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Detention in the EU, can the Charter of Fundamental Rights of the EU provide additional safeguards?

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With the adoption of the new EU asylum acquis, many changes will be made to the Common European Asylum System. Some of the provisions will improve protection standards and safeguards for those who are in need of international protection, nevertheless, it has also brought about some very contentious [1] changes [2]; now for the first time at EU level, EU legislation specifically provides for the detention of those who are in need of international protection. There is limited evidence on the actual number of asylum seekers currently detained in Europe but it is thought to be considerable. Some reports such as the JRS DEVAS report *Becoming Vulnerable in Detention [3]* indicates that asylum seekers are detained on average 1 month longer than irregular migrants and of those detained for 5-6 months, 78% are asylum seekers. The detention of asylum seekers is inherently undesirable and concerns the deprivation of individuals who have committed no crime. Seeking asylum is not an unlawful act, and in line with Article 31 of the 1951 Refugee Convention, asylum seekers should not be penalized for irregular entry in seeking protection.

With the adoption of the recast Reception Conditions Directive [4] (?rRCD?), which needs to be transposed by 20 July 2015 by the participating Member States, an asylum seeker can be detained on a number of grounds. Some of these grounds are open to interpretation and there is a risk that they could lead to widespread detention. Whilst there are a number of safeguards contained within the recast, it is arguable as to whether all provisions are in line with the Charter of Fundamental Rights of the EU [5], which is now legally binding on Member States. When States are implementing and applying the Directive, they must do so in a way that is compatible with the Charter which provides an opportunity to ensure higher safeguards when it is applied at the national level.

Background

During the European Commission?s evaluation [6] of the implementation of the Reception Conditions Directive in 2007, it became evident that Member States allowed for the detention of asylum seekers on various different grounds and the length of detention varied widely between states. As a result, one of the main objectives of the Commission when recasting the Reception Conditions Directive was to include safeguards in EU law to prevent asylum seekers from arbitrary detention and to ensure that detention of asylum seekers is only used as a last resort. However, the end result does not reflect these intentions. A lot of the initially proposed safeguards have been considerably weakened, and some of the grounds under which an asylum seeker can be detained are so broad that it could amount in certain instances to arbitrary and the widespread use of detention.

Reasons for detention

The reasons for detention are set out in Article 8 of the recast Reception Conditions Directive; and provide a lot of scope to Member States. For example, it allows for persons to be detained in order to ?determine or verify his or her identity or nationality? and ?in order to decide in the context of a procedure on the applicant?s right to enter the territory? which puts people at risk of systematic detention in entry proceedings, including at the border. Where Member States legal aid regimes are insufficient to ensure that the detention can be effectively challenged and use the procedural guarantees laid out in Article 9 of the rRCD, asylum seekers could be subject to automatic detention.

Another ground for detention is to determine those elements on which their asylum application is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant. What constitutes ?risk of absconding? is not defined in the Directive and is open to interpretation. If States decide to apply this ground they should do so in ?clearly defined exceptional circumstances? in line with recital 15 rRCD. In addition, when ?determining those elements on which their asylum application is based?, it should, at a minimum, be read as ?recording? those elements and not carry out a substantive examination.

The recast also allows for detention ?when protection of national security or public order so requires?, which again could be interpreted in an arbitrary fashion. For example, in Malta [7] this ground has been used to detain asylum seekers systematically for often long periods of time. (For a full list of the grounds, see Article 8 (3) rRCD [4]). However, Member States do not have to implement all grounds as set out in the rRCD: they can implement and/or apply the grounds on a more restrictive basis and have the option to introduce more favourable provisions, or they can decide not to detain asylum seekers for any reason related to the examination of the asylum application.

Detention safeguards

Before a Member State can apply any of the grounds listed in Article 8, they must first carry out a necessity test whereby Member Sates need to carry out an individual assessment on each applicant as to whether they should be detained. In addition, asylum seekers can only be detained ?if other less coercive alternative measures cannot be applied effectively? (Article 8 (2)). Only after both of these steps are complied with can a Member State apply one of the exhaustive grounds for detention. This is a positive development, it goes further than what is required by the ECHR and if applied properly, can limit the use of detention.

Once detained, the rRCD provides a number of procedural guarantees, which are laid out in Article 9. Whilst it is positive that the Directive now consolidates crucial procedural guarantees to ensure that an asylum seeker is effectively protected from arbitrary detention and for the shortest possible time, certain safeguards fall short of what is required under the Charter and the ECHR. In addition, in certain Member States it will be very difficult for applicants to use the guarantees, particularly when Member States have restrictive legal aid regimes. Given that the national implementing law needs to be read in light of the Charter (which is also mentioned in recital 35 of the rRCD), this can ensure that the safeguards as set out in the recast are read in a more protection sensitive manner.

The right to good administration (Article 41 of the Charter): The concept of due diligence forms part of the right to good administration and Article 9(1) rRCD provides that administrative procedures relevant to the grounds for detention shall be executed with due diligence; recital 16 of the rRCD sets out the minimum standards that due diligence requires. The CJEU has looked at this principle in a number of cases. In *TU München [8]* the Court found that the requirement to act

with due diligence requires the relevant body to examine impartially and carefully all aspects of the applicants case. In addition, the principle obliges the relevant decision making body to take into consideration relevant submissions that could impact the outcome of the decision. It acts as a counterbalance to the discretionary powers of the relevant decision maker (*Detlef Nollev Hauptzollamt Bremen-Freihafen [9]* §35*).*

In the context of detention guarantees, due diligence is an important guarantee to ensure that the detention of asylum seekers is for the shortest possible time, and that it is interpreted in line with the necessity test that is explicitly required for the detention of asylum seekers (Article 8 (2)). It also requires that there is an ongoing assessment as to whether the grounds for detention as laid out in Article 8(3) are still applicable and that the detention is reviewed whenever it is of prolonged duration, when relevant circumstances arise or when new information becomes available which may affect the lawfulness of detention (Article 9(5)).

