TALLINN UNIVERSITY OF TECHNOLOGY

Faculty of Social Sciences

Tallinn Law School

Ramona Muljar

State Practice of Detaining Asylum Seekers: A Look at the New Reception Conditions Directive

Master´s Thesis

Supervisor: Lehte Roots, Ph D.

Tallinn 2014

I hereby declare that I am the sole author

of thiS Master´s Thesis and it has

not been presented to any other

University of examination.

Ramona Muljar

14th May 2014

The Master´s Thesis meets the established requirements

Supervisor Lehte Roots

14th May 2014

Accepted for examination " ..... " 2014

Board of Examiners of Law Master´s Theses

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Content

List of abbreviations

EU European Union

EC European Community

MS Member State of the European Union

UNHCR United Nations High Commissioner for Refugees

ECHR European Convention on Human Rights

EctHR European Court of Human Rights

OJ Official Journal of the European Union

ICJ International Court of Justice

ECJ European Court of Justice

1. INTRODUCTION

Persons who seek asylum from persecution in foreign countries are depending on rights provided for in international law. These are rights that States are obliged to respect and uphold. When such persons are then detained in the country they arrive in, whether for short or for longer periods, legal as well as moral problems arise. The aim of this research is, through analysis of academic articles, European case-law and EU as well as international and national legislation, to establish whether the new EU Reception Conditions Directive (Directive 2013/33/EU) will affect the practice of detaining asylum seekers who seek refuge in European Union states. Will the new Reception Conditions Directive reduce and/or harmonize EU state practice of detaining asylum seekers, specifically in Finland and in Estonia? The issue is topical because, as will be seen, detention measures are in use in all EU Member States, and measures are used variably and in some cases inconsistently, which causes problems to arise regarding equal treatment of asylum seekers in the EU. This research will in its first part briefly provide a historical background of the development of EU legislation on asylum and immigration matters. The second part of this research with then more substantively identify the different aspects and problems related to the detention of asylum seekers; through European Court of Human Rights cases and European Court of Justice rulings, as well as published research on the cases concerned, the second section will attempt to establish the main legal difficulties and controversies surrounding the practice of detaining, as well as contemplate the differing practices among EU member states. The third section of this research will then go into an analysis of the new Directive itself; the new provisions it contains as compared to the previous Directive and whether these new provisions will help in limiting the detaining of asylum seekers, as well as harmonize Member State practice. The final chapter of this section will then take a closer, comparative look at the situation in two, geographically closely situated but otherwise very different EU Member States (Estonia and Finland) to determine whether the new Directive has already been transposed, how the practice of detaining asylum seekers has manifested in each country and whether the practice will be in fact affected by the new Directive. These two countries are chosen for this research because despite their geographical proximity, they are very unsimilar countries; their size, population, historical background, socio-economic stance as well as their position as asylum destination countries are vastly different, yet they are expected to apply the same rules and mechanisms to the detention of asylum seekers through EU Directives. This research aims at providing a novel comparative overview of how the new Reception Conditions Directive specifically will affect these two states. In the conclusion I will evidently aim to answer these questions, eventually finding that because

the new Directive is more specific in nature on the issue of detention of asylum seekers, and because its new provisions address the problems identified in the second chapter of this research, it will in fact have a positive impact in harmonizing state practice, and, when transposed, will most likely reduce the use of detention or at least regularize it both in Estonia and in Finland.

1.1 Establishing a Common European Asylum System

Since World War II, European states have increasingly been hosting large immigrant populations, with countries such as Italy, Spain, Greece and Portugal (traditionally states with high levels of emigration) now being targeted as destination countries. Although refugee and asylum law in Europe can often be a very emotional and politically motivated topic, it is worth bearing in mind that the number of asylum seekers entering Europe is actually small in comparison with the rest of the world.[1]

Before the Treaty on European Union in 1992, European states acted outside the EC/EU framework in asylum and immigration matters. As asylum policy has always been an issue considered by most states to be an area reserved for exclusive national competence, any instruments that were adopted in this area before 1992 were done solely in an intergovernmental context.[2] Two main instruments relating to immigration control that were developed outside the EU framework were the Schengen and the Dublin Conventions; the first relating to the abolition of check-points at internal frontiers between Member States, the second relating to the determination of the Member State (MS) responsible for examining an asylum claim (this was necessary because due to the Schengen Convention, people could move between Member States unchecked and possibly then lodge an asylum application in multiple states simultaneously). The Schengen Convention also introduced a uniform visa and visa requirements for entry into the EU. There was however little governmental support for a harmonized asylum determination procedure at the time, despite the Commission´s efforts to that affect. The Treaty on European Union finally included provisions on the co-operation of states in asylum policy in its Third Pillar on Justice and Home Affairs.[3]

[1] R. Wallace, Refugees and Asylum: A Community Perspective 11 (1996) Butterworths Publishing
[2] R. Cholewinski, *The EU Acquis on Irregular Migration Ten Years On: Still Reinforcing Security at the Expense of Rights? in* E. Guild; P. Miderhoud (Ed.), The First Decade of EU Migration and Asylum Law, at 130-131 (2012) Martinus Nijhoff Publishers, pp 130-131
[3] R. Wallace, Refugees and Asylum: A Community Perspective (1996) Butterworths Publishing, pp. 15-30

Traditionally, the issue of granting asylum and the rules states use regarding the admission of foreigners into their territory has been a matter each state has had the power to decide upon independently, taking into account of course of any international treaties it might be party to. With the Amsterdam Treaty, European Union states however gave up some of this sovereign power, as the idea of a Common European Asylum System started coming into effect.[4] Following the removal of internal borders and the objective of building a common external border, cooperation in the field of asylum was an inevitable step towards a common, internally open Europe. With the completion of the internal market, with no internal frontiers and free movement of people, immigration policy became applicable only to third-country nationals, in other words non-EU citizens.[5]

In 2000, the Commission produced a study it had commissioned on the administrative practices and legal framework the MS had in place at the time regarding the reception conditions of asylum seekers, persons seeking international protection and displaced persons, which showed that MS had widely divergent practices on a range of issues related to the reception of asylum seekers. From this evidently flowed concern that such disparities made some EU MS more attractive destination countries. A discussion paper submitted to the Asylum Working Group by the French delegation emphasized that asylum seekers should not have the right to work during their asylum application procedure, as it was alleged that many asylum applications were made for economic reasons and access to the labor market during an asylum application procedure would lead to more asylum applications. This paper however also stated that it saw no reason for asylum seekers´ freedom of movement to be restricted in the territory of the MS in which the application was lodged. The guidelines adopted by the Council at a meeting in December 2000 were undecided on the issue of the discretion national authorities had on deciding on a place of residence for the applicant of international protection, although issuing detention measures for the mere reason that a person had applied for asylum was not deemed acceptable.[6]

Despite the importance seemingly afforded by the EU to its asylum policy and the protection of refugees coming into its territory, the EU has nevertheless even recently emphasized that its commitments lie both with protection and solidarity. As important an emphasis as it has

[4] E. Guild, *Between Persecution and Protection – Refugees and the New European Asylum Policy,* vol. 3 Cambridge Yearbook of European Legal Studies, pp 169-198 (2000-2001), pp 171-185

[5] R. Wallace, Refugees and Asylum: A Community Perspective (1996) Butterworths Publishing, p.11

[6] N. Rogers, *Minimum Standards for Reception*, vol. 4 Issue 2 European Journal of Migration and Law, pp. 215-230 (2002), pp 216-217

put on having high protection standards for asylum seekers, it has also placed equal importance on the notion of burden-sharing and solidarity between the Member States in asylum matters;[7] "This collective attempt to negotiate the values of protection and solidarity has come to be known as the Common European Asylum System (CEAS)"[8].

1.2 EU asylum law

With the Amsterdam Treaty, some of the most important aspects of the asylum application procedure were transferred to EC competence. These include the criteria and mechanisms for determining which Member State is responsible for examining an asylum claim; the minimum standards for receiving asylum seekers; standards on the qualification as refugees of third-country nationals; and standards for the procedures involved in granting and withdrawing refugee status.[9]

The Common European Asylum System essentially currently consists of five main pieces of legislation: the Asylum Procedures Directive (revised), the Reception Conditions Directive (revised), the Qualification Directive (revised), the revised Dublin Regulation, and the revised EURODAC Regulation (on a fingerprint database).[10]

The Council adopted the first Asylum Procedures Directive in 2005. This contained some changes that had been made to the first 2002 draft proposal; the final version included a more narrow definition of the scope of the Directive, limiting it to third-country nationals and stateless persons (thus excluding EU citizens), however the word "detention" as mentioned in Article 18 of the Directive was left open to interpretation. Also, the rules on access to the procedure were amended to allow MS to rule that applications for asylum had to be made at a certain place, and lower standards for interviews were introduced.[11] The Asylum Procedures Directive did not contain a clause on the use of detention, other than to say that a person should not be detained

[7] S. W. Allard, *Casualties of Disharmony: The Exclusion of Asylum Seekers under the Auspices of the Common European Asylum System*, 24 Emory International Law Review, pp 295-331 (2010), pp 295-296

[8] Ibid. p. 296

[9] E. Guild, *Between Persecution and Protection – Refugees and the New European Asylum Policy,* vol. 3 Cambridge Yearbook of European Legal Studies, pp 169-198 (2000-2001), pp 175-195

[10] "Common European Asylum System, European Commission website, 06.03.2014, <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm> accessed 15 March 2014

[11] S. Peers, *Key Legislative Developments on Migration in the European Union*, vol. 8 Issue 1 European Journal of Migration and Law, pp 97-114 (2006), pp 101-105

solely because they apply for asylum; detention seemed to be allowed in some circumstances but the Directive did not state the acceptable grounds for using detention measures. The Directive envisioned a vigorous role for the UNHCR; MS were to provide UNHCR access to asylum seekers in detention, transit areas, airports, and other reception facilities, as well as access to information concerning applications, procedures and decisions.[12] The recast Procedures Directive also does not go further into the issue of detention and the grounds for detention, but it refers back to the Reception Conditions Directive[13], which then regulates the matter more specifically.

As mentioned earlier, EU states had agreed upon rules governing which MS is responsible for examining an asylum already earlier, in 1990 in the Dublin Convention. This became the Dublin II Regulation in 2003; its aim was to prevent asylum seekers from filing claims simultaneously in several countries. Where the Dublin Convention, as an intergovernmental treaty between states and outside of the EU legal framework, could not be interpreted by the ECJ, the Dublin Regulation on the other hand was an integral part of the CEAS.[14] The EURODAC System is a fingerprint database of asylum seekers.[15] The revised Dublin Regulation contains more specific provisions on detention, as will be discussed further on.

The Qualification Directive was adopted in 2004. It essentially gave a classic definition of who a refugee is (as defined in the Geneva Refugee Convention), but it also introduced the notion of subsidiary protection, and thus obliged states to offer (at least) two types of international protection. The Directive also stipulated the lengths of the living permits refugees and persons who are eligible for subsidiary protection receive. EU legislation on the minimum standards for the receiving of asylum seekers had been adopted in 2003. The aim of the Reception Conditions Directive was to effectively stop or restrict forum-shopping by asylum seekers; by harmonizing standards and receiving conditions provided to asylum seekers it was envisaged that no one country would become a magnet for attracting asylum seekers. There is no proof that this aim was actually achieved; the minimum standards were so moderate in nature that no harmonization really occurred (many national asylum systems already complied with the Directive). Furthermore,

[12] M. Fullerton, *A Tale of Two Decades: War Refugees and Asylum Policy in the European Union*, 87 Washington University Global Studies Law Review, pp 87-133 (2011), p. 112

[13] Directive 2013/32/EU, Article 26

[14]M. Fullerton, *A Tale of Two Decades: War Refugees and Asylum Policy in the European Union*, 87 Washington University Global Studies Law Review, pp 87-133 (2011), pp 104-107

[15] "Common European Asylum System, European Commission website, 06.03.2014, <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm> accessed 15 March 2014

factors other than reception conditions play a bigger role in where a person files an asylum claim, factors like the presence of compatriots or family in the destination state, as well as the language spoken there and the success rate of asylum applications. Access to the work market also plays a role.[16] Essentially, the Directive, in its previous form, did not do much to harmonize state practice regarding reception conditions to the effect of affecting asylum seekers´ preference of where to apply for asylum.

As mentioned above, the challenge EU asylum law has faced is the balance between asylum seekers´ rights and the states´ interests. So far, regarding the previous set of legislation, EU asylum law has put focus on the control of asylum seekers, and not on the protection of asylum seekers´ rights. Although the legislative measures all protect asylum seekers to a certain degree, they also provide states with many discretionary rights.[17]

Despite Europe´s attempt to harmonize the asylum process across the Union, to ensure that persons who need it have access to international protection and that MS collectively fulfill their international obligations towards asylum seekers and refugees, the EU has itself admitted that there are still considerable disparities in state practice between the MS.[18] Lately, the EU has adopted revised versions of these five pieces of legislation on EU asylum law; the revisions are meant to bring more harmonization to national legislation on standards of protection in the MS, to ensure better cooperation among the MS, and to increase responsibility and burden-sharing between the states.[19] The Reception Conditions Directive (Directive 2003/9/EC) was likewise revised, bringing into effect Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast). Whether the new Directive will address and solve the problems that were related to the previous Directive will be discussed further in this paper.

