

The Detention of Asylum Seekers in Europe

Tara Wolfe

Summary:

This essay reviews the safeguards and standards existent in international refugee law, regional human rights law and EU law for the protection of asylum seekers against the use of detention by states in Europe. The use of detention in Europe, although varied, is widespread and is an interference with the individual's right to liberty. It is considered a legitimate expression of the states broadly unfettered right to control the admission and expulsion of non-nationals. The tension that exists between the interest of the state in controlling migration and the right of the asylum seeker to personal liberty is examined. It is argued that the only system capable of resolving this tension is the EU regime. It is capable of codifying high standards for the protection of asylum seekers against detention, to which Member states consent to being bound, consistent with the maintenance of an efficient system of migration control.

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Introduction

Liberty of the person and freedom of movement is a fundamental principle of liberal democracies protected in all international and regional human rights instruments¹. Detention² constitutes an interference with this right. In recognition, there is international consensus that the detention of asylum seekers should only be a measure of last resort. The United Nations High Commissioner for Refugees (UNHCR) has called the practice “inherently undesirable” stating that “it should only be resorted to in cases of necessity”³. The Working Group on Arbitrary Detention has cited the “growing and preoccupying practice” of the administrative detention of those exercising their right to seek asylum under Article 14 of the Universal Declaration of Human Rights (UDHR) as an example of arbitrary detention⁴. In Europe the Committee of Ministers has called for alternative and non-custodial measures to be considered before resorting to measures of detention, reaffirming that any deprivation of liberty should be “exceptional”⁵.

Despite this, state practice within Europe reveals that the detention of asylum seekers is on the increase and is fast becoming routine practice⁶. In spite of legal restrictions preventing the detention of asylum seekers solely on account of their having made a claim for asylum,⁷ state practice reveals that these restrictions are not always adhered to⁸. Although practices vary widely, all Member States of the European Union have enacted legislation which provides for the detention of asylum seekers; from Germany, where detention is exceptional, to Malta where detention is systematically applied to all those who enter the country illegally⁹. Recent EU directives, adopted under title IV of

¹ Article 9(1) of the International Convention on Civil and Political Rights (ICCPR); Article 5(1) of the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR); Article 37(b) UN Convention on the Rights of a Child (CRC); Article 7(2) American Convention on Human Rights 1969 (American Convention); Article 5 African Charter on Human and People’s Rights (African Charter); Article 16(4) of the International Convention on the Protection of All Migrant Workers and Members of their Families (ICMW)

² The following definition of detention will be used: the deprivation of liberty in a confined place, such as a prison or purpose built closed reception centre or holding centre which the asylum seeker is not at liberty to leave.

³ UNHCR’s Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers paragraph 1.

⁴ UN Commissioner for Human Rights, *Fact Sheet No. 26*

⁵ Council of Europe Committee of Ministers, Recommendation Rec (2003)5 of the Committee to member states on measures of detention of asylum seekers, Strasbourg, 16 April 2003; Council of Europe: Parliamentary Assembly, Resolution 1707 (2010): The detention of asylum seekers and irregular migrants in Europe, 28 January 2010

⁶ For a recent detailed analysis of state practice within the EU the reader is referred to Cornelisse (2010), Chapter 1; *The Report from the Commission to the Council and to the European Parliament on the Application of Directive 2003/9/EC dated 26.11.2007*; EMN “*Reception Systems, their Capacities and the Social Situation of Asylum Applicants within the Reception System in the EU Member States*” May 2006; and, Guild (2006).

⁷ Article 31 of the UN Convention relating to the Status of Refugees 1951; Article 7 of the Reception Conditions Directive; and, Article 18(1) of the Procedures Directive.

⁸ Cornelisse (2010), 11

⁹ Except for those with special needs

the EC Treaty¹⁰, arguably give a wide margin of discretion for the detention of those who seek asylum.

It is beyond doubt that under international and European law states are competent to detain non-nationals for the purposes of regulating entry and pending removal, as confirmed by a number of judicial decisions. Equally, the individual is protected against arbitrary detention whatever their immigration status. Therefore, there exists a tension between the state's interest in maintaining and enforcing effective migration policies, which is largely influenced by economic and political¹¹ considerations, and the human rights of the individual. Immigration detention sits at the centre of this tension. As stated by Wilsher, "...any human right of non-nationals to respect for their liberty conflicts with the broadly unfettered right of States to control the admission and expulsion of non-nationals conferred by both national and public international law."¹²

In this essay I seek to examine first how far international refugee law, regional human rights law and EU law constrains or limits state sovereign power to detain asylum seekers for administrative purposes¹³. Second, I seek to examine whether and to what extent the different normative systems are capable of resolving the underlying conflict between the interest of the state to control migration and the human rights of the individual asylum seeker.

In my analysis I focus on the detention of asylum seekers, as opposed to all non-nationals who seek entry into Europe, for the following reasons. First, the category asylum seeker is problematic in a legal sense. Asylum seekers are not a class of persons known in international refugee law or regional human rights law, although they have been recently defined in the EU Reception Conditions Directive¹⁴. Their legal status remains undetermined. Second, despite recognising that the detention of non-nationals for administrative purposes also raises ethical and legal concerns, as a category the asylum seeker can and must be distinguished from other non-nationals seeking entry into Europe. Different rights should and do attach depending on whether the individual is seeking to enter to gain

¹⁰ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31/18, 6 February 2003 (Minimum Standards Directive); Council Directive 2005/85/EC of 1 December 2005 laying down minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13, 13 December 2005 (Procedures Directive); Council Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24 December 2008 (Returns Directive).

¹¹ In using the term political I am referring to the fact that State's are constrained and influenced on a practical level by what is possible to achieve in their political community. For a discussion of this issue the reader is referred to Gibney (2005)

¹² Wilsher (2004), 898

¹³ The detention of asylum seekers following criminal proceedings for immigration offences will be outside the ambit of this essay, save where relevant to the penalisation of asylum seekers who have entered clandestinely.

¹⁴ For the purposes of this essay, a broad definition is used: an asylum seeker is a non-national who has made a claim for refugee status or international protection

international protection or for economic reasons. This differentiation can be justified. The asylum seeker is exercising their right to seek and enjoy asylum, as first articulated under Article 14 of the Universal Declaration of Human Rights (UDHR). It is the principle on which the refugee protection regime rests. Particularly relevant for the issue of detention is the right to enjoy asylum, which is given substance by Article 3-34 of the Refugee Convention. Although the right to seek and enjoy asylum is more of a Hohfeldian privilege than a right¹⁵, it does provide some legal justification for maintaining a distinction. Further, as highlighted by Skordas, the distinction is important on a practical level both for the protection of those who are entitled to international protection as well as to enable states to propose, enact and maintain effective migration policies¹⁶.

The further challenge is that there are undoubtedly those who use the asylum process in order to gain entry into Europe. Despite the controversy that surrounds such a statement, it is well documented. It has been reported by the Working Group on Arbitrary Detention, which concluded in a report on UK practice of immigration detention that a large majority of asylum seekers were economic migrants and a small percentage were genuine asylum seekers¹⁷. This has implications for the anomalous position of the asylum seeker in law and practice.

Using the typology of Guild¹⁸ the detention of asylum seekers in Europe will be grouped into three stages: initial detention for the purposes of identification; detention during the asylum process; and, detention post-determination. I will analyse the ambit of state competence to detain asylum seekers at each of these stages of the determination process with particular focus on the first two stages.

