

[Home](#) > Analysis of the Strasbourg case-law on Kurdish asylum seekers in Cyprus and the controversial practice of detention

Analysis of the Strasbourg case-law on Kurdish asylum seekers in Cyprus and the controversial practice of detention

Date:

Friday, August 28, 2015

Introduction

On July 21, 2015 the European Court of Human Rights (ECtHR) found the Republic of Cyprus to be in breach of Articles 5§1 (right to security and liberty) and 5§4 (right to an effective remedy against detention) of the European Convention of Human Rights for the detention of 17 Kurdish asylum seekers. In particular, the Court said that the right of all applicants to speedy proceedings, deciding the lawfulness of their detention, and their right to an effective remedy against detention were violated. These decisions of the ECtHR bring to light the problematic practice of detention as enforced by the Cypriot authorities, as well as the issues arising from the asylum procedure as such. It furthermore proves the shortcomings of the judicial review system and the framework of asylum and immigration laws, for which a harmonization with the broader European framework is urgently needed. Despite its EU and international legal obligations, Cyprus falls short of required protection standards and procedural safeguards against detention and deportation of asylum seekers.

The cases, the decision and the background

The European Court of Human Rights issued its decision in three cases concerning the detention and deportation of 17 Syrian Kurdish asylum seekers from Cyprus to Syria: [A.H. and J.K. v. Cyprus \(Nos. 41903/10 and 41911/10\)](#), [1] [H.S. and Others v. Cyprus \(No. 41753/10 and 13 other applications\)](#) [1], [K.F. v. Cyprus \(no. 41858/10\)](#). [1]

The applicants' asylum claims had been rejected by the asylum authorities, principally on the basis that their claims lacked credibility and that they had failed to make a plausible case that they were at risk of persecution and were in need of international protection. In other cases the claims were discontinued for failure to appeal within the requisite deadline. The applicants, following their participation in a protest outside government buildings, were arrested by police authorities for unlawful stay and were detained based on detention and deportation orders, despite some of them having pending asylum proceedings at the Supreme Court level.

The Court held Cyprus responsible for the inadequate mechanisms and ineffective remedies that are in place to challenge the lawfulness of detention, and which violate Article 5§1. In the context of the duration of detention, the Court concluded that the lack of a 'speedy' procedure of judicial review of the lawfulness of the applicants' detention, amounted to a violation of Article 5§4 of the Convention.

The Court affirmed the principles it set out in the case of [M.A v Cyprus \(No. 41872/10\)](#) [2] (paras 160 -163) where it found that the detention of the applicants constituted a violation of article 5§1 and 5§4, as there was no mechanism of effective and speedy review by which the applicant could challenge the lawfulness of his detention.

The Court found that the remedies available in domestic law (recourse to the Supreme Court under [Art. 146 of the Constitution](#) [3] and Habeas Corpus under [Art. 155](#) [3]) in order to challenge unlawful detention were not effective as they did not secure the conduct of speedy proceedings within the meaning of Article 5§4. In one of the cases ([K.F. v. Cyprus, No. 41858/10, para 113](#) [4]) the Court emphasised that pursuing a recourse would not have provided the applicant with a speedy review of the lawfulness of detention and that the habeas corpus proceedings were not conducted 'speedily'. As it remarked, the proceedings had been excessively long and did not respect the requirement of speediness. Indeed, the first instance proceedings had lasted one month and nineteen days and the appeal proceedings one year and seven months.

The Court reiterated the strict standards laid down under Article 5, and stressed that measures must be in place that guarantee a speedy and proper examination of the lawfulness of a detained person's deprivation of liberty and that comply with the requirements of Article 5. The Court also noted that the remedies under Article 5§4 must be sufficiently certain and fair.

Detention of asylum seekers in Cyprus

The cases, along with MA v Cyprus, highlight the shortcomings of the judicial review system and the legal framework regarding asylum and immigration law standards in Cyprus.

In practice, the majority of asylum seekers or migrants are detained under the provisions of the [Aliens and Immigration Law, CAP 105](#) [5]. According to these provisions, detention can be authorised if a person is declared a 'prohibited immigrant' (article 6 and 14 CAP 105) or for the purpose of return under the provisions that transpose the Returns Directive 2008/115/EC (i.e. Article 18PST of the CAP 105, which is rarely used) ([AIDA \(2015\) Country Report Cyprus](#) [6], 61).

