

The Detention of Asylum Seekers and Refugees, the Case of Albania

Lisjana Cukaj Phd (c)

European University of Tirana

liselda2009@yahoo.com

Abstract

The detention is considered to be an intrusion in the people rights, it is legitimate if it conforms to the procedure defined by law. Detention as freedom privation should be realized conform to clear and transparent legal procedures. It should not be extended beyond the necessary period, and should not be used to obstacle the asylum seekers in advancing their requests. Although they may be used in the context of public security, such restrictions should be proportional to their serving interest. The detention decision despite being conform to the national law, if it was taken in bad faith should be a consequence of arbitrary detention. The country should consider detention as an alternative measure, when it does exist evidence that other smaller restrictions will be insufficient in the particular circumstances of this case.

Keywords: Detention, asylum seekers, refugees, the right for protection, ECHR.

Introduction

The detention pursues the policy to control migration but must also meet the legitimate requirements. No one may be subject to detention or deprivation of liberty except in cases provided by law. Detention is lawful only when it is in accordance with Article 5 (1) f in accordance with "procedure prescribed by law" where deprivation of liberty is in conformity with article 5 namely to protect the individual from arbitrariness. The procedure defined by law should not be referred to the narrow interpretation that the prohibition should have a legal basis in domestic law, but also the quality of that law must be accessible in order to avoid the risks of arbitrariness. It should be based on a reliable communication between the individual and authority under section 5 (2), and the individual must be informed quickly for the reasons of his detention in a language you understand, it should be provided with sufficient information in order to be able to challenge the legality of the decision to stop. While the right to review should not be only theoretical but also practical. It must contain conditions which are essential for the lawful detention of a person in accordance with article 5 (1) f. Issues of public security cannot justify the lack of judicial control. Despite that the decision of prohibition is in accordance with national law, if it is taken in bad faith would be result of arbitrary detention. The detention consists of resolving the conflict between the interest of the state for preservation and effective border control, of human rights and involuntary migrants, which seek to enter in violation of these controls, and they do not have an official status.

1. The detention of asylum seekers and refugees

The detention of asylum seeker is considered to be an extraordinary measure which should be used only in cases "allowed by law". In such process is required a balanced interest. It is limited pursuant to article (31) of the Convention for the Refugee status which do prohibit countries to impose the obligations charged to the people whom enter the territory of the country without having any authorisation, when they come directly from the country where they have been persecuted, on condition to present themselves promptly at the authorities, having a strong reason to ground their entrance and their illegal presence (Refugee Convention, 1951). Precisely articles 31/2 prohibits in various limitations, the movement of these persons, which are necessary, and requires to be settled only till the people status will be regulated. The prohibition is used when it is necessary, due to reasons determined by law such as: a) to certify the identity b) to certify the elements on which is grounded such request for the refugee or asylum status c) to be engaged on cases when the refugee of asylum seekers have destroyed their travelling and identity documents d) to protect the national security or the public order. Prohibition due to other reasons such as to prohibit in the future to the asylum seeker to turn back the asylum seeker, or as a punishing measure due to discipline reasons and contrary to the norms of refugees right (UNHCR Guidelines to Detention).

a) The prohibition to prevent the an authorise entrance, may be justified by such factors as the number of asylum seekers and the administrative difficulties. For example in the case *Saadi v. United Kingdom*, these factors and the fact that the British authorities have been using detention in confidence as a way of fast elaboration, through accelerate procedures helped to justify several days of detention of the asylum seeker in appropriate conditions (*Saadi v. United Kingdom*, 2008). The arrest conditions are important when it is considered the maximal possible length of an arrest. Although law and procedures should ascertain that the arrest during the entrance does not effect negatively, in the rights to be entitled to effective approach in the procedures to pretend about the refugee status. Arrest in entrance may be justified by identity verification reasons, but if such arrest are extend unfairly may become arbitrary (*Amuur v. France*, 1996).

b) Arrest while waiting for the expulsion is justified, if the country is considering expulsion with appropriate attention (*Chahalal v. United Kingdom*, 1996). Long time arrest may be justified by the complexity of the case or when applicant actions lead to delay (*Kolompar v. Belgium*, 1992). While when the procedure has been suspend for a long period of time, or it was not actively followed, then arrest would not be justified anymore. For example the case of *Kashmiri k. Turkey* (no. 2), the court declares that the extended arrest without any reason constitutes violation of article 5/1 of the Convention for the Defence of the Human Fundamental Rights and Freedom because it continued for many months after the temporary measure, and during this time was not made any step forward to find an alternative solution including the possibility to send the returned people toward another country, or to the country of origin (*Molotchko v. Ukraine*, 2012).