My analysis will start with international refugee law. I will argue that, from the perspective of the asylum seeker, this legal regime is problematic for two reasons: it does not set out the procedure by which the rights of the de facto refugee at different stages of the process can be determined and it lacks any form of judicial enforcement. As such, it fails to offer clear and enforceable standards to which states must comply. In the second chapter I examine Article 5 of the European Convention of Human Rights (ECHR) through the jurisprudence of the European Court of Human Rights (ECtHR). I seek to show that the ECtHR has not formulated an adequate response to the detention of asylum seekers despite a few helpful cases. I argue that this is due to the inherent restraint that the concept of territorial sovereignty exerts on the protective reach of human rights in the context of immigration control which the court is reluctant to interfere with. Finally, I will examine the EU legal

¹⁵ O'Nions (2006), 3

¹⁶ Skordas (2004), 24

¹⁷ E/CN.4/1999/63/Add 3 para 20

¹⁸ Guild (2005), 5

regime. I will argue that although an adequate response has not yet been formulated, it is within this system that the tension is most likely to be resolved. The EU regime, with the correct political will, is capable of setting high standards for the protection of the asylum seekers' right to liberty consistent with the right of a state to maintain fair and efficient immigration controls.

Chapter 1

International Refugee Law and the asylum seeker: the protection gap

The UN Convention Relating to the Status of Refugees 1951 and its Protocol 1967 (“the Refugee Convention”) remain the core international instruments providing for the protection of refugees, despite recent challenges to its relevance¹⁹. It defines the class of persons, refugees, deserving of protection under the convention and provides minimum standards for their treatment²⁰. There are two provisions potentially relevant to the detention of asylum seekers: Article 31 and Article 26. Article 31(1) provides that refugees, having come directly, should not be penalised for their illegal entry or stay, provided that they present themselves without delay to the authorities and show good cause for their illegal entry or presence. Article 31(2) permits some restrictions on the movements of refugees who have entered or stayed illegally, but stipulates that they must be “necessary” and “shall only be applied until his or her status in the country is regularised or they obtain admission into another country.” Article 26, which falls to apply after the refugee has had their status regularised, creates a presumptive right of freedom of movement to refugees “lawfully in” a contracting state subject to “regulations applicable to aliens generally in the same circumstances”.

Interpretation of its articles must conform to the object and purpose of the Refugee Convention, stated in the preamble to assure to refugees the “widest possible exercise of these fundamental rights and freedoms”²¹. As a preliminary observation, it is notable that Article 31 does not apply to all refugees but only those who attempt to regularise their status. This is consistent with the object and purpose of the provision to provide an incentive to those forced to enter clandestinely to make themselves known to the host state²². Further, although administrative detention may constitute a penalty²³, an initial period of detention for the purposes of identification is not prohibited²⁴. This is the logical corollary of the state’s justifiable need to identify whether the individual is an asylum seeker and thus potentially deserving of protection or to establish whether they pose a threat to national security such that provisional measures may be justified under Article 9. Obviously, any asylum seeker who has had a final, negative determination on their claim no longer benefits from immunity. Under Article 26, detention is not prohibited per se, but subject to restrictions.

¹⁹ Goodwin-Gill (2001)

²⁰ See Article 5 Refugee Convention

²¹ Article 31(1) of Vienna Convention on the Law of Treaties 1969

²² UN Dept of Social Affairs, “A Study of Statelessness” UN Doc. E/1112, 1.2.49, at 20 cited in Hathaway (2005), 388

²³ Goodwin-Gill (2003), 194-195; Hathaway (2005), 421

²⁴ UNHCR Guidelines 1999; Goodwin-Gill (2007), 462

The procedural gap

These provisions create a “critical legal standard for the protection of refugees.”²⁵ The issue is whether and, if so, when these rights attach to asylum seekers who may (or may not) be refugees, but who have not had a determination on the issue by the country of asylum. The Refugee Convention does not deal expressly with the rights of asylum seekers: on the face of it, it is exclusively concerned with the rights of refugees. A refugee is defined under article 1(A)2 of the Refugee Convention. Once an individual satisfies the criteria within this definition they are entitled to the protections and rights guaranteed under the Refugee Convention which accrue according to an incremental “attachment system”²⁶. Refugee recognition being a declaratory act entails that if a state denies certain rights to those who have made an application for asylum it risks failing to meet its obligations under the Refugee Convention.

On this basis, it must be correct that “certain rights..... inevitably attach until status is determined for the system of protection envisaged by the Convention to operate effectively.”²⁷ Article 33, the protection against *non-refoulement*, is the most obvious example of such a right. Its application to those who have made a claim for asylum is now beyond dispute. There are also strong arguments for contending that Article 31 must apply in this manner. Given the proliferation of non-entrée policies and practices pursued, from visa requirements to carrier sanctions, it is albeit impossible for a refugee to enter a European state legally, as was recognised in the UK courts by Simon Brown LJ in *Adimi*²⁸. Article 31 must operate to prevent prosecution or penalisation in these circumstances not only to provide protection for refugees but also “presumptive refugees.”²⁹ This interpretation is supported by the drafters of the Refugee Convention and the stated purpose of the provision.³⁰

Article 26 requires that the refugee be “lawfully in” the territory of the receiving state. Whether this applies to those who have made a claim for asylum is a matter of controversy. The weight of opinion seems to support the contention that once an individual has made an application for asylum they are “lawfully in” the state. Hathaway argues that a refugee is “lawfully in” a state, as distinct from “lawfully staying”, once admitted to the asylum procedure.³¹ This interpretation is also supported by the UNHCR³² and finds some support in judicial decisions³³. Thus an asylum seeker should also

²⁵ Hathaway – refugee law is not immigration law

²⁶ Hathaway (2003), 3; for a full explanation of the nature of the rights regime see Hathaway (2005) 156-192, Goodwin-Gill (2007),

²⁷ Goodwin-Gill (2007), 412

²⁸ *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667

²⁹ *Ibid*; Goodwin-Gill (2003), 219

³⁰ Hathaway (2005) 157 - 159

³¹ Hathaway (2005), 417

³² UNHCR (2007), 6

benefit from this provision. This is the position taken by Edwards who argues that the protection accorded by Article 26 would be rendered meaningless if asylum seekers did not also benefit³⁴.

But, what of the migrant who has used the request for asylum as a means to obtain entry through deception. The UNHCR states that the immunity from penalisation under Article 31(1) would not apply should there be reasonable grounds to suspect such action.³⁵ Does this mean that the provisions of the Refugee Convention only apply to bona fide asylum seekers – i.e. those who are genuinely searching for international protection? It would be surprising indeed if a contrary position was held. But, herein lies the problem. The Refugee Convention does not address the procedure to be followed by Contracting states to ensure that a balance is maintained between the rights of the refugee and the legitimate interests of the state. It is left to each party to establish the procedure that it considers most appropriate³⁶. With irregular mixed population movements, illustrated most starkly by migration in the Mediterranean region, distinctions need to be made between irregular migrants and those seeking international protection for the purposes of establishing the beneficiaries under the Refugee Convention. At a practical level, however, devoid of clear procedural safeguards and standards, the Refugee Convention is unable to ensure that “presumptive refugees” receive the rights to which they are entitled.

It is important to state that while the Refugee Convention does not set out the procedure that must be followed for the purposes of status determination, neither does it permit states to avoid granting the rights owed to refugees within their territory by delaying the decision making process³⁷. The contracting state has an obligation to pursue the decision making process diligently and in good faith in order to ensure that they are not in breach of their obligation to secure the rights to all refugees who are in fact in their jurisdiction³⁸. But, this duty of good administration is not sufficient to ensure adequate safeguards for the asylum seeker.

A second problem is that although the Refugee Convention is the core instrument for the protection of refugees, many of the rights as they apply to those during the determination procedure are abstract in nature and difficult to define. This difficulty is compounded by the lack of an enforcement

³³ The UK Supreme Court held that a person admitted to asylum procedures and granted temporary admission was “lawfully in” the UK: *Szoma v DP* [2005] UKHL 64 para 24; HRC *Celepi v Sweden* (456/91) on an interpretation of “lawfully within” for the purposes of Article 12 ICCPR – however, in that decision the asylum seeker, who was subject to a deportation order, had been granted formal permission to remain in Sweden although he was not granted refugee status.

