

[Home](#) > Detention of asylum-seekers under the scope of Article 5(1)(f) of ECHR - some thoughts based on recent ECHR and CJEU jurisprudence

Detention of asylum-seekers under the scope of Article 5(1)(f) of ECHR - some thoughts based on recent ECHR and CJEU jurisprudence

Date:

Wednesday, September 14, 2016

Introduction

The deprivation of liberty is only authorised under the [ECHR](#) [1] if it pursues a specific objective defined in subparagraphs (a)-(f) of Article 5(1). Detention of irregular migrants, as well as asylum seekers usually falls under subparagraph (f), which has two limbs: to prevent unauthorised entry or when action is being taken with the view to deportation. Under EU law Article 8(3) of the [Recast Reception Conditions Directive](#) [2] prescribes the grounds for which an asylum seeker may be detained, however, [and as analysed in various literature](#) [3], it is not always clear whether detention under Article 8(3) actually pursues one of the objectives listed in Article 5(1)(f) of ECHR. The legality of detaining asylum seekers under both Convention and EU law has again come to the forefront in recent jurisprudence from Strasbourg and Luxembourg and this blog will explore in further detail how both courts have interpreted the scope and meaning of Article 5(1)(f) of the Convention.

Detention for the purpose of securing deportation

The legality of detaining asylum-seekers for the purpose of securing deportation is not always clear. At first the ECtHR has stated that the pre-deportation limb of Article 5(1)(f) of the Convention may not be applied to asylum-seekers, since Articles 31 and 33 of the Geneva Convention precludes the expulsion of asylum-seekers before a final decision has been taken on their application ([S.D. v. Greece](#) [4], No. 53541/07, 11 September 2009 and [R.U. v. Greece](#), [5] No. 2237/08, 7 September 2011).

However, in the more recent case [Nabil and others v. Hungary](#) [6], the Court adopted a different position. The case concerned 3 Somali nationals who entered Hungary illegally, were issued an expulsion order and detained in order to secure their return. After a few days they applied for asylum. They remained in detention until they were granted subsidiary protection. The Court reiterated that detention ?with a view to deportation? can only be justified as long as the deportation is in progress and there is a true prospect of executing it. But the pending asylum case does not as such imply that the detention was no longer ?with a view to deportation? ? since an eventual dismissal of the asylum applications could have opened the way to the execution of the deportation orders.

In this concrete case the detention of asylum-seekers was found unlawful because Hungary did

not carry out the required scrutiny while prolonging the applicants' detention. However, the fact that during the asylum procedure the deportation of asylum-seekers cannot be carried out did not remove such detention from the scope of Article 5(1)(f). The aim of securing deportation was still pursued.

It is hard to see how deportation of an asylum-seeker who has the right to remain on the territory of the Member State through the asylum procedure can be secured. We could accept the Court's reasoning that deportation can be carried out once the asylum procedure terminates with a negative decision, however this does not seem in line with the Court's jurisprudence on detention of irregular migrants under return proceedings where the Court adopted the standard that detention can only be justified if there is a realistic prospect of removal and the authorities show that they are acting with due diligence and they actually carry out acts of preparation for deportation ([Singh v. the Czech Republic](#) [7], No. 60538/00, 25 January 2005; [Mikolenko v. Estonia](#) [8], No. 10664/05, 8 October 2009; [M. and Others v. Bulgaria](#) [9], No. 41416/08, 26 July 2011 and [Longa Yonkeu v. Latvia](#) [10], No. 57229/09, 15 November 2011.) What kind of preparation would this entail? Preparation of deportation usually means buying the tickets or contacting the individual's country of origin in order to get their documents, or contacting several embassies in case the nationality of the migrant is not known. These actions cannot be carried out in the case of an asylum-seeker because according to the Geneva Convention authorities do not have the right to contact the asylum-seeker's country of origin. It is therefore clear that no action of preparation for deportation can be carried out where an asylum seeker is concerned. Indeed, in practice, the Police usually wait for the asylum procedure to end before taking necessary steps to arrange the deportation.

In *Nabil* the Court states that in order to validly prolong the applicants' detention the domestic authorities had to verify that the applicants were frustrating the enforcement of the expulsion and whether or not the expulsion could eventually be enforced. How could the applicants frustrate the enforcement of the expulsion, if expulsion at that moment was not possible, neither were preparations for expulsion? How could the national court that is assessing the prolongation of detention examine whether the expulsion could eventually be enforced? If the authorities of the country of origin of the applicants cannot be contacted, it is not possible to assess in advance whether the expulsion would eventually be possible.

