IMMIGRATION DETENTION THE RULE OF LAW

NATIONAL REPORT: SPAIN

Iago Bañobre
1. Some basic figures

According to the Spanish Ministry of Justice, in 2009 Spanish authorities carried out the detention of 11,573 persons on immigration-related grounds (Ministry of Justice/Ministerio de Justicia 2010, p. 888). 55 per cent of illegal immigrants were apprehended and detained while attempting to enter the country. An additional 1,930 migrants were held in confinement centres in order to secure their expulsion from the country. The total number of immigration-related detainees registered in Spain during 2009 was 16,590, a sensible reduction from 26,032 in 2008, 90 per cent of these were male, and 53 per cent were eventually expelled from the country (Ministerio de Justicia 2010, p. 889).¹

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<td><strong>Evolution of illegal immigrant expulsions in Spain</strong></td>
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Source: Ministry of Internal Affairs (2011)²

Within the Spanish territory, depending on the Ministry of Internal Affairs, there are seven facilities dedicated to the confinement of irregular immigrants (Centro de Internamiento de Extranjeros), currently in use and located at Algeciras, Barcelona, Las Palmas de Gran Canaria, Madrid, Murcia, Santa Cruz de Tenerife and Valencia. During 2012 the use of Fuerteventura CIE was suspended due to the low influx of irregular immigrants to Canary Islands, and Malaga CIE was closed following multitude of denounces and reports related to the poor conditions of habitability in the centre.

¹ Global Detention Project (2010)
2. **Substantive criteria**

   a) *Arbitrariness*

According to the Spanish legislation, detention can only be undertaken by government authorities under specific circumstances and following specific legal procedures and safeguards.

The detention is carried out by the government authority or its agents after the identification and the review of the legal status of the migrant. Subsequently, the detention and eventual confinement have to be determined based upon legal grounds settled by law.

However, taking into account plenty of reports and denounces from detainees and NGOs, there are serious indications that police identifications previous to the detention of immigrants have been in the recent past arbitrary and undertaken targeting specific racial profiles and detention quotas.

As a matter of fact, in the year 2012 General Directorate of Police (Dirección General de la Policía) delivered a notice expressly forbidding these practices to the different police departments. In addition, the notice insists in the obligation of police agents to duly carry out their duties within the boundaries established by Article 20.2 OL 1/1992 and OL 4/2000 when undertaking detentions pursuing identification.

As mentioned in the Global Detention Project 2013 for Spain: "In April 2011, the UN Committee for the Elimination of Racial Discrimination recommended that Spain amend those provisions of Circular No. 1/2010 that could be interpreted as allowing indiscriminate detention and the restriction of the rights of foreign citizens in Spain (AI 2013)". This statement refers to a previous notice released in 2010 that allegedly could be misinterpreted by police members when proceeding to carry out detention of immigrants.

Moreover, cases of arbitrary detention, torture and general mistreatment have been reported to the Spanish Ombudsman by Human Rights and civil society independent organizations.

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4 Circular Núm. X/2012 / Notice Num. X/2012
5 Informe annual 2012 Defensor del Pueblo / Annual Report 2012 Spanish Ombudsman
7 Cáritas España
8 Asociación Pro Derechos Humanos, en su informe Centros de Internamiento de Extranjeros en España / Association Pro Human Rights, report on Alien Confinement Centres in Spain
Example of specific reported cases:

In an Opinion (No. 37/2012) adopted by the UN Working Group on Arbitrary Detention, addressed to the Spanish Government on May 2012 in relation to the detention and internment of the Moroccan citizen Mr. Adnam El Hadj in Madrid in May 2012, it is stated that: “The detention of Mr. Adnam El Hadj was arbitrary”.

In the point 17th of the Opinion, that statement is developed: “The Working Group finds that Mr. El Hadj's detention was arbitrary because of the absence of a warrant, the lack of access to rapid judicial remedies to end his detention and the abuses to which he was subjected”.

Subsequently, paragraph 19th quotes “Furthermore, ...the deprivation of liberty affecting Adnam El Hadj was motivated by discrimination based on his national, ethnic and social origin, thus disregarding the essential equality of all persons for the recognition and enjoyment of their human rights.”

In this specific case, the Spanish Government rebutted against the Opinion of the Working Group claiming that the detention of Mr. El Hadji was undertaken according to the law. In any event, doubts remain about the proper conduction of the detention and subsequent confinement of immigrants in this and many other reported cases.

b) Reasons and authority to detain

Spanish legislation establishes a system in which the most serious infringements of immigration rules lead as ultimate sanction for immigrants towards an expulsion measure. The detention and eventual confinement plays a decisive role in order to secure the execution of the expulsion measure.

In relation to the authority to detain in the Spanish system, unlike in other jurisdictions, there is not a specific agency in charge of undertaking the detentions, being entitled either a government authority or its agents.

