The European Union Returns Directive: Does it prevent arbitrary detention?

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Abstract

This article provides a critical analysis of immigration detention regime under European Union (EU) law. It assesses the relevant provisions of the EU Returns Directive and their domestic implementation in several EU states against the underlying requirement for any deprivation of liberty not to amount to arbitrary detention. Three elements embodied in this requirement are highlighted: the exceptional nature of pre-removal detention, its use as a last resort, and its shortest possible length. The article argues that by using broad terms, the EU Returns Directive falls short of providing for strong safeguards against arbitrary immigration detention. In fact, pre-removal detention imposed in an automatic manner and for lengthy periods is not necessarily incompatible with the EU Returns Directive. Moreover, national authorities may actually use some of its provisions to justify more stringent measures.

Introduction

Systematic detention of non-citizens in the European Union (EU) member states, for periods equivalent to imprisonment terms for petty crimes, with limited procedural safeguards and in substandard conditions is well documented. Yet, since the entry into force of the Amsterdam Treaty in 2004, immigration detention, along with other migration and asylum related measures, is no longer regulated exclusively at the national level. Since then the EU has been provided with shared responsibility for immigration and asylum and has adopted several directives that member states have been required to transpose in their domestic legislation.[1] Detention pending expulsion is dealt with by the EU Returns Directive (Directive).[2] Defined in article 5(1)(f) of the European Convention on Human Rights (ECHR) as detention 'of a person against whom action is being taken with a view to deportation', pre-removal detention is not banned under human rights law. However, it must not amount to arbitrary deprivation of liberty, as arbitrary detention is explicitly prohibited under article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) and at variance with article 5(1) of the ECHR protecting liberty of person. As interpreted by human rights bodies, immigration detention shall be an exceptional tool in the country's migration policy, resorted to as a last resort in individual circumstances and maintained for the shortest time possible.[3]

[1] EU directives lay down certain end results that must be achieved in every Member State. National authorities have to adapt their laws to meet these goals, but are free to decide how to do so, see European Commission Website "Application of EU law", http://ec.europa.eu/eu_law/introduction/what_directive_en.htm, accessed 29 July 2013.

[2] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Official Journal of the European Union L 348, 24 December 2008, p. 98-107. The Returns Directive is applicable in all the EU countries except from the UK and Ireland, as well as in the Schengen Associate countries (Iceland, Liechtenstein, Norway and Switzerland).

[3] Two remaining sets of standards relate to procedural guarantees and conditions of confinement. Due to space constraints the article does not address them. For information on how they are implemented, see detention country profiles on the Global Detention Project Website, http://www.globaldetentionproject.org/.

According to the European Commission, detention sanctioned under the Directive adequately fulfils human rights requirements.[4] This article aims to challenge this assumption. It argues that by using broad terms, the Directive can be seen as failing to preclude domestic practices amounting to arbitrary detention. In fact, pre-removal detention imposed in an automatic manner and for lengthy periods is not necessarily incompatible with the Directive. Moreover, national authorities may actually use some of its provisions to justify more stringent measures. As the article will show, due to its failure to circumscribe the use of detention by clearly defined grounds, the Directive does not ensure that detention remains exceptional measure. Neither is the use of detention *as a last resort* in individual cases unequivocally required because the Directive lacks a clear obligation to consider alternatives to detention. By setting the maximum detention period at 18 months, in practice the Directive may actually trigger the extension of the length of detention across the EU states.