³⁴ UNHCR (2011b), 13

³⁵ UNHCR (2007), 5

³⁶ UNHCR Handbook para 189

³⁷ See Hathway(2003)

³⁸ See also Article 27 VCLT

mechanism or judicial or quasi-judicial body to rule on the interpretation, scope and effect of the rights enshrined in the Refugee Convention. Under Article 31(1) detention may be prohibited unless “necessary”, an objective test. But, it does not provide criteria as to what constitutes “necessary”. States are given a wide margin of discretion as to what interpretation to adopt. The same applies to the term “regularise”, the ambit of which is crucial for determining who the beneficiaries of protection are.

True, the UNHCR, as the body responsible for supervising the Refugee Convention³⁹, has provided guidelines as to how to interpret the term “necessary”. The Executive Committee in Conclusion No44 (XXXVII) examines what is meant by the term “necessary” and set out exceptions to the general rule that detention should be avoided: to verify identity; to determine the elements on which the claim for refugee status is based; where asylum seekers have destroyed or used fraudulent travel documents and to protect national security and public order. The UNHCR Guidelines reiterate these exceptions. But, these exceptions remain wide; too wide to place adequate limitations upon state discretion. This may be a necessary corollary of the role of the UNHCR which, in order to deliver its protective mandate, must both supervise, challenge and lobby governments for support: a delicate path to tread.⁴⁰ Further, such recommendations and guidelines are soft law only. As illustrated by the approach of the UK Supreme Court and the ECtHR in *Saadi*, they are not binding⁴¹. UNHCR’s protection efforts are as effective as a State would have them.⁴² In the current political climate of restrictive entrance policies, this does not bode well.

Commentators have been at pains to ensure that a conceptual distinction is maintained between refugee protection and migration control. In the words of Hathaway, “In principle, refugee protection is not about immigration. It is intended to be a situation-specific human rights remedy.”⁴³ As argued by Edwards “the inclusion of Article 14 of the UDHR alongside unanimously agreed human rights and fundamental freedoms squarely places international refugee law within the human rights paradigm.”⁴⁴ However, without any mechanism for the interpretation or enforcement of the rights it contains these rights offer limited protection for the asylum seeker who is subject to administrative detention, save ensuring that the determination procedure is pursued diligently and in good faith.

³⁹ UNHCR Mandate Article 8; Article 35 of the Refugee Convention

⁴⁰ See Forsythe (2001) for a detailed examination of the political “non-political” role of the UNHCR

⁴¹ Both courts declined to adopt the approach taken by the UNHCR to whether or not an asylum seeker is “lawfully in” the host state, as evidenced by their Written Submissions to the Grand Chamber, (2007). In relation to the SC, this position was criticised by Hathaway (2005), 417

⁴² UNHCR (2006), 18

⁴³ Hathaway (1997), 117; Edwards (2005)

⁴⁴ Edwards (2005), 297

Concluding remarks

This is not to argue that the Refugee Convention is not able to provide effective protection to those who flee persecution. The difficulty is in attaching the rights guaranteed in the Convention to the asylum seeker. It may be true that international refugee law has the “fundamental purpose of balancing the rights of involuntary migrants and those of the states to which refugees flee”⁴⁵. But, it fails to resolve the underlying conflict between the state’s interest in maintaining effective border control and the human rights of those involuntary migrants who seek to enter in contravention of those controls and who lack formal status.

⁴⁵ Hathaway (1997), 116

Chapter 2

Human rights and State Sovereignty

Introduction

The application of the class asylum seeker within international human rights law is not problematic. Save a few provisions that expressly exclude non-nationals⁴⁶, the human rights standards elucidated under international law are owed to “all human beings”. Human rights law pierces “the veil of sovereignty” such that the state owes obligations to those within its territory regardless of nationality.⁴⁷ In the context of immigration detention this is important since customary international law permits states a wide discretion to detain irregular migrants as a “crucial aspect of traditional notions of territorial sovereignty.”⁴⁸ The question is to what extent human rights norms are capable of providing real and effective limitations on the exercise of the sovereign right of Member states to detain those who seek asylum.

Since the focus of my examination is the protection of rights within Europe, I will examine the question through an analysis of the jurisprudence of the European Court of Human Rights (ECtHR). First, the ECtHR is emerging as the Constitutional Court of Europe: promoting national compliance with its norms and convergence in the national institutions of European states⁴⁹. Second, unlike the International Covenant on Civil and Political Rights (ICCPR) and the Refugee Convention there is real possibility for the effective enforcement of rights and obligations contained in the ECHR through the individual application procedure in Article 25 and the jurisprudence of the ECtHR that has followed such applications. For this reason, it is widely considered the “most effective trans-national judicial process for complaints brought by individuals and organisations against their own governments.”⁵⁰

An analysis of the jurisprudence of the ECtHR on Article 5 reveals that its approach has been less than liberal in the context of the detention of asylum seekers. Although it sets standards and safeguards for the manner in which the decision to detain is executed, it does not place adequate restrictions on the decision to detain itself i.e. the substantive conditions that must be satisfied for detention to be lawful. Procedural rights are secured; substantive rights are compromised. It is argued that this difference in approach can be explained by its perception of detention as a

⁴⁶ For example article 16 ECHR

⁴⁷ Cornelisse (2011)

⁴⁸ Wilsher (2007), 396

⁴⁹ Greer (2006), 317

⁵⁰ Greer (2006), 1

“necessary adjunct” to the sovereign state’s undeniable right of control.⁵¹ As will be seen, the court is reluctant to interfere in the sovereign right of the state to regulate migration and as such fails to harmonise the competing interests of the state in migration control and the human rights of the asylum seeker.

The European Convention on Human Rights and the asylum seeker: Article 5

Article 5 balances the individual right to personal liberty with the right of the state to detain non-nationals pursuant to immigration control. The text of Article 5 provides that “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases...” and an exhaustive list of exceptions follows. If the ground of detention does not appear in the list, the detention is presumed to be arbitrary. For our purposes the key provision is Article 5(1)(f) which authorises the detention of a person to “prevent his effecting an unauthorised entry into the country” or against whom “action is being taken with a view to deportation or extradition”. The first limb of Article 5(1)(f) is most applicable to first two stages identified by Guild, initial detention for the purposes of identification or detention during the asylum process, and, the second limb of Article 5(1)(f) will only apply to the third stage, at the end of the process once the asylum seeker has had a final negative decision on their claim. Importantly for the purposes of analysis, at this point they are liable to removal or deportation on the same basis as irregular migrants⁵². It is clear that Article 5 permits the detention of non-nationals for the purpose of immigration control⁵³. The question is how the court has applied this provision to the detention of asylum seekers at the various stages of their application.

Procedural guarantees

It is clear that the court has maintained a rigorous approach to the procedural rights of asylum seekers subject to decisions to detain. Detention is only lawful under Article 5(1)(f) when it is both in accordance with a “procedure prescribed by law” and where the deprivation of liberty is in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness⁵⁴. The ECtHR has consistently held that a “procedure prescribed by law” refers not only to the narrow meaning that the detention must have a legal basis in domestic law but also that the quality of the law must be

⁵¹ *Saadi v UK* para 64, see also Cornelisse (2011), Ch 8

⁵² Although as will be seen there may be some differentiation in terms of the length of their detention in the court’s review of whether or not the state has acted with “due diligence” in the individual circumstances of the case.

