court, 3rd Chamber n° 30394 of 27 April 2012. The court said: « Le tribunal est amené à retenir que les démarches ainsi entreprises en l’espèce par les autorités luxembourgeoises doivent être considérées comme suffisantes, de sorte qu’il y a lieu de conclure que l’organisation de l’éloignement est exécutée en l’espèce avec toute la diligence requise au regard des exigences de l’article 120, paragraphe (3), de la loi du 29 août 2008, notamment au regard de la considération que l’origine du demandeur n’ a pas encore pu être déterminée, celui-ci étant démuné des documents d’identité et de voyage requis. Il est certes vrai que la demande de délivrance d’un laissez-passer date de janvier 2012 et que depuis, les autorités luxembourgeoises sont en l’attente d’une réaction des autorités marocaines, respectivement algériennes, cette circonstance ne permet pas de conclure à un défaut de diligences de la part des autorités luxembourgeoises

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dans la mesure où celles-ci sont tributaires des autorités étrangères auxquelles elles se sont adressées. Si encore le demandeur affirme être d'origine palestinienne et s'il reproche au ministre de ne pas avoir contacté une nouvelle fois la délégation palestinienne, ces contestations ne sont pas de nature à permettre de retenir un manque de diligences dans le chef des autorités luxembourgeoises. »

See First instance Administrative Court, 2<sup>nd</sup> Chamber n° 29962 of 19 March 2012. The court said: «...Or, en l'espèce, il ressort sans équivoque de trois notes figurant au dossier administratif, à savoir des notes datées des 3 janvier, 13 et 15 février 2012 que l'ambassade de la République de la Guinée, pays dont le demandeur est ressortissant suivant les pièces et éléments non contestés figurant au dossier administratif, refuse la délivrance d'un laissez-passez en faveur du demandeur en attendant qu'un jugement pénal soit rendu à l'égard du demandeur par les juridictions luxembourgeoises, que le délai d'appel aura expiré et que le demandeur aura purgé sa peine au Luxembourg. Lors des entretiens téléphoniques qui ont eu lieu aux dates précitées des 3 janvier, 13 et 15 février 2012 entre les autorités luxembourgeoises et les autorités consulaires à Bruxelles, il est apparu que l'ambassadeur de la République de la Guinée était d'avis que le demandeur « *devrait avoir la possibilité de se justifier dans cette affaire* [pénale] ». ... Ainsi, et au vu des circonstances de l'espèce, le tribunal ne peut que constater qu'à l'heure actuelle les autorités de la République de Guinée refusent la délivrance d'un laissez-passez en faveur du demandeur, de sorte que son éloignement ne peut être réalisé à l'heure actuelle et qu'il n'est pas prévisible à quelle date son éloignement pourra être envisagé compte tenu des développements exposés ci-dessus. ...Il suit des constatations qui précèdent que dans la mesure où les conditions initiales se trouvant à la base de la première mesure de rétention administrative ne sont plus données, au vu du comportement adopté par les autorités guinéennes, la mesure de rétention administrative à l'égard du demandeur ne se justifie plus. Il y a partant lieu d'ordonner sa mise en liberté immédiate »

<sup>54</sup> See First instance Administrative Court, 2<sup>nd</sup> Chamber, n° 30636 of 7 June 2012. The court said: « Force est de constater que l'autorité ministérielle est restée en défaut de rapporter la preuve qu'à la date de l'audience des plaidoiries, elle a entrepris une démarche postérieure à celle du 15 mai 2012, soit pendant une période de presque trois semaines, de sorte qu'il y a lieu de retenir que les démarches entreprises en l'espèce par les autorités luxembourgeoises doivent être considérées comme insuffisantes. Partant il y a lieu de conclure que l'organisation de l'éloignement n'a pas été exécutée en l'espèce avec toute la diligence requise au regard des exigences de l'article 120, paragraphe (3) de la loi du 29 août 2008 de sorte que le moyen du demandeur fondé sur un défaut de diligences en vue d'exécuter son éloignement est à accueillir. Il s'ensuit que l'arrêté déféré encourt la réformation. »

<sup>55</sup> Article 125bis (1) of the amended law of 29 August 2008.

<sup>56</sup> See First instance administrative court, 1st Chamber, n° 30201 of 5 April 2012. The court said: « ...En l'espèce, il n'est pas contesté que Monsieur ... a fait l'objet d'une décision de retour du 19 décembre 2011, par laquelle le ministre a refusé à Monsieur ... le séjour sur le territoire, au vu notamment qu'il ne justifie d'aucun document d'identité ou de voyage en cours de validité, de sorte que le risque de fuite résulte en l'espèce d'une présomption légale. Il convient encore de relever que la constatation de l'existence de cette présomption légale, résultant de la situation de l'intéressé telle qu'indiquée expressément dans la décision initiale de rétention, explique et justifie que le ministre n'ait pas à indiquer dans la décision déférée en détail les considérations qui l'ont amené à retenir l'existence d'un risque de fuite, de sorte que le moyen basé sur une motivation stéréotypée en ce point précis doit être rejeté pour ne pas être fondé. »

<sup>57</sup> Article 10 (1) a) of the amended Law of 5 May 2006.

<sup>58</sup> Article 10 (1) b) of the amended Law of 5 May 2006.

<sup>59</sup> Article 10 (1) d) of the amended Law of 5 May 2006.

<sup>60</sup> Article 10 (1) d) of the amended Law of 5 May 2006.

<sup>61</sup> LU EMN NCP, Establishing Identity for International Protection: Challenges and Practices, Luxembourg 2012, pp. 27-28, <https://www.emnluxembourg.lu/sites/default/files/Establishing%20Identity%20for%20International%20Protection%20Challenges%20and%20Practices.pdf> [accessed 13.05.2014].

<sup>62</sup> Article 8 of the amended Law of 5 May 2006.

<sup>63</sup> Judicial Police, Foreigners Service, Interview, 20.06.2012.

<sup>64</sup> First instance administrative Court, 3<sup>rd</sup> Chamber, n° 32022 of 13 November 2013. The Administrative Court has withheld a serious threat for the public order and security in the case of a person who had to serve a prison sentence of 36 months and was condemned to pay a fine based on the legislation in the matters of drugs, stealing as well as assault and battery. The criminal records, the infringement, the absence of remorse and the assessment made by the Steering Committee, who disapproved of an adjustment of the sentence, led the Court to retain that the applicant represents a serious threat for the public order and security.

<sup>65</sup> Article 9 (1) of the amended Law of 5 May 2006.

<sup>66</sup> LU EMN NCP, Establishing Identity for International Protection: Challenges and Practices, Luxembourg 2012, p. 28.

<sup>67</sup> Article 100 (1) of the amended Law of 29 August 2008.

<sup>68</sup> The only international border is the international airport.

<sup>69</sup> Article 135 of the amended Law of 29 August 2008.

<sup>70</sup> The cases in which the third-country national must leave the country without further delay are established by Article 111 (3) of the amended law of 29 August 2008.

<sup>71</sup> Article 111 (2) of the amended Law of 29 August 2008.

<sup>72</sup> The verification is done by the Grand-ducal Police in accordance with Article 134 of the amended Law of 29 August 2008.

<sup>73</sup> Judicial Police, Foreigners Service, Interview, 02.04.2014.

<sup>74</sup> Directorate of Immigration, Interview, 02.04.2014. The decision can be made orally if the Minister in charge of Immigration is incapable of producing a written one. However, the written decision must be notified to the third-country national 48 hours after the oral decision was taken. Article 120 (2) of the amended Law of 29 August 2008.