Exceptional nature of detention

Under the Directive, pre-removal detention goes beyond exceptional migration-related measures that should never be imposed in an automatic fashion. According to the UN Human Rights Committee (HRC), immigration detention may be arbitrary if it is not in line with the principles of necessity and proportionality.[5] These principles entail that authorities should not consider detention a measure to be used regularly and systematically. Rather, as explicitly stressed by the UN Working Group on Arbitrary Detention (WGAD) and the Special Rapporteur on the Human Rights of Migrants (SRHRM), immigration detention should never be automatic, and, in particular, it should be the exception rather than the rule. Therefore, the grounds justifying detention must be clearly defined and exhaustively enumerated in legislation.[6] Yet the Directive neither defines the grounds for detention in an exhaustive manner nor requires states to do so in their domestic legislations. Without such clarity, the Directive hardly ensures that detention is not resorted to as a rule. States may even rely on the Directive's broad terms to justify their stringent practices.

There are two grounds allowing detention that are explicitly laid down in the Directive. First, states may detain a non-citizen if he or she represents a risk of absconding (article 15(1)(a)). The risk of absconding is described as 'the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a person under return procedures may abscond' (article 3(7)). The Directive does not define the central term – 'objective criteria', instead leaving its clarification to states' discretion.

[4] According to the Commission, one of the key features of the Directive, is "limiting the use of detention, binding it to the principle of proportionality and establishing minimum safeguards for detainees", see European Commission Website "Return & Readmission", http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/immigration/return-readmission/index_en.htm, accessed 29 July 2013.

[5] Human Rights Committee, *A. v. Australia*, 560/1993, 30 April 1997, para. 9(2).

[6] SRHRM, *Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau: Detention of Migrants in an Irregular Situation*, A/HRC/20/24, 2 April 2012, para. 69; WGAD, *Report of the Working Group on Arbitrary Detention: International Trends on Deprivation of Liberty of Concern to the Working Group: Detention of Non-citizens*, A/HRC/7/4, 10 January 2008, para. 51; WGAD, *Report of the Working Group on Arbitrary Detention: Thematic Considerations: Detention of Immigrants in Irregular Situations*, A/HRC/10/21, 16 February 2009, para. 82.

This ambiguity means that the understanding of the risk of absconding varies across the EU. For instance, under Greek law the objective criteria include: non-compliance with a voluntary departure obligation, explicit expression of intent for the non-compliance with the return decision, possession of false documents, providing false information to authorities, conviction for criminal offences, the lack of travel documents or identity documents, prior absconding, and the non-compliance with an existing entry ban.[7] On the other hand, Slovak legislation stipulates that there is a risk of absconding if it is impossible to identify immediately the non-citizen, if he or she has no residence permit or he or she may be issued an entry ban exceeding three years.[8] The differences in the meaning of the concept of the risk of absconding are understandable as states enjoy the margin of appreciation in implementation of the EU law. However, it is worrisome that both legislations consider the above criteria to be non-exhaustive, while in other countries, such as Estonia or Finland, they are not enumerated at all.[9] Thus in practice authorities are free to establish the risk of evasion according to their liking. This weakens the ability of the Directive to ensure that detention is indeed an exceptional measure.

Instead, in order to prevent pre-removal detention from being used in an automatic manner, the Directive should impose a safeguard against a presumption of the risk of absconding on account of irregular stay. The Directive's current failure to do this results in the legislation of some states, like Luxembourg or the Netherlands, to include irregular entry or stay as 'objective criteria'.[10] In practice, deprivation of liberty ordered for the sole reason of irregular status amounts to automatic detention.

The second ground justifying detention under the Directive concerns situations in which a person avoids or hampers the preparation of return or the removal process (article 15(1)(b)). Again, not only are the relevant terms not defined but also the Directive does not obligate states to define them in their national laws. This gap is mirrored in legislations of several states, such as the Czech Republic and Greece, which set forth this ground for detention without clarifying its meaning.[11] As a consequence, authorities enjoy a wide discretion to characterise a person's conduct as avoiding or hampering the return process and thus to justify detention. Therefore, the Directive fails to ensure that detention is imposed in only exceptional circumstances.