⁵³ *Amuur v France; Chahal v UK; Abdulaziz Cabales and Balkandali v UK* App no 94, 28th May 1985

⁵⁴ *Amuur v France* para 50

“sufficiently accessible and precise in order to avoid all risk of arbitrariness.”⁵⁵ There must also be reliable communications between the individual and the authorities⁵⁶ and under Article 5(2) the individual must be informed promptly of the reasons for his or her detention⁵⁷, in his or her own language⁵⁸ and the quality of the information must be such as to enable the detainee to challenge the lawfulness of the decision⁵⁹. Immigration detainees are entitled to the remedy of *habeas corpus* under Article 5(4). The right to judicial review must not be “theoretical...but practical and effective”⁶⁰ and must be “wide enough to bear on those conditions which are essential for the ‘lawful’ detention of a person according to Article 5(1)(f).”⁶¹ Thus, a blanket policy of detaining all asylum seekers would be unlawful⁶². Security concerns cannot justify a lack of judicial control⁶³. It has also been established that where the decision to detain, despite being in accordance with national law, is tainted by bad faith, the subsequent detention will be arbitrary⁶⁴.

The procedural requirements that the court places upon state behaviour in the context of immigration control should not be downplayed. Procedural rights go a long way to providing protection for the immigration detainee against arbitrary interferences by the state. In addition, they can contribute to the implementation and formation of effective immigration policies⁶⁵. They are a reflection of the “strong procedural bias” of the court, observed by Wildhaber, and in keeping with “the objective underlying the system: to ensure that persons throughout the Convention community are able fully to assert their Convention rights within the domestic legal system.”⁶⁶

But, as will be seen, the court does not maintain this rigorous approach when reviewing the substantive conditions that must be satisfied in order for the detention to be lawful. This difference in approach will be illustrated through an examination of how the court has interpreted “unauthorised entry” under the first limb of Article 5(1)(f) and “lawfulness” under Article 5(1).

⁵⁵ *Amuur v France* para 50; *Dougoz v Greece* para 55; *Mayeka and Mitunga v Belgium* no. 13178/03, judgment of 12 October 2006

⁵⁶ *Conka v Belgium* 51564/99 2002-I para 42

⁵⁷ In *Saadi v UK* 76 hours was not considered prompt: para 84

⁵⁸ *Rusu v Austria*, 2 October 2008, App no 34802/02 para 43

⁵⁹ *Conka v Belgium*

⁶⁰ *Conka v Belgium* para 45

⁶¹ *Dougoz v Greece*, 6 March 2001, Reports 2001-II, para 61

⁶² Lambert (2006), 22

⁶³ *Chahal v UK*

⁶⁴ *Conka v Belgium* no. 51564/99 2002-I ; *Bozano v France*, judgment of 18 December 1986, Series A no.111

⁶⁵ See Skordas (200x) 324

⁶⁶ Wildhaber (2002), 161

The lawful but “unauthorised” entrant

What constitutes “unauthorised entry” has important implications for the circumstances in which an asylum seeker can lawfully be detained on entry or during the asylum process: unless an asylum seekers’ situation can be brought within this exception, Article 5’s general prohibition on detention will apply. This matter has now been considered by the court in *Saadi v UK*. The facts of the case are significant. Mr Saadi entered the UK and claimed asylum immediately upon arrival. He was granted temporary admission in the UK. The decision therefore concerns the detention of an asylum seeker during the asylum process after the initial identity checks had been carried out. The court found by a narrow majority that “until a State has “authorised” entry to the country, any entry is “unauthorised””.⁶⁷ This is so whether the potential immigrant is an asylum seeker or not.⁶⁸ Given that Mr Saadi had been admitted into the UK, albeit not in possession of a residence permit, this interpretation is surprising and has been subject to much criticism⁶⁹.

The interpretation of the court does not sit easily with either international refugee or human rights law⁷⁰. Under the VCLT, the terms of the provision must be interpreted in light of its object and purpose⁷¹. The context of the provision – “a treaty for the effective protection of individual human rights”⁷² - must also be considered as well as rules and principles of international law⁷³. First, this interpretation is at odds with Article 31 of the Refugee Convention, as discussed in the previous chapter. As stated by Hathaway, “a focus on the purpose and context of Article 31(2) suggests that “regularisation” of a status occurs when a refugee has met the host state’s requirements to have his or her entitlement to protection evaluated.”⁷⁴ Thus, an asylum seeker who has submitted to the asylum procedure is “lawfully in” the state and it cannot be said that their stay is “unauthorised”. Second, this interpretation contrasts with the Human Rights Committee (HRC), which found that a person who has presented an application for asylum is “lawfully within the territory.”⁷⁵ Finally, it is at odds with the notion that the exceptions to the right of liberty should be interpreted restrictively.⁷⁶ As stated in the dissenting judgment, the purpose of the first limb of Article 5(1)(f) is to prevent entry in contravention of immigration controls. Applying the exception restrictively, it was open to

⁶⁷ *Saadi v UK*, para 65

⁶⁸ *Saadi v UK* para 44

⁶⁹ Wilsher (2007); O’Nions (2008a) and (2008b); Cornelisse (2010); UNHCR (2011b)

⁷⁰ See Hathaway (2005), 417

⁷¹ Article 31(1) VCLT

⁷² *Saadi v UK* para 62

⁷³ Article 31(3)(c) VCLT; *Al-Adsani v UK* no 35763/97 2001-XI at para 55

⁷⁴ Hathaway (2005), 417

⁷⁵ *Celepi v Sweden* CCPR/C/51/D/456/1991

⁷⁶ *Winterwerp v the Netherlands*, judgment of 24 October 1979, Series A no 33

the court to find that Mr Saadi was not effecting an “unauthorised entry” since he had made a claim for asylum on arrival.

The interpretation adopted in *Saadi* highlights a subtle inconsistency in the court’s approach. The court has recognised that an asylum seeker has a right to gain effective access to the procedure for determining refugee status⁷⁷. This is inconsistent with its finding that such an individual’s presence is not authorised. This inconsistency is further demonstrated by the approach taken by the court in cases that do not involve the decision to detain. In *Paramathan v Germany*, a case concerning Article 2(1) of Protocol 4, the European Commission on Human Rights held that an asylum seeker who had been admitted conditionally, pending the determination of his asylum application, would lose his *lawful status* if he breached the conditions of his temporary admission.⁷⁸ This is similarly illustrated by the court in *Sultani v France* in which it was held, in a case concerning Article 1 of the seventh Protocol, that a failed asylum seeker can *no longer* be regarded as lawfully in the territory⁷⁹.

The consequence of the decision is that, subject to the prohibition of arbitrariness, it is only asylum seekers who enter through regular channels who fall to be protected by the general prohibition on detention under Article 5. In light of the proliferation of non-entrée practices and policies this will prove to be a small minority. Most importantly, it fails to recognise an application for asylum as a lawful act.⁸⁰ The court rejected the argument that at all times Mr Saadi had been seeking to enter the country lawfully in order to claim asylum. This is problematic. It makes a mockery of the right to seek and enjoy asylum, which has at least in part been recognised by the court⁸¹. And, on a practical level, effective migration policies require a clear distinction to be made between those who seek international protection and irregular migrants. This decision fails to distinguish between the two groups in that both asylum seekers and irregular migrants are held to have effected an “unauthorized” entry⁸². In the words of the court, “the position regarding potential immigrants, *whether they are applying for asylum or not* (my italics), is different in that, until their application for immigration clearance/ asylum has been dealt with they are not authorised to be on the territory.”⁸³ This undermines the court’s own recognition that asylum seekers are a particularly vulnerable group in need of “special protection”⁸⁴.