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[16] M. Fullerton, *A Tale of Two Decades: War Refugees and Asylum Policy in the European Union*, 87 Washington University Global Studies Law Review, pp 87-133 (2011), pp 103-108

[17] J. Fry, *European Asylum Law: Race-to-the-Bottom Harmonization*, vol. 15 Issue 1 Journal of Transnational Law and Policy, pp 97-108 (2005), pp 98-101

[18] S. W. Allard, *Casualties of Disharmony: The Exclusion of Asylum Seekers under the Auspices of the Common European Asylum System*, 24 Emory International Law Review, pp 295-331 (2010), p. 296

[19] "Common European Asylum System, European Commission website, 06.03.2014, <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm> accessed 15 March 2014

2. DETENTION

When a state detains foreign nationals, there are many legal and moral aspects involved. Detention measures are governed by national as well as international law; in the EU the issue of detaining asylum seekers is now more or less regulated by EU asylum law. The act of detaining a third-country national is in itself an international one; the detaining state should take into account its international obligations as well as its possible bilateral obligations towards the state from where the third-country national is coming from. International human rights treaties and principles must also be taken into account. The International Court of Justice has stated that "Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights"[20]. When it comes to detaining asylum seekers, there is an uneasy attempt at balancing the interests and prerogatives of a sovereign state to manage the incoming and residence of foreigners on its territory with the obligations to protect and respect the rights of migrants, including asylum seekers, stemming from international treaties and human rights standards. The European Court of Human Rights has played a key role in attempting to balance these two interests in Europe, and has more often than not ended up emphasizing state sovereignty to decide on the legality of detaining asylum seekers over migrant rights, sometimes causing a disservice to its credibility by restrictively applying the rights the Convention is meant to protect. States have arguably been given too much discretion to interpret the application of the right to freedom of movement, as shall be seen from the ECtHR case-law in the forthcoming chapters.

2.1 Detention of asylum seekers

The arbitrary arrest and detention of migrants has been a recognized problem for at least over a decade now; over 14 years ago in 2000 the UN urged states to end the practice of arbitrarily detaining migrants.[21] In December 2013, the United Nations General Assembly adopted their latest

[20] ICJ May 1980 Judgment in USA v Iran, Case concerning United States Diplomatic and Consular Staff in Tehran, para 91

[21] United Nations Resolution 55/92 "Protection of migrants", adopted on the 4th of December 2000, paragraph 7 available at

annual[22] Resolution on the Protection of Migrants (Resolution 68/179). In it the United Nations once again calls upon all states to end the arbitrary arrest and detention of migrants; to review detention periods; and to use alternatives to detention such as non-custodial measures that have been successfully implemented in some countries.[23] The UNHCR Executive Committee recommendations discouraged the use of detention of asylum-seekers already in 1980 and 1983, amidst a growing practice by states of detaining asylum seekers.[24]

Many European states have taken recourse to detaining asylum seekers when they arrive in their territories, often on the basis of having false or no travel documents or if they have entered the country illegally.[25] States can have a basis in law for detaining immigrants pending the execution of deportation orders, for example, but the case for detaining asylum seekers while their application is still pending is another matter. The essential problem with detaining asylum seekers is that detention in general is a serious interference into any person´s fundamental rights and freedoms. Traditionally, detention is used as a punishment for having committed a crime or as a means to prevent serious danger to public order. When states start using detention as a preventive measure, whether to prevent or deter asylum seekers from entering their territory, or to prevent the abuse of the asylum system, higher stakes are involved, and higher safeguards against abuse should also be in use. An intrusion on a basic human right should always be proportionate to the desired objective; an intrusion on the fundamental human right of freedom in general and freedom of movement more specifically should be well justified and not used lightly. The idea of using such a significant intrusion on the freedom of movement as a preventative measure is worrisome, to say the least.

States use detention as a preventive measure to prevent applicants from going into hiding, from committing criminal acts and to prevent using the asylum procedure as a means to escape

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<http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/55/92&Lang=E> accessed 15 March 2014

[22] The UN GA has adopted a Resolution on the Protection of migrants annually since 2000, see at <https://www.un.org/documents/resga.htm> accessed 15 March 2014

[23] United Nations Resolution 68/179 "Protection of migrants" adopted by the General Assembly on 18 December 2013, paragraph 4 (a)
<http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/63/184&Lang=E> accessed 19 March 2014

[24] *UNHCR Executive Committee of the High Commissioner´s Programme Standing Committee, 15th Meeting – Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice*, vol 11 International Journal of Refugee Law, pp 574-582 (1999), p. 575

[25] K. Hailbronner, *Detention of Asylum Seekers*, vol. 9 Issue 2 European Journal of Migration and Law, pp 159-172 (2007), p.160

extradition measures or decisions. Most governments will admit that legitimate refugees should not be detained; however detaining asylum seekers who are just trying to use the international protection procedure as a cover for bypassing usual immigration restrictions is seen as a legitimate instrument to reduce such practice. It can be pointed out that, according to recognition statistics, usually less than ten percent of applicants for international protection are recognized as genuinely in need of protection; it is also generally known that human traffickers and smugglers use fraudulent asylum claims as a means to get residence permits for illegal immigrants.[26] After all, human traffickers and smugglers are paid for their expertise and skills in cheating the normal immigration procedure in desirable destination countries; they may know ways to obtain, in some cases fraudulently, residence and work permits. Therefore the claim that detention measures are used to deter fraudulent asylum claims is understandable; whether this actually works is another matter. The problem is that genuine refugees often also need to resort to the services of human traffickers in order to escape their home country, as we shall see later on in this paper.

When detention measures are justified by the need to carry out an expulsion order or when there is concern that the person may abscond, then there generally is no breach of the right to not be arbitrarily detained. However, one can discern a trend towards states´ using detention for administrative convenience, which goes against the principle of non-arbitrariness and proportionality. There exists a real risk of slipping towards the mandatory detention of all asylum seekers which needs to be avoided. Despite the notion that asylum seekers choose specific target states because of a perceiving of a soft policy towards asylum seekers, and that because of this a restrictive approach should be applied, the truth is that the reception conditions (whether this includes detention or not) play a far lesser role in where the asylum seeker ends up. This scare has however led to a competitive restrictionism among states, where each state wants to out-do the other in the restrictions it applies to incoming asylum seekers, so as not to end up a favorite destination state.[27]

The practice of detaining asylum seekers in the EU varies quite drastically from state to state; some EU countries detain asylum seekers arriving at airports or international borders in order to ensure a speedy returns process in the event of a negative outcome; some states detain asylum seekers for parts of the procedure; while some states have the practice of systematically detaining

[26] K. Hailbronner, *Detention of Asylum Seekers*, vol. 9 Issue 2 European Journal of Migration and Law, pp 159-172 (2007), p.160
[27] H. O´Nions, *The Detention of Asylum Seekers for Administrative Convenience*, vol. 10 Issue 2 European Journal of Migration and Law, pp 149-186 (2008), pp 151-153

asylum seekers as a direct result of filing an asylum claim. When assessing the necessity and proportionality of detention measures, the most important factors to consider are no doubt the length of the detention and the criteria used for issuing detention. It is somewhat difficult to compile a proper analysis of the use of detention measures in EU states, as statistics on detention numbers seldom take into account detentions which last a few hours or less than a day (but which are, nonetheless, detentions), and because statistics may not reflect the legal basis for detention (whether it is based on criminal charges or other criteria).[28]

Restriction of movement within the territory of a state should be distinguished from actual confinement. Issuing an asylum seeker a place of residence or accommodation where he or she is to live, subject to some restrictions, is common, and is used also to ensure an equal distribution of asylum seekers within a state.[29] The restriction of the movement of an asylum seeker, even if it is not detention, is nevertheless also problematic, and although perhaps used in many states, may not be entirely legal and in accordance with the Geneva Refugee Convention, as will be seen from the case of Omwenyeke v. Germany further on.

In a report from 2012 on the human rights of migrants, especially regarding the detention of migrants in an irregular situation, Special Rapporteur of the Human Rights Council François Crépeau points out that states in general detain migrants on a wide range of reasons, some seeing irregular migration as a national security issue. Some states seem to operate under the notion that detention can be used as a deterrent for incoming migrants, whether they be asylum seekers or other irregular migrants; however the Special Rapporteur notes that there is no empirical evidence that shows that detention would in fact discourage incoming flows of migrants or discourage persons from applying for asylum. Rather, migrants may see detention only as an inevitable part of the process. The Special Rapporteur notes that the legitimate objective for detention of migrants should be the same as that for nationals of the country; i.e. if they present a threat to themselves or other people or to public security, or if there exists a risk of absconding future legal proceedings. In order for this criteria to be fulfilled, an individual assessment of each individual´s case and circumstances is of utter importance. [30]

[28] K. Hailbronner, *Detention of Asylum Seekers,* vol. 9 Issue 2 European Journal of Migration and Law, pp 159-172 (2007), p.160
[29] Ibid.
[30] Human Rights Council ”Report of the Special Rapporteur on the human rights of migrants, Francois Crépeau” paras 8-10 UN General Assembly, Document nr A/HRC/20/24 2 April 2012 available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf> accessed 19.3.2014

Commissioner for Human Rights of the Council of Europe, Thomas Hammaberg, has also expressed concern for asylum seekers who are trying to enter Europe in and around the Aegean Sea. He has expressed concern regarding reports of the systematic detention of all new arrivals in the area, including asylum seekers. Among the persons detained on border islands have been pregnant women, minors and disabled persons.[31]

In addition to issues of legality, detention measures can have a severely detrimental effect on the mental and physical health of an asylum seeker, who most likely has already experienced psychological trauma in his/her home country. Such effects can manifest as depression, self-harm, traumatic stress and even suicide attempts. In Australia, for example, a considerable number of detained asylum seekers have shown signs of deep mental depression and distress, with many having harmed themselves or attempted suicide. Prolonged detention can lead to boredom, sleeplessness, and psychotic episodes, while the indeterminacy of issued detention measures makes detention much more difficult to endure.[32] Prolonged detention coupled with not receiving information regularly about the process of their application can lead to the same symptoms displaced persons experience in refugee camps; desocialization, breakdown of family relationships, temporal and spatial disorientation as well as anxiety and grief.[33]

The Special Rapporteur further notes in his 2012 Report on the human rights of migrants that "There are many reasons why detention of migrants should be avoided and alternatives be sought. Immigration detention remains far less regulated and monitored than criminal detention, leaving migrants at risk of, inter alia, prolonged detention, inadequate conditions and mistreatment. Migrants in detention often do not benefit from their right to legal review and due process, sometimes due to the lack of access to legal counsel or interpretation services. Detention systematically deteriorates the physical and mental condition of nearly everyone who experiences it. Symptoms related to depression, anxiety and post-traumatic stress disorder are common.

[31] T. Hammaberg, *States Should Not Impose Penalties on Arriving Asylum-Seekers*, vol. 20 Issue 2 International Journal of Refugee Law, pp 364-366 (2008), pp 364-366

[32] D. Silove; P. Austin; Z. Steel, *No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia*" vol. 44 no. 3 University of South Wales, Journal of Transcultural Psychology, pp 359-393 (2007), pp 365-367

[33] H. O´Nions, *The Detention of Asylum Seekers for Administrative Convenience*, vol. 10 Issue 2 European Journal of Migration and Law, pp 149-186 (2008), p. 179

Prolonged detention deepens the severity of these symptoms, which are already noticeable in the first weeks of detention..“[34]

Additionally, the systematic detention of asylum seekers by authorities worsens the general public´s perception of asylum seekers, making them seem illegitimate and even criminal in nature, and their asylum claims to be generally false or overrated. Some media outlets have even used the term “illegal asylum seeker”, which is an inaccurate term and one that triggers feelings of fear and hostility towards asylum seekers.[35] Therefore, in addition to governments infringing the right to freedom of asylum seekers, through detention measures they also create a negative image of asylum seekers, causing problems of integration into the host state´s society as well as animosity towards asylum seekers to arise.

Some states, such as Lithuania, have legislation that provides for criminal sanctions for illegal entry[36], which means asylum seekers that enter Lithuania unlawfully can be detained directly on criminal grounds. The United Nations High Commissioner for Refugees has issued Guidelines on the Detention of asylum seekers. In these Guidelines, the UNHCR emphasizes that the detention of asylum seekers (for immigration-related reasons) should not be punitive in nature, and that the use of facilities operating as jails or prisons should be avoided when detaining asylum seekers. Detention of asylum seekers in police cells is not deemed appropriate.[37]

Detaining a person who has already perhaps suffered physical or mental anguish from which they are escaping should not be allowed. Especially mandatory detention, as used in the USA for example, leads to asylum seekers often reliving the very conditions of inhuman treatment which they are seeking to escape, as they are often placed in the same or similar detention facilities which are used to house convicted criminals, and are sometimes treated like criminals by untrained wardens. This may further intensify their trauma, as well as be in breach of Article 31(1) of the

[34] Human Rights Council ”Report of the Special Rapporteur on the human rights of migrants”, paragraph 48, Francois Crépeau. UN General Assembly, Document nr A/HRC/20/24 2 April 2012 available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf> accessed 19 March 2014

35 H. O`nions, *Exposing Flaws in the Detention of Asylum Seekers: A Critique of Saadi*, vol. 17 Issue 2 Nottingham Law Journal, pp 34-51 (2008), pp 40-51

[36] K. Hailbronner, *Detention of Asylum Seekers*, vol. 9 Issue 2 European Journal of Migration and Law, pp 159-172 (2007), p.163

[37] UN High Commissioner for Refugees (UNHCR), Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, available at <http://www.refworld.org/docid/503489533b8.html> accessed 9 April 2014

Geneva Refugee Convention which stipulates that detention measures should not be punitive in nature.[38]

2.1.1 Arbitrary detention

Detention is problematic from a human rights perspective because it violates fundamental human rights and because it can pose real health risks. Detention is especially problematic and plainly illegal when the detainee is not given, promptly and in an understandable fashion, the reasons or legal grounds for his detention, or when the duration of his detention remains a mystery. It is unfathomable that a national of a European state be incarcerated without a clear indication of how long the incarceration will last, the reasons for his incarceration, and the ways he can challenge the decision to incarcerate him. Why the, do we seemingly allow such treatment to asylum seekers? The issue of arbitrariness and the length of detention measures will be discussed below.