Moreover, the risk of absconding and avoidance or hampering of return are not listed in the Directive in an exhaustive manner. It thus implicitly allows states to resort to pre-removal detention in other circumstances. Not surprisingly, some member states therefore confine non-citizens pending return on grounds unrelated to immigration, such as public order, crime prevention or public health.[12] These grounds should be regulated by other branches of law

[7] Greek Law No. 3907/2011 on the Establishment of an Asylum Service and First Reception Service, Article 18.
[8] Slovak Act No. 404/2011 on Stay of Aliens, Article 88.
[9] Estonian Act on the Obligation to Leave and Prohibition on Entry, Section 7(2)(2)(8); Finnish Aliens Act No. 301/2004, Section 121.
[10] Luxembourg Law on free movement of persons and immigration, Article 111(3)(c); Dutch Aliens Decree 2000, Article 5(1)(b).
[11] Czech Act No 326/1999 on the Residence of Aliens, Article 124; Greek Law No. 3907/2011, Article 30.
[12] Public health: Lithuanian Law No. IX-2206 on the Legal Status of Aliens, Article 113; public order: Czech Act No. 326/1999, Article 124; Latvian Immigration Law, Section 51; crime prevention: Finnish Aliens Act No. 301/2004, Section 121; Greek Law No. 3907/2011, Article 18. In the *Kadzoev* case the Court of Justice of the EU addressed detention on grounds of public order and public safety. The Court found that none of them can constitute in itself a ground for pre-removal detention, without pending return proceeding, see Court of Justice of the European Union, *Kadzoev*, Case C-357/09 PPU, 30 November 2009, para. 70-71. However,

that afford more guarantees to the detainee. Above all, however, it is questionable whether detention on such grounds is necessary for carrying out removal.

Detention as a last resort

The Directive falls short of establishing that pre-removal detention is ordered as a last resort even when grounds for detention are satisfied in the individual case. The principles of necessity and proportionality emphasised by the HRC are relevant to the individual circumstances of a particular case. For the HRC, deprivation of liberty may amount to arbitrary detention if it is not necessary in all the circumstances of a case and proportionate to the goals pursued by the authorities.[13] In light of this interpretation, the WGAD and SRHRM reiterate that immigration detention should only be imposed as a last resort when there are no less coercive ways to achieve the State's objectives.[14] In particular, the SRHRM stressed that '[g]overnments have an obligation to establish a presumption in favour of liberty in national law, first consider alternative non-custodial measures, proceed to an individual assessment and choose the least intrusive or restrictive measure'.[15] It could be argued that the Directive enshrines this safeguard. It does indeed allow states to resort to detention 'unless other sufficient but less coercive measures can be applied effectively in a specific case' (article 15(1)).

While this rule is welcome, in practical terms it serves as an opportunity for member states to opt for non-custodial measures. Arguably, the presumption in favour of liberty is not clearly set forth – which is also reflected in domestic legislations. Pursuant to the Austrian Aliens Police Act, for instance, authorities may refrain from imposing detention if there is a reason to assume that its purpose can be achieved by use of more lenient measures.[16] This sentiment is stronger in the Danish Aliens Act, which provides that if the non-custodial measures are not sufficient to ensure removal, police may order deprivation of liberty.[17] On the other hand, the Polish Aliens Act merely mentions non-custodial measures, without requiring authorities to examine them in the light of particular circumstances in each individual case.[18] This Polish legislation is still in line with the weak language used in the Directive. It is also disappointing that the Directive does not list any specific alternatives to detention that could lead to more consistency in national practices.[19]

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arguably this ruling cannot be interpreted as precluding detention under the Directive on these grounds if removal proceedings are ongoing and the maximum length has not been exceeded.

[13] HRC, *Danyal Shafiq v. Australia*, 1324/2004, 13 November 2006, para. 7(2).

[14] WGAD, *Report of the Working Group on Arbitrary Detention: Thematic Considerations: Detention of Immigrants in Irregular Situation*, A/HRC/13/30, 18 January 2010, para. 59; SRHRM, *Detention of Migrants in an Irregular Situation*, para. 68.