There is not a specific government agency in charge of immigration issues, thus any of police body is entitled to undertake the identification and detention of immigrants, being in practice the Policía Nacional (Statetal Police) the security force which usually carry out those activities, although Guardia Civil and Policía Local are involved in the detention of immigrants as well.

However, when the detention is undertaken in the framework of immigration controls and it is not related to criminal activities, the Policía Nacional is in theory the only security force entitled to carry out those detentions.

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9 Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fourth session, 27–31 August 2012. No. 37/2012 (Spain)
Grounds for detention:

Detention of third country nationals found to be in irregular situation in Spanish territory can exclusively be undertaken as a provisional and precautionary legal measure. That measure precedes the eventual expulsion of that illegal immigrant following a judicial or administrative decision.

However, according to Attorney’s General Office 2012, including statistics from the preceding year, 49 percent of interned illegal immigrants were not eventually expelled from Spanish territory subsequently to the resolution of the administrative procedure.

In any event, and in order to be accurate, it is necessary to establish a difference between detention and confinement in Spanish immigration legislation:

- Detention of irregular non-citizens it is a preventive measure and previous to the requirement to the judicial authority of confinement in an ad-hoc detention centre. Preventive detention according to Spanish legislation is limited to a maximum duration of 72 hours. Furthermore, from a factual perspective, it is considered detention any restriction of ambulatory freedom beyond the time length strictly necessary for identification purposes.
- Confinement can only be undertaken after judicial review of the process and as a precautionary measure pursuing to secure the expulsion of the irregular immigrant in the eventual case that is the outcome of the disciplinary procedure. The length of the confinement measure has a limit of 60 days.

Furthermore, preventive detention exceeding 72 hours in the framework of an administrative procedure was declared legal by the Spanish Constitutional Court when authorized by a judicial authority.

The legal basis for detention of irregular immigrants can be found in Organic Law 4/2000 (Sobre derechos y libertades de los extranjeros en España/ About Rights and Liberties of Aliens in Spain) amended on 24th April 2012, and in Royal Decree 557/2011 of 20 April, approving the Regulation of the Organic Law 4/2000

Article 61 OL 4/2000 (Precautionary measures/Medidas cautelares):

Art. 61.1 Since the commencement of a disciplinary procedure having the expulsion measure among the optative proposals, the official instructing the procedure, with the aim of securing the eventual resolution, will be entitled to adopt any of the following precautionary measures:

12 Article 17.2 Spanish Constitution
13 Case 115/1987, 7th July, Constitutional Court
d) Precautionary detention, undertaken by a government authority or its agents, for a maximum period of 72 hours previous to the request of confinement.

In any other detention event, the referral of the detainee to a judge shall be carried out in a maximum period of time of 72 hours.

e) Preventive confinement, after judicial authorisation, in the designated confinement centre.

[Article 61.1: Desde el momento en que se incoe un procedimiento sancionador en el que pueda proponerse la expulsión, el instructor, a fin de asegurar la resolución final que pudiera recaer, podrá adoptar alguna de las siguientes medidas cautelares:

d) Detención cautelar, por la autoridad gubernativa o sus agentes, por un período máximo de 72 horas previas a la solicitud de internamiento.

En cualquier otro supuesto de detención, la puesta a disposición judicial se producirá en un plazo no superior a las 72 horas.

e) Internamiento preventivo, previa autorización judicial en los centros de internamiento.]

Concerning the expulsion measure:

The expulsion is a sanctioning measure ordered by the competent administrative authority (Government Delegate or Government Deputy-Delegate), and represents the final stage of the procedure, in case that is the outcome of the administrative resolution.

According to Article 59, in those cases the illegal immigrant has been victim or witness of acts related to human trafficking, promotion of illegal immigration, labour and/or sexual exploitation, and offers effective collaboration to the authorities against the perpetrators, will be exonerated of its administrative liability, and therefore won’t be subjected to an expulsion file.

Regarding the execution expulsion measure, as a general rule Article 64 determines that the illegal immigrant shall abandon Spanish territory within the time limited settled in the administrative resolution, which in any case cannot be inferior to 72 hours. That rule does not apply for expulsions decided through the Preferential procedure, whose execution shall be applied “immediately”, according to Article 63.7.

In cases where the illegal immigrant does not leave the country in the period requested, administrative authorities will enforce the measure of expulsion undertaking the detention of the illegal immigrant until the execution of the measure. If the execution cannot be carried out within 72 hours, the confinement of the illegal immigrant must be confirmed by a judicial authority in order to eventually secure the execution of the expulsion.