The Law specifies an exhaustive list of offences for which a person is declared a 'prohibited immigrant', which includes persons who enter Cyprus irregularly (even if they were intending to apply for asylum and only been in the country for a few days) and/or who remain in Cyprus beyond the expiration of their residence permit (unlawful stay). If an asylum seeker is convicted of an offence that falls under the provisions of CAP 105, they are declared a 'prohibited immigrant' and a detention and deportation administrative order is issued against them. If sentenced to prison, they will serve the sentence and then be transferred to the detention centre, based on the detention and deportation order, where they will remain until the asylum application is examined pending deportation. ([AIDA \(2015\) Country Report Cyprus](#) [6], 61).

In practice, therefore, the majority of asylum seekers are detained based on the 'prohibited immigrant' provisions of the Aliens and Immigration Law and not the provisions transposing the Returns Directive. As a result, many provisions upon which detention could be challenged do not apply in the case of detained asylum seekers, such as the lack of prospect of return, or the 18 month maximum detention limit and other important safeguards provided by the Returns Directive ([AIDA \(2015\) Country Report Cyprus](#) [6], 64).

National legislation provides for two legal remedies available to asylum seekers to challenge detention. Firstly, the lawfulness of detention which is based on the declaration of an asylum

seeker as a 'prohibited immigrant' or on the articles of the Aliens and Immigration Law that transpose the Returns Directive, can be challenged under Article 146 of the Constitution before the Supreme Court. The other remedy available for challenging the lawfulness of detention is a habeas corpus application under Article 155.4 of the Constitution.

According to reports documenting legislative and judicial practice in Cyprus, there are no time-limits in the judicial review process. Priority is supposed to be given to cases of detention, however, in practice the time it takes to examine such cases is still lengthy as the average is 8 months whereas a Habeas Corpus application may take 1-3 months but only challenges the duration of the detention and not its lawfulness. ([AIDA \(2015\) Country Report Cyprus](#) [6], 70-71).

In relation to the duration of the detention of asylum seekers, towards the end of 2014, the authorities introduced a change in the policy of asylum seekers' detention, mainly concerning those who apply for asylum whilst in detention. Under the new policy the applications of detained asylum seekers undergo a fast track examination while their deportation orders are suspended: the first instance procedures must take a maximum of 30 days. If protection is granted, the detainee must be released. If the application is rejected and the applicant submits an appeal to the Reviewing Authority, then the latter is obliged to issue a decision within 15 days. In the event that due to the complexity of a case, a decision cannot be reached within 30 days, then the detainee must be released. Despite this policy, recent monitoring by the Future Worlds Centre (FWC) shows that the deadlines are not strictly followed and asylum seekers continue to be detained despite their claims being under examination, and at times for the entire duration of the examination of their asylum claim ([AIDA \(2015\) Country Report Cyprus](#) [6], 11), in clear violation of EU law standards.

Most alarming is the fact that, notwithstanding the ECtHR judgment in [M.A v Cyprus \(Application no. 41872/10\)](#) [2] and the State's obligation to comply with the decision, Cyprus continues violating procedural safeguards and detaining asylum seekers where an appeal before the Supreme Court is pending, even though the Supreme Court's decision will be the final one.

The current practice of Cypriot authorities in relation to the lawfulness and length of detention of asylum seekers manifestly violates EU law and standards, as laid down in the [recast Reception Conditions Directive](#) [7], the [Charter of Fundamental Rights](#) [8] of the EU and ECtHR case-law.

A person's right to liberty and security is guaranteed by Article 6 of the Charter which is equivalent to Article 5 of the ECHR. It is noteworthy to mention that the rights contained in the Charter are given the same meaning to their corresponding ECHR rights, subject to the possibility for EU law to provide more extensive protection. Two main principles have arisen in the context of Article 5 of the ECHR: detention must be proportionate, and reasonable alternatives to detention must have been properly considered before detention can be lawful ([Burnham, E](#) [9].)