The Inter-American Court of Human Rights declared in its judgment in Vélez Loor v. Panama that "…migratory policies based on the mandatory detention of irregular migrants, without ordering the competent authorities to verify, in each particular case and by means of an individualized evaluation, the possibility of using less restrictive measures to achieve the same ends, are arbitrary."[39]

The UNHCR Executive Committee describes, it its 1999 Report, arbitrary detention as such that is not accordance with the law; if the issuing of detention is random or is not accompanied by efficient and fair procedures for review; if the law is in itself arbitrary or allows for arbitrary practice or is enforced in an arbitrary way; or if the detention is indefinite or disproportionate.[40]

Arbitrary and unjustified detention is of heightened concern when the detainee is a migrant, as such a person is in an especially vulnerable situation; he may not speak the language of the country, he may not be aware of the procedural safeguards available to him and he may not be able to understand or challenge the legality of his detention. Migrants in detention are often

[38] K. M. Jarvis Johnson, *Fearing the United States: Rethinking Mandatory Detention of Asylum Seekers,* vol. 59 Administrative Law Review, pp 589-620 (2007), pp 591-595

[39] Case of Vélez Loor v. Panama, Inter-American Court of Human Rights, Judgment of November 23 2010

[40] *UNHCR Executive Committee of the High Commissioner´s Programme Standing Committee, 15th Meeting – Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice,* vol 11 International Journal of Refugee Law, pp 574-582 (1999) p. 577

denied interpretation or translation services, prompt access to legal aid, means of contacting a family member, or necessary medical care. Even if these safeguards are in place, detention can be seen as arbitrary when the authorities show an element of bad faith. In order to ensure safeguards are respected, the notification and grounds for detention should be given in writing in a language the detained individual understands, as well as should be the procedure for challenging the detention order.[41] The decision to detain is taken in some states on the basis of very wide discretionary powers, which may not even be prescribed in law. Even if the grounds for detention are laid down in law, the detention measures may be applied in an arbitrary fashion, for example on the assumption that it is likely that asylum-seekers will abscond in the event of a negative decision when they would be required to remove themselves from the territory of the state. Although detention in such cases may have a ground in national law, it is however against international standards that such measures be taken without reviewing the individual case and circumstances.[42]

While the detention of such persons who do not possess identity papers or use false ones is used as a basis for mandatory detention in several countries, states need to bear in mind that making a quick decision to escape persecution in one´s home country can inevitably lead to leaving behind important personal belongings and documents; thus asylum-seekers should generally not be detained on this basis alone.[43]

Detention can be seen as arbitrary for example if there is no real chance for judicial review of the detention decision. Often, asylum-seekers are expected to initiate review proceedings themselves, which poses obvious problems because the asylum-seeker more often than not is unfamiliar with the language or legal process of the host country. This is especially the case in jurisdictions where free legal aid is not automatically provided to asylum-seekers. The UNHCR recommended already in 1999 that detention measures be subject to automatic periodic review before an independent body.[44]

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[41] Human Rights Council "Report of the Special Rapporteur on the human rights of migrants, Francois Crépeau" paras 8-10 UN General Assembly, Document nr A/HRC/20/24 2 April 2012 available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf> accessed 19 March 2014, paras 15-16

[42] *UNHCR Executive Committee of the High Commissioner´s Programme Standing Committee, 15th Meeting – Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice*, vol 11 International Journal of Refugee Law, pp 574-582 (1999) paragraph 14

[43] Ibid. paragraph 15

[44] Ibid. paragraph 16

Arbitrariness can be construed also from the length of the detention, as we shall see from the case of Saadi v the United Kingdom further on.

2.1.2 M.A. v Cyprus

In the case of M.A. v Cyprus (final decision 23 July 2013), the European Court of Human Rights had to establish whether or not the applicant had been subjected to arbitrary arrest and detention contrary to the rights enlisted in Article 5 of the European Convention of Human Rights.

The applicant had taken part in protests against the Cypriot government's asylum granting policies, whereby a large group of asylum seekers camped near government buildings for several weeks. When the camp was finally dispersed by the authorities, most persons identified as being in Cyprus unlawfully (having had their asylum claim denied and/or an appeal rejected) were detained in different facilities. The applicant was placed in immigration detention facilities located in a prison. The Cypriot government alleged that the applicant was informed orally of the reasons behind his detention, which were that he was essentially considered an illegal, or prohibited, immigrant, who had been staying in Cyprus unlawfully. The applicant was informed in writing, by letters from the authorities, of the decision to detain and deport him. The police submitted that the applicant, declined to accept and sign for the letters. The applicant claimed to not have been informed, either orally or in writing, of the reasons for his detention or of his deportation, until he was given this information by his lawyer. The applicant was held in detention from 11 June 2010 until 3 May 2011, a total of 10 months and 22 days. The applicant was first detained for over two months on the basis of being a prohibited immigrant, and then further for the remaining period on the basis of being an illegal immigrant on public order grounds.[45]

Firstly, the applicant claimed his right to habeas corpus and effective remedy before a national authority had been violated, because challenging the negative asylum claim as well as the deportation and detention orders did not have automatic suspensive effect on his deportation order.[46]

The Court noted that the applicant did not, in fact, have the possibility to stay proceedings regarding his deportation, and that the Cypriot government refrained from deporting the applicant solely because of the ECtHR applying Rule 39 of its rule book for interim measures (which stayed the deportation until a final judgment from the ECtHR). Because the applicant could have been

[45] M.A. v. Cyprus (Application no. 41872/10, final decision 23rd July 2013) paragraphs 29-49
[46] Ibid. Paragrah 112

deported even as his case was still pending in the Supreme Court, the Court found that there was a violation of Article 13 of the ECHR on the right to effective remedy in a national court.[47]

The applicant complained of not having an effective remedy to challenge the lawfulness of his detention.[48] Article 5 §4 of the Convention stipulates "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful"[49].

To the requirement that an applicant have recourse to speedy review of the lawfulness of his detention, the Court found that the average period of time it takes to challenge the lawfulness of a detention order in Cyprus was far too long (8 months by the Government´s submission); and that there thus was a violation of Article 5 §4.[50]

The applicant further claimed his detention had been contrary to the right of not being arbitrarily deprived of one´s liberty, guaranteed in Article 5 (1) of the Convention, claiming that, in light of the Government´s observations later, it was in fact not at all clear on what grounds the applicant was indeed arrested and detained. The applicant could not have been, according to domestic law, considered an unlawful immigrant, as his asylum application was still being examined at the time of the arrest.[51]

The Court finds that because the applicant´s re-examination request for his asylum claim was still pending, he should have, according to national law, been considered as lawfully residing in Cyprus as an asylum-seeker, and that therefore his first period of detention on the basis of him being a "prohibited immigrant" was wrong and a mistake, and therefore in violation of Article 5 §1.[52]

The second period of detention was based on the applicant being declared an illegal immigrant on public order grounds, because of his alleged involvement in receiving money from prospective Kurdish immigrants in exchange for securing work and residence permits in Cyprus. The applicant claims that the orders and the basis for his detention had not been communicated to him. The Government could not produce any evidence to show that the applicant was in fact

[47] Ibid. Paras 140-142
[48] Ibid. Paragraph 144
[49] European Convention on Human Rights, Article 5 §4
[50] M.A. v. Cyprus paras 164-170
[51] Ibid, paragraphs 172-174
[52] Ibid, paras 209-210

notified of the issuance of the second orders, so it could be derived that the applicant was not notified of the reasons for his detention regarding the change in the legal grounds behind his detention. The Court thus finds a violation of Article 5 §1 also regarding the second period of detention.[53]

The Court then contemplated whether the detention and the actions of the authorities were in line with the right of a detainee to be informed, promptly, in a language understandable to him, of the reasons for his arrest and any charge issued against him (Article 5 §2 of the Convention). The applicant contended that he had not been notified of the grounds for his detention on the day he was detained, but only three days later by his attorney (who then instigated interim measures from the ECtHR pursuant Rule 39 of the Court´s Rule book). The applicant claimed he had not received any written information from the authorities, and that in any case the letters addressed to him were in English, a language he does not understand. Also, there was no information provided as to what remedies were available to contest the decision to detain and deport him. Furthermore, the applicant complained that he had not been informed of the change in orders on his detention which had occurred in August 2010, which changed the legal basis for his detention.[54]

The Court first emphasizes the importance of the principle that every person who is detained should know the reasons for his detention, and that this information be served to the detainee promptly and in a language he can understand. If the grounds for the detention change, a detainee has the right to this further information as well. The Court finds that due to the circumstances of this particular applicant, he should have been aware of the reason for his detention and deportation orders, as this would have been made apparent to him during the identification process on the first day of his arrest. Furthermore, the applicant filed a Rule 39 Request to the Court the very next day following his arrest, which makes it evident that he was aware of the reasons behind his detention and his imminent deportation. The Court thus finds that there is no violation of Article 5 §2 of the Convention, as the applicant evidently was aware of the grounds for his detention.[55]

Detention can be thus considered arbitrary when the detainee is not given, promptly, the reasons, in writing and in a language the individual understands, for the detention measure. This case illustrates that detention can also be considered arbitrary when there is no real chance of judicial review of the detention measure. The principle of proportionality, which should always be

[53] Ibid, paras 211-216
[54] Ibid, paras 221-223
[55] Ibid, paras 227-237

considered when detaining an individual, cannot be satisfied if migrants are subject to indefinite periods of detention with virtually no possibility of review.

2.1.3 Duration

It is alarming that there have been reports of long-term administrative detention of migrants being frequently used, with the durations sometimes lasting over a year.[56] Detention itself, of asylum seekers, should be a last resort; but if used, it should most certainly be as short as possible, with the detention decision reviewed periodically. The state should be able to provide appropriate justification for the entire period of detention. A detention sentence should not be indefinite and should always carry with it the possibility of judicial review; a maximum period of detention should be set in law. As the UNHCR has previously stated, so also does the Special Rapporteur of the Human Rights Council deem that it is necessary to have an automatic periodic review of a decision to detain an immigrant.[57]

In Directive 2008/115/EC on common standards for returning illegally staying third-country nationals, Article 15 (5) stipulates that detention for the purpose of removal of that person from the territory should generally last a maximum of six months, with the possibility of extending that period with another twelve months in specific circumstance (if the third-country national does not cooperate or if there are delays in obtaining travel documents from the third country).[58]

The duration of detention measures has also been assessed by the ECJ. In Case C-357/09, the Court was asked by a Bulgarian court whether the article in Directive 2008/115/EC on the duration of detention measures was applicable to such detention decisions which had been issued before the Directive came into force. In this case, a Chechnyan man had already been detained in Bulgaria for several years. The authorities had not been successful in deporting him because there was some confusion as to his identity, and the several requested states (Turkey, Austria, Georgia) refused to accept him. He was officially a stateless person, as the authorities were unsuccessful in

[56] Human Rights Council "Report of the Special Rapporteur on the human rights of migrants, Frnacois Crépaud" paragraph 21 UN General Assembly, Document nr A/HRC/20/24 2nd April 2012 available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf> accessed 19.3.2014

[57] Human Rights Council "Report of the Special Rapporteur on the human rights of migrants, Francois Crépeau" paras 21-23 UN General Assembly, Document nr A/HRC/20/24 2 April 2012 available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf> accessed 19.3.2014

[58] Article 15 Directive 2008/115

determining, with certainty, his nationality. The third-country national applied for asylum while in detention. Bulgarian law did not, before the application of Directive 2008/115/EC, stipulate a maximum length for detention of an alien in a detention center; nor did it contain any transitional provisions for such decisions that were taken before the transposition of the Directive. In this case, the maximum period of detention established by the Directive had already been exceeded when the Directive was transposed. The Court was asked by the Bulgarian authorities, inter alia, whether the limits on the duration of detention apply when a person was already detained when the Directive was transposed; whether the limits on the duration of detention (with a view to deportation) also apply when the removal decision has been suspended due to an asylum application but the detention continues during the asylum determination process; and whether a State can continue to keep a third-country national in detention, even if there is no reasonable ground for removing him and the grounds for his detention have been exhausted, if that person further does not have valid identity documents and there is doubt as to his identity, and he has no means to support himself (and no third person has undertaken to provide for him).[59]

The Court first contemplated the question of whether the time limits to detention apply to such detainees who have already been in detention when the Directive came into force; the Court quickly found that as the objective of the Directive was that no one would be detained for more than 18 months altogether, it would be inconsistent with that objective if persons who had been detained for more than that period before the Directive came into force would have the provisions apply to them only in decisions taken after the Directive was transposed. Therefore the provisions on the duration of detention most certainly apply also to such detention measures that have commenced before the Directive became applicable. As to the issue of detaining an asylum seeker and the period of detention thereof, the Court is set to remind the Bulgarian court that the detention of asylum seekers and the detention of third-country nationals with a view to deportation fall under different legal rules. Article 18 (1) of Directive 2005/85 stipulates that Member States should not hold a person in detention for the sole reason that he or she is an asylum seeker; furthermore a detained asylum seeker is entitled to speedy judicial review. The Court comes to the conclusion that, as the grounds for detaining asylum seekers should be laid down in national law, it is for the national courts to determine whether keeping the detainee in the detention center during the period he was an asylum seeker complied with national and Community law concerning asylum seekers. Therefore, the answer depends on whether or not there was a decision taken for the third-country national´s placement in detention relating to his application for asylum; then the period the person

[59] C-357/09 European Court of Justice

was detained as an asylum seeker would not be taken into account for the purpose of Article 15 of Directive 2008/115. As to the question of whether a State can keep detaining a third-country national when the prospects for removal or the grounds for detention no longer exist, the Court first pointed out that Article 15 (6) of Directive 2008/115 does not authorize, in any case, the exceeding of the maximum period of detention (18 months). It is not possible to base the detention of a person on public order or public safety grounds under Directive 2008/115. Therefore, the keeping in detention of a third-country national for more than the period stipulated in the Directive, for reasons pertaining to the Directive, is not authorized (by the Directive).[60]

The European Court of Justice has thus taken a rather restrictive stance on the duration of detention measures of third-country nationals. The maximum period of 18 months of detention for the purpose of the removal of that person should be upheld at all times; the Directive does not authorize the extension of that time limit. However, the Court reiterates that the grounds and time limits for the detention of asylum seekers is not covered by Directive 2008/115 and is a matter left up to national authorities. Detention of asylum seekers and third-country nationals fall under different rules. Unfortunately, the EU legislators had at that point decided not to issue specific grounds or time limits for the detention of asylum seekers.[61]

2.1.4 Detention pending deportation

The Special Rapporteur notes in his 2012 report that while several states detain immigrants for the purpose of removing them from the country, it is in some cases not possible to expel that person after all; this can be the case when that person lacks identification documents and cannot thus be returned to any country, or because there exists a risk of refoulement upon return, whereas he cannot then be returned to his country of origin. It is evident then, that in such circumstances, the person should not be detained, at least any further, as there lacks the legal justification for detention (detention pending expulsion orders). Detention should always have a legitimate aim, and such an aim is lost if there is no real prospects of removing that person from the territory.[62]

[60] C-357/09 European Court of Justice
[61] See Directives 2003/9/EC, 2005/85/EC
[62] Human Rights Council ”Report of the Special Rapporteur on the human rights of migrants, Francois Crépeau” paras 8-10 UN General Assembly, Document nr A/HRC/20/24 2 April 2012 available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf> accessed 19.3.2014, paragraph 24

There has also been a rise in the use of detention measures to secure Dublin transfers; Member States have been increasingly using custodial measures to prevent asylum applicants from absconding before the transfer is carried out.[63] Even in these cases detention measures should be seen as a last resort, when it has been assessed that other less coercive measures would be insufficient to ensure the transfer goes through. There should always be an objective evaluation of the individual´s risk of absconding, and detention should not be automatic in Dublin transfers as it should not be in any case.

