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4.8.1 Recourse to detention



Legislative amendments to immigration detention were introduced in many EU+ countries, particularly in relation to a mass influx of third-country nationals and pre-removal restrictions.

Estonia amended the Act on Granting International Protection to Aliens and the Act on the Obligation to Leave and Prohibition on Entry, transposing the Return Directive, Article 18 which allows Member States to review the requirements for detaining a third-country national during a mass influx of migrants. The PBGB or the Estonian Internal Security Service may detain an applicant for international protection for up to 48 hours without the permission of an administrative court. After this period, the authority must apply to an administrative court for permission to detain an applicant up to 7 days in the exceptional situation of mass immigration if it is not possible to begin the assessment of the case. In this context, a new surveillance measure was adopted regarding 'appearance for counselling'. [xxxix] The Estonian Centre for Human Rights and the Estonian Refugee Council issued an Opinion against the extensive use of detention, which should be applied only as last resort. [651]

Germany also introduced changes to legislation which allow 'preventive' detention in preparation for a deportation.[652] Similarly, Law No 4636/2019 was amended by Law No 4686/2020 [653] in Greece to give the responsibility to the police director to issue a detention order without needing a recommendation from the Asylum Service. A judicial review is only undertaken for a prolongation of the detention order but not for the initial order. In addition, the time limits were extended from 45 days to 50 days for the maximum initial detention period, and from 3 months to 18 months for the total maximum detention period. Despite the recent abolition of protective custody (Law No 4760/2020, Article 43), children still remain under protective custody (i.e. detention) according to reports from METAdrasi.[654] and HumanRights360.[655]

The new law in Greece also clarified the concept of 'closed controlled island structures' ("KEDN") as multifunctional centres envisaged for the temporary reception and accommodation of third-country nationals or stateless persons who have applied for international protection, who are in the process of return or whose removal has been postponed. In separate areas within these structures, Reception and Identification Centres (RIC/K.Y.T.), Closed Temporary Reception Structures and Pre-Departure Detention Centres for Foreigners (PRO.KE.K.A.) may operate, in addition to separate areas for vulnerable groups. The general supervision of the operations of the closed controlled island structure is under the responsibility of the Commander of the Reception and Identification Centre (K.Y.T.) that operates within it. [656]

The United Nations Working Group on Arbitrary Detention noted that “the new provisions appear to introduce more restrictive procedures that may compromise the general legal principle that the detention of asylum seekers is exceptional”. 657 Along the same lines, Amnesty International stated that the detrimental reforms in asylum-related detention and arbitrary detention in the context of the temporary suspension of asylum in Greece featured more restrictive provisions in detention compared to previous legislation, 658 which was also echoed by more than 20 NGOs.659 , xi The Greek Council for refugees noted that maximum time limits for the detention of asylum seekers have been significantly increased (up to a total of 36 months, with 18 months maximum for the detention of an asylum seeker and 18 months of detention in view of a return), but no alternatives to detention were examined or applied by the Greek Authorities.660 Further, RSAegean raised concern on the administrative practice in the island of Kos, where newly-arrived third-country nationals are sent directly to the pre-removal detention centre.661 HumanRights360 noted that detainees in long-term detention stay in police stations under unsuitable conditions and without access to basic rights for long periods of time, even more than 6 months.662

In March 2020, Greece encountered excessive and organised migratory pressure 663 at the Evros border (Kastanies). The temporary suspension of asylum applications led to criminal charges and imprisonment for migrants who entered the country illegally. The CPT questioned the practice and recommended to the Greek authorities to ensure that all public prosecutors and misdemeanour courts are fully aware of Greece’s international legal obligations,xlii while urging the Greek authorities “to change their approach towards immigration detention and to ensure that migrants deprived of their liberty are treated both with dignity and humanity”. 664 The arbitrary detention of people who entered Greece during the temporary suspension of asylum was also heavily criticised by civil society organisations, such as Amnesty International,665 Human Rights Watch,666 RSAegean, 667 etc.

Hungary amended the Asylum Law to add that there must be a risk of absconding to detain a foreigner when the person has not applied for asylum and the Dublin III Regulation (Article 24) may apply. In exceptional cases, the asylum detention can also take place in a health care institution. 668

In Italy, Legislative Decree No 130, which aimed to overcome some of the provisions brought by Law No 132 of 2018 (Salvini Decree), entered into force on 22 October 2020.669 The new amendments introduced two additional grounds for detention, namely when i) there is a condition for which the rejection of refugee status (for state security/public order reasons) and exclusion from subsidiary protection status is foreseen; or ii) a subsequent application is issued during the execution of a removal order. In addition, applications submitted by third-country nationals for whom detention in a hotspot or in a repatriation centre has been ordered and applications submitted by nationals of a safe country of origin – without prejudice to the examination by an accelerated procedure – are no longer examined in priority. The decree also introduced more procedural safeguards for detained asylum seekers, such as conditions for detainees, information provision once the detention order is issued in a language which is understood or, where this is not possible, in English, French or Spanish, reduced maximum length of detention in the context of return from 180 to 90 days, and the possibility to address petitions or complaints about detention to the Ombudsperson acting as the National Guarantor, as well as the regional and local guarantors. Although it discontinued the follow-up procedure, the UN Human Rights Committee

requested the Italian authorities to ensure that immigration detention is applied only for the shortest period and as a measure of last resort, while standard operating procedures must be applied in practice. 670