⁷⁷ *Amuur v France*, App no 19776/92 of 25th June 1996, para 43

⁷⁸ App No. 12068/86 51 DR 237, 240 as cited by UNHCR (2007), 5

⁷⁹ *Sultani v France*, 20 September 2007

⁸⁰ UNHCR (2011b), 31

⁸¹ *M.S.S. v Belgium and Greece* App No. 30696/09, para 251

⁸² Skordas (2004), 324

⁸³ *Saadi v UK* para 44

⁸⁴ *M.S.S v Belgium and Greece* para 251

Lawful detention – unnecessary and disproportionate

The manner in which the court has defined the scope of arbitrariness in the context of immigration detention is also problematic and fails to adequately differentiate between the asylum seeker and irregular migrant. This is illustrated by the manner in which the court has reviewed the lawfulness of detention in both pre-determination and pre-deportation cases. In *Chahal v UK*⁸⁵, a pre-deportation case, the court found that Article 5(1)(f) does not demand that “the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary... all that is required... is that ‘action is being taken with a view to deportation.’”⁸⁶ The court separates the concepts of proportionality and necessity from that of arbitrariness. That the detention may be unnecessary to achieve the intended purpose, deportation, but remain lawful under Article 5, has been confirmed in subsequent decisions of the court⁸⁷. For the detention to be lawful the state need only show that ‘action is being taken’. A literal reading of the text is preferred.

The same approach was followed in the pre-determination case of *Saadi v UK*: there was no requirement for the detention of an asylum seeker to be “reasonably considered necessary”. They found that it would be “artificial to apply a different proportionality test to cases of detention at the point of entry than that which applies to deportation, extradition or expulsion of a person already in the country”⁸⁸. The result is that a state may detain an asylum seeker in order to prevent an “unauthorised entry” even where it is not necessary to do so to achieve the stated purpose⁸⁹. Under the jurisprudence of the court there is no strict necessity test in respect of either pre-determination or pre-deportation cases. The reasoning of the court is flawed and difficult to defend.

At the outset, it is not argued here that the principle of proportionality has no function in the context of the court’s review of the lawfulness of immigration detention. First, detention must not exceed a period that is reasonable in view of the purpose for which the individual is detained. In *Saadi*, the court found it significant that Mr Saadi had only been detained for 7 days in order to enable the swift processing of his asylum claim⁹⁰. In *Chahal*⁹¹ deportation was only deemed lawful whilst deportation proceedings were in progress and being executed with due diligence. Second, the court in assessing whether not the state has acted with due diligence considers the individual circumstances of the case. Thus, in *Chahal* the court considered that the extremely complex and

⁸⁵ 23 EHRR 413

⁸⁶ *Chahal v UK*

⁸⁷ *Conka v Belgium* (2002) para 38

⁸⁸ *Saadi v UK*, para 73

⁸⁹ See O’Nions (2008) for a detailed analysis

⁹⁰ *Saadi v UK*, para 79

⁹¹ *Chahal v UK*, para

serious nature of the case, which included national security concerns, justified the lengthy period of detention. The concept of due diligence may also serve to ensure that the asylum seekers' period of detention at the start of the determination process is kept to a minimum. What is argued is that the application of the principle is narrowly applied and amounts to little more than a duty of good administration and good faith.

The court's definition of what constitutes arbitrary detention in the immigration context is very restrictive and denotes a radical departure from the position under international human rights law. As mentioned above, under VCLT, the rules and principles of international law are material for the purposes of interpretation. The main international instrument for the purposes of comparison is the ICCPR as interpreted by the HRC, the body responsible for supervising its application. Article 9(1) of the ICCPR, emanating from Article 3 of the UDHR, is the key provision relevant to the detention of asylum seekers. It sets out the basic right of all to "liberty and freedom of the person" and provides that "no one shall be subjected to arbitrary arrest or detention" or deprived of liberty "except on such grounds and in accordance with such procedures as are established by law." It is clear that detention pursuant to immigration control is not prohibited per se, although it must satisfy the requirements of arbitrariness and legality in order to conform to Article 9(1)⁹². The notion of arbitrariness, contrary to the position taken by the court, has been interpreted broadly to encompass "inappropriateness and injustice."⁹³

More significantly, the HRC has linked the concept with that of necessity: detention may be considered "arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the consideration of proportionality becomes relevant in this context." In order to avoid a characterisation of arbitrariness, detention "should not continue beyond the period for which a state can provide appropriate justification" and a failure to consider "less invasive means of considering the same ends" could render the detention arbitrary. But, there may also be justifications for detention during the asylum process: "such as the likelihood of absconding and lack of cooperation."⁹⁴ But, it is notable that "without such factors detention may be considered arbitrary, even if the entry was illegal."⁹⁵ Thus proportionality, necessity and reasonableness are central to the notion of arbitrariness under the ICCPR, an approach that is shared

⁹² *A v Australia* Comm. No. 560/1993, 3 April 1997 ; *Van-Alphen v the Netherlands* No 305/1988; *C v Australia* No 900/1999

⁹³ *Ibid*; see also MJ Bossuyt *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecht Martinus Nijhoff Publishers 1987) as cited in Wilsher (2004), 901

⁹⁴ *A v Australia*; and, as confirmed and applied in subsequent decisions.

⁹⁵ *A v Australia*

by the UN Working Group on Arbitrary Detention⁹⁶. The court's approach demonstrates a clear departure from the principles established under international law and offers the asylum seeker less protection.

The court in eschewing a strict necessity test, removes the requirement that detention must be a measure of last resort. There must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention⁹⁷ but this falls short of requiring that detention is necessary to achieve the stated aim. This is inconsistent with the position in international law in which detention must only ever be used once other less coercive means have been found to be insufficient⁹⁸. Further, the court's reasoning produces an incoherent result. As illustrated by Edwards, it divorces the purpose of detention with its necessity: "if the detention is not necessary, how can it achieve or be related to its purpose? The purpose would not therefore exist"⁹⁹. The reasoning of the court implies that the concept of necessity is being applied to the immigration system a whole as opposed to on an individual basis: the detention is necessary to achieve the purpose of an effective system of immigration control. This is further evidenced by its reference to the "escalating flow of huge numbers of asylum seekers" and the benefit to be had to all asylum seekers from "the provision of a more efficient system of determining large numbers of asylum claims."¹⁰⁰ Human rights protection requires individualised assessments. A state needs to adopt a flexible approach in response to an increase in uncontrolled migration, but the function of the court must be to ensure that this is not done at the expense of the protection of the individual's right to liberty. In this instance, it has failed to do so.

The court's reasoning is also internally inconsistent. It rejects the proportionality test in respect of immigration detention which it applies in Article 5(1)(e)¹⁰¹, in the context of the detention of the mentally ill. In its interpretation of permissive grounds for detention under Article 5(1)(e) the court applies a necessity test: the detention must be necessary to achieve the stated aim¹⁰². As held by the court in *Litwa v Poland* unless detention under paragraph (e) is "necessary in the circumstances" and "where other less severe measures have been considered and found to be insufficient" it is

⁹⁶ UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, 28 December 1999, E/CN.4/2000/4 para 27, 29 and 33

⁹⁷ *Mayeka and Mitunga v Belgium*, 12 October 2006, App no 13178/03; *Muskhadzhiyeva v Belgium*, unreported 19 January 2010

⁹⁸ UNHCR Guidelines para 1; UN Commissioner for Human Rights, Fact Sheet no 26; Committee of Ministers, Rec (2003) 5 (supra 5)

⁹⁹ UNHCR (2011), 31

¹⁰⁰ *Saadi v UK*, para 80

¹⁰¹ For a detailed analysis see Cornelisse (2004)

¹⁰² *Litwa v Poland Reports 2000-III; Varbanov v Bulgaria*, 5 October 2000, Reports 2000-X para 46

unlawful¹⁰³. This variance in approach cannot be justified from the text of the article.¹⁰⁴ Neither subparagraph contains a proportionality test¹⁰⁵. A literal reading is preferred in the context of sub-para (f) but not (e).