In the new Dublin Regulation, a new section has been added on detaining asylum seekers for the purpose of the so-called Dublin transfers. The preamble of the new Dublin Regulation (Regulation EU No 604/2013) states that detention of applicants for international protection should be applied according to the principle that an individual should not be held in detention for the sole reason of being an asylum seeker; the provisions of Directive 2013/33/EU should likewise be applied to Dublin transferees. Article 28 of the Regulation establishes new rules for detaining a person who is awaiting a Dublin transfer. It stipulates that a person should not be detained because of being subject to the procedure established by the Regulation; a person can be detained in order to secure a transfer procedure only when there is a risk of absconding and when detention is proportional and other less coercive measures cannot be applied effectively, based on an individual assessment. Such detention measures should be for as short a period of time as possible and should be reasonably necessary, in order to fulfill the required administrative procedures. The Article further establishes time limits, stipulating that regarding a detained person, the take charge or take back request should be lodged within a month from the lodging of the asylum application, and the reply from the other state should be given within two weeks, or else the failure to reply will amount to acceptance. Furthermore, the transfer of a detained person should be done as soon as possible, at the latest within six weeks of the acceptance by the other Member State, or from the moment the appeal or review no longer has a suspensive effect. If the transfer does not take place within six weeks, the person shall be released.[64]

It is interesting to note that the Human Rights Committee of the ICCPR has in fact stated in a Communication that such a person against whom a deportation order has been taken but who

[63] Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system/COM/2007/0299, issued 6th June 2007

[64] Regulation (EU) no 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)

still remains in the deporting state can be considered as being lawfully within that state (until the expulsion is followed through). A Turkish national against whom an expulsion order had been taken in Sweden, but who had been allowed to remain in the country, was considered as being lawfully in the territory of Sweden, for the purpose of Article 12 of the ICCPR, even if under the restrictions placed on him by the state.[65] This gives the person time and opportunity to have the expulsion decision reviewed and possibly appealed against, without having to be considered as an illegal immigrant for the entire proceedings.

2.1.5 Conditions of detention

In his 2012 report, the Special Rapporteur also expresses concern about the conditions in which migrants and asylum seekers are kept. The facilities used were seen to be often overcrowded, and with limited sanitation possibilities as well as infrequent meals. The Special Rapporteur further heard complaints about migrants in detention suffering violence and abuse, and pregnant women not receiving proper health care. The report reiterates the importance of migrant detention not bearing any punitive aspects to it, and that migrants should not be treated as or put in the same facilities as prisoners.[66]

The UNHCR Guidelines on the detention on asylum seekers stipulates that the conditions of detention of asylum seekers must be humane and dignified, and that asylum seekers should be treated with dignity, and in accordance with international standards. Appropriate medical treatment, including psychological counselling, should be provided when needed. As previously mentioned, detained asylum seekers should be kept in a separate facility from that where convicted criminals are kept. Basic amenities should be provided, and the detainees should be able to wear their own clothing. Emphasis is also put on providing detainees with suitable food of nutritional value.[67] This has actually been an issue in Estonia as recently as in 2013, when the Estonian Chancellor of Justice made an inspection visit to the Immigration Detention Facility in Estonia. In his report, the Chancellor found that there was a serious problem regarding the meals and the meal

[65] Communication No. 456/1991 Celepli v Sweden, U.N. Doc. CCPR/C/51/D/1991, paragraph 9.5
[66] Human Rights Council "Report of the Special Rapporteur on the human rights of migrants, Francois Crépeau" paras 8-10 UN General Assembly, Document nr A/HRC/20/24 2 April 2012 available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf> accessed 19 March 2014, paras 26-33
[67] UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at <http://www.refworld.org/docid/503489533b8.html> accessed 9 April 2014

times that were in use in the detention center; for example, persons who do not eat pork for religious reasons (i.e. Muslims) were nevertheless offered the same food as other detainees, which often contained pork. The last meal of the day was offered at 6 pm, and because the detainees were generally not allowed to keep their own foodstuff in their rooms (for sanitary reasons), the detainees often suffered from feelings of hunger. Even the medical staff of the detention facility brought out that detainees have health problems due to too little food. The amount of food that was given was found to be insufficient when taking account the dietary needs of men aged 15-50, who were the main class of detainees in the center at the time.[68]

2.1.6 Children and victims of human trafficking

Keeping children in detention facilities is especially undesirable and should be avoided at all costs, as children do not have the mental capacity perhaps to understand why they are being detained when they have not committed any wrongful acts.[69] Article 37 (b) of the Convention on the Rights of the Child stipulates that "No child shall be deprived of his or her liberty unlawfully or arbitrarily" and that "the detention .. of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time"[70]. It follows from this that such detention measures, which are ordered automatically or without an individual assessment, and which do not carry with them a maximum period or real chance of judicial review, is in breach of Article 37 of the afore-mentioned Convention, and should cease to be used. Automatically issued detention orders without a set maximum period of detention cannot be seen as being "in conformity with the law"; furthermore, the obligation to use detention as a last resort and for the shortest appropriate period of time does not seem to be respected in such states which automatically detain minors or children at the border, for example.

In the case of Muskhadzhiyeva and others v. Belgium, a Chechen woman with her four children, all under 10 years old at the time, were detained in a transit center in Belgium to await a

[68] Estonian Ministry of Justice, Inspection of the Immigration Detention Facility, June 2013 *Ôiguskantsleri kontrollkäik Politsei- ja Piirivalveameti väljasaatmiskeskusesse,* available at <http://oiguskantsler.ee/sites/default/files/field_document2/kontrollkaigu_kokkuvote_ppa_valjasaatmiskeskus_1.pdf> accessed 10 May 2014

[69] Human Rights Council "Report of the Special Rapporteur on the human rights of migrants, Francois Crépeau" paras 8-10 UN General Assembly, Document nr A/HRC/20/24 2 April 2012 available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf> accessed 19 March 2014, paras 38-40

[70] Convention on the Rights of the Child 1989

transfer back to Poland where they had travelled to Belgium from. The organization "Médecins sans frontières" conducted an evaluation on the children in detention and found that they were showing signs of serious psychological and psychotraumatic distress. Although the detention had lasted for a relatively short period of time (approximately one month), a psychologist in Poland confirmed, upon their return there, that one of the children was in a very critical psychological state and that this could have been caused by the detention in the transit center in Belgium. The European Court of Human Rights found that the extreme vulnerability of a child took precedence over the status of being an illegal alien and that there had been a violation of Article 3 on the prohibition of torture. Although the children were not separated from their mother, the authorities should have taken more care and not detained the children in a center that was not designed to house children; furthermore because of the extreme vulnerability of children and the unsuitability of the detention facility to house children, the Court also found a violation of Article 5(1).[71]

The Special Rapporteur brings attention to the fact that minors travelling alone are especially vulnerable to becoming victims of human trafficking, or being sexually or economically exploited. Children should not be detained or criminalized on the basis of irregular entry or presence in a country. Given the alternatives available to detention for minors, it is difficult to see a situation in which detention would fulfill the criteria set out in Article 37 (b) of the Convention on the Rights of the Child.[72]

Some irregular migrants or asylum seekers may enter the territory of a state with false documents they may have received from smugglers in exchange for large sums of money. Although detaining a person long enough for the authorities to establish that person´s identity can be used a legal basis for detention of irregular migrants, it must be borne in mind that such persons may be victims of human trafficking, and are therefore in an especially vulnerable position. Such people should be treated as victims, not as criminals, and should not be unduly punished for the acts of their traffickers. Also, the fear of being detained and then deported may prevent victims from seeking assistance and protection as well as justice against their traffickers. The Special Rapporteur in his 2012 report also points to the Recommended Principles and Guidelines on Human Rights and Human Trafficking, which recommends that states do not, in any

[71] Muskhadzhiyeva and others v. Belgium (Application no. 41442/07)
[72] Human Rights Council "Report of the Special Rapporteur on the human rights of migrants, Francois Crépeau" paras 8-10 UN General Assembly, Document nr A/HRC/20/24 2 April 2012 available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf> accessed 19.3.2014, paras 38-41

circumstances, hold victims of human trafficking in immigration detention or detain or charge them for their illegal entry into or residence in that state.[73]

2.1.7 Disparities in state practice

Despite EU-level legislation, state practice on the detaining of asylum seekers varies greatly in the European Union. Some countries only detain asylum seekers who have received a negative decision or are otherwise in the process of being removed from the state, while other states detain asylum seekers at certain stages of the application procedure for a variety of reasons, for example to prevent absconding or illegal movement within the EU or for other public order considerations. A serious concern is also the rising amount of asylum seekers being detained who are awaiting a Dublin II transfer to another EU country; although the Dublin Regulation did not previously have specific provisions on detention, some Member States have nonetheless resorted to using detention in connection with implementing the Dublin rules.[74]

All EU states have some form of asylum detention in use, but the grounds and the frequency of use of these measures vary greatly. For example, in Malta all asylum seekers entering the state illegally are systematically detained (except for those with special needs) while in Germany detention is used only in exceptional circumstances. As the length of detention measures is not referred to or restricted by the 2003 Directive on reception conditions, the length of detention also varies from state to state, from seven days to twelve months in some states, while the detention period may even be undefined in some states, such as was the case in Finland.[75] In the Netherlands the length of detention can vary from 48 hours up to over six months, while in Sweden persons are detained generally for two weeks. In Belgium asylum seekers may be detained for up to eight months on public security grounds; in the UK a maximum period of detention is not

[73] Human Rights Council "Report of the Special Rapporteur on the human rights of migrants, Francois Crépeau" paras 8-10 UN General Assembly, Document nr A/HRC/20/24 2 April 2012 available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf> accessed 19.3.2014, paragraph 42

[74] K. Hailbronner, *Detention of Asylum Seekers*, vol. 9 Issue 2 European Journal of Migration and Law, pp 159-172 (2007), p.163

[75] Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers/COM/2007/0745 final, issued 26 November 2007

specified.[76]Automatic detention is by default illegal, as the new Reception Conditions Directive stipulates that detention should only be used if "it proves necessary", which inevitably requires an individual assessment of each case. Furthermore the longer an asylum seeker remains in detention the longer he is usually kept from enjoying the rights supposedly guaranteed by the Directive, which goes against its purpose and provisions.[77]

Only a few years ago the European Court of Justice admitted in its decision on a request for a preliminary ruling on the interpretation of EU asylum law that it is up to the Member States themselves to establish the legal grounds for the possible detention of asylum seekers.[78] Although similar grounds are used in Member States, there has not been a clear exhaustive list of such grounds. This might change with the new Receptions Directive which has finally included such a list.

2.1.8 M.S.S. v Belgium and Greece

The use of detention measures as well as the actual conditions of detention may vary from state to state, even drastically in some cases, as will be seen from the case of M.S.S v Belgium and Greece from 2009.

In the case of M.S.S. v Belgium and Greece, the applicant was an Afghan national who had entered the EU in 2008 through Greece; having had his fingerprints taken there and having been issued an order to leave the country he then travelled through France to Belgium, where he applied for asylum. He was initially placed in a reception center in Belgium, while the Belgian authorities requested Greece to take the applicant back, pursuant the Dublin Regulation. After not receiving an answer within two months, the Belgian authorities took this as a tacit acceptance by Greece of the take charge request, and the applicant was eventually ordered to leave Belgium to be transferred to Greece where he could apply for asylum; he was taken into custody in order to ensure his compliance with the order. Some time later the Greek authorities acknowledged that it was their responsibility to examine the applicant´s claim for asylum and that he could apply for

[76] K. Hailbronner, *Detention of Asylum Seekers*, vol. 9 Issue 2 European Journal of Migration and Law, pp 159-172 (2007), p.165

[77] Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers/COM/2007/0745 final, issued 26 November 2007

[78] C-534/11

asylum in Greece. The applicant lodged a complaint against the transfer order based on the bad detention conditions on Greece and the probability that his asylum claim would not be properly examined. He was however transferred to Greece, where he was placed on arrival in a detention facility, where he had to remain in a small space with 20 other persons, with limited access to the toilets or open air. He was subsequently released and given an asylum seeker´s card. He had no means to subsist so he eventually went to live in a park. He attempted to leave Greece with a false identity card, but he was caught and detained in the same detention facility as before and in the same bad conditions; he was subsequently sentenced to two months imprisonment for attempting to leave the country with false papers. He was however released as his asylum claim was still pending. After another attempt to leave Greece the Greek authorities allegedly attempted to expel the applicant to Turkey.[79]

The applicant made a claim against Greece to the ECtHR based on Article 3 of the Convention (prohibition of torture) because of the conditions of his detention, and on Article 13 (right to effective remedy) because of the deficiencies in the asylum procedure in Greece. He made a claim against Belgium based on the same Articles because Belgium had exposed him to the risks posed to his rights under Article 3 and 13 of the Convention by sending him back to Greece. The Court first found that there is a breach of Article 3 on the part of Greece, for having knowingly let the applicant live on the streets of Athens. The Court also found a breach of Article 13, as the applicant´s asylum claim had, even as the European Court was considering his case, not been decided, which showed significant deficiencies in the Greek authorities´ examination of the applicant´s asylum claim. As to the actions of the Belgian authorities, the Court found that, in light of all the information available to Belgium on the appalling detention conditions asylum seekers are subjected to in Greece, and on the negligible rate of successful asylum claims in Greece (around 0,1% at first instance compared to 36% in Germany for example), the Belgian authorities did in effect breach Article 3 of the Convention by subjecting the applicant to such conditions, when they had a legal possibility under the Dublin Regulation to refrain from transferring him. A breach of Article 13 was also found on the part of the Belgian authorities, as the applicant was unsuccessful in staying the decision to transfer him to Greece because of minor procedural technicalities.[80]