Equally, according to Article 64.4, in the event that an immigrant is found to be in irregular situation and holding an order of expulsion dictated by an EU country, the execution of that order will be enforced in the same terms as described for the preferential procedure.
Legal basis for confinement in ad-hoc centres:

According to Article 62.1, the official instructing the procedure, in those cases when the irregular situation of the immigrant is verified, can request to the judicial authority the confinement of the non-citizen in an alien confinement centre (Centro de Internamiento de Extranjeros), during the time of instruction of the procedure.

c) Hearing in front of the judge

Among the legal safeguards established in the Spanish immigration legislation for irregular immigrants it is included the right of a fair hearing in front of the judge.

Accordingly, Article 62.1 continues as follows: “The judge, after hearing the detainee and the public prosecutor, will deliver a reasoned ruling, in which, following the principle of proportionality the specific circumstances of the case shall be taken into consideration”...“In the event of alien’s serious condition, the judge will evaluate the risk the confinement represents for public health and the alien itself.”

[“El Juez, previa audiencia del interesado y del Ministerio Fiscal, resolverá mediante auto motivado, en el que, de acuerdo con el principio de proporcionalidad, tomará en consideración las circunstancias concurrentes”...“Asimismo, en caso de enfermedad grave del extranjero, el juez valorará el riesgo del internamiento para la salud pública o la salud del propio extranjero.”]

In relation to the application of this paragraph, and according to the Attorney’s General Office Report 201215, has been resulting problematic the verification of claims from the detainee during the hearing in front of the judge. Specifically those facts related to the argued close linkages of the immigrant with the community implying a minimization of the risk of scape. As a result, in several occasions when those facts were eventually verified, the administrative resolution ordering the confinement of the immigrant had to be revised whilst the immigrant already confined in a detention centre.

These cases represent a serious flaw in the design of the procedure settled by OL 4/2000, since as a matter of fact, leave without effect the right of a fair hearing and undermine both the principle of proportionality and favor libertatis.

In order to avoid such a pernicious effect, adequate means should be provided to the judicial authorities in order to verify at the earliest point the claims made by the immigrant, or in a different way, widening the timeframe in which the claims could reasonably be verified.

**Case law**

According to **Case 303/2005, 24th November, Constitutional Court**: “The guarantees for the personal freedom derived from the judicial review regime just described (referred to **Article 62.1** and .2) are equivalent, from a material and effectiveness point of view, to those could be achieved through means of a *Habeas corpus* procedure...”

[**Sentencia 303/2005 de 24 de noviembre del Tribunal Constitucional**: “Las garantías que para la libertad personal se derivan del régimen de control judicial que acaba de describirse equivalen, desde el punto de vista material y de eficacia, a las que pueden alcanzarse por medio del habeas corpus”]

**d) Duration of confinement in the designated detention centre**

The OL 4/2000 establishes a time limit for the confinement of the immigrants, which cannot be longer than necessary for expulsion to take place with a maximum of 60 days. According to **Article 62.2**: "Confinement shall be maintained the indispensable time needed for achieving the objectives of the disciplinary procedure, with a time limit of 60 days..."

[**El internamiento se mantendrá por el tiempo imprescindible para los fines del expediente, siendo su duración máxima de 60 días...**]

In case the expulsion of the irregular immigrant is proven not to be possible within that timeframe, administrative authorities shall request the release of the person in confinement.

**e) Alternatives to detention:**

It has been already settled that detention and confinement is designed as a preventive measure pursuing to secure the eventual expulsion of the immigrant. However, when circumstances of the specific case advise otherwise, alternative preventive measures can be adopted instead of confinement.

Accordingly, **Article 61** establishes other alternatives, which are foreseen for those situations in which it is proven the irregular immigrant has strong linkages with the community, family burdens and there is no record of previous illegal activities in Spanish territory.

Thus, administrative authorities, on a case by case basis, must consider these other options and consequently can propose for the judicial review more lenient preventive measures such as:

- periodical presence towards the competent authority
- passport withdrawal
• compulsory residence in a determined place
• any other measures the judicial authority could determine.

Previous alternatives apply for those situations in the framework of paragraphs b), c) and d) of Article 28.3 OL 4/2000, which determines the circumstances under a compulsory leaving of Spanish territory can be ordered:

- a. expulsion from Spanish territory following a judicial decision in the framework of a criminal procedure.
- b. expulsion or return measures adopted through an administrative resolution in those cases foreseen in this law.
- c. administrative refusal of those applications made by aliens pursuing an extension of time to remain in Spanish territory or lack of authorization to be in Spain.
- d. breach by an alien worker of the deadline for leaving Spanish territory in the framework of a program of voluntary return.

In all cases the sanction of expulsion must be subsequent to the processing of an administrative file.

According to the Article 57.1 OL 4/2000, the measure of expulsion as a substitute of a fine against an alien, can only be adopted in those cases involving very serious infringements (Article 54 OL 4/2000), or serious infringements (paragraphs a, b, c, d and f, Article 53 OL 4/2000).

