Please cite as: EUAA, '4.8.8 Overseeing the framework for detention' in *EASO Asylum Report 2021*, Ιανουάριος 2022.

4.8.8 Overseeing the framework for detention

The CJEU has a primary role in interpreting EU law (including CEAS) to ensure that it is applied in the same way in all EU countries and to settle legal disputes between national governments and EU institutions. Inevitably, detention practices have been reviewed during relevant procedures. Similarly, the ECtHR assesses violations of the Convention regarding the reception and detention of asylum seekers, mainly in line with Article 3. In addition, the United Nations human rights bodies frequently review individual complaints about detention in the context of migration and asylum. National courts also remain at the forefront of asylum and human rights protection in EU+ countries.

Given the significant work of judicial institutions not only in identifying violations and interpreting the law, but also in setting standards, reference to recent case law sheds light on the implications of detention for asylum and return procedures at the European, international and national levels.

European courts

The CJEU held that judicial authorities adjudicating on the detention of a third-country national without a legal right of residence can receive an application for international protection, even though they are not competent, under national law, to register such applications. The court also ruled that not finding accommodation in a humanitarian reception centre cannot justify holding an asylum applicant in detention.

The CJEU ruled that administrative detention is possible when implementing a forced removal to a Member State which granted refugee status, whereas the Return Directive does not preclude national legislation which allows an illegally-staying third-country national to be detained in prison for the purpose of removal, separated from ordinary prisoners, if the person poses a security threat to society or the Member State.

Two landmark judgments (of 14 May 2020 and of 17 December 2020) on detention practices in Hungary were issued. The CJEU confirmed that asylum applicants who are forced to remain in a transit zone for the duration of the examination of their application constitutes detention and an absence of legal guarantees *(see Section 2)*. Furthermore, the court highlighted that a mass influx of asylum seekers cannot justify derogations in order to maintain public order and preserve internal security. Following the CJEU decision on 14 May, all asylum seekers – over 280 persons – were

relocated from the transit zones to other reception centres in Hungary.

The ECtHR reviewed similar issues related to detention. In *R.R. and others v Hungary*, the court held that there was unlawful *de facto* detention in the transit zone due to the duration of the confinement and restrictions on free movement. In addition, the conditions in the transit zone were not deemed to be sufficient for people with special needs, and the 4-month confinement of a pregnant woman and minors exceeded the threshold of severity.

The situation of children in a detention centre was examined in *Moustahi v France*. The court found violations due to unaccompanied minors being placed in *de facto* administrative detention where they associated with an unrelated adult. There were also violations of their right to an effective remedy.

Keeping children in a closed centre for aliens while their application was being reviewed was considered as incompatible to the ECHR in *Bilalova and Others v Poland*. Following this ruling, Poland acknowledged in *A.A. v Poland* by way of a unilateral declaration that the applicant was deprived of her liberty in breach of the Convention without an effective procedure to challenge the lawfulness of her detention. In *A.B and others v Poland*, the ECtHR noted an interference with the effective exercise of the right to family life and found that the authorities failed to provide relevant and sufficient reasons to justify the applicants' detention.

Regarding the lawfulness of successive detention orders, the ECtHR highlighted in *Muhammad Saqawat v Belgium* that each decision should abide by both the substantive and procedural standards at all times. On prolonged detention, the court found in *M.K. v Hungary* that the authorities were justified in using detention to confirm the applicant's identity and nationality and ensure his presence for the asylum procedure, but the length of time taken annulled the reasons for detention.

The lawfulness of detention and the availability of a judicial review was reviewed in many cases by the ECtHR, for example in *E.K. v Greece, M.S. (Afghanistan) v Slovakia and Ukraine*, and *M.K. (Pakistan) v Hungary*.