Further, why is it “artificial”, as the court claims, to apply a different proportionality test in respect of the first and second limb of Article 5(1)(f)? The text does not support such an interpretation. In the first limb detention is only justified in order to “prevent” an illegal entry. As opined by Wilsher, this implies a necessity test¹⁰⁶. The state must show that the measure is necessary to *prevent* illegal entry. In respect of the second limb the state arguably need only show that “action is being taken.” Further, assimilating the tests in both limbs erodes the ability of the court to maintain effective distinctions between different classes of non-nationals. It was open to the court to apply a different test in respect of those who seek to enter and those whom the state has deemed have no right to remain. Such distinctions are not only necessary for ensuring that the unique protection needs of the different groups of non-national are met but also to promote effective migration policies.

The court’s limited application of the principle of proportionality, confined to consideration of whether the state has acted with “due diligence”, is regrettable. Proportionality is a general principle of the ECHR and the mechanism by which the court is capable of harmonising state interests with individual rights. This is most explicit in the jurisprudence concerning the application of Articles 8-11 of the ECHR. It also features elsewhere, as evidenced above in the context of Article 5(1)(e). The court’s restrictive approach has two consequences. It limits the ability of the court to strike a fair balance between the interests of the state and the individual and, importantly for the asylum seeker it curbs the ability of the court to assess the legitimacy of state coercion in light of the unique circumstances of the individual.

Concluding remarks

It has been suggested that the approach of the court can be explained by its perception of immigration detention as a “necessary adjunct” to the core sovereign powers of the state. Until the asylum seeker is authorised to be on the territory and is no longer in breach of the territorial sovereignty of the state, “the court accepts that the State has a broader discretion to decide

¹⁰³ *Litwa v Poland* para 78

¹⁰⁴ In the way that it can explain a divergent approach between detention in a criminal and immigration context See Article 5(1)(c)

¹⁰⁵ Wilsher (2007), 399

¹⁰⁶ (2004), 907

whether to detain potential immigrants than is the case for other interferences with the right to liberty.”¹⁰⁷ There exists a wide margin of discretion to detain in the context of immigration control. As convincingly argued by Cornelisse, this portrayal can be explained by the court’s “perception of territorialised sovereignty as a natural and innocent concept” resulting in a “clear failure to address the legitimacy of the coercive means that are used to assert this right.”¹⁰⁸ Whilst this assertion is undoubtedly true, the concept of territorial sovereignty lies at the root of international law. It is beyond the function of the court to challenge the inherent constraint this concept exerts on the protective scope of human rights. As argued by Greer, the ECHR is “at best an instrument for gently encouraging, rather than for instigating change.”¹⁰⁹ Further, it is tentatively suggested that the court cannot stray too far from what is politically acceptable. To do so is to threaten its legitimacy and position as the Constitutional Court of Europe. This has been particularly evident in the response of the UK parliament and press following the recent case of *Othman v UK*¹¹⁰.

The result is that, on balance, human rights norms, as enforced by ECtHR, are unable to provide effective protection to those who seek asylum in the context of immigration detention. The court has failed to harmonise the right of the asylum seeker to personal liberty with the interest of the state to control migration. It has deferred to the sovereign right of the state to control the entry and expulsion of migrants. As evidenced by the court’s remark in *Saadi*¹¹¹, “the Strasbourg case-law reflects the customary international law view that the right of territorial sovereignty permits States a peculiarly unfettered discretion in relation to the detention of non-nationals pursuant to their exclusion.”¹¹²

¹⁰⁷ *Saadi v UK* para 44

¹⁰⁸ Cornelisse (2011), 310

¹⁰⁹ Greer (2006), 57

¹¹⁰ App No 8139/09, 21 January 2012

¹¹¹ Above n44

¹¹² Wilsher (2004), 908

Chapter 3

The EU Regime and the asylum seeker: a codification of rights

In contrast to the regional human rights system, the EU legal regime relating to immigration and asylum is capable of effecting systemic legal change: its legislative rules are directly effective in Member states and are subject to interpretation and enforcement by the European Court of Justice¹¹³ (ECJ) whose decisions are directly binding. Since the Treaty of Amsterdam 1997 immigration and asylum matters are no longer of purely national concern subject to inter-governmental agreements. The Treaty of Amsterdam brought “core issues of national sovereignty” within the competence of the EC (as it then was)¹¹⁴. Pursuant to the powers entrusted to it under Article 63(1) of the TEC, following the entry into force of the Treaty of Amsterdam 1997, the Council adopted various legislative measures relating to immigration and asylum¹¹⁵ in the first phase towards a Common European Asylum System¹¹⁶ (CEAS) - namely the reception conditions Directive and the procedures Directive. Pursuant to the second phase, the basis of which was the Hague Programme adopted in November 2004, the EU adopted the controversial Returns Directive¹¹⁷. The Treaty of Lisbon 2009 has further extended EU competence in the area of immigration and asylum, enabling legislation to provide not “minimum”¹¹⁸ but “common” or “uniform”¹¹⁹ standards. The Commission has submitted a number of directives recasting those currently in existence. Further, the EU Charter of Fundamental Rights¹²⁰, which has the same status as the Treaties¹²¹ reaffirms that everyone has a right to liberty and security of person¹²² and guarantees the right to asylum¹²³. Thus it has the potential to provide effective protection to the asylum seeker against arbitrary detention by Member states through the codification of procedural and substantive safeguards peculiar to that group.

¹¹³ The Treaty of Lisbon has removed the restrictions previously in place relating to immigration and asylum matters: Art 19, revised TEU, and Arts 251-281 TFEU

¹¹⁴ Hailbronner (2010) 2; although due to the “political ‘sensitiveness’ of immigration and asylum issues for a 5 year transitional period the Council could only act unanimously on a proposal from the Commission or on the initiative of a Member State and only after consulting with Parliament.

¹¹⁵ Relevant for our purposes: Directive 2003/9 ([2003] OJ L 31/18); Directive 2004/83 ([2004] OJ L 304/12) and Directive 2005/85 ([2005] OJ L 326/13)

¹¹⁶ First declared by States at the Tampere Summit in 1999

¹¹⁷ Directive 2008/115 ([2008] OJ L 348/98)

¹¹⁸ A limit inherent in the scope of the EC’s competence under Title IV of the EC Treaty

¹¹⁹ Article 78 Treaty on the Functioning of the European Union

¹²⁰ OJ 364/3

¹²¹ Article 6(1) TEU

¹²² Article 6

¹²³ Article 18

In this chapter I will examine whether this potential of the EU legal regime is borne out in practice. I will commence with an examination of the legislative provisions under the Procedures Directive and the Reception Conditions Directive as they relate to the detention of asylum seekers prior to final determination of their claim. I will argue that the measures as they stand at present are disappointing and to a large extent endorse current state practice. The tension between Member state sovereignty and individual rights is resolved in favour of the State and to the detriment of the goal to harmonise EU asylum law.¹²⁴

However, an analysis of the Returns Directive and the latest proposal to recast the Reception Conditions Directive demonstrate that a fair and efficient legal framework regulating the detention of asylum seekers remains possible. I seek to argue that it is only through the setting of high standards and clear procedural safeguards that a fair and humane approach to detention can be achieved: if left to the discretion of Member States, the inevitable race to the bottom follows.

Pre-determination detention: endorsing current state practice

The Reception Conditions Directive's rules on detention are minimal, abstract and disappointing. The Directive contains the main EU law provisions on detention, partly by default which perhaps serves as an explanation for its confused text.¹²⁵ Article 7 relates to the detention of asylum seekers. It is headed "Residence and Freedom of Movement". It provides that asylum seekers are entitled to freedom of movement within a Member state or an assigned area. Article 7(3) provides that Member states may "confine" an asylum seeker to a particular place "when it proves necessary, for example for legal reasons or reasons of public order." It is notable that there is a complete omission of the term detention from this Article although it clearly covers it given that the Directive defines detention as the "confinement of an asylum seeker....within a particular place"¹²⁶ Article 7(2) concerns lesser restrictions on liberty and therefore will not be considered. The Article sets out a general right to free movement for asylum seekers in Member states to which Article 7(3) is an exception. This interpretation derives support from the Commission who consider that under the Directive "detention is an exception to the general rule of free movement."¹²⁷ However, the exception is articulated in such abstract and ambiguous terms that arguably it will be of little or no assistance to asylum seekers wishing to challenge a decision by a Member state to detain them.