<sup>75</sup> This requirement had been clearly explained by the First instance Administrative Court, 1st Chamber, n° 30149 of 2 April 2012 which says: « Le tribunal constate que même si le procès-verbal de notification mentionne que le demandeur aurait des connaissances minimales en anglais et si le délégué du gouvernement fait valoir que les agents de la police grand-ducale ayant procédé à la notification de la décision litigieuse auraient valablement pu présumer que le demandeur comprendrait l'anglais, et au-delà de la question litigieuse entre parties si le demandeur

comprend suffisamment l'anglais, il ne se dégage d'aucun élément du dossier que le demandeur se serait vu expliquer le contenu de la décision de placement rédigée en français, langue que le demandeur déclare ne pas comprendre, au moins en anglais. D'autre part, la partie étatique n'a pas fait état d'une impossibilité matérielle de notifier la mesure de rétention dans une langue dont il est raisonnable d'admettre que le demandeur la comprend. Il s'ensuit que la notification de la mesure de rétention a été faite en méconnaissance des dispositions de l'article 121 (1) de la loi du 29 août 2008 quant à la langue dans laquelle l'arrêté de placement a été porté à la connaissance du demandeur, le ministre ne justifiant d'aucune impossibilité matérielle de procéder à la notification dans une langue dont il est raisonnable d'admettre que le demandeur la comprend, à savoir, en l'espèce, conformément aux indications figurant sur le procès-verbal, en anglais. »

Also see First instance Administrative Court, 2<sup>nd</sup> Chamber, n° 30147 of 29 March 2012. This decision says: « Eu égard à la conclusion ci-avant retenue que l'exigence de la notification de l'arrêté de rétention dans une langue dont il est raisonnable d'admettre que l'intéressé la comprenne constitue une formalité substantielle, son non respect doit être sanctionné par l'annulation, dans le cadre du recours en réformation dont le tribunal est saisi, de la décision de placement déferée et dont l'exécution reposait sur une procédure viciée. »

See First instance Administrative Court, 1st Chamber, n° 29957 of 14 March 2012.

<sup>76</sup> The Judicial Police normally used a template.

<sup>77</sup> Article 121 (1) of the Law of 29 August 2008.

<sup>78</sup> Directorate of Immigration, Interview, 08.05.2014.

<sup>79</sup> The Consultative Commission on Human Rights (CCDH), in its opinion on the bill n°6218 transposing the 'Return' Directive wondered whether it would be appropriate to complete the bill by putting more emphasis on taking into account the special needs of vulnerable groups and therefore invited the legislator to establish a detection mechanism of such vulnerabilities. Parliamentary document, n°6218/04 of 28 April 2011, [http://www.chd.lu/wps/PA\\_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/108/039/100378.pdf](http://www.chd.lu/wps/PA_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/108/039/100378.pdf) [accessed 12.05.2014].

<sup>80</sup> Article 92 (1) of the Law of 29 August 2008. In case of human trafficking, according to the Law of 9 April 2014 Reinforcing the Right of Victims of Trafficking in Human Beings published in the Memorial A, No. 63 of 14 April 2014, the Grand-Ducal Police must inform the victim of its rights. <http://www.legilux.public.lu/leg/a/archives/2014/0063/a063.pdf#page=2> [accessed: 12.05.2014].

<sup>81</sup> Judicial Police, Foreigners Service, Interview, 02.04.2014.

<sup>82</sup> Article 34 of the amended Law of 29 August 2008. The third-country national must have a valid travel document and, if required, a visa. See First instance Administrative Court, 2<sup>nd</sup> Chamber n° 34199 of 25 March 2014, First instance Administrative Court, 2<sup>nd</sup> Chamber, n° 30636 of 7 June 2012, First instance Administrative Court, 1<sup>st</sup> Chamber, n° 30149 of 2 April 2012, First instance Administrative Court, 2<sup>nd</sup> Chamber n° 30147 of 29 March 2012. First instance Administrative Court, 1<sup>st</sup> Chamber, n° 30201 of 5 April 2012. The court said: « ...En l'espèce, il n'est pas contesté que Monsieur ... a fait l'objet d'une décision de retour du 19 décembre 2011, par laquelle le ministre a refusé à Monsieur ... le séjour sur le territoire, au vu notamment qu'il ne justifie d'aucun document d'identité ou de voyage en cours de validité, de sorte que le risque de fuite résulte en l'espèce d'une présomption légale. »



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<sup>83</sup> See First instance Administrative Court, 1<sup>st</sup> Chamber, n° 29671 of 11 January 2012. The court said: « ...une décision de placement en rétention est prise contre l'étranger en particulier s'il existe un risque de fuite, présumé aux termes de l'article 111 (3) de la loi du 29 août 2008 lorsqu'il s'agit d'un étranger en situation irrégulière. »

<sup>84</sup> Article 116 of the amended Law of 29 August 2008.

<sup>85</sup> See note 82.

<sup>86</sup> Directorate of Immigration, Interview, 02.04.2014 and Judicial Police, Foreigners Service, Interview, 02.04.2014. See Administrative Court, n° 34049C of 27 February 2014. The Court said: « Cour relève ensuite un manque de collaboration totale de la part de l'intimé quant à sa véritable nationalité, celui-ci se disant tantôt être de nationalité tunisienne pour ensuite « opter » pour la nationalité libyenne et finalement dire avoir la nationalité algérienne, attitude cautionnée par sa mandataire qui à l'audience des plaidoiries du 25 février 2014 a déclaré « ne pas avoir mandat de révéler la véritable nationalité » de Monsieur .... »

<sup>87</sup> See Article 10 (1) a) in accordance with article 20 (1) i) of the Law of 5 May 2006. See First instance Administrative Court, Vacation Chamber n° 28932 of 17 August 2011.

<sup>88</sup> See First Instance Administrative Court, 1<sup>st</sup> chamber, n° 29464 of 7 March 2012 and First instance Administrative Court, 2<sup>nd</sup> Chamber, n°30696 of 25 June 2012.

<sup>89</sup> See Administrative Court, n°28620C of 24 May 2011.

<sup>90</sup> See Administrative Court n°28769C of 20 June 2011. The court stated : «Relativement au reproche au fond fait à l'appelant d'avoir constamment manipulé ses doigts afin d'empêcher une prise d'empreintes digitales utilisables pour une vérification dans le système EURODAC, le tribunal a justement relevé qu'il ressort des pièces du dossier qu'avant la prise de la décision déférée, il a été procédé à dix relevés d'empreintes en dates des 22 février, 11 mai, 24 août, 25 novembre et 21 décembre 2010 ainsi qu'en dates des 10 janvier, 16 février, 10 mars, 29 avril et 13 mai 2011, qui se sont tous révélés inexploitable par le système EURODAC en raison du mauvais état de l'épiderme des doigts de l'appelant. Depuis la prise de la décision litigieuse, il a encore été procédé à une prise des empreintes digitales en date du 27 mai 2011, également sans succès... Il se dégage par ailleurs des rapports de la police judiciaire des 7 mars 2011 et 13 mai 2011 que l'état des extrémités des doigts de l'appelant varie d'un relevé à l'autre, les lignes papillaires étant des fois plus illisibles que d'autres, tandis que les paumes des mains ne sont pas manipulées.» It is important to mention that in this case the court decided that the detainee's to submit himself to a DNA test was not relevant because for EURODAC file identification only fingerprints are valid information." See also Administrative Court n° 29235CA of 25 October 2011.