[15] SRHRM, *Detention of Migrants in an Irregular Situation*, para. 68.

[16] Austrian Aliens Police Act, Article 77.

[17] Danish Aliens Act No. 947, Section 36.

[18] Polish Aliens Act, Article 90-91.

[19] The most common alternatives laid down in domestic legislation of the EU States include the obligation to surrender the identity or travel documents (e.g. French Code of entry and residence of foreign nationals and right of asylum, Article 552-4; Italian Consolidated Act No. 286/1998 of measures governing immigration and norms on the condition of foreign citizens, Article 14(1bis)), residence restrictions (e.g. Austrian Aliens Police Act, Article 77; Polish Aliens Act, Article 90-91), reporting requirements (e.g. Finish Aliens Act, Section 118; German Residence Act, Section 61), and release on bail (e.g. Danish Aliens Act, Section 34; Finish Aliens Act, Section 120).

Shortest possible period of detention

Although the Directive sets forth that detention shall be as short as possible (article 15(1)), it fails to ensure the application of this requirement in practice. The length of detention can have a bearing on the arbitrariness of the custodial measure. As stipulated in the jurisprudence of the European Court of Human Rights, immigration detention may be considered arbitrary if, among others, its length exceeds a time-span that is necessary for the purpose pursued by authorities.[20] Detention sanctioned under the Directive shall not exceed six months but may be extended by another twelve months in two circumstances (article 15(5)-(6)).[21]

On one hand, the maximum time-limit on detention spelled out in the Directive has had a beneficial effect in countries that previously did not provide it in their legislation (for example Denmark, Finland, Lithuania and Sweden) or that allowed longer duration (for example Latvia and Romania). However, some of those states, such as Latvia and Lithuania, introduced or modified the time-limit to comply with the Directive but adopted the maximum permissible length.[22] On the other hand, several countries, including Greece, Hungary, Italy and Spain, increased their maximum length of detention. In particular, Greece and Italy, while having previously respectively six-month and three-month maximum length of detention, following the transposition of the Directive both allow detention up to 18 months.[23] These examples suggest that on balance negative implications of the Directive's time-line outweigh its beneficial results. The time- limit served states as justification for extending the length of detention in their legislation. This is worrying because such duration could be considered excessive, as explicitly pointed by ten UN independent experts and Parliamentary Assembly of the Council of Europe.[24]

The circumstances in which states may prolong the initial detention up to 18 months include the lack of cooperation by the detainee or delays in obtaining the necessary documentation from third countries (article 15(6)). Both grounds are problematic. Extended detention on account the lack of cooperation may operate as a punishment, and authorities may use detention to compel the detainee to cooperate. The lawfulness of latter ground is even more questionable as it is beyond the control of the migrant. In this respect, the WGAD explicitly stressed that detention is likely to be unlawful if the obstacle for carrying out removal does not lie within detainees' sphere of influence.[25] Moreover, in practice, the majority of detainees fall within the scope of these grounds. Thus the Directive allows authorities to systematically detain non-citizens for 18 months.

However, article 5(1) of the ECHR circumscribes a state's power to extend detention on account of the practical obstacles to removal. In line with the Strasbourg Court's jurisprudence, pre-removal detention is justified only for as long as deportation proceedings

[20] European Court of Human Rights, *Louled Massoud v. Malta*, 24340/08, 27 July 2010, para. 62.
[21] Detention may be extended up to 18 months on account of a lack of cooperation by the non-citizen or delays in obtaining the necessary documentation from third countries.
[22] Latvian Immigration Law, Section 54; Lithuanian Aliens Law, Article 120.
[23] Greek Law No. 3907/2011, Article 31(5)-(6); Italian Consolidated Act No. 86/1998, Article 14.
[24] SRHRM, *The annual report to Human Rights Council: Addendum: Communications sent to governments and replies received*, A/HRC/11/7/Add.1, 20 March 2009, para. 90; Parliamentary Assembly of the Council of Europe, *Resolution 1707(2010): Detention of asylum seekers and irregular migrants in Europe*, 28 January 2010, para. 5.
[25] WGAD, *Thematic Considerations 2008: Detention of Immigrants in Irregular Situations*, para. 82.