The conditions of the detention facilities in Greece had certainly been appalling; reportedly the applicant had been locked in a small room with twenty other people, had not been let out in the open air, had only been allowed to the toilet at the discretion of the guards, was given very

[79] M.S.S v Greece and Belgium, paras 9-53
[80] M.S.S v Greece and Belgium

little to eat and had to sleep on a dirty mattress. The UNHCR likewise found that the detention conditions in Greece were appalling.[81]

The Court´s findings against Belgium for applying the Dublin Regulation even when it was known that an applicant´s rights would most likely not be protected in the receiving state, regardless of that state belonging to the Common European Asylum System, means that EU states can no longer take it for granted that applying the Dublin Regulation will relieve the sending state of any responsibility for the procedure applied to the asylum seeker in the receiving state. This is a contrast to the decision reached in K.R.S. v United Kingdom from 2008 where the Court found that a complaint regarding a return, pursuant the Dublin Regulation, of an asylum seeker to Greece as manifestly ill-founded; in that case the Court found that the inefficiencies of the Greek asylum system should have been taken up by the applicant directly with the Greek authorities, especially regarding the possible violations of EU asylum law by Greece. The difference regarding this case is that M.S.S. had already been sent to Greece and had experienced the poor conditions there, and his claim was against both the sending and the receiving state. Judge Bratza in his dissenting opinion in M.S.S brought out that the Belgian authorities should have been able to rely on K.R.S. v United Kingdom in not being responsible for the applicant´s condition when sending him to Greece. The outcome however leaves somewhat open the question of to what extent a sending state is responsible for ensuring that the recipient state´s asylum system is on par, and what is required of a state who plans to effect a Dublin transfer.[82] It can be argued even that the judgment puts a rather heavy burden on a sending state when applying the Dublin Regulation; membership in the EU and transposition of EU asylum legislation is not sufficient guarantee to safeguard against refoulement in the receiving state, but more steps need to be taken by the sending state to ensure the asylum seeker´s rights are protected and respected. The Court even went as far as saying that EU asylum legislation needs to perhaps be revised to better take into account the needs and constraints of particularly Greece and to better take into account present realities.[83] Despite inadequate detention and asylum conditions in certain Member States, other EU states were unwilling to halt transfers to Greece, and hardly ever used the sovereignty clause of the Dublin Regulation, assuming that belonging to the EU and thus being bound by EU asylum legislation

[81] P. Mallia, *Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-Thinking of the Dublin II Regulation*, vol 30 (3) Refugee Survey Quarterly, pp 107-128 (2011), pp 117-118

[82] G. Clayton, *Asylum Seekers in Europe: M.S.S. v Belgium and Greece*, vol. 11 (4) Human Rights Law Review, pp 758-773 (2011), pp 759-762

[83] P. Mallia, Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-Thinking of the Dublin II Regulation, vol 30 (3) Refugee Survey Quarterly, pp 107-128 (2011), pp 125-128

was prima facie evidence of a sufficient level of protection. The Dublin Regulation evidently cannot however function properly if there are such discrepancies in in the examination of asylum applications and the conditions asylum seekers are subjected to.[84] It is interesting to note that since the judgment, Finland, among other states, has halted the transfer of applicants to Greece.[85]

Due to this judgment, and the cited jurisprudence of previous ECtHR case-law, it can be argued that a state party to the ECHR should not return asylum seekers to such states where their rights under the Convention risked being violated. "International law" as a term has been used to describe the requirements for transfer of responsibility of an asylum seeker to another country; a person should not be transferred to a country unless that country can offer effective protection to that asylum seeker. What constitutes effective protection are, for example, a guarantee against refoulement, access to UNHCR asylum procedures, access to primary health care, and physical security. Regardless of the state being party to international refugee and human rights instruments, it is the actual practice in the state in question which is of importance.[86]

2.2 States´ legal grounds and concerns behind detaining asylum seekers

"International protection is about secure entry into a territory in which refugees are sheltered from the risk of being persecuted or in other ways treated in a prohibited manner, or in a way that is inhumane or degrading. The challenge is to reconcile this universal protection concern with the fact that all of the Earth´s territory is in controlled or claimed by governments, who to a greater or lesser extent restrict access to non-citizens"[87].

It is a generally accepted principle that even fundamental human rights can be restricted if the intrusion is proportionate, the aim to be achieved by the restriction is legitimate, if it is prescribed by law and if no lesser but equally effective measure can be applied.

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[84] I. G. Lang, *Is there Solidarity on Asylum and Migration in the EU*, 9th Croatian Year Book of European Law and Policy 13, pp 1-14 (2013), p 13

[85] P. Mallia, Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-Thinking of the Dublin II Regulation, vol 30 (3) Refugee Survey Quarterly, pp 107-128 (2011), pp 125-128

[86] C. Costello, *The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrance, Deflection and the Dismantling of International Protection?*, vol. 7 European Journal of Migration and Law, pp 35-69 (2005), pp 57-59

[87] J. Pirjola, *European Asylum Policy – Inclusions and Exclusions under the Surface of Universal Human Rights Language*, vol. 11 European Journal of Migration and Law, pp 347-366 (2009), p 347

Regardless of several restrictive international conventions that states are party to (such as the ECHR, the ICCPR, Geneva Refugee Convention), it is a well-grounded presumption that states nevertheless have almost absolute discretion over the rules that govern the admission, residence and expulsion of any non-national. The power to detain aliens, without criminal charges or conviction, is still considered an important symbol of state sovereignty, one that is not easily given up.[88]

Preventing the going into hiding of an asylum seeker or the committing of an offence (for example the offence of unlawful entry) are among the legitimate reasons for detaining an asylum seekers, according to states, as well as detention for the sake of ensuring a speedy asylum procedure.[89] The automatic detention of aliens in a foreign state is often referred to as administrative detention, as it lies outside the scope of national criminal law. Administrative detention is claimed to be necessary where such persons that have been refused entry, or stay, pose a risk of misconduct or of absconding, as well as for the purpose of facilitating the afore-mentioned speedy asylum procedure.[90]

In Saadi V the United Kingdom, the Human Rights Court emphasized that "States enjoy an undeniable sovereign right to control aliens´ entry into and residence in their territory"[91]. In effect, the European Court of Human Rights, in its Saadi v UK judgment discussed further on, balanced the rights of migrants not to be unnecessarily detained against the right of a State to control the flow of incoming migrants, asylum-seekers or other, and interpreted the right to freedom as being conditional by interpreting the right to freedom in a light that is favorable to States´ interest in securing their borders against unauthorized migrants.[92]

Already in 1986, the UNHCR Executive Committee listed the accepted bases on which asylum-seekers may be detained, namely for the purpose of identification in the case of no

[88] I. Bryan; P. Langford, *The Lawful Detention of Unauthorized Aliens under the European System for the Protection of Human Rights*, vol. 80 Issue 2 Nordic Journal of International Law pp 193-218 (2011), pp 195-210

[89] K. Hailbronner, *Detention of Asylum Seekers*, vol. 9 Issue 2 European Journal of Migration and Law, pp 159-172 (2007), p. 171

[90] I. Bryan; P. Langford, *The Lawful Detention of Unauthorized Aliens under the European System for the Protection of Human Rights*, vol. 80 Issue 2 Nordic Journal of International Law pp 193-218 (2011), pp 195-210

[91] Saadi v UK, para 64

[92] I. Bryan; P. Langford, *The Lawful Detention of Unauthorized Aliens under the European System for the Protection of Human Rights*, vol. 80 Issue 2 Nordic Journal of International Law pp 193-218 (2011), pp 195-210

documents or destroyed documents; to determine elements of the asylum claim; to deal with cases where the individual has used fraudulent documents; or to protect national security or public order.[93]

It can be argued that detention is an efficient means to make sure migrants who have been issued expulsion orders obey these orders to leave the country. In a report published in 2003 by the Immigration and Naturalization Service (INS) of the United States, it was brought out that the INS had a high rate of success for removing detained aliens that have received final removal orders (92%) compared with a very low rate of successful removals of persons that were not detained that had received final removal orders (13%).[94]

Detaining asylum seekers is also used in some states as a deterrent to discourage asylum seekers to arrive in that state. In the USA, asylum seekers could perceive the detention system in place as penalizing them for trying to seek refuge in the United States; prison-like conditions and being treated like a criminal certainly adds to this perception, and might, from the government´s point of view, act as an effective deterrent for other asylum seekers.[95] Some states, including the UK and the USA, have made detention a bona fide means to deter incoming asylum seekers. In the UK, legislation on the possibility to detain asylum seekers was broadened in the 1990´s; at the same time the Oakington Detention center was opened in the UK that was specially designed to contain incoming asylum seekers that meet certain criteria[96]. Such measures amount to mandatory and automatic detention, which will be considered further on. Detaining incoming asylum seekers should not, however, be used as a deterrent and thus a means for a state to contravene its international and domestic legal obligations towards asylum seekers. Government representatives have expressed concern that a rights-based asylum policy would attract more refugees; however, instead of restricting asylum seekers´ rights, policies should be coordinated according to mutually

[93] "UNHCR Executive Committee of the High Commissioner´s Programme Standing Committee, 15th Meeting – Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice". International Journal of Refugee Law vol 11, pp 574-582 (1999)

[94] US Department of Justice, "The Immigration and Naturalization Service´s Removal of Aliens Issued Final Orders" Report number I-2003-004, published February 2003, available at <http://www.justice.gov/oig/reports/INS/e0304/final.pdf> accessed 24.3.2014

[95] K. M. Jarvis Johnson, *Fearing the United States: Rethinking Mandatory Detention of Asylum Seekers,* vol. 59 Administrative Law Review, pp 589-620 (2007), pp 591-605

[96] L. Hassan, *Deterrence Measures and the Preservation of Asylum in the United Kingdom and United States,* vol. 13 Issue 2 Journal of Refugee Studies, pp 184-204 (2000), pp 188-189

agreed human rights standards.[97] Detention can hardly be considered an effective deterrent when asylum seekers consider the situation they are fleeing from to be worse. Risk of abuse of the asylum system is another reason states often bring out as a grounds for issuing detention; however risk-analysis tools and alternative measures to detention can reduce this risk while allowing for the asylum seeker to remain free.[98]

Although there are differences in MS national laws on the reception conditions of asylum seekers, one can find a common tendency to have a restrictive approach when it comes to the socio-economic integration of asylum seekers into the host society (at least until their asylum claim is accepted). Such a restrictive approach has to do with financial issues as well as serves as a possible deterrent, but it also has to do with avoiding any such economic or social developments that could later frustrate a possible expulsion measure taken against an asylum seeker who has received a negative decision. One obvious way to avoid nonessential integration at an early stage is to detain an asylum seeker until a decision has been made; this way it is easier to enforce an expulsion measure, as no irreversible social ties have had a chance to occur between the detainee and the host state. Some states have viewed this as an effective way to prevent middle or long term dependence, even if it does put a burden on the state to provide food, hygiene, health care etc.[99]

2.3 International Conventions

Although it is dubious whether there in fact exists a right to enjoy asylum in international law, the universal Declaration of Human Rights (a non-binding legal instrument) does mention such a right in its Article 14(1), which stipulates that:

"Everyone has the right to seek and enjoy in other countries asylum from persecution"[100]

[97] T. Hammaberg, *States Should Not Impose Penalties on Arriving Asylum-Seekers*, vol. 20 Issue 2 International Journal of Refugee Law, pp 364-366 (2008), pp 364-366

[98] A. Olsen, *Over-Detention: Asylum Seekers, International Law, and Path Dependency*, vol. 38 Issue 1 Brooklyn Journal of International Law, pp 451-486 (2012), pp 468-471

[99] R. Bank, *Reception Conditions for Asylum Seekers in Europe: An Analysis of Provisions in Austria, Belgium, France, Germany and the United Kingdom*, vol. 69 Issue 3 Nordic Journal of International Law, pp 257-288 (2000), p 259

[100] Article 14(1) Universal Declaration of Human rights

The question however remains as to who exactly is obliged to then provide this asylum, as governments continue to dispute the existence of an individual right to asylum in a country of one´s choosing and continue to develop policies to deflect asylum seekers elsewhere.[101] The use of detention measures against asylum seekers can discourage bona fide refugees from exercising this right to seek asylum, and is essentially a way for states to contravene their obligations under international human rights standards.[102]

However, the rights of recognized refugees and asylum seekers are more specifically regulated by international treaties and regional conventions, as will be seen be seen below.

2.3.1 Geneva Convention Articles 26 and 31

The Geneva Convention on the Status of Refugees Article 26 on Freedom of Movement reads:

"Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances."[103]

It is the term "lawfully resident" which proves problematic and which is left open to varied interpretations. A refugee lawfully present in a state´s territory could mean a person who is already recognized as a refugee in that state, and may not apply to person whose asylum application is still pending. It depends greatly on the supplementary domestic legislation of each state whether a lawfully residing refugee means someone who has already received a living permit (based on refugee status) or someone who is still waiting to be recognized as a refugee. It can be argued that the detention of any migrant who has entered the country unlawfully can be subject to a limitation on his or her freedom of movement, whether that person has lodged an asylum claim or not. However, Article 31 (1) of the Convention stipulates that:

[101] C. Costello, *The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrance, Deflection and the Dismantling of International Protection?*, vol. 7 European Journal of Migration and Law, pp 35-69 (2005), p. 35

[102] B. L. Aust, *Fifty Years Later: Examining Expedited Removal and the Detention of Asylum Seekers through the Lens of the Universal Declaration of Human Rights*, vol. 20 Issue 1 Hamline Journal of Public Law & Policy, pp 107-146 (1998), p 128

[103] Article 26 of the Geneva Convention Relating to the Status of Refugees of 1951

"The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who… enter or are present in their territory without authorization, provided they present themselves without delay and show good cause for their illegal entry or presence"[104]

Article 31 (2) goes on to say that states should only apply such restrictions to the movement of refugees as are necessary, and that such restrictions should cease the moment that individual´s status is regularized.[105]

Detention can most certainly be seen as a penalty (although states may argue the opposite), as it is a measure generally used as punishment in the criminal justice system. Furthermore it is a paramount intrusion of a fundamental human right. States may argue that detention is necessary for the purpose of determining the individual´s identity in the case of unreliable or forged documents; or that detention is necessary when that individual is considered a flight risk. The Geneva Convention does not specify what exactly is meant by the term "necessary" in its Article 31(2), which leaves states a wide margin of appreciation in interpreting the word.