The Article 57.1 also creates some legal guarantees for those cases in which the expulsion measure is decided: "Expulsion may be applied, taking into account the principle of proportionality, instead of the penalty fine, subsequent to the related administrative procedure including a reasoned resolution evaluating the facts involved in the infringement."

["…podrá aplicarse, en atención al principio de proporcionalidad, en lugar de la sanción de multa, la expulsión del territorio español, previa la tramitación del correspondiente expediente administrativo y mediante la resolución motivada que valore los hechos que configuran la infracción."]

As a general rule, Articles 52, 53 and 54 OL 4/2000, establish a fine as the ordinary sanction for infringement of immigration law. In fact, the measure of expulsion is actually foreseen as an alternative.

It is an established doctrine of the Spanish Constitutional Court that precautionary measures implying restriction of movement or confinement must be weighted with the exceptional nature and "favor libertatis" principles\textsuperscript{16}.

These legal principles are reflected by judicial rulings in Spanish courts, which specifically refer to the importance of the principle of proportionality when supporting an expulsion order.

\textsuperscript{16} Case 115/1987, 7th July, Constitutional Court
Case Law

Case 344/2012, Madrid Supreme Court of Justice:
“In those cases in which the alleged cause for the expulsion is, simply, the illegal stay in Spanish territory, without any further negative consideration, it is clear that the Administration shall motivate specifically why is it is making recourse to the expulsion sanction, since the illegal stay, in principle, is sanctioned with a fine.”

[Tribunal Superior de Justicia de Madrid, sentencia 344/2012:
“Tratándose de supuestos en que la causa de expulsión es, pura y simplemente, la permanencia ilegal, sin otros hechos negativos, es claro que la Administración habrá de motivar de forma expresa por qué acude a la sanción de expulsión, ya que la permanencia ilegal, en principio, como veíamos, se sanciona con multa.”]

In the same ruling, the court makes reference to the jurisprudence settled by the Spanish Supreme Court in cases 21st April 2006, Recurso de Casación num. 1448/2003, 30th June 2006, Recurso de Casación num. 5101/2003, and 28th September 2007, Recurso de Casación num. 2344/2004, which determined that in those cases where the administrative file includes facts and circumstances upon which justify the expulsion proposal, the principle of proportionality has been respected by Public Administration and resolution has been duly motivated. Are specifically mentioned the facts that the illegal stay of the alien in Spanish territory appears to be combined with other circumstances, namely: lack of identification, thus remaining unidentified and with unknown filiation, and additionally, there is no knowledge about where and when entered in Spanish territory.

f) Use of fast-track procedures/administrative detention

The Spanish legislation foresees two different administrative procedures pursuing a sanction for immigration law infractions. These two procedures are applied according to the type of infraction committed.

• Ordinary Procedure:

Regulated through Article 63 bis OL 4/2000 and in Regulation developing Organic Law 4/2000, in its Title XIV, Chapter II, Section II, Articles 226 to 233, it is the procedure to be applied for infractions included in Articles 53 and 54 OL 4/2000. According to Article 244.1 of the Regulation developing Organic Law 4/2000, in the framework of this procedure cannot be applied as precautionary measure the confinement of the illegal immigrant while the administrative process is on-going.
**Preferential Procedure:**

Regulated through Article 63 OL 4/2000 and in Regulation developing Organic Law 4/2000, in its Title XIV, Chapter II, Section II, Articles 234 to 237, for cases involving conducts specifically included in Articles 53.1 OL 4/2000 paragraphs d), f) and eventually a) if there is risk of failure to appear, cases in which alien obstructs the expulsion process and cases there is risk for public order or national security, as well as Article 54.1 a) and b).

In practice it is the most commonly used procedure of both. It limits significantly the length of the administrative course of action and pursues securing the immediate execution of the expulsion at the end of the process.

One of the main differences included in the Preferential Procedure according to Articles 63.4 OL 4/2000 and 235. 4 of Regulation developing OL is related to the shortening of the timeframe for the illegal immigrant and its legal representatives to present allegations against the administrative file, limited in this case to 48 hours. In the event the defense does not provide any allegation, the proposal of resolution in the administrative file will be presented as definitive to the competent authority (Delegate or Vice-Delegate of Government).

In addition, it is in the framework of the Preferential Procedure where can be requested to a judge the preventive confinement of the illegal immigrant in an ad-hoc centre, until the resolution of the expulsion file. In case the judge refuses to accept that request, the administrative authority in charge of the file shall apply an alternative precautionary measure instead of the confinement.

There is a link between both procedures according to Article 63. 6 in the event that the illegal immigrant can prove to have requested temporary residence in Spain for reason of strong social linkages, together with the circumstance that the administrative file has been opened as a consequence of the conduct included in Article 53 a). If that is the scenario, the procedure will continue as an ordinary one instead of preferential.