The right to an effective remedy (Article 47 of the Charter): Decisions taken to detain an applicant for international protection under the recast are subject to judicial review. Article 47 of the Charter is applicable to the review of the lawfulness of the detention. The review must provide an accessible and effective means to challenge the detention measure (*Nasrulloyev v. Russia [10]* §86). Some aspects of Article 9 may not comply with Article 47 of the Charter and the ECHR. Article 9(2) provides that detention can be ordered by an administrative authority. However, when ordered by an administrative authority, the judicial review does not need to be *ex officio;* it may be that the judicial review is to be conducted at the request of the applicant. Article 9 (3) provides that when detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention to be conducted ex officio and/or at the request of the applicant.

The CJEU has found that under EU law, the right to an effective remedy includes a right of *access* to the effective remedy (*DEB v Bundesrepublik Deutschland [11]*). Therefore, not conducting a judicial review *ex officio* may, under certain circumstances, amount to excessive procedural rules that affect access to the Court. In addition to the fact that a judicial review does not need to be *ex officio*, there are a number of other possible restrictions on the right of access to the courts, these will be considered below.

The right to information in a language that you understand

Article 9(4) provides that detained applicants shall immediately be informed in writing, in a language which they understand or are reasonably supposed to understand, of the reasons for detention and the procedures laid down in national law for challenging the detention order as well as the possibility to request free legal assistance and representation. Article 5(2) ECHR provides that ?everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him?.

Article 52(3) of the Charter is intended to ensure consistency between the Charter and the European Convention on Human Rights (ECHR). It states that the meaning and scope of Charter articles that correspond to ECHR articles should be given the same meaning and scope as those laid down in the ECHR (Explanations relating to the Charter of Fundamental Rights [12]). This includes the case law of the European Court of Human Rights (ECtHR).

If there is no obligation on Member States to provide information in a language that applicants *actually* understand, given the possible background and vulnerability of some of the applicants, they may be unable to understand why they are being detained which affects their ability to challenge the detention. In *Abdolkhani and Karimnia v. Turkey [13]* the ECtHR found that ?by virtue of Article 5(2) any person arrested must be told, in simple, non-technical language that can

be easily understood, the essential legal and factual grounds for the arrest, so as to be able, if he or she sees fit, to apply to a court to challenge its lawfulness in accordance with Article 5(4)? (§136).

The standard set by the ECtHR does not meet the standard set out in Article 9(4) rRCD, an order that should be ?easily understood? needs, at a minimum, to be in a language that the applicant understands, and according to the ECtHR, even obliges the Member State to explain the detention order in non-technical language so the applicant understands it.

The right to legal assistance

Given the fact that the applicant is in detention, it may be very difficult for them to access legal assistance. Article 9 (4) provides that legal assistance only needs to be provided when there is a judicial review of a detention order. Recent research [14] has illustrated that in a number of Member States, it is difficult for applicants for international protection to contact a lawyer if they were not already assigned one prior to their detention (pp 46-52). Given that a legal representative is only assigned once judicial review proceedings are underway, this could mean in practice that an applicant is in detention for a considerable amount of time before the lawfulness of the detention is reviewed.

Moreover, given the general vulnerability and the backgrounds of applicants who find themselves in detention, it is unreasonable to assume that they would know to request a judicial review of a detention order. The CJEU has taken into account the disadvantaged position of vulnerable persons in a number of instances. It considered that given their vulnerability, procedural rules can make it excessively difficult to obtain the requisite legal advice (*Virginie Pontin v T-Comalux SA [15]* §65*)*. Therefore, even if this provision by itself would meet the standard of reasonableness and proportionality and not significantly impact on the right of access to the court, when applied to a particularly vulnerable applicant and combined with other factors such as the language that the relevant information is provided in, it may breach Article 47 of the Charter.

Conclusion

All secondary EU legislation and national implementing legislation must be read in light of the Charter. Therefore, even if the recast Reception Conditions Directive does not provide adequate safeguards to ensure that asylum seekers are not subject to systematic detention, the Charter provides higher legal guarantees that Member States need to comply with. The recast also recognises that it must comply with the Charter (recitals 9 and 41).

For persons seeking protection, being placed in a detention centre or in a prison, as a result of asking for protection can cause irreparable damage and can make persons even more vulnerable which can in turn affect their asylum claim. Therefore, it is essential that detention is avoided and that where appropriate, alternatives are used. Where this is impossible, all safeguards should be used to ensure that the detention is not arbitrary and is for the shortest period of time. The Charter can assist in achieving this.

ECRE is coordinating a project (theFRAME project[16]) that aims to promote the use of the Charter amongst legal practitioners. For those who are interested, as part of this project a more detailedpaper[17] has been published on the Examination of the Reception Conditions Directive and its recast in light of Article 41 and 47 of the Charter.

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(This journal entry is an expression of the author?s own views, and not those of EDAL or ECRE. If you would like to share any comments, you can contact us here [18].)

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