<sup>91</sup> This procedure has been questioned by the Luxembourgish Refugee Council (*LFR*) especially when the person that they are trying to expel is a rejected international protection applicant. The main concern is the potential sanctions that the third-country national can be subjected to in his/her country of origin. See *LFR, Déclaration politique du Collectif Réfugiés Luxembourg à l'occasion de la journée mondiale du réfugié*, 20 June 2011, [http://www.clae.lu/pdf/migrations/asile/lfr/declaration\\_politique\\_LFR\\_2011.pdf](http://www.clae.lu/pdf/migrations/asile/lfr/declaration_politique_LFR_2011.pdf) [accessed 12.05.2014].

See First instance Administrative Court, 2<sup>nd</sup> Chamber, n° 27484 of 14 December 2010: «... il ressort des pièces versées en cause, et notamment d'un courrier du 5 août 2010 du ministre aux autorités de l'ambassade de la République de Gambie, que le ministre a révélé auxdites autorités,



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que les personnes que le Luxembourg entendait rapatrier en Gambie et dont faisait partie le demandeur, étaient des demandeurs d'asile déboutés, sans préciser davantage les motifs à la base des demandes de protection internationale. Dès lors, c'est à juste titre que le demandeur affirme que les autorités gambiennes sont libres de s'imaginer toutes sortes de raisons, telles que des raisons politiques, pour lesquelles le demandeur a sollicité une protection internationale à l'étranger.»

See First instance Administrative Court, 2<sup>nd</sup> chamber, n°29933 of 5 March 2012. In this case an Ivory Coast national refused to meet with the diplomatic officials from his country of origin on several occasions. It is important to mention that in this case the person had already escaped to Denmark before in order to avoid the expulsion by the Luxembourgish authorities.

<sup>92</sup> See First instance Administrative Court, 2<sup>nd</sup> Chamber n° 29068 of 16 September 2011. In this case, the person rejected his/her Sierra Leonean origins but recognised being 'African' without indicating the nationality.

<sup>93</sup> See First instance Administrative Court, 3<sup>rd</sup> Chamber n° 32022 of 13 November 2013. The court said: « ... compte tenu des faits pour lesquels le demandeur a fait l'objet de deux condamnations par jugements des 6 mai 2010 et 21 octobre 2010 et plus amplement décrites dans lesdits jugements, combinés à ses antécédents judiciaires qui se dégagent des pièces du dossier administratif et qui dénotent une énergie criminelle incontestable, vu l'appréciation faite par le comité de guidance dans le rapport précité du 20 avril 2011 qui s'est prononcé en défaveur d'une mesure d'aménagement de la peine que le demandeur est en train de purger au Luxembourg, vu les constats faits par le tribunal correctionnel dans son jugement du 6 mai 2010 que « l'énergie criminelle [et] la dangerosité [de l'intéressé] qui découle de ses antécédents judiciaires, ainsi que du constat que des peines prononcées à son encontre à ce jour n'ont pas été de nature à le dissuader de récidiver » et que le demandeur n'a à l'audience « manifesté ni regrets, ni repentir et n'a pas donné l'impression de mesurer la gravité de ses actes », le ministre a valablement pu, sans commettre une erreur manifeste d'appréciation et sans violer le principe de proportionnalité, retenir que le demandeur constitue une menace grave pour l'ordre et la sécurité publics... »

<sup>94</sup> LU EMN NCP, Establishing Identity for International Protection: Challenges and Practices, Luxembourg 2012, p.28.

<sup>95</sup> First instance Administrative Court, n° 30008 of 23 March 2012.

<sup>96</sup> A third-country national came to Luxembourg and applied for international protection claiming to be an Iraqi national. After being rejected he went to the UK where he applied for international protection claiming to be an Iranian national. Falling under the Dublin regulation, he is returned to Luxembourg. In this case the Ministry did not try any diligence with the Iranian or Iraqi Embassies. In the end, the court ordered the release of the person from the detention centre. See First instance Administrative Court, 2<sup>nd</sup> Chamber, n°28677 of 6 June 2011.

See Administrative Court n° 34049C of 27 February 2014. The court said: « La Cour relève ensuite un manque de collaboration totale de la part de l'intimé quant à sa véritable nationalité, celui-ci se disant tantôt être de nationalité tunisienne pour ensuite « opter » pour la nationalité libyenne et finalement dire avoir la nationalité algérienne, attitude cautionnée par sa mandataire qui à l'audience des plaidoiries du 25 février 2014 a déclaré « ne pas avoir mandat de révéler la véritable nationalité » de Monsieur .... S'il est exact que suite à la décision de prorogation du 9 janvier 2014 de la mesure de placement initiale, le ministre a attendu jusqu'au 29 janvier 2014 avant de contacter à nouveau le consulat tunisien à Bruxelles, après avoir abandonné la piste libyenne, ledit délai d'attente ne saurait cependant lui être reproché, étant donné que les autorités luxembourgeoises sont à ce stade essentiellement tributaires de la collaboration et de l'efficacité des autorités étrangères. A cela s'ajoute que l'intimé est malvenu de se plaindre du fait que les mesures d'instruction successives requièrent un certain temps, étant donné qu'il

a en grande partie provoqué lui-même cette situation par son refus continu de collaborer et de révéler son identité et sa véritable origine, doublé d'une multiplication des identités et nationalités déclarées en cours de procédure. »

LU EMN NCP, Establishing Identity for International Protection: Challenges and Practices, Luxembourg 2012, p.15.

<sup>97</sup> See First instance administrative court, 1<sup>st</sup> Chamber, n° 30201 of 5 April 2012. The court said: « Dès lors, l'éventuelle absence alléguée de coopération de l'ambassade d'Algérie ne constitue pas un motif susceptible d'énervier la légalité de la décision de prorogation déferée, mais au contraire un motif légal justifiant *a priori* la décision déferée. »

<sup>98</sup> See First instance Administrative Court, 2<sup>nd</sup> Chamber, n° 29962 of 19 March 2012. The court said: « A défaut toutefois d'avoir plus de précision à ce sujet quant aux infractions pénales qui sont reprochées au demandeur, quant à l'instruction pénale qui serait éventuellement en cours et quant à la date présumée du jugement pénal à intervenir, le tribunal n'est pas en mesure d'apprécier le temps que prendra l'éventuelle délivrance d'un laissez-passez en faveur du demandeur. Ainsi, et au vu des circonstances de l'espèce, le tribunal ne peut que constater qu'à l'heure actuelle les autorités de la République de Guinée refusent la délivrance d'un laissez-passez en faveur du demandeur, de sorte que son éloignement ne peut être réalisé à l'heure actuelle et qu'il n'est pas prévisible à quelle date son éloignement pourra être envisagé compte tenu des développements exposés ci-dessus. Il suit des constatations qui précèdent que dans la mesure où les conditions initiales se trouvant à la base de la première mesure de rétention administrative ne sont plus données, au vu du comportement adopté par les autorités guinéennes, la mesure de rétention administrative à l'égard du demandeur ne se justifie plus. Il y a partant lieu d'ordonner sa mise en liberté immédiate. »

<sup>99</sup> First instance administrative court, 3<sup>rd</sup> Chamber, n° 30457 of 4 May 2012 (in this case the diplomatic mission of Togo) and n° 30456 of 4 May 2012 (in this case the diplomatic mission of Cameroun).

<sup>100</sup> Directorate of Immigration, Interview, 08.05.2014 and Caritas, Phone interview, 07.05.2014.

<sup>101</sup> First instance administrative court, 1<sup>st</sup> Chamber, n° 29756 of 1 February 2012 First instance administrative court, 2<sup>nd</sup> Chamber, n° 29525 of 5 December 2011 and First instance Administrative Court, 3<sup>rd</sup> Chamber n° 34300 of 9 April 2014.