As far as the detention of asylum seekers is concerned, the [recast Reception Conditions Directive 2013/33/EU](#) [10] (rRCD) which has not been transposed into Cyprus law yet but since 21 July 2015 has entered into direct effect, regulates several procedural and substantive aspects relating to the detention of international protection applicants and establishes the basis on which they can be detained.

Article 8 of the rRCD lays down specific procedures that ought to be observed in cases of asylum

seekers and specifies the grounds for their detention, which cannot be based on the sole reason of seeking international protection. Under Article 8(2) Member States may detain an applicant, when it proves necessary and on the basis of an individual assessment of each case? if other less coercive alternative measures cannot be applied effectively.? In addition, Member States must ensure that defined rules of non-custodial alternatives to detention, such as regular reporting to authorities, a financial guarantee, or an obligation to stay at an assigned place, are set out in national law.

According to current practice in Cyprus, and in contradiction with the Directive's provisions, the decision to detain is not based on an assessment of the asylum seeker's individual circumstances and does not comply with the exhaustive list of detention grounds provided by the EU asylum acquis. There is no assessment regarding the risk of absconding or the application of other less coercive alternatives to detention. Moreover, although the Aliens and Immigration Law refers to less coercive measures? and alternatives to detention and states that detention should only be used as a last resort, this is not the case in practice, as detention is the default procedure. ([AIDA \(2015\) Country Report Cyprus](#) [6], 63). The consideration and implementation of alternatives to detention in the asylum field constitutes an obligation for Member States under EU law and in particular the recast Directive and Cyprus must abide by it. Decision-makers throughout the EU ought to design and promote alternative solutions to the existing legal framework and practice of detention, which respect and safeguard asylum seekers' rights and liberty (Odysseus Network (2015) [Alternatives to Immigration Detention and Asylum Detention in the EU](#) [11]).

As mentioned above, despite the fact that the responsible Cypriot authorities are obliged to issue their decision on a detained asylum seeker's claim within a limited time-frame, there have been cases of unjustified delays leading to lengthy detention periods of asylum seekers on grounds which are not legitimate or legally specified, contrary to the guarantees of the rRCD and article 5 of the ECHR (see the dissenting views in [Saadi v. Italy, No 37201/06](#) [12] where there was strong dissent supporting the opinion that detention is not in the interest of asylum seekers).

Paragraph 3 of Article 8 of the rRCD provides an exhaustive list of the detention grounds, which does not include the detention of asylum seekers while their claim is examined under the accelerated procedure, as is the case in Cyprus. Notwithstanding this lack of legal basis then, where accelerated decision-making procedures are undertaken in detention they must still comply with procedural guarantees in accordance with the rRCD and [the recast Asylum Procedures Directive 2013/32/EU](#) [13]. Amongst others, this includes a period of detention for as short as possible, as well as an *ex officio* judicial review of the lawfulness of detention which is both speedy and periodic (Article 9).

All in all, as the current system stands, there are no guidelines or legal procedures in place to examine the necessity of detention, its aim, length and proportionality in order to determine if it is or should be the last resort nor any specified clear alternatives to detention in contravention of Cyprus' obligation under the rRCD. Moreover, the accelerated procedure as it is currently applied has resulted in lengthy and unjustifiable incarceration periods of asylum seekers, in contravention to the State's obligation to observe procedural guarantees according to EU acquis.

The present cases draw a bleak picture of the situation of international protection seekers, who are considered to be a vulnerable part of our population, due to their status and experiences ([MSS v. Belgium and Greece, No 30696/09](#) [14], 251)

Deficiencies in the Cypriot asylum and reception systems should raise an alarm concerning the effectiveness of its asylum system, and the scope and content of guarantees provided for detained applicants. Cyprus, as a participant in the CEAS, is responsible to adhere to European as well as to international standards as laid down in the Geneva Convention 1951 (Article 31) and safeguard

the rights of the vulnerable group of asylum seekers. As a response to the recent judgments, Cyprus needs to implement procedural and substantial safeguards that respect asylum seekers rights under Article 5, and are in accordance with the legal standards of the Directives and the prerequisites of the CEAS.