The legal framework was revised also in Lithuania in November 2020 (in force as of 1 March 2021). The amendments included a regular review (at least once every 3 months) of the detention grounds with a view to shortening the detention, review of the framework of alternatives to detention and provisions on the conditions and procedure for the temporary accommodation of aliens detained for more than 48 hours or aliens who have been granted an alternative measure to detention in the State Border Guard Service. 671

Following the *Gnandi* and *C and others* cases, the Netherlands amended as anticipated 672 the Aliens Act by the Law of 22 April 2020 to allow detention during the appeal phase in the border procedure.673 The amendments (Articles 3 and 6) aim to establish a legal ground for detention following the rejection or inadmissibility of an asylum application, in line with the Reception Conditions Directive, Article 8(3). In the absence of these clarifications, third-country nationals could be granted access to the Dutch territory.

Following a change to the Aliens Circular (paragraph A5/2.4) in the Netherlands, the grounds for placing unaccompanied minors in detention for the purpose of a return were expanded. This expansion concerned minors who were not previously in sight of the authorities and they can be removed within 4 weeks. This policy change "aims to prevent unaccompanied minors from absconding and potentially, consequently, becoming a victim of exploitation". 674

Romania amended its regulation on accommodation centres for foreigners taken into public custody with a new chapter to regulate the General Inspectorate for Immigration's use of personal data. 675

Recourse to detention practices in Malta was strongly criticised by the CPT. As noted in the report, the restriction of movement was imposed on grounds of public health since 2018, leaving third-country nationals in arbitrary detention without procedural guarantees. Consequently, migrants are "*de facto* deprived of their liberty" 676 in poor living conditions that may amount to inhumane and degrading treatment contrary to the ECHR, Article 3. The deteriorating conditions were also reported repeatedly by NGOs.677 In this context, the CPT urged "the Maltese authorities to take decisive steps to address the very serious issues outlined in this report and reform their immigration detention system accordingly with the support of the EU and the Council of Europe, as appropriate". NGOs have frequently advocated for the immediate release of people held in detention arbitrarily as detention orders were issued several weeks or months after arrival, without any individual assessment.678 The report was fully endorsed by the Malta Refugee Council, which recognised positive developments brought by the new Detention Services Director, and expressed hope that "these developments are merely the first steps of a major overhaul of the situation in the centres." 679 In its response to the CPT report, the Maltese government reported that, since the CPT visit in September 2020, the number of persons held in closed centres had been reduced by 79% and that measures were being taken to improve detention conditions. 680

The AIDA report for Slovenia also noted that the International Protection Act was not amended

following the Supreme Court's decision on the legal ground for detention in the Dublin procedure in 2020 but the Ministry of the Interior's Directorate for Migration underlined that these amendments were adopted in 2021. The report noted that applicants continued to be detained pending the Dublin procedure in 2020, based on other grounds of the law. The report also noted that applicants were detained on the premises of the Centre for Foreigners by the Migration Directorate when previously they were transferred to the Asylum Centre following a preliminary procedure. [681] The Ministry of the Interior underlined that this practice was only applied for a short period due to a stricter regime which was in line with the International Protection Act, and applicants had the right to legal remedy to challenge these decisions.

Stateless people were more likely to be detained in various EU+ countries linked to the fact that they often lacked proper identification or travel documents, for example in Bulgaria, France, Italy and the Netherlands, was raised by the European Network on Statelessness. In the majority of cases, prolonged detention was linked to the lack of proper statelessness determination procedures in the context of return.

Regarding the placement of asylum seekers in administrative detention, Lithuania reported positive developments to the United Nations Human Rights Committee, in line with the recommendations and concluding observations adopted by the Committee. [682] Lithuania reported that asylum seekers were detained in rare and exceptional cases, and the average duration was reduced to 48 days in 2019 compared to 56 days in 2018.

[xi] Similarly, BVMN has reported that detention, both formal and informal, has become an increasingly prevalent part of migration management in Greece. Border Violence Monitoring Network. Input to the EASO Asylum Report 2021. /sites/default/files/BVMN.pdf

[xli] Αναστολή της υποβολής αιτήσεων χορήγησης ασύλου [Suspension of the submission of asylum applications. Gov. Gaz. 45 A'/2.3.2020]. https://migration.gov.gr/wp-content/uploads/2020/05/pnp-anastolh-ths-yp... . The act envisaged that illegal immigrants entering the country were not entitled to apply for international protection. The CPT "urged the Greek authorities not to resort to such a legislative measure again even when faced by a potential increased influx of migrants. It is imperative that all persons in need are placed in a position to effectively request asylum". Council of Europe. (2020, November 19). Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 17 March 2020. https://rm.coe.int/1680a06a86%20

[xlii] Council of Europe. (2020, November 19). Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 17 March 2020. https://rm.coe.int/1680a06a86%20. In its reply, the Greek Government informed the CPT that from 28 February 2020 to 14 March 2020 the Single-Member Court of Misdemeanours in Orestiada sentenced 103 aliens to imprisonment and pecuniary penalty for violation of Law No 3386/2005, Article 83(1a). For 19 aliens, the prison sentence was suspended and the administrative procedure of deportation followed. 84 aliens who were sentenced to imprisonment were taken to detention centres in the country.

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