are being conducted. In the case where expulsion is not feasible due to detainee's lack of cooperation or the failure to issue travel documents by the countries of destination, continued detention cannot be said to be effected with a view of deportation. Such situations lack a 'realistic prospect of expulsion' and detention becomes unlawful under article 5(1) of the ECHR, thus arbitrary.[26] It is striking that the Directive sanctions extension of detention in such cases.

Although the Directive also sets forth that detention is no longer justified if a reasonable prospect of removal no longer exists (article 15(4)), this concept is read in conjunction with the maximum permissible length of detention. As interpreted by the Court of Justice of the EU, a reasonable prospect of removal means that removal can be carried out successfully within the 18-month period and such prospect does not exist where it appears unlikely that the detainee will be admitted to a third country within that period.[27] This position is inconsistent with the European Court's case-law. Once return is no longer feasible (meaning there is no realistic prospect of removal), continued detention becomes unlawful under article 5(1) of the ECHR. It is, however, permitted under the Directive as long as it does not exceed 18 months. As a consequence, member states may become even more inclined to consider the maximum length of detention as a rule rather than exception.

Conclusion

The Returns Directive arguably falls short of providing strong safeguards against arbitrary immigration detention. It fails to definitely preclude lengthy, unnecessary and disproportionate detention in the EU states. Without disregarding the Directive's provisions, states may systematically detain non-citizens with no account of last-resort requirement. Additionally, the excessively long maximum period of detention laid down in the Directive risks becoming a rule across the EU. It is questionable whether the Directive has improved detention-related practices in member states. This discussion is timely because the European Commission shall present the evaluation of the Directive's application at the end of 2013. The possibility exists that the Commission will also propose amendments to the Directive. The recently adopted amendments to the EU asylum directives and regulations that strengthened some standards laid down therein may be seen as an example to follow.[28]

As this article has demonstrated, the Directive's detention provisions warrant amendment. In keeping with the principles of necessity and proportionality the Directive shall prevent domestic practices amounting to arbitrary deprivation of liberty. It shall thus ensure that pre-removal detention remains an exceptional measure, ordered as a last resort in individual circumstances of the case and maintained for the shortest period possible. To this end it should clearly and exhaustively enumerate grounds for detention and require authorities to assess the alternatives to detention before imposing custody. It should also shorten the

[26] European Court of Human Rights, *Mikolenko v. Estonia*, 10664/05, 8 October 2009, para. 59, 64-65 and 68; *Louled Massoud v. Malta*, para. 60, 67, 69 and 73-74.
[27] Court of Justice of the European Union, *Kadzoev*, Case C-357/09 PPU, 30 November 2009, para. 67.
[28] European Commission, Communication on the evaluation of the common policy on return and on its future development: Roadmap, http://ec.europa.eu/governance/impact/planned_ia/docs/2011_home_047_communication_and_report_return_policy_en.pdf, accessed 29 July 2013. The adopted in June 2013"Asylum Package" encompasses the recast Asylum Procedures, Reception Conditions and Qualification Directives, as well as the Dublin and Eurodac Regulations, see European Commission, *A Common European Asylum System: Memo,* http://europa.eu/rapid/press- release_MEMO-13-532_en.htm, accessed 29 July 2013.

maximum length of detention. Only by placing the right to liberty of persons at its heart, will the Directive reflect the common values on which, as the EU Charter of Fundamental Rights recalls, the EU is founded: human dignity, freedom, equality, solidarity, democracy and the rule of law.

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