<sup>102</sup> First instance Administrative Court, 1<sup>st</sup> Chamber n° 29858 of 21 February 2012. The court said: « Il convient encore de vérifier si la condition de maintien de la rétention est remplie, à savoir, si le dispositif d'éloignement est en cours et exécuté avec toute la diligence requise. Force est de constater que Monsieur ... a fait l'objet d'une décision de retour en date du 29 décembre 2011 prise sur base des articles 100 et 109 à 115 de la loi du 29 août 2008, ... En date du 13 janvier 2012, le ministre a sollicité la reprise en charge conformément au règlement dit Dublin II auprès des autorités suédoises, qui a été acceptée en date du 20 janvier 2012. En date du 23 janvier 2012, le ministre a saisi le Service de Police judiciaire afin d'organiser le transfert, lequel est actuellement prévu pour le premier mars 2012. Le tribunal est partant amené à retenir que les démarches entreprises en l'espèce par les autorités luxembourgeoises doivent être considérées comme suffisantes au vu du temps relativement court qui s'est écoulé depuis son placement, de sorte qu'il y a lieu de conclure que l'organisation de l'éloignement est exécutée en l'espèce avec toute la diligence requise au regard des exigences de l'article 120, paragraphe (3) de la loi du 29 août 2008, et que le moyen afférent est à rejeter. »

<sup>103</sup> See Administrative Court, n° 34334C of 17 April 2014. The court said: « ... la Cour se doit de constater que l'accord des autorités belges du 7 janvier 2014 mentionne un délai de préparation d'un transfert de quatre jours ouvrables, mais que le courrier ministériel au Service de Police judiciaire du 24 mars 2014 précise d'emblée que le « transfert ne pourra pas être organisé avant le 7 avril 2014 », soit après un délai de

quatorze jours, le Service de police judiciaire ayant respecté cette consigne en ayant convenu avec leurs collègues belges la date du 8 avril 2014. Il s'ensuit que dès le 24 mars 2014, le ministère avait admis que l'appelant serait mis en rétention administrative pour quatorze jours au moins sans qu'une possibilité d'arrangement avec les autorités belges en vue d'un transfert antérieur ne soit envisagée, étant remarqué que le transfert devait avoir lieu vers un pays voisin et non pas vers un pays lointain. Le délégué du gouvernement n'a pas fourni d'autres explications pour ce délai retenu dès le jour de la prise de la mesure de rétention à l'égard de l'appelant, sauf à faire état d'un accord afférent nécessairement trouvé au niveau des autorités belges, du ministère luxembourgeois et de la police luxembourgeoise. Or, à défaut de justifications plus concrètes de ce délai de quatorze jours entre le début de la mesure de rétention à l'égard de l'appelant et son transfert vers la Belgique, cette mesure ne peut pas être considérée comme proportionnée pour ne pas avoir été limitée à la durée strictement nécessaire pour rendre possible l'exécution utile du transfert de l'appelant vers l'Etat membre compétent pour l'examen de sa demande de protection internationale, en l'occurrence la Belgique. Au vu de ces éléments particuliers, c'est à bon droit que l'appelant conteste la légalité de la mesure de rétention prise à son encontre et son recours est à déclarer justifié. Par voie de conséquence, le jugement entrepris encourt la réformation en ce sens que l'arrêté ministériel déféré du 24 mars 2014 est à annuler dans le cadre du recours en réformation introduit. »

<sup>104</sup> See First instance Administrative Court, 1st Chamber, n° 29464 of 7 March 2012. The court said: « Il résulte de la lecture de la disposition légale qui précède que la possibilité pour le ministre de reporter l'éloignement d'une personne ressortissante d'un pays tiers, présuppose, d'une part, qu'il existe un ordre de quitter le territoire luxembourgeois à l'encontre de la personne concernée, et d'autre part, que l'étranger en question ait adressé une demande afférente au ministre tout en rapportant la preuve, (« justifie »), qu'il existe une impossibilité de quitter le territoire luxembourgeois dans son chef et ceci pour des raisons indépendantes de sa volonté, respectivement qu'il ne peut regagner son pays d'origine, ni se rendre dans aucun autre pays, sans mettre sa vie ou sa liberté en danger ou ..... »

<sup>105</sup> The burden of proof is on the applicant. See First instance Administrative Court, 3<sup>rd</sup> Chamber, n° 30713 of 29 June 2012. The court said: « Force est encore de constater que le demandeur reste en défaut de fournir des éléments permettant de renverser la présomption légale de l'existence d'un risque de fuite ayant permis au ministre de recourir à une mesure de rétention plutôt qu'à une autre mesure moins coercitive, étant relevé que la simple affirmation de n'avoir aucune intention de quitter le territoire luxembourgeois, voire la simple contestation d'un risque de fuite, sont insuffisantes à cet égard. »

See also Administrative Court n° of 29931 of 8 March 2012. The court said : « Si les appelants sont à suivre en ce qu'ils entendent voir retenir en substance que qu'une assignation à résidence est à préférer à un placement en rétention à l'égard d'un étranger visé par une mesure d'éloignement qui présente des garanties de représentation effectives propres à prévenir un risque de fuite, d'une part, et que la présomption légale vérifiée en l'occurrence d'un risque de fuite peut être renversée par la preuve contraire, d'autre part, force est cependant de constater en l'espèce que les appelants omettent d'avancer des garanties de représentation effectives propres à prévenir ledit risque de fuite. »

See also First instance Administrative Court, 2<sup>nd</sup> Chamber, n° 29567 of 15 December 2011. Le tribunal constate: « que la possibilité de l'assignation à résidence n'est prévue que pour certaines hypothèses spécifiques et surtout que les dispositions législatives luxembourgeoises afférentes n'ont pas transposé le principe retenu par la Directive suivant lequel une mesure de rétention ne peut être ordonnée qu'à titre subsidiaire et à condition qu'il n'existe pas de mesures moins coercitives applicables « dans un cas particulier ». ... C'est partant la priorité qui doit ainsi être accordée à des mesures moins coercitives qu'une mesure de rétention administrative, qui n'a pas été transposée par le législateur luxembourgeois. .... La contrariété des dispositions nationales étant ainsi retenue, il échet d'écarter, sur ce point, l'application des dispositions législatives nationales, pour faire application du texte de droit communautaire afférent, au vu également de ce que le délai de transposition de la

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Directive a expiré, en application du principe de la primauté du droit communautaire et en considération de ce que les dispositions communautaires afférentes sont assez claires et précises pour pouvoir faire l'objet d'une application directe en droit national. Il se dégage encore de ce qui précède, que le ministre, au vu de cet état du droit, aurait dû faire application de l'article 15, paragraphe (1) de la Directive et examiner, en application de ladite disposition de droit communautaire, s'il existait, au vu de la situation particulière de Monsieur ..., des mesures suffisantes, mais moins coercitives qu'une mesure de placement. »

<sup>106</sup> Judicial Police, Foreigners Service, Interview, 02.04.2014.

<sup>107</sup> See Article 111 (3) c) of the amended Law of 29 August 2008. Directorate of Immigration, Interview, 02.04.2014.

<sup>108</sup> Detention Centre, Interview, 01.04.2014.