**Ending the administrative procedure:**

It is up to the Delegate and Vice-Delegate of Government to dictate a motivated resolution, confirming, modifying or rejecting the proposal of sanction included in the administrative file. This resolution shall be communicated to the illegal immigrant, as previous stage to the execution of the resolution. As previously indicated, the administrative procedure ends with the execution of the expulsion order\(^\text{17}\).

\(^{17}\) See page 3
3. Procedural safeguards

a) Bail

The legal figure of bail is not contemplated in the Spanish legislation for cases of preventive detention and/or confinement of irregular immigrants. Bail is foreseen in Spain only for cases related to criminal offenses and in the framework of criminal procedures. Preventive detention and/or confinement in the framework of immigration law infringements have an administrative nature and there is no relation with a criminal offense, as consequence usual procedures for that specific jurisdiction do not apply.

b) Automatic review of detention order

Spanish legislation establishes a maximum of 72 hours prior to referral to a judge to authorise the confinement of an irregular immigrant at an officially designated confinement centre, this time limit is provided for in Article 61.1 d.

c) Continuous review of appropriateness of detention

Spanish legislation provides safeguard mechanisms pursuing to secure the lawfulness of the decision taken related to the detention and confinement of migrant.

According to Article 62.3, in the event the conditions described in paragraph 1 are no longer applicable, the alien shall be immediately released by the administrative authority in charge, duly informing the judge who had authorized the confinement. The termination of detention can also be ordered by the judge ex officio or on the initiative of the Public Prosecutor.

[Artículo 62.3: Cuando hayan dejado de cumplirse las condiciones descritas en el apartado 1, el extranjero será puesto inmediatamente en libertad por la autoridad administrativa que lo tenga a su cargo, poniéndolo en conocimiento del Juez que autorizó su internamiento. Del mismo modo y por las mismas causas, podrá ser ordenado el fin del internamiento y la puesta en libertad inmediata del extranjero por el Juez, de oficio o a iniciativa de parte o del Ministerio Fiscal.]

However, according to the Attorney’s General Office Report 2012, administrative authorities have often demonstrated reluctance to request the release of the immigrant even where the circumstances that had justified the original confinement measure no longer exist.

Accordingly, Article 2.2 of Ministerial Order Of 22 Of February 1999 On Functioning Norms And Internal Procedures Of Aliens Detention Centres (Orden ministerial de 22 de febrero de 1999 sobre normas de funcionamiento y régimen interior delos centros de internamiento de extranjeros) establishes:

2.2 Authorization and Judicial Control
During his/her stay in the centre, the illegal immigrant will be under the control of the judicial authority that ordered the measure, who will be informed of any circumstance of interest that may occur within the centre. This authority will verify that fundamental rights of immigrant in the centres are respected, ex oficio, at the request of the Prosecutor's Office or the concerned person.

(2. 2 Durante su estancia en el centro, el extranjero permanecerá custodiado a disposición de la autoridad judicial que hubiera acordado esta medida, debiendo comunicarse a ésta cualquier circunstancia de interés que concurra en el mismo. Dicha autoridad judicial velará por el respeto de los derechos fundamentales de los extranjeros ingresados, de oficio o a instancia del Ministerio Fiscal o del propio interesado.)

d) Access to justice

From a general perspective, Article 20.1 enshrines the constitutional right of access to justice (derecho a la tutela judicial efectiva) and makes it available to irregular immigrants, in line with different international treaties signed by Spain, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention of Human Rights.

This right implies in addition to the access to justice -that is, the right to promote and be part in a judicial process- the right to see the judicial resolution executed and the right to appeal in those cases it is allowed by law. Finally, this right includes the constitutional safeguards established in Article 24.2 of Spanish Constitution, involving the right to defense and legal aid, the right to be informed about the charges against, the right to fair hearing and to presumption of innocence19, among others.

In addition, Article 20.2 OL 4/2000 acknowledges that legal guarantees established for the general administrative processes shall be equally applied to the immigration administrative processes, specifically in relation to the publicity of legislation, right of both parties to be heard and motivation of the resolutions.

For the exercise of these rights and their derived legal procedures there is a general remission to the Legal Regime for Public Administrations and the Common Administrative Procedure Law, 30/1992 (LRJAP-PAC 30/1992), which basically

19 Ana Paloma Abarca Junco, “Inmigración y extranjería” Universidad Nacional de Educación a Distancia, 2010, p. 41
means that in case of violation of rights and guarantees by public authorities, the alien has the right to judicial claim before the Contentious-Administrative jurisdiction.

Accordingly, Article 65 OL 4/2000 acknowledges the general right of the detainee to appeal the disciplinary administrative resolution. From a factual perspective, this right is sometimes limited through enforcing the Preferential Procedure/Administrative Urgency Process [Procedimiento de Urgencia (Administrativo)] funded in reasons of public interest, looking for a prompt execution of the expulsion resolution.