2. The right to be defended during the arrest

The right to be defended during the arrest constitutes a mechanism to avoid illegal and arbitrary arrests. At the beginning of arrest or immediately after arrest the arrested person should be provided information in relation to his rights, and for the way to realise such rights. Information published due to arrest should be in a simple language, in order to be easily understood, where are included fundamental and factual legal basis for a order of arrest, and information in relation to the juridical devices disposed by the arrested person. The provided information should be correct, full, in order to allow the arrested person to challenge his arrest (*Abdolkahni and Karimnia v. Turkey*, 2009). The arrest reason should be provided promptly, in general should be provided within hours of arrest. Such right to be provided with the arrest reasons results to be violated, for example when the reason where given only after 76 hours (*Saadi v. United Kingdom*, 2008). Although it is not necessary that the information should be given at the moment when someone is arrest. For the asylum seeker who are subject to accelerated asylum procedures, who are arrested waiting for the expulsion conform to these procedures, the right for the arrest reasons should be applied without any distinction (*Shamayev and others v. Georgia and Russia*, 2005). In European and regional level, such right has been affirmed in the directives of the European Council about the protection of human rights in the context of the accelerated procedures of asylum Directive XI. 5 which states that: the arrested asylum seeker will be informed immediately in a language that he understands, for factual and legal reasons of their detention and about the juridical devices on his dispose.

3. The detention of asylum seekers in Albania

The detention is an administrative measure taken and executed by the responsible state authority responsible in regional and local level toward the foreigner for whom was notified the expulsion order, forced expulsion or expulsion (*Ikonomi*, 2011). The Directives of European Council does not provide any specific authority, leaving such object in the inner legislation. While the directives of UE provides that the arrest decision may be taken by the administrative organs or by the judicial ones. In order that the arrest may be lawful it is necessary, that the country should show the necessity for the taken decision. This competence of freedom privation of a man in case of foreigners is given to the emigration central administrative authority in Albania being the Border and migration Department, upon obligation to inspect the last mentioned by the court conform to the constitutional principles. The UE Directives provide that the arrested should be provided with the factual and legal reasons of arrest, their rights and obligations, the right for advocate, the right to be visited by a doctor etc. The arrested person has the right to be informed with a language that he understands about his arrest, has the right to ensure legal protection, by an advocate chosen by him or mainly, and the right for his right to meet the relatives. The rights are conform to the constitutional guarantees especially article 28/1 of constitution which declares that: everyone whom has been deprived from freedom has rights to be immediately informed in a language that he understands, in relation to the

causes of this measure, has the right to inform immediately the advocate and to have the possibility to realise his freedoms. This article constitutes a fundamental pre-condition to exercise other rights, as such rights as the one of legal protection, sue to the court etc. do not have any value if the arrested person is not informed about their existence (Constitution of Albania, 1998). In practice this legal obligation states that it is not realised due to the lack of translators, or person who know the language of the foreigner. For example the case of the Somalian citizen S. A versus the Border and Migration Regional Directory Shkoder, which did not provide a translator, and he was not informed about his fundamental rights (Decision No. 861, of administrative court). Lately people arrested at the temporary centre are mainly from Iran, Sudan, Somalia for whom it is difficult to find translators and to inform them conform law (Conform monitoring performed at the Closed Accommodation Centre).

4. Procedural guarantee during arrest

Arrest may be considered an inappropriate measure, in this context proportionality holds an important consideration. The arrested people should be entitled his fundamental rights such as:

a) The right of recourse, European Convention of Human rights in its article 5 (4) provides that everyone who was arrested or stopped has the right to present recourse at the court, in order that the last mentioned may decide within a very short deadline on the arrest legitimacy (ECHR). Every arrested person has the right to start the process for a judicial investigation of legitimacy of arrest by the court. Such possibility should be effective and easily accessed and should be provided legal help conform to the local legislation. Also European Directive for the obligatory return provides that the arrest will be ordered by the administrative and judicial authorities. In Albania the arrested subject has the right to present recourse at the court of first instance against the arrest or arrest duration within 10 days from the day he was informed about (Law on foreigners, 2013). Such disposition which is contrary to the law 28 (4) of constitution treats the procedural guarantees in case of freedom violation, or provides that "the person whose freedom was violated in extrajudicial ways, may present a sue anytime at the judge who decides within 48 hours about the lawfulness of such measure". So this article of constitution does not set deadlines about the right of recourse against arrest. The right to ascertain the arrest legitimacy is a fundamental right of every arrested person without any consequence, its limitation within a term of 10 days is contrary to this right and especially for the arrested foreigners makes it impossible to be realised in practice. As the foreign citizen has an added difficulty such as not knowing the language, the judicial system in the country, formal possibilities for legal assistance (Law on foreigners, 2013). Meanwhile Albanian legislation provides that the decision of the court of first instance for the arrest is not definitive, as the foreign citizen has the right to complain against the decision of the court of first instance at the court of Appeal, while the decision of the last mentioned is definitive and absolute. Another obligation for the Albanian authorities is the notification of the consular and diplomatic representative in relation to the arrest. As one of the fundamental principles of international right is the diplomatic defence, considered to be not only a people right, but mainly the right of the country to exercise the right of diplomatic protection, provided at the convention of Vienna for consular relations in 1963. In the case of Albania, collaboration with consular services of the country of origin with the responsible state structures for the return is necessary, as they make possible to issue the travelling documents, the identification of the person who was arrested or even translation services.