Looking at the jurisprudence of the CJEU, there has so far been only one judgment addressing asylum detention based on the Recast Reception Directive. In the *J.N.* case, J.N. was under the return procedure, but submitted an asylum application which gave him the right to remain on the territory of the Netherlands. He was detained based on Article 8(3)(e) of Recast Reception Directive ? detention for protection of national security or public order.

The Dutch court asked whether detention based on Article 8(3)(e) of the Recast Reception Directive is compatible with Article 6 of the Charter, which, as per Article 52(3), corresponds to the meaning and scope given to Article 5(1) of the ECHR. The Court referred to the findings in *Nabil*, that detention of foreigners can be justified only if the expulsion procedure is on-going. It continued that the detention of an asylum seeker under Article 8(3)(e) does not deprive him of his right to remain on the territory. It follows from the duty of sincere cooperation of the Member States and the requirements of effectiveness that, in the cases set out in the Return Directive, the removal must be carried out as soon as possible. This obligation would not be fulfilled if the enforcement of a return decision was delayed because, following the rejection at first instance of the application for international protection, the procedure could not be resumed at the stage at which it was interrupted, but had to start afresh. The CJEU concluded that the ECHR is not disregarded, because it permits the detention of a person against whom "action is being taken" with a view to deportation. And the pending asylum case does not as such imply that the detention was no longer

?with a view to deportation? ? since an eventual dismissal of the asylum application could have opened the way to the execution of the deportation orders.

It seems that detention is justified in order to make sure that the ?failed asylum seeker? will not abscond once his asylum claim is rejected. To interpret this objective with regard to the future is highly contentious as it seems at odds with the general principles of EU law such as principle of legal certainty and legitimate expectations.

Detention in order to prevent unauthorised entry

What about asylum-seekers who have not been issued a return order? The compliance of the detention of an asylum-seeker with the Convention based on the first limb of Article 5(1)(f) was assessed in [Suso Musa v. Malta](#) [11]. The ECtHR had not accepted that as soon as an asylum-seeker had surrendered himself to the immigration authorities, he was seeking to effect an authorised entry, with the result that his detention could not be justified under Article 5(1)(f). The Court concluded that given that it had not been established that the applicant had actually been granted formal authorisation to stay, Mr Musa?s detention pending the determination of his asylum request had been covered by Article 5(1)(f). The question as to when the first limb of Article 5(1)(f) ceases to apply, because the individual has been granted formal authorisation to enter or stay, is largely dependent on national law.

EU asylum legislation gives an asylum seeker a right to remain on the territory during the asylum procedure. Or as a dissenting opinion in [Saadi](#) [12] pointed out: asylum seekers who have presented a claim for international protection are *ipso facto* lawfully within the territory of a State, in particular for the purposes of Article 12 of the ICCPR and the case-law of the Human Rights Committee, according to which a person who has duly presented an application for asylum is considered to be ?lawfully within the territory?. The requirement of the Court that despite this right a Member State has to issue a formal authorisation of entry to an asylum-seeker, otherwise his/her entry is not authorised and his/her detention is covered by Article 5(1)(f) seems a bit far-fetched.

The ECtHR position was recently confirmed in [O.M. v. Hungary](#) [13], which concerns the detention of an Iranian homosexual asylum-seeker in order to establish his identity and to secure his presence through the asylum procedure. Although the Court mainly examined whether his detention was lawful based on Article 5(1)(b), since the government relied only on this ground, the Court still stated that where a State which has gone beyond its obligations in creating further rights or a more favourable position, enacts legislation explicitly authorising the entry or stay of immigrants pending an asylum, an ensuing detention for the purpose of preventing an unauthorised entry may raise an issue as to the lawfulness of the detention under Article 5(1)(f). Although not explicitly written down, it could probably be concluded that since the Hungarian Asylum Act gives all asylum-seekers a right to a permit authorising stay in the territory of Hungary, there is no justification for detention based on the first limb of Article 5(1)(f).