Nevertheless, as it has been indicated, the administrative resolution establishes the end of the administrative process. Against that resolution the illegal immigrant is entitled to appeal before a judge of the Contentious-Administrative jurisdiction, according to Article 25, Act 29/1998, dated 13 July, Governing Contentious-Administrative Jurisdiction (Ley 29/1998, de 13 de julio, Reguladora de la Jurisdicción Contenciosa Administrativa). This judicial appellation looks for the annulation of the administrative resolution and its derived consequences. Further appeals are at disposal of the illegal immigrant subsequent to the completion of the Contentious-Administrative appeal.

**e) Places of detention**

There is no legal basis for an irregular immigrant to be detained in prisons out of the scope of criminal processes. Within the 72 hours prior to the referral to a judge, detainees will often be detained in police facilities.

After those 72 hours, in such a case that preventive confinement of irregular immigrant has been proposed by administrative authorities with the purpose of granting an eventual expulsion, it is up for a judge to determine the suitability of that measure. In the event the judge confirms such measure the irregular immigrant will be confined in a centre out of the prison system denominated Alien Confinement Centre (Centro de Internamiento de Extranjeros) for a maximum period of 60 days.

However, it should be noticed that irregular immigrants share facilities with alien that actually have been charged by criminal offences and as consequence should be confined in prisons, but instead are confined in the CIEs until their expulsion of the country. This fact, together with the circumstance that the Policía Nacional is the body in charge to custody immigrants in the CIEs, like in prisons, raises some concerns about the actual non-prison status of the centres.

Therefore, and according to paragraph 1 of Article 62 bis., which covers the rights of alien in confinement:

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20 Ana Paloma Abarca Junco, “Inmigración y extranjería” Universidad Nacional de Educación a Distancia, 2010, p. 42
“1. Alien Confinement Centres are public facilities out of the prison system; entry and stay shall have a preventive and precautionary purpose, safeguarding rights and freedoms established by law. There will be only applied a limit to the freedom of movement for the inmate, according to the content and purpose of the precautionary judicial measure enforced...”

[Artículo 62 bis. 1: Los centros de internamiento de extranjeros son establecimientos públicos de carácter no penitenciario; el ingreso y estancia en los mismos tendrá únicamente finalidad preventiva y cautelar, salvaguardando los derechos y libertades reconocidos en el ordenamiento jurídico, sin más limitaciones que las establecidas a su libertad ambulatoria, conforme al contenido y finalidad de la medida judicial de ingreso acordada...”]

However, since the opening of CIEs, these centres started their functioning without a specific normative regulating their activities. A 1999 Ministerial Order establishes the general rules of functioning in the CIEs, and a draft of regulation on the matter is nowadays in the process to be passed and enforced. Among other changes, the draft of regulation includes a new denomination for the CIEs, which presumably would be renamed Centros de Estancia Controlada de Extranjeros (Alien Controlled Stay Centres).

4. Conditions of detention

As a starting point for this paragraph, it is important having into account that conditions of habitability among CIEs (Alien Confinement Centres) are diverse, although different sort of deficiencies have been reported by immigrants in confinement, their legal representatives and human rights organizations. Although the law guarantees civil society groups access to places of confinement, NGOs are often denied access (Migreurop Spain 2011).

On the side of institutional representatives, Attorney's General Office Report 2012 included among its recommendations the immediate closing of Malaga CIE, since its general deterioration should prevent the confinement of illegal immigrants22. Months later, the Malaga CIE was eventually closed and the immigrants in confinement relocated to the CIE in Algeciras and Madrid. Nevertheless, Attorney’s General recommendations are not binding, and therefore it is up to the administrative authorities to correct the CIEs detected deficiencies.

In addition, the Report denounces the insufficient normative framework established by OL 4/200 for organization aspects within the CIEs, as well as the specific regime of rights and duties to be applied to the immigrants in confinement.

Furthermore, the Attorney’s General Office Report stresses a great concern related to two main issues affecting diverse CIEs:

- Overcrowding (specially affecting Algeciras and Madrid centres)
- Absence of differentiated facilities to separate immigrants confined after administrative order from immigrants confined through a criminal procedure.

Finally, the Report acknowledges that some violent episodes between immigrants in confinement have been reported, as well as physical resistance to the execution of the expulsion by some immigrants, together with self-harm and suicide attempts of detainees. Nevertheless, no mistreatment by Police authorities has been proved in any of the complaints made.

Beyond any official source or independent report, two dramatic events boosted the attention of media and public opinion in relation to the conditions of immigrants in confinement in the CIEs: The death of the 34 years old Congolese citizen Samba Martine at the Madrid CIE in December 2011 and again, the death of the 21 years old Guinean Idrissa Diallo at the Barcelona CIE in January 2012. In both cases, the lack of a suitable medical attention has been reported by Human Rights organizations as the probable cause of both deaths. In the first case, a Spanish court found no relation between the medical treatment received by Samba Martine and her eventual death. Idrissa Diallo’s death is still under judicial review.