¹²⁴ As set out in Preamble (3), (5) and (6)

¹²⁵ Wilsher (2007), 420

¹²⁶ Article 2k

¹²⁷ COM (2007) 745, 26 November 2007

As a preliminary point, the scope of the Reception Directive is limited to third country nationals¹²⁸ who have made a claim for asylum under the Refugee Convention.¹²⁹ Those who expressly seek a different form of protection than that covered by the Refugee Convention are not covered. This is unlikely to constitute a significant group¹³⁰. Further, an individual will not be covered once they have had a final decision on their claim defined as either being granted or denied refugee status, that decision no longer being subject to a remedy under the Procedures Directive.

It is welcome that detention must only be used when it proves “necessary.” It implies a proportionality test and the notion that alternative means must be considered in order for the decision to detain to be lawful. This is consistent with the soft law of the UNHCR and the HRC’s interpretation of Article 9 of the ICCPR, as discussed above. It also accords with Article 78 TFEU which requires that EU asylum policy be consistent with the protection guaranteed by the Refugee Convention and other international treaties. The challenge lies with how the term “necessary” is to be interpreted, especially in light of the examples of what may constitute necessary detention that follow in the provision. Does it require an individual necessity test or might it be interpreted consistently with the ECtHR approach in *Saadi*?

The ECJ has ruled that EU asylum legislation must be interpreted “whilst respecting” the Refugee Convention and other international treaties¹³¹. Such treaties are the sources of general principles of EU law and as such are relevant for the purposes of interpretation. The ECJ has also stated that it “must take account” of the judgments of the ECtHR¹³². The EU Charter of Fundamental Rights is also relevant. But, these sources present diverse and, in the case of the HRC and the ECtHR, a conflicting approach to what constitutes “necessary” in the context of immigration detention¹³³. As discussed above the UNHCR Guidelines and the Executive Committee Conclusion No. 44 leave a wide margin of discretion for states to detain for administrative purposes, despite the fact that the position of both is that immigration detention should only be used as a last resort. Furthermore, it is likely that the ECJ would only be concerned with the core text of the Refugee Convention as opposed to the non-binding opinions of the supervisory bodies¹³⁴. It is perhaps notable that the ECJ has not referred to

¹²⁸ Thereby excluding EU nationals

¹²⁹ Peek (2010), 890

¹³⁰ The vast majority of Member States chose to apply the directive to those seeking subsidiary status also

¹³¹ *Abdulla and others*, judgment of 2 March 2010, joined cases C-175/08, C176/08, C-178/08 and C-179/08 para 53

¹³² Case C-105/03 *Pupino* [2005] ECR I-5285 as cited in Peers (2011)

¹³³ With the HRC requiring that for detention to be lawful it must be necessary (*A v Australia*) and the ECtHR holding that there is no requirement that detention for administrative purposes be necessary (*Saadi v UK*)

¹³⁴ By analogy with its approach to the non-binding judgments of the HRC; although see Peers’ argument to the contrary: Peers (2005), 29

the soft law of the UNHCR in any case referred to it by national courts on the interpretation of the Qualification directive¹³⁵. It is therefore unlikely to be of assistance.

And, what of the conflict between the HRC and ECtHR approach? The ECJ has held that the ECHR occupies a “special significance” as a source of the general principles of EU law¹³⁶. This has now been confirmed in Article 6 TEU. Article 6(2) requires EU accession to the ECHR. Conversely, despite the fact that the ECJ has referred to the ICCPR as a source of the general principles and held that its provisions must be considered¹³⁷, it has been dismissive of the HRC¹³⁸. In *Grant*, a case that concerned a conflict between the ECtHR and HRC, the ECJ adopted the ECtHR position¹³⁹. In light of the ECtHR’s approach in *Saadi*, as set out above, this does not bode well for the manner in which the ECJ may interpret when detention is necessary “for legal reasons.” This phrase is ambiguous and potentially gives states a very wide margin of discretion to states for detaining asylum seekers for administrative purposes. Further, it remains to be seen how the ECJ will approach what constitutes “legal reasons”, but it seems unlikely, given the “special significance” of the ECHR and the recent case-law of the ECtHR, that the rigorous approach to administrative detention that was maintained in *Oulane*¹⁴⁰, which concerned the detention of a purported French national, will be adopted in respect of asylum seekers.

The Reception Conditions Directive is also notable for what is omitted from its provisions. It is highly regrettable that there is no defined limit to the permissible period for detention and there are no mandatory reviews of detention to ensure that it remains “necessary”¹⁴¹. In short, from the perspective of the asylum seeker, it fails to provide sufficient substantive or procedural safeguards against the use of detention.

The Procedures Directive fails to regulate the use of detention by Member states adequately or at all. Its only provision concerning detention has correctly been described as “skeletal” leaving the regulation of detention in a “dangerous limbo of uncertainty.”¹⁴² It merely provides that detention is

¹³⁵ *Elgafagi and Elgafagi* [2009] ECR I-921; *Abdulla and others*, judgment of 2 March 2010, joined cases C-175/08, C-176/08, C-178/08 and C-179/08; C-31/09 *Bolbol*, judgment of 17 June 2010 and C-57/09 and C-101/09 *B and D*, judgment of 1 June 2010

¹³⁶ Case 222/84 *Johnston* [1986] ECR 1651; Case C-540/03 *EP v Council* [2006] ECR I-5769

¹³⁷ Case C-540/03 *EP v Council* [2006] ECR I-5769

¹³⁸ C249/96 *Grant* [1998] ECR I-621

¹³⁹ See Peers (2005) for a persuasive argument for why the court should limit or overturn this approach

¹⁴⁰ Notably this case involved the administrative detention of an EU national and the court has held that it is not possible to equate an EU national with a third country national in immigration related cases: Case 8/77 *Sagulo* [1977] ECR 1495.

¹⁴¹ See Peers (2011), 372; Wilsher (2007), 421

¹⁴² Wilsher (2007), 424

not permissible for “the sole reason” that the individual has made a claim for asylum¹⁴³. In that, it arguably offers more protection to the asylum seeker than to the irregular migrant and precludes the possibility of the mandatory and automatic detention of asylum seekers, but this minimal safeguard adds nothing to the obligations that all Member States are already subject to under international law. It does not prevent the detention of specific groups of asylum seekers¹⁴⁴. The only procedural protection it offers is “the possibility of speedy judicial review”¹⁴⁵. This is weak. It does not ensure the mandatory judicial oversight of decisions to detain which are often made by administrative officials. As argued by Wilsher, the result is that the EU authorises the detention of asylum seekers for administrative purposes but leaves the rules regulating detention to the national law of Member States¹⁴⁶. The Procedures Directive is devoid of procedural rules essential for the regulation of the use of detention.

Thus the current EU regime in so far as it relates to the detention of asylum seekers is disappointing. Despite its potential to set high standards of liberty for the asylum seeker through legislative implementation it fails to do so. There is a reluctance on the part of Member states to codify provisions providing effective and enforceable provisions for the protection of individual rights. Thus, significant protection gaps remain. Member state sovereignty remains largely intact. In light of Member State practice this is a matter of concern.

The move towards effective protection

But, as an analysis of the Returns Directive and the Proposal to recast the Reception Conditions Directive demonstrate, although not free from criticism, there have been significant improvements in the rules and proposals relating to detention. These indicate that, with political will, effective protection in line with minimal international and regional human rights standards is more than a mere theoretical possibility in Europe.

