# Questionnaire of the Special Rapporteur on the human rights of migrants:

# Ending immigration detention of children and seeking adequate reception and care for them

Questions:

**1. Please provide information on any legislation or policy that prohibits or restricts the use of immigration detention of children and their families in your country. Grateful if you could kindly submit the original text of the legislation or policy, accompanied by an English translation if it is in a language other than English, French or Spanish.**

Unaccompanied minors under 15 years are not detained according to the Act on Residence of Foreign Nationals[[1]](#footnote-1). They are placed directly into the care of specialized Facility for Children of Foreign Nationals. Unaccompanied minor aged 15 and over may be detained for the purpose of administrative expulsion only if there is a well-founded risk that s/he might pose a risk to state security or represents a serious threat to public policy and in case it is in his/her interest according to the Convention on the Rights of the Child[[2]](#footnote-2). The reasons to detain an unaccompanied minor are therefore fewer than to detain an adult, but the detention of unaccompanied minors is not prohibited under Czech law. However, in cases of doubts about the age of a foreigner claiming to be an unaccompanied minor, s/he might be detained until the age assessment procedure is conducted under the same conditions as an adult. This rule applies until the end of age assessment.[[3]](#footnote-3) Therefore, there is no benefit of doubt applied until the age assessment procedure is over. In past, if a potential unaccompanied minor was detained for the time period until the age assessment procedure was conducted, s/he was placed in the detention facility in Bela Jezova, which was designated for vulnerable persons. Recently, we encountered cases where the minor was placed in the detention facility in Balkova for adult men even in case there were still doubts about his/her age. If the results of age assessment are not conclusive, the foreigner is treated as an unaccompanied minor.

According to Section 125 (1) of the Act on Residence of Foreign Nationals, the detention period of a migrant younger than 18 years shall not exceed 90 days (for adults it is 180 days).

Minors accompanied by parents or other legal guardians are placed into facilities for the detention of foreign nationals together with their parents if a detention order was issued to parents.[[4]](#footnote-4) The placement of these alien minors in detention is not limited by age. According to Act on Residence of Foreign Nationals the minor is not formally detained (s/he is accommodated together with an adult person) even if according to the case law this constitutes *de facto* deprivation of liberty[[5]](#footnote-5). The minor may leave the detention facility if his/her care has been ensured by any other manner with the written consent of his/her statutory representative.[[6]](#footnote-6) If this is not possible (that might be a case of lot of families with no other ties to the territory), the minor is in fact forced to stay with his/her parent or another legal guardian in the detention facility.

Please see below the relevant legal provisions of Act on Residence of Foreign Nationals.

**2. Please provide information on existing non-custodial alternatives to immigration detention of children in your country (e.g. community-based reception solutions) and elaborate how these alternatives effectively enhance the protection of the rights of migrant children and their families.**

In general, the police may detain a foreign national if the imposition of non-custodial measures (called “special measures”) is not sufficient.[[7]](#footnote-7) According to 123b of Act on Residence of Foreign Nationals, there are four „special measures“: 1) an obligation to provide the address of one’s place of residence to the police, to reside at that address, and to report any change of the address to the police on the following working day; 2) an obligation to report in person at a police station within a time limit stipulated by police on a regular basis; 3) an obligation to provide a security deposit and 4) an obligation to stay at a place designated by police.

An obligation to stay at a place designated by police is a new alternative that was put into effect on 1 August 2019.[[8]](#footnote-8) According to the explanatory memorandum, it is a non-custodial alternative that was designed especially for the families with children that may be carried out for example in a reception centre.

In general, the non-custodial alternatives are not commonly applied in the Czech Republic. According to the statistics provided by the police, in 2017 the non-custodial measure was applied in 75 cases (number of detention decisions reached 644). In 2018 the non-custodial measure was applied in 92 cases (number of detention decisions was 707). In 2019 (only in period January–May) the non-custodial measure was applied in 39 cases (number of detention decisions reached 337). Those statistics include all foreign nationals, not only minors. For minors, the police provided an information, that in 2019, no alternative measure was imposed to minor foreign nationals. [[9]](#footnote-9) However, it is necessary to stress that the total numbers for unaccompanied minors are rather low. For example, in 2018, 29 unaccompanied minors were placed in the Facility for Children of Foreign Nationals. Unfortunately, we do not have any statistics available for children “accommodated” in detention facilities with their parents or guardians.