<sup>109</sup> Administrative Court, n° 29628 of 23 December 2011. The court said: « Cependant, il y a lieu de relever que Monsieur ... réside depuis son arrivée au Luxembourg en février 2007 à la même adresse à ... , ensemble avec ses parents et ses deux frères, de manière qu'il dispose d'une adresse fixe constante partagée avec d'autres membres de sa famille dont le ministre avait connaissance. En outre, Monsieur ... a pu être trouvé à cette adresse le 29 septembre 2011 par les agents de la force publique afin de se voir notifier les décisions prises à son égard le 19 septembre 2011 et être appréhendé en vue de la mise en exécution immédiate de la mesure de rétention ordonnée à son encontre. De même, il a été libéré volontairement par le ministre le 30 septembre 2011 après qu'un départ immédiat avec le vol à destination du Kosovo du 30 septembre 2011 n'était plus légalement possible et il y a lieu de conclure, indépendamment d'autres considérations éventuellement à la base de cette libération, que le ministre n'aurait pas renoncé à l'exécution d'une mesure de rétention arrêtée pour la durée d'un mois mais organisé plutôt le rapatriement de Monsieur ... vers Kosovo dès après le 4 octobre 2011 s'il avait conclu à l'existence d'un danger concret de fuite dans son chef. Avec le bénéfice du recul de temps en ce que le juge de la réformation statue d'après les éléments de fait et de droit tels qu'ils se présentent à la date de sa décision, il y a lieu d'ajouter que Monsieur ... a également pu être trouvé à son adresse à le 1er décembre 2011 et qu'il s'était engagé, à travers un courrier de son mandataire du 2 décembre 2011, à se présenter à toute convocation du ministère, également en vue de son rapatriement. Sur base de l'ensemble de ces éléments, il y a lieu de conclure que Monsieur ... présentait, à la date du 1er décembre 2011, des garanties de représentation effectives propres à prévenir un risque de fuite dans son chef, de manière que conformément aux dispositions combinées des articles 120 et 125 de la loi du 29 août 2008 interprétés conformément aux développements ci-avant, une assignation à résidence de Monsieur ... aurait été la mesure répondant aux exigences découlant de la priorité à accorder à une mesure moins coercitive et suffisante et du principe de proportionnalité et que l'arrêté ministériel du 21 octobre 2011 est illégal pour ne pas répondre à ces exigences. »

<sup>110</sup> Judicial Police, Foreigners Service, Interview, 02.04.2014.

<sup>111</sup> Detention Centre, Interview, 01.04.2014.

<sup>112</sup> Article 123 (2) of the amended Law of 29 August 2008.

<sup>113</sup> Article 123 (4) of the amended Law of 29 August 2008.

<sup>114</sup> Attorney at Law specialised in migration, Phone interview, 06.05.2014 and Caritas, Phone interview, 07.05.2014.

<sup>115</sup> First instance Administrative Court, 1<sup>st</sup> Chamber, n° 30201 of 5 April 2012.

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<sup>116</sup> Parliamentary document, n° 6218/01 of 22 December 2010, [http://chd.lu/wps/PA\\_RoleEtendu/FTSByteServingServletImpl/?path=/export/exped/sexdpata/Mag/071/969/097608.pdf](http://chd.lu/wps/PA_RoleEtendu/FTSByteServingServletImpl/?path=/export/exped/sexdpata/Mag/071/969/097608.pdf) [accessed 08.05.2014].

<sup>117</sup> Parliamentary document, n° 6218/04 of 28 April 2011, [http://chd.lu/wps/PA\\_RoleEtendu/FTSByteServingServletImpl/?path=/export/exped/sexdpata/Mag/108/039/100378.pdf](http://chd.lu/wps/PA_RoleEtendu/FTSByteServingServletImpl/?path=/export/exped/sexdpata/Mag/108/039/100378.pdf) [accessed 08.05.2014].

<sup>118</sup> Attorney at Law specialised in migration, Phone interview, 06.05.2014 and Caritas, Phone interview, 07.05.2014.

<sup>119</sup> Parliamentary document, n° 6218/04 of 28 April 2011.

<sup>120</sup> First instance Administrative Court, 2<sup>nd</sup> Chamber, n° 30636 of 07 June 2012. The court said: « Il reproche ensuite aux autorités compétentes de n'avoir pas fait « tous les efforts et toutes les démarches nécessaires en vue d'assurer que la mesure d'éloignement puisse être exécutée sans retard, dans les délais les plus brefs ». Il fait plaider, à cet égard, que s'il ne conteste pas être en situation irrégulière au Luxembourg suite au refus de sa demande d'asile, il donne néanmoins à considérer que cette situation aurait été connue des autorités ministérielles depuis longtemps et ce d'autant plus que les autorités pénitentiaires auraient attiré l'attention de l'autorité compétente quant à l'échéance de la peine pénale à la date du 17 avril 2012 de sorte qu'il s'interroge sur la matérialité des démarches faites par l'autorité ministérielle pendant qu'il se trouvait en détention. Il estime en substance que l'autorité ministérielle serait restée en défaut de rapporter la preuve qu'elle aurait entamé des démarches nécessaires en temps utile afin que le son éloignement soit exécuté dans les meilleurs délais. ... Force est de constater que l'autorité ministérielle est restée en défaut de rapporter la preuve qu'à la date de l'audience des plaidoiries, elle a entrepris une démarche postérieure à celle du 15 mai 2012, soit pendant une période de presque trois semaines, de sorte qu'il y a lieu de retenir que les démarches entreprises en l'espèce par les autorités luxembourgeoises doivent être considérées comme insuffisantes.»

<sup>121</sup> Attorney at Law specialised in migration, Phone interview, 06.05.2014 and Prison Chaplain, Phone interview, 07.05.2014.

<sup>122</sup> Ombudsman 2014. *Rapport du contrôleur externe relatif au Centre de rétention*, Luxembourg, p.22.

<sup>123</sup> Directorate of Immigration, Interview, 08.05.2014 and Caritas, Phone interview, 07.05.2014.

<sup>124</sup> Directorate of Immigration, Interview, 08.05.2014

<sup>125</sup> Detention Centre, Phone interview, 06.05.2014.

<sup>126</sup> Directorate of Immigration, Interview, 08.05.2014.

<sup>127</sup> Article 119 of the amended Law of 29 August 2008.

<sup>128</sup> Article 24 (1) of the Law of 28 May 2009.

<sup>129</sup> Detention Centre, Interview, 01.04.2014. Article 25 of the Law of 28 May 2009 lists the different professions that are foreseen to work in the detention centre.

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<sup>130</sup> Article 23 of the Law of of 28 May 2009.

<sup>131</sup> Article 28 of the Law of of 28 May 2009.

<sup>132</sup> Directorate of Immigration, Interview, 02.04.2014.

<sup>133</sup> Detention Centre, Interview, 01.04.2014 and Directorate of Immigration, Interview, 08.05.2014.

<sup>134</sup> See First instance Administrative Court, n°21218 of 7 April 2006.

<sup>135</sup> See First instance Administrative Court, n°21217 of 4 October 2006.

<sup>136</sup> Detention Centre, Interview, 01.04.2014 and Prison Chaplain, Phone interview, 07.05.2014.

<sup>137</sup> Opinion of the Luxembourgish Refugee Council on the concept of a detention centre, Opinion asked by the Luxembourgish government at the meeting of 24 October 2004, 13.01.2005, [www.asti.lu/media/asti/pdf/AVISLFR.pdf](http://www.asti.lu/media/asti/pdf/AVISLFR.pdf) [accessed: 05.05.2014].

<sup>138</sup> Global Detention Project, Luxembourg Detention Profile, Geneva 2010, <http://www.globaldetentionproject.org/countries/europe/luxembourg/introduction.html> [accessed 09.05.2014].

<sup>139</sup> Detention Centre, Phone interview, 06.05.2014.