Moreover, up until present day the Cyprus government has not complied with the ECtHR decision in *M.A. v Cyprus* as no solutions have been implemented regarding the speediness and effectiveness of the judicial review system in relation to detention matters. The Government is taking steps to comply with the MA judgment by introducing a [revised action plan](#) [15] of legal proposals, although progress has been remarkably slow. In relation to Article 5(4) obligations the authorities have drafted a Bill to amend the Refugee Law and establish a time limit within which judicial review of lawfulness of detention must be conducted. Once enacted, the Supreme Court must decide upon the lawfulness of detention as soon as possible and in any event within four weeks. The Bill is currently awaiting approval by the Ministry of Interior, after which it will be placed before Parliament for adoption.

Conclusion

The deprivation of liberty that comes with detention is a grave measure which should be applied on specified legitimate grounds and only when alternatives to detention have been considered and were found unlikely to be effective. The ECtHR promulgated a specific and strict legal approach towards detention and the deprivation of individual liberty, in a manner which places administrative measures of 'convenience' under thorough scrutiny. The EU law also creates the legal framework for the effective protection of asylum seekers' rights, providing for more procedural safeguards with regards to their detention.

Cyprus is obliged to conform to EU law standards and has the responsibility to safeguard the liberty of the person and prevent unreasonable and unjustifiable interference with such a fundamental human right as in the case of unlawful detention. As the cases demonstrate asylum seekers' rights are not sufficiently protected via judicial review, which should serve as a powerful weapon in the hands of individuals and the judiciary for scrutinizing executive decision making and determining whether it is flagrantly unlawful and/or lacks procedural propriety. Legal practitioners and the judiciary have an important role to play in improving the protection framework of asylum seekers' rights by raising awareness of its problematic areas and securing that detained asylum seekers have effective tools at their disposal in order to challenge the deprivation of their freedom.

Cyprus has to adopt a more proactive approach to addressing the shortcomings of its asylum and detention procedures and complying with its EU and international obligations as laid down in relevant legal instruments. In relation to detention, and in accordance with the provisions of the recast Reception Conditions Directive which Cyprus is obliged under EU Law to transpose, once detention takes place it must be subject to efficient judicial scrutiny in regard to its length, legitimacy, proportionality and to the possible application of 'less coercive' alternatives. We hope that the ECtHR decisions will act as a catalyst to ensure the effective application of human rights guarantees to asylum seekers especially those detained in Cyprus.

Mary Zalokosta

Legal Advisor

Humanitarian Affairs Unit, Future Worlds Center

Keywords:

Effective access to procedures

Effective remedy (right to)

Inhuman or degrading treatment or punishment

Links:

[1] <http://www.asylumlawdatabase.eu/en/content/hs-and-others-v-cyprus-application-no-4175310-21-july-2015#content>

[2] <http://www.asylumlawdatabase.eu/en/content/ecthr-ma-v-cyprus-application-no-4187210>

[3]

[http://www.presidency.gov.cy/presidency/presidency.nsf/all/1003AEDD83EED9C7C225756F0023C6AD/\\$](http://www.presidency.gov.cy/presidency/presidency.nsf/all/1003AEDD83EED9C7C225756F0023C6AD/$)

[4] <http://hudoc.echr.coe.int/eng?i=001-156263#%257B%2522itemid%2522:%255B%2522001-156263%2522%255D%257D>

[5] <http://www.refworld.org/docid/3fbde7762.html>

[6] <http://www.asylumineurope.org/reports/country/cyprus>

[7] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0096:0116:EN:PDF>

[8] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>

[9] <http://www.ilpa.org.uk/pages/publications.html>

[10] <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013L0033>

[11] <http://www.justiceandpeace.nl/public/Publication/22/download/MadeReal-report-%20Alternatives%20to%20detention%20in%20the%20EU.pdf>

[12] <http://www.asylumlawdatabase.eu/en/content/ecthr-saadi-v-italy-application-no-3720106>

[13] <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013L0032>

[14] <http://www.asylumlawdatabase.eu/en/content/ecthr-mss-v-belgium-and-greece-gc-application-no-3069609>

[15]

http://www.coe.int/t/dghl/monitoring/execution/reports/pendingcases_EN.asp?CaseTitleOrNumber=cyprus