b) Arrest duration

European Convention of Human Rights ECHR does not provide any term or deadline for the duration of the arrest, leaving this subject in the discretion of the local legislation (ECHR). The instrument which did provided clearly the terms is the BE Directive on Return, deadlines which may not go further to 6 months. Which may be extended even 12 other months only if it evident: a) lack of collaboration from the citizen of the third country (the arrested), b) there are delays in document insurance and receive from the third countries. Prolonged detentions are applied by countries such as: Greece, Bulgaria, Cyprus which are extended for more than one year (ECRE, 2013). While according to Albania legislation, the foreign citizen, being subject of arrest may be arrested for a period up to 6 months and in case after 6 months his return was not made possible "the Border and Migration Police which issues the decision of arrest in closed centre may prolong the term if the causes of arrest continue, but not more than 12 months. The composition of this law is made in the conditions of connection with the community legislation in such case with the European Union Directive for the arrest (Law on foreigners, 2013). While the arrested person has the right to complaint within 10 days after he was informed about the arrest at the court of first instance and at the court of Appeal, but it is not provided the right of revision during predefined periods or arrest

extension. This procedural guarantee is very necessary to avoid the continuity of arbitrary arrest, as with the passing of the item may cease the arrest conditions and the foreigner may be held at the centre due to negligence, or disability of appropriate authorities to realise the removal conform to the removal aim itself. The foreigner has the right to claim for reward in case that by absolute decision the court declared as invalid his removal in a closed centre. This arrest is conform to the article 5/5 of the ECHR that everyone whom has been arrested or held contrary to article 5 of the Convention has the right of the reward (European Convention of Human rights, 1950).

c) Arrest subjects

European Convention of Human Rights in its article 5 states that: Everyone is entitled to personal freedom and security. No one could be denied freedom, despite the following cases and conform to the procedure provided by law: when a person is lawfully arrested or stopped, aiming to deny his unauthorised entrance or for a person against whom is being proceeded an expulsion or extradition (European Convention of Human rights, 1950). So here we are facing two categories: a) The person is arrested or stopped in order not to allow him to enter at that country. b) Against the person is proceeded an expulsion procedure, so he was at the territory and was subject to the expulsion measure. In both above mentioned cases the final interest is the return, which means the departure from the territory. In the first case the migrant is detained in order not to allow his unauthorised access, while further detention after refusal of entry is intended to return him. We conclude that the restriction of freedom can only occur in accordance with a procedure prescribed by law. Prohibition as deprivation of freedom should be implemented conform clear and transparent procedures, since it is not considered as a punitive measure, but as a facilitator of the return process. Detention should be considered the last means for the return of irregular migrants and not be provided whenever is issued an eviction. Consequently there should be an approach with the EC guidelines and the EU directive, including necessity, need for detention as the last device against migrants during the issuance of the order of detention.

d) Detentions conditions

In general in Europe for the irregular migrants are organised specific centres. While Greece and Malta are the two criticised countries by the international reports such as Amnesty International for the detention in prison of the irregular migrant, asylum seekers treating the same way with other prisoners. While in USA the conditions of migrants detention are even harder: they are arrested to jail they have no access in procedural guarantees as other prisoners, they are transfer from one prison to another without any prior notice, in order to isolate from legal aid, family etc. EU Directives and the EC guidelines provide that families should be prohibited in environments different from those of men. And the prohibition of minors must be like to exceptional measure, as last measure only when there is no other alternative, and for the shortest time possible. Their detention should also be implemented in institutions with personnel and facilities in accordance with their specific needs. In Albania foreigner arrest is done in a detention centre set up in 2010 specifically for this purpose. Actually prohibition is made at Karec Centre set up for irregular migrants. Problematic is the situation for unaccompanied minors, which conform law can not be subject to detention in a detention centre, but exceptionally they may be held at open social centres organised specifically for categories of these people in the Republic of Albania. This provision does not apply because it is not set up any social centre for the prevention of the foreign unaccompanied minors. But for women and children is provided an accelerated procedure for 10 days (from Ministry of Intern). Bulgaria has followed a concerning about detention conditions where migrants find themselves in detention behind bars and barbed wire, which are filled beyond their capacity, for several months (ECRE, 2013).