<sup>140</sup> Report to the Government of the Grand-Duchy of Luxembourg on the visit to Luxembourg by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Strasbourg, 28.10.2010, <http://www.cpt.coe.int/documents/lux/2010-31-inf-fra.pdf> [accessed 13.05.2014].

See also Administrative Court, n°21089C of 16 March 2006. The Court noted: « La déclaration gouvernementale du 4 août 2004 précise qu'un centre séparé en-dehors de l'enceinte pénitentiaire sera construit pour étrangers en situation irrégulière. En procédant à la construction du centre de rétention, le gouvernement tient en outre compte des critiques répétées lui adressées, et par le Haut Commissariat des Nations Unies pour les réfugiés (UNHCR), et par la Commission européenne contre le racisme et l'intolérance (ECRI) du Conseil de l'Europe, de même que de la jurisprudence des juridictions administratives qui, tout en reconnaissant le Centre de séjour provisoire pour étrangers en situation irrégulière comme étant en principe un établissement approprié pour l'exécution d'une mise à disposition du gouvernement, arrivent à la conclusion, suite à l'incendie du 30 janvier 2006 ayant impliqué un relogement des personnes retenues, « que (...) la situation et le régime actuels au bloc C du Centre pénitentiaire, encore moins que la situation antérieure au bloc P2, est loin d'être idéale et que la mise en place d'une structure adéquate et séparée du Centre pénitentiaire est plus que recommandée. »

<sup>141</sup> Consultative Commission on Human Rights, Annual Report 2007, p.12, <http://www.ccdh.public.lu/fr/publications/rapports-activite/rapport-2007.pdf> [13.05.2014].

<sup>142</sup> Parliamentary document, n°5654/01 of 06 March 2007, <http://www.chd.lu/wps/portal/public/RoleEtendu?action=doDocpaDetails&backto=/wps/portal/public&id=5654#> [accessed 09.05.2014].

<sup>143</sup> Administrative Court, n°25559 of 2 April 2009.

<sup>144</sup> First instance Administrative Court, 1<sup>st</sup> Chamber, n°27321 of 4 October 2010.

<sup>145</sup> Administrative Court, n° 25559C of 2 April 2009. The court said: « Considérant que la Cour estime que la situation provisoire actuelle du centre de séjour fonctionnant dans l'enceinte du centre pénitentiaire ne sera à terme pas conforme à la notion de structure fermée telle que visée par le législateur à travers l'article 120 (1) de la loi du 29 août 2008 et devra être résorbée par la mise en place effective d'une structure fermée en dehors de l'enceinte du centre pénitentiaire dans un délai raisonnable de deux ans à compter de l'entrée en vigueur, le 1er octobre 2008, de ladite loi du 29 août 2008, soit concrètement jusqu'au 1er octobre 2010 ;

Considérant que dans l'entre-temps, jusqu'au 1er octobre 2010, la Cour est amenée à estimer que le centre de séjour fonctionnant provisoirement dans l'enceinte du centre pénitentiaire est à qualifier de structure fermée répondant en son principe aux exigences de l'article 120 (1) de la loi du 29 août 2008... »

<sup>146</sup> Administrative Court, n° 27345 of 15 October 2010.

<sup>147</sup> Administrative Court, n° 27345 of 15 October 2010. The court said: « S'il est à déplorer que notamment le maître de l'ouvrage public n'arrive manifestement pas à voir ériger un centre de rétention autonome dans un délai raisonnable s'étendant sur deux ans, il n'en reste pas moins que le délai mis en compte à travers l'arrêt du 2 avril 2009 ne s'entendait en délai ni préfixe, ni impératif mais en durée adéquate, non excessive, compte tenu des principes en cause, et devant permettre un passage utile du Centre de séjour provisoire vers le Centre de rétention autonome en construction. »

<sup>148</sup> The Luxembourg Penitentiary Centre only has an exclusive unit for women (Block F); therefore it was not possible to place irregular migrant women in this section, as that would have been a clear violation of Article 16 (1) of the Return Directive.

<sup>149</sup> External control team of the Ombudsman, Interview, 08.04.2014.

<sup>150</sup> Caritas, Phone Interview, 07.05.2014.

<sup>151</sup> Global Detention Project, Luxembourg Detention Profile, Geneva 2010.

<sup>152</sup> Detention Centre, Interview, 01.04.2014.

<sup>153</sup> Detention Centre, Interview, 01.04.2014.

<sup>154</sup> Prison Chaplain, Phone interview, 07.05.2014 and Detention Centre, Phone interview, 06.05.2014.

<sup>155</sup> Detention Centre, Interview, 01.04.2014.

<sup>156</sup> Prison Chaplain, Phone interview, 07.05.2014 and Detention Centre, Phone interview, 06.05.2014.

<sup>157</sup> Detention Centre, Interview, 01.04.2014.

<sup>158</sup> Article 20 of the Law of 28 May 2009 and Article 29 of the Grand-Ducal Regulation of 17 August 2011.

<sup>159</sup> Article 2 (2) and 3 (2) of the Law of 28 May 2009 and Detention Centre, Interview, 01.04.2014.

<sup>160</sup> Detention Centre, Interview, 01.04.2014.

<sup>161</sup> Ombudsman 2014. *Rapport du contrôleur externe relatif au Centre de rétention*, Luxembourg, p.29.

<sup>162</sup> Detention Centre, Phone interview, 06.05.2014.

<sup>163</sup> Detention Centre, Interview, 01.04.2014.

<sup>164</sup> Article 6 (1) of the Law of 28 May 2009.

<sup>165</sup> Article 7 of the Grand-Ducal Regulation of 17 August 2011.

<sup>166</sup> Detention Centre, Interview, 01.04.2014.

<sup>167</sup> Detention Centre, Interview, 01.04.2014.

<sup>168</sup> Directorate of Immigration, Interview, 02.04.2014.

<sup>169</sup> Article 6 (3) of the Law of 28 May 2009.

<sup>170</sup> Article 125bis (2) of the amended Law of 29 August 2008.

<sup>171</sup> Article 6 (3) of the Law of 28 May 2009.

<sup>172</sup> Detention Centre, Phone interview, 06.05.2014.

<sup>173</sup> Article 6 (2) of the Law of 28 May 2009.

<sup>174</sup> Detention Centre, Interview, 01.04.2014.

<sup>175</sup> Article 120 (1) of the amended Law of 29 August 2008.

<sup>176</sup> Detention Centre, Interview, 01.04.2014.

<sup>177</sup> Article 13 (1) of the Law of 28 May 2009.

<sup>178</sup> Rule n°4 of the Holding Centre rules and regulations (Internal Rules of the Detention Centre).

<sup>179</sup> Detention Centre, Phone interview, 06.05.2014.

<sup>180</sup> Article 13 (2) of the Law of 28 May 2009.

<sup>181</sup> Article 13 (3) of the Law of 28 May 2009.

<sup>182</sup> Rule n°21. of the Holding Centre rules and regulations.

<sup>183</sup> Article 15 of the Law of 28 May 2009.

<sup>184</sup> Article 15 (1) of the Law of 28 May 2009.

<sup>185</sup> Article 22 of the Grand-Ducal Regulation of 17 August 2011.



<sup>186</sup> Detention Centre, Interview, 01.04.2014.

<sup>187</sup> Article 23 of the Grand-Ducal Regulation of 17 August 2011 and Ombudsman 2014. *Rapport du contrôleur externe relatif au Centre de rétention*, Luxembourg, p.32.

<sup>188</sup> Detention Centre, Interview, 01.04.2014.