These facts, together with the subsequent public debate generated in Spain, led towards normative modifications in the regulation applied to CIEs, nowadays still in draft bill form. The draft has been intensely contested by civil society organisations since released. It is a common criticism that the proposed regulation maintains the current model of police management and failed to provide additional protections for detainees (Mateos Herraiz 2012). The draft also neglected to include recommendations issued by Spain’s Ombudsperson regarding communication with the outside, visits, access to social organizations, or improved complaints procedures (Mateos Herraiz 2012).

**a) Access to healthcare**

Immigrants in confinement, despite their situation of restricted ambulatory freedom, are entitled to receive certain social services and cannot be deprived of other fundamental rights. As a consequence, **Article 62 bis 1. d OL 4/2000** guarantees among others, the detainee’s right to receive adequate medical assistance and to be assisted by the social services of the centre. In paragraph 2, it is established that confinement centres shall include appropriate medical and health services.

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25 Andalucía Acoge, Pueblos Unidos, and Women’s Link Worldwide
26 Global Detention Project 2013
(Artículo 62 bis. Derechos de los extranjeros internados)

1. Los centros de internamiento de extranjeros son establecimientos públicos de carácter no penitenciario; el ingreso y estancia en los mismos tendrá únicamente finalidad preventiva y cautelar, salvaguardando los derechos y libertades reconocidos en el ordenamiento jurídico, sin más limitaciones que las establecidas a su libertad ambulatoria, conforme al contenido y finalidad de la medida judicial de ingreso acordada. En particular, el extranjero sometido a internamiento tiene los siguientes derechos:

   a) A ser informado de su situación.
   b) A que se vele por el respeto a su vida, integridad física y salud, sin que puedan en ningún caso ser sometidos a tratos degradantes o a malos tratos de palabra o de obra y a que sea preservada su dignidad y su intimidad.
   c) A que se facilite el ejercicio de los derechos reconocidos por el ordenamiento jurídico, sin más limitaciones que las derivadas de su situación de internamiento.
   d) A recibir asistencia médica y sanitaria adecuada y ser asistidos por los servicios de asistencia social del centro.
   e) A que se comunique inmediatamente a la persona que designe en España y a su abogado el ingreso en el centro, así como a la oficina consular del país del que es nacional.
   f) A ser asistido de abogado, que se proporcionará de oficio en su caso, y a comunicarse reservadamente con el mismo, incluso fuera del horario general del centro, cuando la urgencia del caso lo justifique.
   g) A comunicarse en el horario establecido en el centro, con sus familiares, funcionarios consulares de su país u otras personas, que sólo podrán restringirse por resolución judicial.
   h) A ser asistido de intérprete si no comprende o no habla castellano y de forma gratuita, si careciese de medios económicos.
   i) A tener en su compañía a sus hijos menores, siempre que el Ministerio Fiscal informe favorablemente tal medida y existan en el centro módulos que garanticen la unidad e intimidad familiar.
   j) A entrar en contacto con organizaciones no gubernamentales y organismos nacionales, internacionales y no gubernamentales de protección de inmigrantes.

2. Los centros dispondrán de servicios de asistencia social y sanitaria con dotación suficiente. Las condiciones para la prestación de estos servicios se desarrollarán reglamentariamente.)

According to Article 13 of the Ministerial Order Of 22 Of February 1999 On Functioning Norms And Internal Procedures Of Aliens Confinement Centres, regarding Social Assistance services:

1. The centres will have the appropriate social assistance services for the immigrants in confinement assisted by social workers under the direct supervision of the Director of the centre to whom they will present their plans and projects for action, after its analysis by the Board of the Centre.

2. The social services that will be facilitated in the centres could be delegated to public entities of non-governmental organizations or other no profit organizations according to article 6.

3. Social assistance will have the purpose of addressing the problems that have emerged to the illegal immigrants in the confinement centres, and if appropriate to their families, as a
consequence of their confinement in the centre, especially in relation to translation services, family links with other countries or advice in their paperwork.

(Artículo 13. Servicios de Asistencia Social.
1. Los centros dispondrán de los correspondientes Servicios de Asistencia Social a los extranjeros ingresados, atendidos por trabajadores sociales, bajo la dependencia directa del Director del centro, a quien se someterán, para su aprobación, los oportunos planes o proyectos de actuación, previo análisis de los mismos por la Junta de Régimen.
2. La prestación de servicios sociales que se faciliten en los centros podrá ser concertada con otros organismos públicos y con organizaciones no gubernamentales u otras entidades sin ánimo de lucro, conforme a lo previsto en el artículo 6.
3. La asistencia social se orientará fundamentalmente a la solución de los problemas surgidos a los extranjeros ingresados y, en su caso, a sus familias como consecuencia de la situación de ingreso, en especial los relacionados con interpretación de lenguas, relaciones familiares con el exterior, o tramitación de documentos.)