Only the residence restrictions and reporting obligations are used in practice. The security deposit is not used at all. The obligation to stay at a place designated by police is a rather new non-custodial measure and we are not aware of any case where this would be applied. For 2019, the police provided information that it had not been applied in any case.[[10]](#footnote-10)

As alternatives to the detention of minors and families with children are rarely used, they do not effectively enhance the protection of the rights of migrant children and their families. The highest potential to fulfil this role, mostly for the families with children, has the possibility to impose an obligation to stay at a place designated by police on migrants. However, this is a rather new alternative and there are no cases enabling to assess the effectiveness of this non-custodial measure.

3. **Please provide information on any existing good practices or measures taken in your country to protect the human rights of migrant children and their families while their migration status is being resolved, including inter alia their rights to liberty, family life, health and education (e.g. by ensuring effective access to inter alia adequate reception, healthcare, education, legal advice, family reunion).**

It is necessary to stress that the Ombudsman´s office receives normally information only about what is problematic and is rarely informed about best practices. Therefore, we do not have to be informed about all existing good practices.

What can be perceived as a good practice in the Czech Republic with regards to unaccompanied minors is the easier way to get a residence permit as they have a possibility to be granted permanent residence permit even after reaching majority. A foreign national under 18 years of age entrusted to foster care by a decision of a court is entitled to reside permanently in the Czech Republic, if at least one natural person, to whom the foreign national has been entrusted, is in possession of the permanent residence permit in the Czech Republic or if the institution in which the foreign national has been placed is based in the Czech Republic.[[11]](#footnote-11) After reaching 18 years of age the foreign national entrusted to foster care can apply within 60 days for a permanent residence permit for humanitarian reasons.[[12]](#footnote-12) Therefore unaccompanied minors do not face deportation upon reaching 18 years of age and unless they would qualify for being granted refugee status, it is usually more preferable for them to apply for a permanent residence permit. Furthermore, unaccompanied minors have easier access to being granted Czech citizenship. A child in foster care staying on the territory of the Czech Republic may acquire the citizenship of the Czech Republic by declaration.[[13]](#footnote-13)

Secondly, with respect to ensuring effective access to rights while awaiting a migration status, there is an improvement in access to education. While there were problems with compulsory school attendance in 2018, in 2019 Refugees Facilities Administration of the Ministry of the Interior managed to find the solution and after communication with schools, they secured places for children that have an obligation to attend school.

**4. Please indicate any challenges and/or obstacles in the development and/or implementation of non-custodial alternatives to immigration detention of children and their families.**

The first challenge that is the precondition of elimination of detention of minors as well as the precondition of better implementation of non-custodial challenges is linked to the proper age assessment of unaccompanied minors. In recent years the Ombudsman´s office paid particular attention to the age assessment of unaccompanied minors when there are doubts about the alleged minority. The age assessment conducted by the police was found intrusive, but at the same time unreliable as only medical examinations, often using radiation, were applied. In cooperation with the Ministry of the Interior and UNHCR, there was a pilot project of conducting holistic, multi-disciplinary age assessment in cooperation with psychologists and other experts on countries from which unaccompanied minors usually arrive in the Czech Republic. Unfortunately, only a few psychological reports were elaborated and the Ministry of the Interior, as well as the police, seems to use only medical examination again. This situation is a subject of on-going ombudsman´s examination. What can be perceived as problematic is also the fact that there is no benefit of doubt for alleged minors. Therefore, alleged minors can be treated and detained as adults even if there is a doubt about their age.

The second challenge is the fact that non-custodial alternatives are rarely used, even for vulnerable groups such as families with children. As the Czech Republic is a rather transit country, for police or Ministry of the Interior the risk of absconding (and therefore detention of migrant) often prevails over a non-custodial measure. This is the case also for families with children or for alleged unaccompanied minors, for example with the medical results just around the age of majority. The obstacles in implementation of non-custodial alternatives are therefore linked to the general conviction about their ineffectiveness. Until 2019, a major obstacle was a fact, that “special measures” provided by Act on Foreign Nationals were designated mostly for migrants with stronger ties to the territory or migrants with sufficient resources. The legislator solved this problem by adding a new non-custodial measure, an obligation to stay at a place designated by police. However, according to our information, this measure has not been applied yet.