2.3.1.1 Necessity

The most usual aspects examined when determining the necessity of detention measures are:

- the illegal entry or stay of the asylum seeker in the host country
- the necessity to verify the identity of the asylum seeker
- whether the applicant has violated the duty of cooperation with the authorities by for example leaving the reception center without authorization
- if the applicant has filed an asylum claim only after receiving an order to leave the state
- if the individual is filing a follow-up asylum application
- if the application can be fast-tracked as a manifestly ill-founded application
- whether the applicant is a flight-risk[106]

In the UK, asylum seekers are also detained in order to fast-track their claims; detained asylum seekers get their decision much faster than in the normal process. Germany uses detention only on court order in cases of paramount non-cooperation of the applicant in the course of their

[104] Article 31 (1) of the Geneva Convention Relating to the Status of Refugees of 1951
[105] Article 31 (2) of the Convention Relating to the Status of Refugees of 1951
[106] K. Hailbronner, *Detention of Asylum Seekers*, vol. 9 Issue 2 European Journal of Migration and Law, pp 159-172 (2007), pp 164-165

asylum application procedure (for example if they repeatedly fail to show up for court-ordered appearings).[107]

The UNHCR has said in its comments on the EU Procedures Directive, on the issue of necessity, that "Consistent with international and regional human rights law, detention of asylum-seekers is exceptional and should only be resorted to where provided for law and **where necessary to achieve a legitimate purpose**, proportionate to the objectives to be achieved and applied in a non-discriminatory manner, for a minimal period. **The necessity of detention should be established in each individual case**, following consideration of alternative options, such as reporting requirements"[108](emphasis added).

The principle of necessity has not, unfortunately, been held up by the European Court on Human Rights, as can be seen from the case of Saadi v the United Kingdom, depicted in the next heading.

2.3.1.2 Saadi v. the United Kingdom

The applicant in the European Court of Human Rights case Saadi v. the United Kingdom was an Iraqi Kurd who had, at the time of the case, received refugee status in the UK and was working as a doctor in London. He had fled the Kurdish Autonomous Region of Iraq in December 2000 and had applied for asylum at London Heathrow airport on Dec 30th 2000. As there was no immediate vacancy at the Oakington Reception Centre, the applicant was granted temporary admission into the state for 24 hours at a time for three consecutive days. On the third day the applicant was detained and transferred to the Oakington Reception Centre, a closed facility. On January 4th 2001 the applicant met with a lawyer, who enquired into the grounds for the applicant being detained in the Centre and requested his release. The next day the applicant´s lawyer was told that Mr. Saadi was being detained because he fulfilled the Oakington criteria. The applicant applied for judicial review of the detention decision; his asylum claim was initially refused but he

[107] Ibid.

[108] UN High Commissioner for Refugees (UNHCR), *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, page 23, 10 February 2005, available at <http://www.refworld.org/docid/42492b302.html> accessed 1 April 2014

received refugee status after appeals on the 14th of January 2003. He had been detained from Jan 2nd until Jan 8th 2000, a total of 7 days.[109]

In the first judgment in the domestic courts on the legality of Mr. Saadi´s detention, the judges found that it was not permissible to detain an asylum seeker who had followed the applicable procedural rules and instructions, and did not raise suspicions of absconding, solely for the purpose of administrative efficiency. The first court also found that it was disproportionate to keep asylum seekers in detention when it had not been shown that less intrusive measures would not have sufficed; furthermore, the court found that the applicant had not been given sufficient grounds for his detention. However, at the appeals court, this judgment was overturned, with the judges finding that detention was necessary for getting a decision in as fast as seven days (as the applicant did) due to the need for interviewing that goes with the asylum application procedure, as in detention the applicant is always on call for questioning. Also, the judges found that a large increase in asylum seekers in the UK caused heavy administrative problems and it was in their best interest to receive their decision as quickly as possible. The judges themselves, at the second instance, admit that it is extreme to detain such persons who are not likely to abscond, but then refer back to the statistics of the large numbers of asylum seekers entering the UK, and base the grounds for detention in the fact that only in this way can the applicants get a speedy decision. The judgment furthermore stated that "A short period of detention is not an unreasonable price to pay in order to ensure the speedy resolution of the claims…"[110]. The House of Lords, the last instance domestic court, agreed with the appellate court, stating that sovereign states have the right to regulate the entry of aliens into their territory, and that aliens who have not yet received an asylum decision are in the state unlawfully, and therefore the use of detention is allowed under Article 5 (1) (f) of the ECHR, which allows the use of detention in order to prevent unauthorized entry into the country. The House of Lords also finds that there is a balance between detention and receiving a speedy decision on asylum.[111]

The applicant claimed a violation of Article 5 (1) of the ECHR, which guarantees the right to freedom and to not be unlawfully detained. The applicant argued that it was not permissible to detain a person solely on the basis of administrative convenience, which he felt was the case in his situation[112] (and which the House of Lords had admitted to in the national proceedings, albeit they

[109] Saadi v United Kingdom, paras 9-15
[110] Ibid. paras 16-18
[111] Ibid. paragraph 18
[112] Saadi v United Kingdom, paragraph 51

justified this reasoning with the fast-track procedure that required detention so that the authorities can conduct spontaneous interviews and questioning). The applicant also referred to the Court´s previous case-law, requiring an objective need for the detention of the particular individual to be shown. The applicant had been assessed by the UK authorities as posing no risk of absconding, and the only purpose of his detention was to enable the authorities to make a speedy decision on his asylum claim; in other words, for administrative convenience and efficiency. Furthermore, the applicant claimed that the detention measure was not proportionate as no other lesser measure had been first tried.[113]

The European Court first refers to the (first instance court in the ECtHR) Chamber´s previously stated view that such persons that are lawfully at large in a country can be detained if there is a reasonable balance struck between the requirements of society and the freedoms of the individual. This is not precisely the case, however, with such individuals that are awaiting their asylum decision, as they are not generally considered to be lawfully in that state until their stay has been legalized by a positive asylum decision. The Chamber had found that there was no requirement under Article 5 (1)(f) for a detention measure to be considered necessary, if detention was being used as a measure against unauthorized entry. The Chamber said that all that was required was that the detention be a "genuine part of the process to determine whether the individual should be granted immigration clearance and/or asylum, and that it should not otherwise be arbitrary, for example on account of its length"[114].

The Chamber of first instance basically was saying that because the detention was an integral part of the fast-track asylum application procedure, and because the applicant had not yet been given clearance to enter the UK, the detention was not contrary to Article 5 ECHR, especially since it had only lasted 7 days, which the Court found not to be excessive.[115]

The Grand Chamber, in its assessment, firstly reiterated that states have the right to control aliens´ entry into their territory, calling this an undeniable sovereign right[116]. The Grand Chamber agrees with the House of Lords and the first instance Chamber in that until a state has authorized entry into the country, detaining an alien is compatible with Article 5 § 1(f) to prevent that person´s

[113] Ibid. paras 52-53
[114] Ibid. paragraph 45
[115] Ibid. paragraph 46
[116] Saadi v United Kingdom paragraph 64

affecting an unauthorized entry. In essence, the detention of asylum seekers is permissible under Article 5 §1(f) as long as that individual has not been given authorized entry into the country.[117]

The Court then assesses the notion that the detention was arbitrary. Any detention must be lawful, and for this criteria to be met the detention should not be arbitrary. Detention measures can be considered to be arbitrary where: there is an element of bad faith or deception on the part of the authorities; where the order to detain or the execution of the detention is in breach of Article 5 § 1; or where there is no relationship between the ground for legal detention and the place and conditions of the detention. The Court turns to previous findings in the case of Chahal v United Kingdom, where it found that where a person was being detained for the purpose of being deported, there was no requirement for the detention to be necessary, as long as the proceedings were underway. The Court found in the afore-mentioned case that the principle of proportionality applied to detention measures under Art 5 §1 (f) only insofar that the detention should not last for an unreasonable amount of time. The Court finds that the same test of proportionality should be applied to detention measures that are applied at the point of entry as are applied to deportation; in other words proportionality and thus arbitrariness will be measured by the length of the detention, and not the necessity principle. The Court goes on to find that the authorities acted in good faith, that the detention was closely linked to the grounds for the measure (to enable quick and efficient asylum determination), and that the place and conditions of detention were adequate. Finally, the Court finds that, as the length of detention of the applicant was only seven days, it was not excessive, and therefore does not breach the principle of proportionality in this regard. (The Court did however find a violation of Article 5 § 2 requiring prompt justification given to the detainee on the grounds for his detention).[118]

The European Court had thus decided to separate the notion of arbitrariness and necessity in detention measures of asylum seekers, and has found that Article 5 §1 (f) does not require an aspect of necessity or individual assessment when issuing detention measures. It is sufficient that the detention is not arbitrary and that is sufficiently linked to the legitimate aim pursued by the state (preventing unauthorized entry); when assessing arbitrariness the length of detention will be taken into account. The Court established, by this judgment, not only that all non-nationals who are seeking entry into a Member State can be subject to detention, whether they be seeking humanitarian protection or economic relief, but also that Member States have no obligation to show that the resort to administrative detention satisfies the tests of necessity and proportionality.

[117] Ibid. paras 64-66
[118] Ibid. paras 66-80

The majority opinion in this judgment did not pay much regard to international treaty provisions that should have been applied to the Court´s interpretative responsibilities.[119]

This is a rather shocking and somewhat controversial outcome; it may have led to more and more use by states of detention measures against asylum seekers for the main purpose of administrative convenience and efficiency. It is extremely worrisome that the Court of Human Rights would deem detention permissible for the purpose of administrative efficiency. Due to the extreme and often unexpected nature of fleeing one´s home country and seeking refuge in another state, asylum seekers more often than not enter their destination countries unlawfully. Because of the Court´s interpretation of Article 5 §1, states can now freely detain any person entering their territory in the search of asylum, simply for the reason that they have not had a visa or other legal entry document issued to them. Let us be reminded that visas are generally not issued for the purpose of applying for asylum. No assessment of necessity or other less intrusive measures are required, according to Saadi v the United Kingdom. The House of Lords´ justification for detention measures because of spontaneous interview needs the authorities might have[120] is equally ludicrous; the notion that the authorities could not work out an interview schedule, even in fast-track asylum applications, without the need for the applicant to be detained, is unconvincing. It can be interpreted from the text of the case and argued that effectively, the reason for Saadi´s detention was not to prevent unauthorized entry, but to make the asylum application procedure more convenient, efficient and swift for the authorities involved, at the expense of a grave human rights violation. This is so because the applicant was in fact granted leave to be in the country on the three first days he was in the UK; it cannot then reasonably be argued that detention measures three days after entry into the territory of the state are issued to prevent unauthorized entry.

Even the four conditions the Court established (the state must act in good faith; the detention should be closely connected to the preventing of unauthorized entry; the detention place and conditions should appropriate; and the length of detention should not be excessive) that had to be met in order for a detention not to be deemed arbitrary are not as clearly defined or found in this case as the Court would have one believe. Firstly, the Court found that by providing a detention regime that was specifically adapted to facilitate speedy asylum decisions, the state had acted in good faith. However, the application of the detention depended on a selection process which was

[119] I. Bryan; P. Langford, *The Lawful Detention of Unauthorized Aliens under the European System for the Protection of Human Rights*, vol. 80 Issue 2 Nordic Journal of International Law pp 193-218 (2011), pp 195-210

[120] Saadi v United Kingdom paragraph 17

based upon criteria like nationality, and which operated under the presumption of the individual seeking an unauthorized entry. The second criteria of the detention being closely connected to the purpose is also vague in this case; the Court´s reasoning seems to rest on the premise that all entry-seeking non-nationals are basically illegal, and that thus administrative detention for the purpose of fast-track decision-making is closely connected to the purpose of preventing unauthorized entry. This gives rise to the interpretation that now states can hold all entry-seeking non-nationals as illegals. The Court found that the third criteria was fulfilled because the applicant made no complaint of the detention facilities and because there was various amenities available to non-nationals. However this fails to recognize the inadequacies a domestic inspection body found in its report on the Oakington detention center. Finally, the criterion on the length of detention is also vague and deficient; the Court´s scarce elaboration on why it considered 7 days in detention to be not excessive lacks the basis to provide guidance and direction regarding what lengths would be considered as unreasonable in the future. Moreover, the majority judges further render the Court´s judgment non-persuasive and superfluous by stating in their opinion that they are aware of the administrative burden generated by an escalating flow of in-coming asylum-seekers; basically the Court is saying that its judgment reflects a concern on the rising number of asylum seekers in the UK, the pertinence of administrative problems and a fear of more extensive detention measures being used.[121]

The incarceration of asylum seekers inevitably leads to an increasingly negative image of refugees and asylum seekers, as detention is closely linked to the punitive measure of incarceration in the criminal justice system. This in turn provokes the image that asylum seekers are fake, and that they are just illegal immigrants trying to cheat the system to enter the country. The Saadi v the United Kingdom clearly endorses this approach by correlating asylum seekers to illegal immigrants in assessing the proportionality of detention measures and using identical criteria to detaining illegal immigrants who are waiting to be deported as to asylum seekers.