5. Rights during detention

The basic principle that should guide the structures overseeing the prohibition of foreigners in the detention centre is respect for the right to human treatment with dignity, by guaranteeing the minimal standards regarding food, legal assistance, health care, etc. This principles terms from the international law and is sanctioned in a series of instruments and recommendations regarding the treatment of detainees. Despite the fact that irregular migrants are not condemned the fact of deprivation of freedom makes them automatically subject to guarantees, provided for the prisoners. On the other hand considering the fact that they are not criminals, but people looking for better opportunities for living, leads to the conclusion that they should enjoy even an added protection. The legal base in the International right is article 9 of ICCPR which provides that all people deprived from freedom should be treated in a humane manner, respecting the inherent dignity of the human being himself

(International Covenant on Civil and Political Rights). A fundamental guarantee of stopping the process is the right of detainees to complain at any time about the detention conditions and treatment by staff. The detainees have the right to know the procedural rules, the rights and obligations during detention in an understandable language understandable using even the interpreter services. These guarantees are provided for by the EC directives which emphasizes the support that should be given to detainees to contact, legal representatives, family members or consular representative in the country of origin. As for minors and those who need special assistance, conditions and treatment should consider the additional needs. Albanian legislation also maintains this position, it states that a foreigner detained must be informed in a language you understand, about the rights and obligations at this centre. Specific treatment should be provided for women and families, which should be detailed in the rules of the closed centre specifically, accommodation in environments distinct from those of men. While the minor should stay in social environments appropriate to their age and needs. A foreigner detained in a detention centre has the right of judicial appeal at any time for treatment in a detention centre. Due to the nature of the detention, deprivation of freedom therefore, appeal against the treatment centre is a fundamental guarantee, which must be informed and really create conditions for its enjoyment. While in practice, the practice of detention of irregular migrants is different. Two problematic countries are the USA and Greece. So the USA has derogated from many international instruments, the practice of detention of irregular migrants is considered to set the individual into degrading and inhuman conditions. So migrants not only are detained along with criminals, but are also considered as inferior beings since they are foreigners mainly from underdeveloped countries. Due to difficulties with the language they are unable to seek their rights or be informed on them. Even Greece is one of the most criticized countries due to detention conditions. Structures of migration and asylum in Greece are known for their severity. In the case *M. S. S. against Greece and Belgium* MS ECHR decided that detention of asylum seekers in Greece violates human dignity and is degrading. According to the ECHR the information on the conditions of asylum seekers in Greece is known and therefore it found Belgium guilty about the return of asylum seekers to Greece, as a country that severely violates human rights (*M. S. S. v. Belgium and Greece*, 2011). Conditions of detention often have led authorities to declare themselves the detention as arbitrary and therefore unlawful.

Conclusion

States must apply the least restrictive and grave measures, which usually are available. They have the obligation to pursue in good faith the decision making process and accurately, in order to ensure the rights for all asylum seekers and refugees under its jurisdiction. This duty of good administration is not sufficient to ensure adequate protection measures for asylum seekers. The difficulty lies in the lack of enforcement of a judicial or quasi-judicial mechanism that plays role in interpreting the scope and consequences of the rights sanctioned in the Convention. Detention should never be used beyond the period required to identify asylum seekers and fear of well established, and should not hinder asylum seekers request for further advancement. This prohibition of asylum seekers from the country may be used in the context of public safety, but such restrictions must be proportionate to the interest they serve. Countries award a wide difference in the interpretation of the approved judgement as "necessary". In the political climate developments recently, limiting access policies is not a good sign. There must be a connection between the bases that allow, deprivation of freedom and support in place and conditions of detention. But this consists in a short claim that the detention is necessary to achieve the set goal. This is incompatible with international law in which detention should be used only after other coercive means were considered to be insufficient. The detention is necessary to achieve an effective migration control system. This becomes evident referring to the large number of asylum seekers escalated, and the benefits of the asylum seekers, the provision of an efficient system determine a large number of requests for asylum. Protection of individuals the rights requires individualized assessments. The detention should not be extended beyond the necessary time, and should not be used to prohibit asylum seekers in advancing their demands.

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