**5. What support could other stakeholders (other than your Government) provide to strengthen the development and/or implementation of non-custodial alternatives to immigration detention of children and their families that enhance the protection of their rights?**

Considering the low rate of implementation of non-custodial alternatives in the Czech Republic, the most important support from other stakeholders can be given by non-governmental organizations (or lawyers in general) providing legal assistance and legal representation. While there are also the Ombudsman´s on-going examinations related to the implementation of non-custodial measures, the most effective way to increase the use of alternatives to detention seems to be through judicial review of decisions on administrative detention. Timely and qualified legal assistance is crucial to the prospect of success of the judicial review.

# Relevant provisions from Act on Residence of Foreign Nationals (attachment to the question 1):

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| § 124  (1) Policie je oprávněna zajistit cizince staršího 15 let, jemuž bylo doručeno oznámení o zahájení řízení o správním vyhoštění anebo o jehož správním vyhoštění již bylo pravomocně rozhodnuto nebo mu byl uložen jiným členským státem Evropské unie zákaz vstupu platný pro území členských států Evropské unie a nepostačuje uložení zvláštního opatření za účelem vycestování, pokud  a) je nebezpečí, že by cizinec mohl ohrozit bezpečnost státu nebo závažným způsobem narušit veřejný pořádek,  b) je nebezpečí, že by cizinec mohl mařit nebo ztěžovat výkon rozhodnutí o správním vyhoštění, zejména tím, že v řízení uvedl nepravdivé údaje o totožnosti, místě pobytu, odmítl tyto údaje uvést anebo vyjádřil úmysl území neopustit nebo pokud je takový úmysl zjevný z jeho jednání,  c) cizinec nevycestoval z území v době stanovené v rozhodnutí o správním vyhoštění,  d) cizinec závažným způsobem porušil povinnost uloženou mu rozhodnutím o uložení zvláštního opatření za účelem vycestování, nebo  e) je cizinec evidován v informačním systému smluvních států.  […]  (3) Policie v rozhodnutí o zajištění stanoví dobu trvání zajištění s přihlédnutím k předpokládané složitosti přípravy výkonu správního vyhoštění. Při stanovení doby trvání zajištění je policie povinna zohlednit případy nezletilých cizinců bez doprovodu a rodin či jiných osob s dětmi. Je-li to nezbytné k pokračování přípravy výkonu správního vyhoštění, je policie oprávněna dobu trvání zajištění prodloužit, a to i opakovaně. […]  […]  (5) Je-li rozhodováno o zajištění nezletilého cizince bez doprovodu (§ 180c) nebo nezletilého cizince v obdobném postavení, ustanoví mu policie neprodleně opatrovníka. Policie o ustanovení opatrovníka nezletilého cizince bez doprovodu vyrozumí a poučí jej o úkolech opatrovníka.  (6) Policie je oprávněna zajistit nezletilého cizince bez doprovodu, pouze je-li důvodné nebezpečí, že by mohl ohrozit bezpečnost státu nebo závažným způsobem narušit veřejný pořádek, a je-li to v jeho zájmu v souladu s Úmluvou o právech dítěte. V případě důvodné pochybnosti, že jde o nezletilého cizince bez doprovodu, je policie oprávněna cizince zajistit z důvodů uvedených v odstavci 1 do doby, než je zjištěn jeho skutečný věk. Policie zahájí úkony ke zjištění věku nezletilého cizince bez doprovodu bezodkladně po jeho zajištění. Odmítne-li nezletilý cizinec bez doprovodu provedení úkonů ke zjištění věku, hledí se na něj jako na zletilého cizince. Pokud výsledky zjišťování věku nejsou průkazné, hledí se na cizince jako na nezletilého cizince bez doprovodu.  (7) O možnosti provedení úkonů ke zjištění věku, o způsobu a důsledcích jejich provedení a následcích jejich odmítnutí informuje policie nezletilého cizince bez doprovodu v mateřském jazyce nebo v jazyce, ve kterém je schopen se dorozumět. | Section 124  (1) The police shall be entitled to detain a foreign national aged over 15 years to whom a notice on commencement of administrative expulsion procedure has been duly served or in relation to whom a final and conclusive decision on administrative expulsion has been taken or to whom a travel ban valid for the territory of European Union Member States has been imposed by another Member State of the European Union, where the imposition of a special measure for the purpose of leaving the country is insufficient  a) there is a risk that s/he might endanger the security of the state, might seriously disrupt public order,  b) might obstruct or hinder the execution of the decision on administrative expulsion, mostly by claiming false information regarding identity, residence, refusing to provide such information or by expressing of intent not to leave the territory or in case such intent was evident for his/her conduct,  c) the foreigner did not leave the territory within the period set out in the decision on administrative expulsion  d) the foreigner has seriously violated the obligation imposed on him by a special measure for the purposes of the return decision or  e) the foreigner is registered in the Information System of the Contracting States  […]  (3) The police shall set a period of detention taking account of the expected complexity of the preparation of execution of administrative expulsion. While setting a period of detention, the police shall take account of the cases of unaccompanied migrants and families or others with children. If it is necessary for the continuation of the preparation of execution of administrative expulsion, the police may extend the period of detention, even repeatedly. […]  […]  (5) If an unaccompanied minor foreign national is detained (Section 180c) the police shall appoint a guardian for him/her. The police shall forthwith inform a minor foreign national thereof and instruct him/her on their guardian’s tasks.  (6) The police is authorized to detain unaccompanied minor, only if there is a well-founded risk that s/he might pose a risk to state security or represents a serious threat to public policy and in case it is in his/her interest according to the Convention on the Rights of the Child. In cases of doubts about the age of a foreigner claiming to be an unaccompanied minor, s/he might be detained until the age assessment procedure is conducted. The police initiates an age assessment procedure immediately after the detention of unaccompanied minor. If an unaccompanied minor refuses an age assessment procedure, s/he is treated as an adult. If the results of age assessment are not conclusive, the foreigner is treated as an unaccompanied minor.  (7) The police shall inform an unaccompanied minor about the possibility to conduct age assessment procedure, about the manner an age assessment procedure is performed and about the consequences of a refusal to undergo the procedure in a mother tongue, or in a language in which the foreign national is able to communicate. |