However, the general condition of facilities and more specifically healthcare services at the interior of confinement centres have many times condemned by inmates and human rights organizations representatives as clearly inappropriate and insufficient.

On the other hand, Attorney's General Office Report 2012 has qualified as “adequate” the healthcare services in all centres.

b) Protection of vulnerable people

The OL 4/2000 includes within its articles concrete rules dedicated to guarantee specific protection to vulnerable people such as pregnant women, victims of human trafficking and minors. However, this list is not exhaustive and therefore cannot be stated that Spanish legislation provides a uniform and structured specific protection for vulnerable people. Furthermore, there is not foreseen specific protection for vulnerable collectives such as LGBT in Spanish legislation.

Thereby, with the purpose of avoiding any risk for the fetus or the pregnant woman health, Article 57.6 prohibits the expulsion of pregnant women.

In relation to the protection of victims of human trafficking, Article 59 bis. establishes a series of safeguards in order to first identifying them according to the article 10 of the Council of Europe Convention on Action against Trafficking in Human Beings, and subsequently providing them with the correct protection and assistance.

As a consequence, during the process of identification and the period of “recovery and reflection” (at least 30 days), any disciplinary procedure against the alien related to infraction of Article 53.1.a shall be suspended, as well as the execution of the expulsion if already decided. At the same time, during this same period, protection and assistance shall

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27 Informe Migreurop España a la Comisión de DDHH del Consejo de Europa, p. 4 (Migreurop Spain Report for the Council of Europe HHRR Commission)
be provided to the alien and its minor or disable descendants. After the established period of "recovery and reflection" a reevaluation of the situation must be carried out with the purpose of prolonging that period.

Furthermore, regarding the protection of minors, by means of Article 62.4 the confinement of minors in detention centres is forbidden except for the case established in Article 62.1.i, which settles the exception for those cases in which the confined in first instance are minor's parents, and always with the positive report of the public prosecutor, in order to allow family reunification.

(Artículo 62 Ingreso en el centro de internamiento
4. No podrá acordarse el ingreso de menores en los centros de internamiento, sin perjuicio de lo previsto en el artículo 62 bis 1. i) de esta Ley. Los menores extranjeros no acompañados que se encuentren en España serán puestos a disposición de las entidades públicas de protección de menores conforme establece la Ley Orgánica de Protección Jurídica del Menor y de acuerdo con las normas previstas en el artículo 35 de esta Ley.)

Unaccompanied Alien minors in Spain shall be referred to the public services of Minors Protection according to the relative legislation and to the Article 35 of this very act.

**Special status for asylum seekers:**

The legal status of asylum seekers is regulated in Act 12/2009, 30th October, about the Right of Asylum and the Subsidiary Protection/Ley reguladora del derecho de asilo y protección subsidiaria.

Accordingly, Article 25.3 OL 4/2000 determines that asylum seekers, for the mere fact of being such, are not subject to the general requirements for alien at the moment of entry in Spanish territory. In addition, in those cases where the refugee status has been achieved by the asylum seeker, Spanish legislation acknowledges the legal effects derived from the Convention Relating to the Status of Refugees whose Articles 32 and 33 limit the capacity of signatory states to expel and return refugees from their territory, according to the generally accepted non-refoulement principle.

Nevertheless, effects foreseen in the Spanish legislation subsequent to the request by the non-citizen of international protection as asylum seeker have as consequence that administrative authorities can impose any of the precautionary measures established by Article 61 OL 4/2000. Among them, paragraphs d) and e), implying detention for a time limit of 72 hours, and eventually, after judicial review, preventive confinement in ad hoc centres until the resolution regarding the concession or refusal or the request for asylum.

c) Access to legal advice/aid

Article 22 establishes the general right of access to legal aid for aliens without cost under the same circumstances and conditions as the Spanish nationals, including for
administrative processes associated with expulsion from Spanish territory. This right implies the subsidiary right to be assisted by a translator if necessary.

Furthermore, among the rights provided by Article 62 bis, paragraph 1.f provides the right to be assisted by a lawyer (the services of an ex-officio lawyer appointed by the state will be provided if needed), and to communicate with the lawyer in confidence even outside of the general operating hours of the confinement centre in emergency situations.

\textit{d) Restrictions of movement}

In Article 62 ter, related to duties of alien in confinement, paragraph a estates the basic obligation to remain in the centre at disposal of the judge who authorised the confinement. In practice, this obligation implies the limitation of the ambulatory freedom of the immigrant in confinement to the boundaries of the centre under the conditions established by the authorities.

\footnote{Use of alien/immigrant – need to define}