Despite the fact that the Returns Directive has been subject to much criticism, the procedural and substantive limitations it places upon the circumstances in which a failed asylum seeker, as any other “illegally staying third country national”¹⁴⁷, can be detained amounts to a significant improvement on the opaque and ambiguous provisions in the Reception Conditions and Procedures Directives. Importantly, in Article 15 the Returns Directive sets out three conditions that detention for the purposes of removal must satisfy in order to be lawful: detention is taking place to prepare

¹⁴³ Article 18(1)

¹⁴⁴ Peers (2011), 352

¹⁴⁵ Article 18(2)

¹⁴⁶ Wilsher (2007), 425

¹⁴⁷ Article 1

the return/ and or carry out the removal process; the application of less coercive measures would not be sufficient and there is a risk of absconding or the third country national hampers the removal process¹⁴⁸. The Directive outlines an individual necessity test that must be applied in each specific case consistent with the ICCPR. This enables Member States to adopt nuanced detention policies in the context of immigration capable of differentiating between the different groups of third country nationals liable to return under the Directive. Further, the Directive provides for a maximum limit to the duration of permissible detention.

The importance of a clear codified system in the context of immigration detention is illustrated by the recent rulings of the ECJ on the Returns Directive. In *Kadzoev*¹⁴⁹, the ECJ was concerned with the interpretation of Article 15 which sets out the procedural and administrative guarantees granted to irregular migrants. Importantly, the court confirmed that Member states may not depart from the standards in the Directive by applying stricter standards, that the list of grounds for detention was exhaustive and that detention beyond the 18 months permissible under the Directive could not be extended even on grounds of public order or safety. This ruling of the ECJ is based “strictly upon the letter and objectives of the directive.”¹⁵⁰ In *El-Dridi*¹⁵¹ the ECJ followed an equally strict approach and held that Member states must only use detention as a last resort and that they cannot depart from the standards set either through the imposition of stricter standards or through criminal legislation. The high standards provided by the legislation promise effective and enforceable protection. This is of particular importance in the context of a sensitive area such as immigration.

The protection gaps apparent in the Reception Conditions Directive have been addressed, in part, by the amended Commission proposal. The amended proposed Article 8 includes significant restrictions on the right of a Member state to detain an asylum seeker broadly in line with the international soft law standards of the UNHCR and international standards. Detention must only be used where “less coercive alternative measures cannot be applied effectively”¹⁵². The conditions set out in Article 8(3) must apply for detention to be lawful. And, importantly, under Article 8(4) Member states shall ensure that rules concerning alternatives to detention, such as regular reporting to authorities are laid down in national law. From the perspective of individual rights these proposals are welcome.

Regrettably, the stringent safeguards set out are in part undone by the inclusion of Article 8(3)(c) which provides that detention may be used “in the context of a procedure, to decide on the right to

¹⁴⁸ Schieffer (2010), 1542

¹⁴⁹ C-357/09 PPU, 30 November 2009

¹⁵⁰ Mincheva (2010), 361

¹⁵¹ C-61/11 PPU Not yet reported

¹⁵² COM(2011) 320 final Article 8

enter the territory.” Arguably this is a result of the tension between the dual purpose of the recast proposal: “to address possible abuses of their reception systems” whilst “maintain(ing) high standards of treatments in line with fundamental rights.”¹⁵³ The former requires the retention of state discretion and flexibility in its formation of immigration policy: the later requires the imposition of clear procedural and substantive safeguards. Article 9 reflects a similar compromise. Whilst it is welcome that there must be judicial oversight of the decision to detain (Article 9(2)) it is unfortunate that there is no clear limit on the length of permissible detention, particularly in light of the time limits that have been set in the Returns Directive. In essence, the limit is one of due diligence. Arguably, as a result of the two provisions, an asylum seeker may be detained “in accordance with a procedure, to decide on the right to enter the territory” so long as the administrative procedure relevant is executed with due diligence.

While a discussion of issues of governance and decision making processes within the EU are outside of the ambit of this essay, it is perhaps notable that the improved rules under the Returns Directive and the proposed amended recast of the Reception Conditions Directive were a result of the co-decision process which has been in force since 1st January 2005. Under this procedure the Council, historically protective of Member state’s interest in maintaining competence in matters of immigration and asylum, only requires a qualified majority as opposed to unanimity to adopt a new proposal. Parliament, historically perceived as adopting a more migrant-friendly approach, is a co-legislator as opposed to merely subject to consultation. By comparison, the Procedures Directive was adopted under the old decision making process. A number of commentators have highlighted that the inconsistencies and incongruities present in the Procedures Directive are on account of its “troublesome legislative history.”¹⁵⁴ The proposals put forward in respect of detention by both Parliament¹⁵⁵ and the Commission¹⁵⁶ to a greater or lesser extent secured some essential safeguards against the discretion of states to detain and effectively regulated most instances of immigration detention. These were rejected by the Council. Under the new “ordinary legislative procedure” it is hoped that there is greater opportunity for the harmonisation of the interest of Member states in maintaining and enforcing a fair and efficient asylum system with the protection of the asylum seekers right to liberty.

Concluding Remarks

¹⁵³ Ibid, 3

¹⁵⁴ Spijkerboer (2010), 1257; Wilsher (2007), 421-425; Burle (2010); Peers (2011)

¹⁵⁵ A5-0029/2001

¹⁵⁶ Amended Proposal, COM (2002) 326 final

It is argued that without clear and high standards effective substantive and procedural protection cannot be achieved. Such standards can ensure that the interests of Member states in maintaining an efficient and effective immigration system are conducted in a manner which is consistent with the asylum seekers' right to liberty of person. At present the EU regime fails to secure effective protection for the asylum seeker against detention: nor does it provide adequate procedural safeguards essential for a fair and efficient immigration system. However, it is clear that with the correct political will, it is capable of delivering high standards for the protection of the right to liberty of the asylum seeker consistent with the regulation of migration.

Conclusion

As has been demonstrated, immigration detention sits at the centre of the tension between the interest of the state to control immigration and the individual's right to liberty. Within that sphere, the asylum seeker poses a particular challenge as an individual potentially deserving of international protection but who awaits a final determination of their right to remain.

Effective immigration policy is one that identifies those who require international protection and permits them to stay whilst removing those who do not meet the criteria in a fair and efficient way. The right of a state to use detention pursuant to the maintenance of effective immigration control is beyond doubt. The issue is how far international refugee law, regional human rights law and EU law restrain or limit the exercise of this undeniable sovereign right.

It has been argued that asylum seekers form a special class of non-national and that effective immigration policy requires that a distinction is maintained between the asylum seeker and other non-nationals. The international refugee law regime, lacking in procedural rules and judicial enforcement, is unable to secure the rights to which this class are entitled. There is a protective procedural gap into which the asylum seeker falls. The ECtHR fails to differentiate adequately between the asylum seeker and other potential immigrants: both are "unauthorised" on the territory of the Contracting state. Detention is perceived as a "necessary adjunct" to immigration control even in the context of the asylum process, with no requirement that such detention satisfy a condition that it be necessary. The concept of territorial sovereignty, which the court lacks both the teeth and the will to challenge, serves to limit the protective reach of Article 5 in the context of immigration detention.

By contrast, the EU regime specifically deals with the class asylum seeker. It has proposed safeguards and standards that are peculiar to what are considered to be appropriate measures in the context of the asylum system. It is true that the current EU regime, as far as it relates to detention is disappointing. But, there is hope, as evidenced in the recent Returns Directive and the recast proposals for the Receptions Conditions Directive, that the EU will set high standards of liberty for the asylum seeker, consistent with the state's right and prerogative to control migration, and capable of enforcement by the ECJ. It is within this system that there is most evidence that the tension between the interest of the state and the asylum seeker can be reconciled.

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