The removal of the principle of necessity as a requirement to detention measures also goes against UNHCR Guidelines on the detention of asylum seekers issued in 2012. In these Guidelines the UNHCR emphasizes that detention measures should only be issued after an assessment of the individual´s particular circumstances, in which the question of necessity inevitably rises. It also states that mandatory or automatic detention (such as the kind used in the Oakington detention

[121] I. Bryan; P. Langford, *The Lawful Detention of Unauthorized Aliens under the European System for the Protection of Human Rights*, vol. 80 Issue 2 Nordic Journal of International Law pp 193-218 (2011), pp 195-210

center in Saadi v United Kingdom) is by nature arbitrary and is thus not based on the examination of the necessity of a detention measure in any individual case.[122]

The Saadi case causes a discord between European Union law, with the inherent legal principles of the EU, and the European Convention on Human Rights as interpreted by the ECtHR. An integral part of the European Union legal system is the principle of proportionality; in detention rules this is seen as decidedly including the requirement of a necessity assessment[123], which would go against the reasoning of the ECtHR in Saadi v the UK. The Court ruled that the right to liberty guaranteed by Article 5 of the Convention effectively meant the right to not be arbitrarily deprived of one´s liberty.[124] Effectively what the Strasbourg Court did was separate the principles of non-arbitrariness and proportionality of detention measures, and remove completely the necessity requirement, which has in the European Union been considered to be an integral part of these principles.[125]

2.3.1.3 Lawfully residing

The Geneva Convention on the Status of Refugees uses the term "lawfully staying" or "lawfully residing" in the territory of the host state in various articles throughout the entire document. Not once is the term defined or explained.[126] Although the Convention´s aim was to lay down minimal standards for the reception and treatment of refugees, its approach is cautious when it comes to actual procedural guarantees, as the Convention was not meant to set up a globally uniform refugee determination procedure.[127] State practice and interpretation varies greatly; this

[122] UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 4. available at <http://www.refworld.org/docid/503489533b8.html> accessed 9 April 2014

[123] V. Moreno-Lax, *Beyond Saadi v UK: Why the Unnecessary Detention of Asylum Seekers is Inadmissible Under EU Law*, vol. 5 Issue 2 Human Rights & International Legal Discourse, pp. 166-206 (2011), pp 166-206

[124] I. Bryan; P. Langford, *The Lawful Detention of Unauthorized Aliens under the European System for the Protection of Human Rights*, vol. 80 Issue 2 Nordic Journal of International Law pp 193-218 (2011), pp 195-210

[125] V. Moreno-Lax, *Beyond Saadi v UK: Why the Unnecessary Detention of Asylum Seekers is Inadmissible Under EU Law*, vol. 5 Issue 2 Human Rights & International Legal Discourse, pp. 166-206 (2011), pp 166-206

[126] See for example Articles 15, 17-19, and 26 of the Geneva Convention Relating to the Status of Refugees

[127] K. Hailbronner, *Detention of Asylum Seekers,* vol. 9 Issue 2 European Journal of Migration and Law, pp 159-172 (2007), p.162

is the case on the EU level as well, regardless of attempts at harmonization of practices through community legislation.

2.3.1.4 Omwenyeke v Germany

Germany has traditionally had a very lenient approach to asylum seekers, resulting in part from the events that occurred in World War II. Until 1993, a right to enjoy asylum for persons persecuted on political grounds was enshrined in the German Constitution. In 1993, after being somewhat overburdened with asylum seekers (having received roughly half of the asylum seekers entering Europe) and the cost related to this factor, Germany passed more restrictive asylum legislation. For example, it excluded from asylum eligibility asylum seekers who had passed through safe third countries, as well as adopted other measures that shortened or restricted asylum proceedings. From 1994 to 2000 the recognition rate of asylum seekers as refugees fell from 7,2% to 2,9%. It can be said that other European countries, who are also experiencing pressure from large numbers of incoming asylum seekers, look to Germany´s solutions and restrictions as a means to deal with this "problem". If Germany with its multilayered asylum jurisprudence and elaborate asylum social structure can manage to shift the refugee burden to other countries, surely other countres can achieve this goal as well.[128]

In the case of Omwenyeke v. Germany of 20 November 2007 brought before the European Court of Human Rights in 2007, the issue at the core of the case was Germany´s national law and practice of issuing asylum seekers certain places of residence (cities or municipalities) from which the asylum seekers were not to leave without due authorization. The German Asylum Procedure Act held a provision whereby an asylum applicant shall have a residence permit for the duration of the asylum procedure, and that that permit is "territorially restricted to the district of the Aliens Office in which the institution responsible for the reception of the foreigner is located"[129]. According to this Act, the Aliens Office for that location may grant an asylum applicant grant to leave the designated area, according to certain listed rules. The Act also provides that an applicant who repeatedly contravenes a restriction of residence shall be sentenced to a fine or a prison sentence not exceeding one year. On applicable international law, the European Court applies Article 26 of the Geneva Convention relating to the Status of Refugees, which states that refugees

[128] M. Fullerton, *Failing the Test: Germany Leads Europe in Dismantling Refugee Protection*, vol. 36 Issue 2 Texas International Law Journal pp 231-276 (2001), pp 235-245

[129] Omwenyeke v Germany

who are residing lawfully in a member state have the right to choose their place of residence and move freely within the territory of that state. Article 12.1 of the International Covenant on Civil and Political Rights also provides that everyone lawfully residing in a State shall have the right to liberty of movement in that state, and the freedom to choose his residence.[130]

The applicant, a Nigerian national who had applied for asylum in Germany and who had repeatedly violated the restriction of movement without proper authorization, complained that the provisions in the German Asylum Procedure Act, which oblige asylum seekers to stay within an assigned district, violate his right to liberty of movement under Article 2 of Protocol No. 4 of the European Convention on Human Rights. The Article reads "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."[131]

The Court first contemplates the wording "lawfully resident", which appears in each of the provisions of the international conventions. The Court rather speedily comes to the conclusion that it is up to each state to establish for themselves, the conditions which pertain an individual´s lawful residence in that country.[132] The Court states that "… foreigners provisionally admitted to a certain district of the territory of a State, pending proceedings to determine whether or not they are entitled to a residence permit under the relevant provisions of domestic law, can only be regarded as "lawfully" in the territory as long as they comply with the conditions to which their admission and stay are subjected.."[133]

Although the applicant in this case raised his rights under Article 26 of the Geneva Refugee Convention, the Court eventually upheld the German law´s interpretation of lawfully residing without making reference to the Refugee Convention. Instead, the Court cautiously and applying some precedents, ruled that it is up to national law to determine who is lawfully present in the country. It can be argued that as a possible refugee, the lawfulness of Mr. Omwenyeke´s presence did not stem from national law, but from the international Convention to which Germany was a party. As is the norm, international law outweighs national legislation according to the German Basic Law. Therefore, the narrow interpretation of the ECtHR on the right to freedom of asylum seekers in their host territory should not affect the rights of asylum-seekers that Germany has committed to uphold by being a party to the Geneva Refugee Convention. Although the lawfulness

[130]Ibid. paragraph 2
[131] Ibid. "Complaints", paras 1-2
[132] Ibid. "The Law", para 1.
[133] Omwenyeke v Germany

of a non-national´s presence in a Member State according to the ECHR may depend on national law, the lawfulness of a refugee´s presence in a state should be looked at from the Refugee Convention perspective. This entails that, as the term is not specifically defined by the Convention nor by any supranational authority, it must be interpreted with regard to the context, object and purpose of the Convention. It flows from this that, when taking into account also the drafting history of the Convention, a person who has applied for asylum in Germany and has received a formal residing permit in accordance with the Asylum Procedure Act is indeed lawfully present in the country; it cannot be rationally argued that a person who has availed himself of domestic laws that authorize entry into the asylum procedure to be recognized as a refugee is unlawfully present in that country. If the claimant would be in Germany unlawfully, it would not make sense that state would issue the asylum seeker a residence document at all, which the government however does under the Asylum Procedures Act. Moreover, the Refugee Convention allows for restriction of movement only on an individual basis and under exceptional circumstances; it can also be argued that, according to the drafting documents, the Convention was meant to provide that detention measures that lasted more than a few days (reserved for investigation of the application) would also need to be necessary. Although Germany does not mean to recognize lawful presence of an asylum seeker under the Asylum Procedures Act, it actually does just that by providing them with residence permits, even if these are limited to a certain area.[134]

The Court eventually finds that as the residence permit was provisional in that it only allowed for residence in a certain city, the applicant was, according to domestic law, unlawfully residing in German territory outside this permitted city, when he had not previously obtained leave from the proper authorities. The Court found that there was no arbitrariness as to application of this measure; therefore, as the applicant´s residence permit was provisional and he was not considered "lawfully residing" in other parts of Germany, he could not rely on Article 2 of Protocol No. 4 relating to the right to liberty of movement. [135]

However, it can be argued that although the restriction of movement of asylum seekers can be claimed to be allowed under the previous Reception Conditions Directive, which stipulates that asylum seekers may be obliged to stay in an area assigned to them, it is in fact illegal under the Geneva Refugee Convention. The Geneva Convention stipulates that asylum seekers may move freely within the territory of the host state and that they possess the same right to choose their

[134] P. McDonough, *Revisiting Germany´s Residenzpflicht in Light of Modern E.U. Asylum Law*, vol. 30 Issue 2 Michigan Journal of International Law, pp. 515-54 (2009), pp 515-54

[135] Omwenyeke v Germany

residence as other aliens in similar situations in the host state. The German law provides that asylum seekers must remain in a certain locality, while other similarly situated groups of aliens are not required to do so. If asylum seekers were to be classified as legally present, the restrictions applied to their freedom of movement would be a clear violation of the Geneva Convention.[136]

Because Germany allows, through its national legislation, foreign nationals to enter its refugee determination procedure on its territory, and issues them with residence documents to that effect, it cannot be plausibly argued that an asylum seeker is in Germany unlawfully. There really isn´t any legal or moral grounds for issuing asylum seekers such residence permits that restrict their freedom of movement to a certain municipality; although EU legislation did not at the time expressly forbid such restrictions (instead even allowing it), Germany´s obligations under the Geneva Refugee Convention do not permit such restrictions. Although it may be the case indeed that it is for domestic law to establish when a person is lawfully present in the state´s territory, the German Asylum Procedure Act provides such rights and documents to asylum seekers that it can only be inferred that an asylum seeker is in fact lawfully present in Germany when he has availed himself to the refugee determination procedure provided for in law and when he is allowed to stay in Germany for the length of the procedure.

Furthermore, the Geneva Convention provides in its Article 31(2) that restrictions on movement shall only be applied until an asylum seeker´s status in the country is regularized[137]; as the German Asylum Procedure Act provides for the issuance of residence documents and permits, and an asylum seeker is thus involved and registered in the asylum procedure, it is clear that such an asylum seeker´s status is indeed regularized in the country, and his freedom of movement should not then be restricted.

The European Parliament and the Council have since Omwenyeke taken a decidedly different approach from the European Court of human Rights to the notion of whether or not an asylum seeker is lawfully residing in the state in which their asylum application has been lodged; Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals states clearly in its preamble that third-country nationals who have applied for international protection in the Member State shall not be considered as being

[136] P. McDonough, *Revisiting Germany´s Residenzpflicht in Light of Modern E.U. Asylum Law*, vol. 30 Issue 2 Michigan Journal of International Law, pp. 515-54 (2009), pp 515-54

[137] Geneva Convention on Refugees, Article 31(2)

illegally present in the territory of that state until they have received a negative asylum decision or a decision ending their right of stay as an asylum seeker has come into force.[138]

The Court of Justice of the European Union has emphasized this principle in its decision in a preliminary ruling asked of it on the interpretation of Article 2(1) of Directive 2008/115/EC on returning illegally staying third-country nationals. The Court was asked by a Czech national court whether the Directive applied to third-country nationals who had applied for international protection. In this case a Turkish national had been detained for a total of 180 days for the purpose of carrying out expulsion orders against him. While in detention awaiting the preparations for his deportation, the Turkish national had applied for asylum whereas the preparations for his expulsion were stayed. The applicant brought an action against the decision to extend his detention, claiming that at the time the decision was taken it was known that there was no reasonable prospect that his removal could take place within the maximum detention period of 180 days as stipulated by national law, as the expulsion had been stopped pending the result of the asylum claim. The referring Czech court wanted to know whether an applicant for international protection could lawfully be kept in detention under Directive 2008/115; specifically whether detention measures should cease to be applied against a third-country national if he applies for international protection, or whether a new detention order should be issued based on a provision specifically allowing for the detention of an asylum seeker. The European Court finds that it is clear from the wording and scheme of Directive 2008/115 that an asylum seeker has the right to remain in the Member State concerned until his application been rejected at first instance, and cannot be considered to be illegally staying in that country within the meaning of Directive 2008/115 which relates to the removal of the individual from that territory. Consequently, Directive 2008/115 does not apply to a person who has applied for asylum in a Member State. The Court was then asked whether it is possible to keep in detention such a person that has applied for international protection only after being already detained. The Court first reiterates that detention for the purpose of removal and detention of an asylum seeker fall under different legal rules. The Court emphasizes Article 7(1) of Directive 2003/9/EC which provides asylum seekers with the freedom of movement; detention can be used when necessary for legal reasons or for reasons of public order. Member States cannot hold a person in detention for the sole reason that he or she is an asylum seeker, and if an asylum seeker is detained then the Member State should at least ensure the possibility of a speedy review procedure. It is however pointed out that an exhaustive list of grounds for the detention of an asylum seeker was not adopted in the EU legislation of that time (but has since been incorporated

[138] Recital 9 of the preamble of Directive 2008/115/EC

into the new Reception Conditions Directive). Therefore the Court finds that at that time, it was for the Member States themselves to establish the grounds on which an asylum seeker may be detained, or kept in detention.[139]

2.3.2 European Convention on Human Rights

The European Court of Human Rights and EU asylum legislation have a different angle and source when it comes to the rights of asylum seekers. EU legislation has so far been primarily aimed at limiting the incoming of economic migrants, a group into which asylum seekers are often added, while the ECHR´s main focus is presumably on protecting the rights of asylum seekers in this context[140], although the Saadi v UK judgment would have one think otherwise.