<sup>189</sup> Article 27 of the Grand-Ducal Regulation of 17 August.

Amnesty International, ASTI, Caritas, ACAT, CLAE and the Red Cross have an agreement as legal entities. Some 50 individual visitors from these NGOs are allowed to access the Center.

<sup>190</sup> LU EMN NCP answer to EMN Ad-hoc Query on Access to detention centres, requested by FR EMN NCP on 11 June 2013.

<sup>191</sup> LU EMN NCP answer to EMN Ad-hoc Query on Access to detention centres, requested by FR EMN NCP on 11 June 2013.

<sup>192</sup> LU EMN NCP answer to EMN Ad-hoc Query on Access to detention centres, requested by FR EMN NCP on 11 June 2013.

<sup>193</sup> Ombudsman 2014. *Rapport du contrôleur externe relatif au Centre de rétention*, Luxembourg, p.32.

<sup>194</sup> Detention Centre, Interview, 01.04.2014.

<sup>195</sup> Article 14 (1) of the Law of 28 May 2009.

<sup>196</sup> Rule n°17 of the Holding Centre rules and regulations.

<sup>197</sup> Article 14 (2) of the Law of 28 May 2009.

<sup>198</sup> Article 24 of the Grand-Ducal Regulation of 17 August 2011.

<sup>199</sup> Detention Centre, Interview, 01.04.2014.

<sup>200</sup> Detention Centre, Interview, 01.04.2014.

<sup>201</sup> Detention Centre, Interview, 01.04.2014.

<sup>202</sup> Article 12 (3) of the Law of 28 May 2009, Article 11 of the Grand-Ducal Regulation of 17 August and Rule n°16 of the Holding Centre rules and regulations.

<sup>203</sup> Detention Centre, Interview, 01.04.2014.

<sup>204</sup> Detention Centre, Interview, 01.04.2014.

<sup>205</sup> The Ombudsman was surprised by this rule, as there will be a risk of absconding after those 24 hours. See: Ombudsman 2014. *Rapport du contrôleur externe relatif au Centre de rétention*, Luxembourg, p.41.

<sup>206</sup> Article 2 (1) of the Law of 28 May 2009.

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<sup>207</sup> Article 7 (3) of the Law of 28 May 2009.

<sup>208</sup> Detention Centre, Interview, 01.04.2014.

<sup>209</sup> Article 123 of the amended Law of 29 August 2008.

<sup>210</sup> Article 7 (3) of the Law of 28 May 2009.

<sup>211</sup> Detention Centre, Interview, 01.04.2014.

<sup>212</sup> Article 7 (3) of the Law of 28 May 2009.

<sup>213</sup> Detention Centre, Phone interview, 06.05.2014.

<sup>214</sup> Detention Centre, Interview, 01.04.2014.

<sup>215</sup> Article 9 of the Law of 28 May 2009.

<sup>216</sup> Detention Centre, Interview, 01.04.2014.

<sup>217</sup> Ombudsman 2014. *Rapport du contrôleur externe relatif au Centre de rétention*, Luxembourg, p.40.

<sup>218</sup> Article 12 of the Grand-Ducal Regulation of 17 August 2011.

<sup>219</sup> Detention Centre, Interview, 01.04.2014.

<sup>220</sup> Article 13 of the Grand-Ducal Regulation of 17 August 2011.

<sup>221</sup> Ombudsman 2014. *Rapport du contrôleur externe relatif au Centre de rétention*, Luxembourg, p.42 and 43.

<sup>222</sup> Article 7 (2) of the Law of 28 May 2009.

<sup>223</sup> Detention Centre, Interview, 01.04.2014.

<sup>224</sup> Article 6 (1) of the Law of 28 May 2009.

<sup>225</sup> Detention Centre, Interview, 01.04.2014.

<sup>226</sup> Detention Centre, Interview, 01.04.2014.

<sup>227</sup> Article 29 of the Grand-Ducal Regulation of 17 August 2011.

<sup>228</sup> Article 125 (1) of the amended Law of 29 August 2008.

<sup>229</sup> Article 125 (1) of the amended Law of 29 August 2008.

<sup>230</sup> Article 125 (1) of the amended Law of 29 August 2008.

<sup>231</sup> Directorate of Immigration, Interview, 13.05.2013.

<sup>232</sup> Detention Centre, Interview, 01.04.2014.

<sup>233</sup> Governmental Programme 2014, Luxembourg, p.204, <http://www.gouvernement.lu/3322796/Programme-gouvernemental.pdf> [accessed 22.04.2014].

<sup>234</sup> Article 125 (1) of the amended Law of 29 August 2008.

<sup>235</sup> Article 125 (1) of the amended Law of 29 August 2008.

<sup>236</sup> Article 125 (1) of the amended Law of 29 August 2008.

<sup>237</sup> Article 133 of the amended Law of 29 August 2008.

<sup>238</sup> Article 111 (3) c) 6. of the Law of 29 August 2008 and Directorate of Immigration, Interview, 02.04.2014.

<sup>239</sup> Directorate of Immigration, Interview, 02.04.2014.

<sup>240</sup> First instance Administrative Court, 2<sup>nd</sup> Chamber, n° 29567 of 15 December 2011.

<sup>241</sup> Parliamentary document, n° 6218/04 of 28 April 2011.

<sup>242</sup> Attorney at Law specialised in migration, Phone interview, 06.05.2014.

<sup>243</sup> Parliamentary document, n°6218/01 of 22 December 2010.

<sup>244</sup> Article 125 (1) of the Law of 29 August 2008.

<sup>245</sup> See First instance Administrative Court, 3<sup>rd</sup> Chamber, n°30713 of 29 June 2012.

<sup>246</sup> See Section 5, Question 1, residence requirements.

<sup>247</sup> Parliamentary document, n°6218/02 of 08 March 2011,  
[http://www.chd.lu/wps/PA\\_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/089/938/098387.pdf](http://www.chd.lu/wps/PA_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/089/938/098387.pdf)  
[accessed 13.05.2014].

<sup>248</sup> Motion 2 introduced by Xavier Bettel during the open session of 09.06.2011,  
[http://www.chd.lu/wps/PA\\_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/118/018/101177.pdf](http://www.chd.lu/wps/PA_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/118/018/101177.pdf)  
[accessed 13.05.2014].

<sup>249</sup> Directorate of Immigration, Interview, 02.04.2014.

<sup>250</sup> Judicial Police, Foreigners Service, Interview, 02.04.2014.

<sup>251</sup> Article 125 (1) of the amended Law of 29 August 2008.

<sup>252</sup> Directorate of Immigration, Interview, 02.04.2014.

<sup>253</sup> Article 125 (1) of the amended Law of 29 August 2008.

<sup>254</sup> Article 125 (1) of the amended Law of 29 August 2008.

<sup>255</sup> Article 125 (1) of the amended Law of 29 August 2008.

<sup>256</sup> Detention Centre, Interview, 01.04.2014.

<sup>257</sup> Directorate of Immigration, Interview, 01.04.2014. See also First instance Administrative Court, 3<sup>rd</sup> Chamber n° 34306 and 34308 of 9 April 2014.

<sup>258</sup> Information provided by the Directorate of Immigration.

<sup>259</sup> Article 22 (1) of the amended Law of 5 May 2006.

<sup>260</sup> Article 100 (1) in relation with 111 (2) of the amended Law of 29 August 2008.

<sup>261</sup> Article 116 (1) of the amended Law of 29 August 2008.

<sup>262</sup> Article 111 (1) of the amended Law of 29 August 2008.