International human rights bodies

The Working Group on Arbitrary Detention recently found in *Saman Ahmed Hamad v Hungary* that detaining an asylum applicant in a transit zone at land borders, solely because he had submitted an application for international protection, constituted an arbitrary deprivation of liberty, in violation of several provisions of the 1948 Universal Declaration of Human Rights and Article 9 (right to liberty) of the International Covenant on Civil and Political Rights (ICCPR). The Working Group concurred with the opinion of the CJEU Advocate General that the isolation and high degree of restriction of the freedom of movement of asylum seekers amounted to a deprivation of liberty. [xlv] It further reinstated that all procedural guarantees should be respected (e.g. an individual assessment, a periodical review of the detention order on the basis of necessity and proportionality, and the right to a judicial review), ensuring that "detention in the course of immigration proceedings is, as it must be, an exceptional measure used only as a last resort while consideration must be given to alternatives". [745]

National courts

The freedom of movement of applicants for international protection in Ceuta and Melilla was brought before the Supreme Court in Spain. In *Eleuterio v General Police Direction (Direccion General de la Policia)*, the applicant contested that geographical restrictions interfered with his freedom of movement within national territory, but the General Directorate of the Police dismissed his complaint. The Spanish Supreme Court ruled that an asylum applicant in the autonomous city of Ceuta (or in another case in Melilla) whose application is being processed has the right to enjoy free movement in Spain, even on a provisional basis. Recently, the Supreme Court reaffirmed the right to free movement for asylum applicants in Ceuta and Melilla and to establish residence in any other city within the national territory.

Regarding the prolongation of detention due to COVID-19 travel restrictions in deportation procedures, the Administrative Courts in Luxembourg concluded that the measure was legal and proportionate as the execution of the order was still reasonably expected, for example in the cases of a Moroccan and a Tunisian national. In contrast, the Swiss Federal Court ruled that the enforcement of an expulsion to Algeria could no longer be regarded as foreseeable within a reasonable period of time, so the person was released and required to report to the authorities.

The Supreme Administrative Court in Lithuania granted an alternative to detention to an applicant who requested asylum during expulsion procedures, despite the risk of absconding and that the application was lodged to delay the expulsion. In contrast, the Administrative Court for International Protection in Cyprus considered that no alternative measures to detention are appropriate to prevent an applicant from escaping when a return is pending, for example in the cases of a Vietnamese and a Pakistani national.

Several rulings by the Migration Court of Appeal clarified under what circumstances asylum applicants can be detained in Sweden. The rulings significantly reduced the reasons that an asylum applicant can be detained. The court held that there are no other conditions in the Reception Conditions Directive, Article 8(3) to detain an asylum seeker except when the rejected applicant is detained as part of a return procedure. Furthermore, the provisions in the Aliens Act do not have the same grounds for detention as the Reception Conditions Directive. The directive's grounds for detaining an asylum seeker for the purpose of determining or confirming identity or nationality or for the purpose of determining the factors on which the application is based cannot therefore be applied when there is no support for this in the Aliens Act. In order for supervision to be used as an alternative to detention, there must be a ground for detention in accordance with the Aliens Act that is compatible with EU law. If a third-country national is in custody as part of a return procedure covered by the Return Directive and submits an asylum application solely to delay or prevent the enforcement of a return decision, there are grounds for detaining the asylum seeker under the Aliens Act and the Reception Directive. When the conditions for detention in such a situation are met, there is also a basis for supervision.

The Administrative Court for International Protection in Cyprus highlighted the need for an

individual assessment of detention in line with the principles of proportionality and necessity. The court also underlined that its repeated omission in most detention cases raised a serious issue concerning the obligation of the administration to comply with the decisions and instructions of the judiciary.

[xlv] Reference is made to cases C-924/19 PPU and C-925/19 PPU mentioned above which were pending before the CJEU at that time.

[745] United Nations, Human Rights Council. (2020, June 6). *Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April–1 May 2020: Opinion No 22/2020 concerning Saman Ahmed Hamad (Hungary)* . https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session87/A_HRC_WGAD_2020_22_Advance_Edited_Version.pdf

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