| § 125  (1) Doba zajištění nesmí překročit 180 dnů a počítá se od okamžiku omezení osobní svobody. V případě cizince mladšího 18 let nebo rodiny s nezletilými dětmi nesmí doba zajištění překročit 90 dnů.  […] | Section 125  (1) The duration of detention must not exceed 180 days and it starts running from the moment of restriction of personal liberty of the foreign national concerned. In the case of foreign national younger than 18 years or families with minor children, the period of detention must not exceed 90 days.  […] |
| § 129  (1) Nelze-li účinně uplatnit zvláštní opatření za účelem vycestování, policie zajistí na dobu nezbytně nutnou cizince, který neoprávněně vstoupil nebo pobýval na území, za účelem jeho předání podle mezinárodní smlouvy sjednané s jiným členským státem Evropské unie přede dnem 13. ledna 2009 nebo přímo použitelného právního předpisu Evropské unie; policie na dobu nezbytně nutnou zajistí i prováženého cizince v případě, že jeho průvoz nelze z objektivních důvodů dokončit bez nutné přestávky.  […]  (5) Policie je oprávněna zajistit nezletilého cizince bez doprovodu, pouze je-li důvodné nebezpečí, že by mohl ohrozit bezpečnost státu či závažným způsobem narušit veřejný pořádek, a je-li to v jeho zájmu v souladu s Úmluvou o právech dítěte. Policie je oprávněna v případě důvodné pochybnosti, že jde o nezletilého cizince bez doprovodu, takového cizince zajistit do doby, než je zjištěn jeho skutečný věk. Policie zahájí úkony ke zjištění věku nezletilého cizince bez doprovodu bezodkladně po jeho zajištění. Odmítne-li nezletilý cizinec bez doprovodu provedení úkonů ke zjištění věku, hledí se na něj jako na zletilého cizince. Pokud výsledky zjišťování věku nejsou průkazné, hledí se na cizince jako na nezletilého cizince bez doprovodu.  (6) O možnosti provedení úkonů ke zjištění věku, o způsobu a důsledcích jejich provedení a následcích jejich odmítnutí informuje policie nezletilého cizince bez doprovodu v mateřském jazyce nebo v jazyce, ve kterém je schopen se dorozumět.  […] | Section 129  (1) Where the imposition of a special measure for the purpose of leaving the country is insufficient, the police shall detain a foreign national who has entered or stayed on the territory illegally for the period of time necessarily required in order to secure transfer procedures in accordance with an international treaty concluded with another Member State of the European Union before 13 January 2009 or with the directly applicable legislation of the European Union. Police shall also, for the necessary period, detain a foreign national who is transited throughout the territory, if such transit cannot be carried out without a necessary break.  […]  (6) Police is authorized to detain unaccompanied minor, only if there is a well-founded risk that s/he might pose a risk to state security or represents a serious threat to public policy and in case it is in his/her interest according to the Convention on the Rights of the Child. In cases of doubts about the age of a foreigner claiming to be an unaccompanied minor, s/he might be detained until the age assessment procedure is conducted. Police initiates wan age assessment procedure immediately after the detention of unaccompanied minor. If an unaccompanied minor refuses an age assessment procedure, s/he is treated as an adult. If the results of age assessment are not conclusive, the foreigner is treated as an unaccompanied minor.  (7) The police shall inform an unaccompanied minor about the possibility to conduct age assessment procedure, about the manner an age assessment procedure is performed and about the consequences of a refusal to undergo the procedure in a mother tongue, or in a language in which the foreign national is able to communicate. |
| § 140  (1) Provozovatel je oprávněn ubytovat v části s mírným režimem cizince, vůči kterému má zajištěný cizinec vyživovací povinnost nebo jej má v péči, nelze-li zajistit péči o něj jiným způsobem (dále jen "ubytovaný cizinec"). Ubytovanému cizinci poskytne stravu a další služby jako zajištěnému cizinci. Je-li ubytovaný cizinec schopen uvědomit si omezení spojená s pobytem v zařízení, přihlíží se k projevu jeho vůle.  (2) Ubytovaný cizinec může zařízení opustit, má-li zajištěnu péči jiným způsobem. Jde-li o nezletilého nebo osobu s omezenou svéprávností, může opustit zařízení jen po písemném souhlasu zákonného zástupce.  […] | Section 140  (1)The facility operator shall be entitled to accommodate in the open part a foreign national in relation to whom the detained foreign national has the duty to support and maintain or who is in the custody of the detained foreign national, if the care for the foreign national concerned cannot be arranged for in any other manner (hereinafter referred to as an ‘accommodated foreign national’). An accommodated foreign national shall be provided with meals and other services as a detained foreign national. If an accommodated foreign national is able to understand the consequences of being placed in the detention facility the expression of his/her volition shall be taken into account.  (2) An accommodated foreign national may leave the detention facility if his/her care has been ensured in any other manner. If an accommodated foreign national is a minor or a person without any legal capacity, such person can leave the detention facility only with the written consent of his/her statutory representative  […] |