<sup>263</sup> Article 112 (1) of the amended law of 29 August 2008.

<sup>264</sup> Directorate of Immigration, Press Conference of 13 February 2013, *Bilan de l'année 2013*, Luxembourg, p. 22, <http://www.gouvernement.lu/3508079/bilan.pdf> [accessed 13.05.2014].

<sup>265</sup> Direction de l'immigration, Press Conference of 13 February 2013, *Bilan de l'année 2013*, Luxembourg, p. 22.

<sup>266</sup> Directorate of Immigration, Interview, 08.05.2014.

<sup>267</sup> Article 119 (2) of the amended Law of 29 August 2008.

<sup>268</sup> Information provided by the Detention Centre.

<sup>269</sup> Information provided by the Detention Centre.

<sup>270</sup> Information provided by the Detention Centre.

<sup>271</sup> Draft Budget 2013, Grand-Ducal Decree of 1 October 2012 authorising the submission to the Chamber of Deputies of the Bill on the budget of revenues and expenditures of the State for the year 2013, pp.60-61, <http://www.igf.etat.lu/pb2013.pdf> [accessed 23.04.2014].

<sup>272</sup> Ombudsman 2014. *Rapport du contrôleur externe relatif au Centre de rétention*, Luxembourg.

<sup>273</sup> Administrative Court, n°29856 of 16 February 2012.

<sup>274</sup> First instance Administrative Court, 3<sup>rd</sup> Chamber, n° 30008 of 23 March 2012. The court said: « Par ailleurs, c'est à tort que le demandeur soutient que le fait de le soumettre au port de menottes violerait l'article 7 de la CEDH. En effet, contrairement à ce que soutient le

demandeur, le port des menottes auquel il a, le cas échéant, pu être soumis lors de l'exécution de la mesure de placement ne constitue pas une peine, de sorte que le moyen tiré d'une violation de l'article 7 de la CEDH consacrant le principe de la légalité des délits et des peines est à rejeter comme inopérant. Le demandeur fait également valoir que le port des menottes auquel il aurait été soumis en l'espèce serait contraire à l'article 3 de la CEDH et constituerait une mesure disproportionnée, en ce qu'il créerait un sentiment d'infériorité et d'angoisse et constituerait une atteinte à sa dignité, puisqu'il aurait subi le même régime que les détenus de droit commun. L'article 3 de la CEDH dispose que : « *Nul ne peut être soumis à la torture ni à des peines ou traitements inhumains ou dégradants.* » La Cour européenne des droits de l'homme a posé le principe selon lequel seul un mauvais traitement revêtant un minimum de gravité est à considérer comme acte de torture ou de traitement inhumain et dégradant. L'intensité de la souffrance infligée constitue donc un critère d'application de l'article 3 de la CEDH et donc un élément définissant les notions de torture et de traitement inhumain et dégradant. Au-delà du constat que la mise de menottes constitue une modalité d'exécution de la mesure de placement qui n'est pas de nature à affecter la légalité de la mesure de placement en tant que telle, il convient de relever que s'il ne saurait être nié que le port des menottes lors de la mise en rétention est intrinsèquement humiliant, il convient cependant de relever qu'il ne revêt pas un caractère de gravité tel qu'il serait contraire à l'article 3 de la CEDH. Cette pratique, tout comme d'ailleurs les fouilles corporelles auxquelles une personne faisant l'objet d'une mesure de rétention doit se soumettre au moment de son entrée au Centre de rétention, est une mesure de sécurité et de précaution qui ne saurait affecter la légalité de la mesure de placement. »

See also Administrative Court n°29856 of 16 February 2012.

<sup>275</sup> Governmental Programme, Luxembourg, p.202.

<sup>276</sup> First instance Administrative Court, 2nd Chamber, n°29525 of 5 December 2011.

<sup>277</sup> First instance Administrative Court, n° 25524 of 24 March 2009 and Administrative Court n° 25559C of 2 April 2009.

<sup>278</sup> First instance Administrative Court, n° 25524 of 24 March 2009 The court said: « Il échet tout d'abord de relever que l'Etat n'a pas pris position sur les conditions dans lesquelles Monsieur ... est retenu au centre de séjour provisoire pour étrangers en situation irrégulière situé dans les bâtiments du centre pénitentiaire de Luxembourg à Schrassig et qu'il n'a pas contesté l'affirmation du demandeur suivant laquelle il y subit un traitement identique sinon largement similaire à celui des délinquants de droit commun. Au vu de cette situation de fait et de la personne de l'étranger visé par la décision litigieuse, à qui il n'est pas reproché d'avoir commis une infraction pénale, mais uniquement de se trouver en situation irrégulière sur le territoire luxembourgeois en raison de son défaut de disposer des autorisations de séjour légalement requises, le traitement ainsi réservé à Monsieur ... est à considérer comme constituant un traitement dégradant dans son chef. En effet, le traitement auquel Monsieur ... est ainsi soumis peut valablement être ressenti par lui comme étant de nature à l'humilier gravement devant autrui et à le soumettre à un discrédit social. Dans la mesure où il ne se dégage pas des pièces et éléments du dossier qu'un autre traitement est susceptible d'être réservé à Monsieur ... au sein dudit centre de séjour, et au vu du fait que les traitements que subit Monsieur ... dans ledit centre sont contraires à l'article 3 de la CEDH, il y a lieu d'ordonner la libération immédiate de Monsieur ... dudit centre, en considération également du fait qu'à la connaissance du tribunal, il n'existe pas d'autres structures fermées créées ou gérées par l'Etat dans lesquelles Monsieur ... pourrait être transféré. » This decision was revoked by the Administrative Court n° 25559C of 2 April 2009. The Court said : Considérant que la Cour ayant été amenée, d'un côté, compte tenu de la situation provisoire par elle dégagee, à qualifier le centre de séjour comme rentrant en l'état, sous les prévisions de l'article 120 (1) de la loi du 29 août 2008 et, d'un autre côté, à déclarer non fondé le moyen

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tendant à une violation de l'article 3 CEDH en raison d'un traitement dégradant, il y a lieu à réformation du jugement entrepris sous ces différents aspects et à déclaration du recours initial non fondé y relativement ;

Considérant que pour le surplus, il convient de retenir que les deux premiers moyens, auxquels l'intimé ne fait que renvoyer en instance d'appel, sans y ajouter un quelconque élément ni prendre position au volet du jugement entrepris les toisant ont été rencontrés par les premiers juges suivant un argumentaire auquel la Cour se rallie »

<sup>279</sup> Information provided by the Detention Centre.

<sup>280</sup> Information provided by the Detention Centre.

<sup>281</sup> Also, in its report the Ombudsman criticises that both laws, the Asylum Law and the Immigration Law, foresee different lengths of detention and recommends to harmonise both laws. The circumstances that lead to a placement in detention according to either of the laws do not justify the differences in the lengths of detention. Ombudsman 2014. *Rapport du contrôleur externe relatif au Centre de rétention*, Luxembourg, p.10, p.17 and p.18.

Even though the two laws concern two objectively different categories of persons, it is arguable that this difference is discriminatory as the placement decision of a person detained on the base of the Immigration Law is re-evaluated every month and the person receives the possibility to appeal each month against the decision, whereas the placement decision of someone detained on the basis of the Asylum Law only gets re-evaluated after three months and can appeal only every three months. A person could thereupon decide against lodging an application for international protection to avoid staying longer in detention. Detention Centre, Interview, 02.04.2014.

<sup>282</sup> The detention centre opened 22 August 2011, before the detention took place in the Luxembourgish Penitentiary Centre in Schrassig.