Regarding detention for the purpose of establishing asylum-seeker?s identity, the ECtHR ruled that since there was no specific and concrete legal obligation for the applicant to provide documentary evidence of his identity and nationality, the applicant?s detention could not fall under the scope of Article 5(1)(b). It is rare that a national legislation would actually impose an obligation on the asylum-seeker to provide documentary evidence of his identity and therefore it is highly questionable if the detention ground contained in Article 8(a) of the Recast Reception Directive actually falls under the scope of Article 5(1) of ECHR.

Conclusion

Looking at the established jurisprudence of the two European courts, so far Article 5(1)(f) of the

Convention can serve as a legal basis for asylum detention only if the asylum-seeker was firstly issued a return decision - second limb of Article 5(1)(f), or if there is no national legislation that would grant a special permit authorising an asylum-seeker to stay on the territory of the Member State - first limb of Article 5(1)(f).

Interestingly whether the grounds of Article 8(a) and (b) of the recast Reception Conditions Directive fall under the scope of 5(1)(f) of the Convention has been referred to the CJEU in the case [C-18/16](#) [14]. Given Suso Malta and O.M one wonders how the CJEU will deal with the question of detaining to prevent an unauthorised entry, especially with regards to Article 8(a). It is further hoped that the CJEU will discuss the articles? compliance with 5(1)(b) given that both [relate more to the scope](#) [15] of that Convention article rather than 5(1)(f). This will prove an extremely fruitful exercise given the inclusion of both articles as well as others in the Commission?s [proposal](#) [16] to amend the Recast Reception Conditions Directive.

As a final remark the use of detention for asylum-seekers under EU law is reaching new levels ? [pre Dublin transfer](#) [17], post transfer, detention for purposes of relocation or upon relocation, detention for purposes of fingerprinting, detention at transit zones, etc. ? all this raises serious concerns as to its legal grounds and procedural requirements. A question yet to be answered is how do all these detention forms reconcile with the Convention? Will the Court expand the interpretation of the scope of Article 5(1)(f) further to include these new creations of grounds for detention of asylum-seekers as legally permissible?

Gru?a Matev?i?, Legal Officer, Hungarian Helsinki Committee and Slovenian national ELENA Coordinator.

(This journal entry is an expression of the author?s own views, and not those of EDAL or HHC)

Keywords:

Détention

Effective remedy (right to)

Right to remain pending a decision (Suspensive effect)

Return

Links:

[1] http://www.echr.coe.int/Documents/Convention_ENG.pdf

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

[3] <http://www.asylumineurope.org/news/07-06-2016/aida-legal-briefing-detention-under-dublin-regulation>

[4] <http://www.asylumlawdatabase.eu/en/content/ecthr-sd-v-greece-application-no-5354107-11-september-2009>

[5] <http://www.asylumlawdatabase.eu/en/content/ecthr-ru-v-greece-application-no-223708>

[6] <http://hudoc.echr.coe.int/eng#?i=001-157392>

[7] <http://hudoc.echr.coe.int/eng#?appno="60538/00">

[8] <http://www.asylumlawdatabase.eu/en/content/ecthr-mikolenko-v-estonia-application-no-1066405-8-october-2009>

[9] <http://www.asylumlawdatabase.eu/en/content/ecthr-m-and-others-v-bulgaria-application-no-4141608-0>

[10] <http://www.bailii.org/eu/cases/ECHR/2011/1921.html>

[11] <http://www.asylumlawdatabase.eu/en/content/ecthr-suso-musa-v-malta-application-no-4233712-9-december-2013>

[12] <http://www.asylumlawdatabase.eu/en/content/ecthr-saadi-v-united-kingdom-application-no-1322903>

[13] <http://hudoc.echr.coe.int/eng?i=001-164466>

[14]

<http://curia.europa.eu/juris/document/document.jsf?text=detention&docid=175036&pageIndex=0>

[15] <http://clp.oxfordjournals.org/content/early/2015/10/01/clp.cuv015.abstract>

[16] [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-)

[migration/proposal-implementation-](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/proposal_on_standards_for_the_reception_of_applicants_for_international_protection)

[package/docs/20160713/proposal_on_standards_for_the_reception_of_applicants_for_international_protection](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/proposal_on_standards_for_the_reception_of_applicants_for_international_protection)

[17] <http://www.ecre.org/wp-content/uploads/2016/07/AIDA-Briefing-the-legality-of-detention-of-asylum-seekers-under-the-Dublin-III-Regulation-June-2015.pdf>.