1. Section 124 (1) of Act No. 326/1999 Coll., on Residence of Foreign Nationals in the Territory of the Czech Republic. [↑](#footnote-ref-1)
2. Section 124 (6) of Act No. 326/1999 Coll., on Residence of Foreign Nationals in the Territory of the Czech Republic [↑](#footnote-ref-2)
3. Ibid. [↑](#footnote-ref-3)
4. Section 140 (1) of Act No. 326/1999 Coll., on Residence of Foreign Nationals in the Territory of the Czech Republic**.** [↑](#footnote-ref-4)
5. Judgment of Constitutional Court of 10 May 2017, no. III. ÚS 3289/14. [↑](#footnote-ref-5)
6. Section 140 (2) of Act No. 326/1999 Coll., on Residence of Foreign Nationals in the Territory of the Czech Republic**.** [↑](#footnote-ref-6)
7. Section 124 (1) and section 129 (1) of Act No. 326/1999 Coll., on Residence of Foreign Nationals in the Territory of the Czech Republic. [↑](#footnote-ref-7)
8. By Act No. 176/2019 Coll. [↑](#footnote-ref-8)
9. Information provided from: <https://www.policie.cz/clanek/statistiky-nezletilych-cizich-statnich-prislusniku.aspx> [↑](#footnote-ref-9)
10. Ibid. [↑](#footnote-ref-10)
11. Section 87 (1) of Act No. 326/1999 Coll., on Residence of Foreign Nationals in the Territory of the Czech Republic. [↑](#footnote-ref-11)
12. Section 87(7)(a)(4) of Act No. 326/1999 Coll., on Residence of Foreign Nationals in the Territory of the Czech Republic. [↑](#footnote-ref-12)
13. Article 36 of Act No. 186/2013 Coll., on Citizenship of the Czech Republic and on the amendment of selected other laws. [↑](#footnote-ref-13)