Although there is no express right for asylum mentioned in the ECHR, the Court nonetheless has lately played a big part in shaping asylum law in the EU through its case-law, with cases brought to it relating to refugee and asylum-seeker rights and freedoms[141], especially under Article 5 of the Convention.[142]

Article 5 (1) of the European Convention on Human Rights grants everyone the right to liberty and security.[143] This Article has been increasingly used in the Court of Human Rights by detainees, to challenge detention measures. However the Article does provide for allowing detention in order to secure the fulfilment of an obligation prescribed by law; in order to prevent illegal entry into the country; in the case of a person against whom a decision has been taken with a view to extradition or deportation.[144] Article 3 on the prohibition of torture, Article 8 on respect for family and private life, and Article 13 on effective remedy have also been used. Article 39 of the Court´s rules on procedure has been used to issue interim measures in asylum cases,

[139] C-534/11 (Request for a preliminary ruling)
[140] L. Lavrysen, *European Asylum Law and the ECHR: An Uneasy Coexistence*, vol. 4 Issue 2 Goettingen Journal of International Law, pp. 197-242 (2012), pp 200-225

[141] L. Roots, *European court of asylum – does it exist? in* T. Kerikmäe (Ed), Protecting Human Rights in the EU: Controversies and Challenges of the Charter of Fundamental Rights, pp. 129-143 (2013) Springer Verlag, pp 135-143

[142] I. Bryan; P. Langford, *The Lawful Detention of Unauthorized Aliens under the European System for the Protection of Human Rights*, vol. 80 Issue 2 Nordic Journal of International Law pp 193-218 (2011), pp 195-210

[143] Article 5 (1), European Convention on Human Rights
[144] K. Hailbronner, *Detention of Asylum Seekers*, vol. 9 Issue 2 European Journal of Migration and Law, pp 159-172 (2007), p.165

particularly to stop deportation measures until a final decision[145], as we saw from the case of M.A. v Cyprus.

The European Court of Human Rights has, unfortunately, adopted a rather interpretative position when it comes to the notion of administrative detention of asylum seekers; it has allowed an extensive and somewhat unscrutinized practice to evolve through its case-law, by permitting states large discretionary powers regarding the control and treatment of unauthorized third-country nationals. Some may even claim that the ECtHR`s somewhat feeble approach to affording asylum seekers the rights envisaged under Article 5 of the Convention has led to the weakening of the credibility and legitimacy of the Court as well as of Europe´s Convention-based human rights system. As seen from case-law in the previous chapter, the ECtHR has decided to focus on the "arbitrariness" aspect of detention measures to judge whether they are lawful or not.[146]

Although the Court of Justice of the European Union now has the competence to interpret EU asylum law[147], it however does not have the competence to interpret the European Convention of Human Rights, as the EU has not acceded as a party to the ECHR. The European Charter on Fundamental Rights of the European Union does provide in its Article 18 the right to asylum[148], which is unprecedented in EU or international law (see the Geneva Convention above). Thus it can be said that, with the Charter becoming a part of primary EU legislation after the Lisbon Treaty[149], there exists a right to asylum in the EU. If EU asylum law would require a MS to violate an obligation under international human rights or refugee law, the EU legislation in question would be invalid.[150]

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[145] L. Roots, *European court of asylum – does it exist? in* T. Kerikmäe (Ed), Protecting Human Rights in the EU: Controversies and Challenges of the Charter of Fundamental Rights, pp. 129-143 (2013) Springer Verlag, pp 132-143

[146] I. Bryan; P. Langford, *The Lawful Detention of Unauthorized Aliens under the European System for the Protection of Human Rights*, vol. 80 Issue 2 Nordic Journal of International Law pp 193-218 (2011), pp 195-210

[147] L. Roots, *European court of asylum – does it exist? in* T. Kerikmäe (Ed), Protecting Human Rights in the EU: Controversies and Challenges of the Charter of Fundamental Rights, pp. 129-143 (2013) Springer Verlag, pp 132-143

[148] Article 18 of the Charter of Fundamental Rights of the European Union 2010

[149] L. Roots, *European court of asylum – does it exist? in* T. Kerikmäe (Ed), Protecting Human Rights in the EU: Controversies and Challenges of the Charter of Fundamental Rights, pp. 129-143 (2013) Springer Verlag, pp 132-143

[150] L. Roots, *European court of asylum – does it exist? in* T. Kerikmäe (Ed), Protecting Human Rights in the EU: Controversies and Challenges of the Charter of Fundamental Rights, pp. 129-143 (2013) Springer Verlag, pp 133-143

2.4 Alternatives to detention

Asylum seekers are usually detained at two instances; when they first apply for asylum and are detained for part or the entire duration of the asylum application procedure, or when they have received a negative decision in their application and they are detained to await expulsion. As seen from UNHCR documents mentioned previously, detention should be used only as a last resort, and there should be more effort put into finding alternatives to administrative detention, which at the moment can be claimed to be perhaps a product of bureaucratic comfort. Detaining minors, families or pregnant women has been seen as especially problematic and undesirable. What such alternatives may be and how sustainable these other options are will be discussed in the following chapter.

The right to liberty and security of person, as well as several international conventions, compel states to first consider other, less intrusive alternatives to administrative custody in the case of asylum seekers and/or irregular migrants. The obligation for the authorities to always consider other alternatives when issuing detention orders should be specifically prescribed by law. State officials and the judiciary should be trained and given guidelines in order to promote the use of non-custodial measures instead of detention. Migrants who are subject to alternative measures should have access to legal counsel, and the alternative measures should be, likewise to detention, subject to judicial review. Individual circumstances should always be taken into account when issuing measures to monitor migrants or asylum seekers, with special emphasis on those individuals with particular vulnerabilities, such as children or victims of human trafficking; the least intrusive and restrictive measure should always be applied.[151] The Special Rapporteur of the UN Human Rights Council notes that "Research has found that over 90 per cent compliance or cooperation rates can be achieved when persons are released to proper supervision and assistance. The alternatives have also proved to be considerably less expensive than detention, not only in direct costs but also when it comes to longer-term costs associated with detention, such as the impact on health services, integration problems and other social challenges."[152]

[151] Human Rights Council "Report of the Special Rapporteur on the human rights of migrants", paragraphs 53-54, Francois Crépeau. UN General Assembly, Document nr A/HRC/20/24 2 April 2012 available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf> accessed 19 March 2014

[152] Human Rights Council "Report of the Special Rapporteur on the human rights of migrants", paragraph 48, Francois Crépeau. UN General Assembly, Document nr A/HRC/20/24 2 April 2012 available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf> accessed 19 March 2014

Asylum seekers are not criminals for seeking international protection in a foreign state. Although they may enter the territory into a state unlawfully, perhaps with forged documents and possibly as the victims of human trafficking, they should not, in any circumstances, be treated as criminals. Sadly, this is currently not the case, as the practice of detaining asylum seekers is widespread while the act itself is seen as predominantly belonging to the criminal justice system as a punitive measure. That being said, it might be worthwhile to then look at the alternatives the criminal justice system uses for incarceration, when contemplating alternatives for detaining asylum seekers or irregular migrants.

Non-custodial measures of oversight should conform to the principles of non-discrimination, necessity and proportionality. They should also respect the individual´s human right to health and education. As to the actual measures that could be applied in place of detention for irregular migrants and asylum seekers, Special Rapporteur Crépaud points to the United Nations Standard Minimum Rules for Non-Custodial Measures, which stipulate that the issuance of non-custodial measures shall be prescribed by law and subject to judicial review, with the subject of the measure having the possibility to make a complaint to the competent authorities, with respect to the dignity of the individual and his right to privacy shown at all times. The person being issued this measure should be informed in writing and orally of the conditions of the measure, and his rights and obligations under this measure. These measures can amount to registration and issuance of certificates, reporting requirements, deposit of documents, bond or bail systems, supervised release, designated residence and others, discussed in more detail below.[153]

2.4 1 No detention measures at all

There are in fact several different forms of alternative to detention systems in place in EU Member States. Usually alternative systems do include a certain aspect of restriction to movement; for example, there are measures which stipulate release from detention on conditions; release from detention on bail or bond or other surety; community-based supervised release from detention; designated residence at particular accommodation centers; electronic tagging or satellite tracking; home curfews, and other complementary measures, all discussed in more detail further on. Of

[153] Human Rights Council ”Report of the Special Rapporteur on the human rights of migrants”, paragraph 48, Francois Crépeau. UN General Assembly, Document nr A/HRC/20/24 2 April 2012 available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf> accessed 19 March 2014

course, there is also the option of no detention of applicants for international protection at all, or release from detention without conditions or on own recognizance.

For example, the Philippines gives asylum-seekers certification and releases them from detention without conditions. South African law stipulates that anyone applying for asylum be released from detention, unless detention is founded on national security concerns. The burden of proof to justify detention lies on the state, as there should be an assumption of a right to liberty and freedom and a presumption against the automatic detaining of asylum seekers. A majority of countries have formal review systems of administrative detention, which permit the release of an individual either subject to conditions based on their specific circumstances or subject to no conditions. For example, France and Luxembourg require asylum seekers to personally renew identity documentation, while for example Austria, Denmark and Greece have at their disposal legal frameworks that can require an individual to report to the immigration authorities or the police at regular intervals.[154]

2.4.2 Reporting and registration

It is interesting to note that almost all EU countries allow for the use of reporting or registration as an alternative for detention; however, although an option in law, it may not be so readily accessible in practice. When allowing release from detention conditionally (such as registering one´s place of residence or living in a designated address, surrendering one´s passport and other documents, reporting to authorities at regular intervals etc), such conditions are often imposed without individual assessment and may be excessive and unnecessary restrictions on the individual. The costs of using this system of release from detention on conditions are minimal, nonetheless it is not in widespread usage as courts and administrative tribunals appear reluctant to release migrants under these rules. The UK, Denmark, Slovenia and Finland have systems that permit release on bail or bond, usually a financial deposit placed with authorities to guarantee the individual´s attendance when required (and discourage disappearance).[155]

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[154] Edwards, Alice. UN High Commissioner for Refugees (UNHCR), *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*. April 2011, PPLA/2011/01.Rev.1, available at <http://www.refworld.org/docid/4dc935fd2.html> accessed 17 March 2014, pp 50-54

[155] Edwards, Alice, UN High Commissioner for Refugees (UNHCR), *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*. April 2011, PPLA/2011/01.Rev.1, available at: <http://www.refworld.org/docid/4dc935fd2.html> accessed 17 March 2014, pp 53-55

2.4.3 Community supervision

Also being used are so-called community supervision systems. In Australia, for example, the government issues "bridging visas", or visas of a temporary nature issued to persons who are in the process of applying for a substantive visa or who are making arrangements to leave Australia. Such temporary visas can also be issued to persons in immigration detention, so that they can be released into the community. These visas can be issued with conditions attached; nonetheless they provide the receiver with a "lawful" basis to be in the state. In Hong Kong, asylum seekers are released from detention with a recognizance document, issued usually for 6-8 weeks at a time. The government and NGO´s operate a system of support services for asylum seekers, including accommodation search and distribution of food and other necessities. Other government-run models of support systems to replace detention are the "return houses" used in Belgium; these are specialized housing schemes aimed at assisting families with minor children who have no legal basis for staying in the country (after exhausting asylum procedures or after an expulsion order). The houses employ persons who assist the families in examining other lawful means to stay in the country or help with repatriation arrangements. This approach has increased the number of families who return voluntarily, and lowered the number of families absconding. The return houses are still considered means of detention, however persons staying in these houses are more or less free to come and go as they wish. Families awaiting Dublin II returns are also housed according to this arrangement, when there is capacity. The program´s main objective is to prepare families, with the support of IGO´s and NGO´s (such as IOM) for any immigration decision outcome. There seems to be evidence that "return houses" that prepare families for return or a negative asylum outcome, and assist families in finding any other legal means to stay in the country, make the asylum seekers feel like they have genuinely been heard and that the final decision of expulsion is indeed final, thus increasing the compliance rate of decisions. [156]

3. THE NEW RECEPTION CONDITIONS DIRECTIVE

[156] Edwards, Alice. UN High Commissioner for Refugees (UNHCR), *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*. April 2011, PPLA/2011/01.Rev.1, available at: <http://www.refworld.org/docid/4dc935fd2.html> accessed 17 March 2014, pp 57-73

Originally, the European Commission only intended to provide a minimal legal framework for the detention of asylum seekers, and this was to be included in the Asylum Procedures Directive, with the Reception Directive only cross-referencing the Procedures Directive on the issue. The first proposal for a Procedures Directive established the general principle that asylum-seekers should not be detained for the sole reason of having their applications examined. Detention was however permitted if it was considered necessary in order to ascertain the applicant´s identity; for determining the elements on which the asylum claim was based; or for the purpose of a preliminary procedure, independent from the asylum application, to decide on the authorization of entry into the territory. A requirement of regular reviews of the orders for detention was also added. The Parliament and the Council did not, however, agree on a uniform provision to this affect, and instead the focus was laid on giving a definition of overall custodial measures[157], which "suggested that Member States should only be authorized to detain when objectively necessary for an efficient examination of the application or where, on the basis of the personal conduct of the applicant, there was a strong likelihood of his absconding"[158]. Although the Parliament attempted to have the requirement that alternative measures be examined before resorting to detention added to the Directive, the Member States effectively objected to any substantive limitations on their prerogative to detain asylum seekers, and in the end it was substantially only Article 7 in the Reception Conditions Directive that was considered a provision on detention measures.[159]

Article 7 of the 2003 Reception Conditions Directive is on residence and freedom of movement, and stipulates that asylum seekers may move freely within the MS or within an area assigned to them (the assigned area shall respect the private life of the applicant); that MS may decide on the residence of an asylum seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of the application; and that MS may confine an applicant to a particular place in accordance with national law if this proves necessary for example for legal reasons or reasons of public order.[160] The legislative history of the previous Reception Conditions Directive´s provisions on detention indicates that attempts to include a more restrictive and exhaustive list of grounds for detention did not find enough support from the MS.[161]

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[157] V. Moreno-Lax, *Beyond Saadi v UK: Why the Unnecessary Detention of Asylum Seekers is Inadmissible Under EU Law*, vol. 5 Issue 2 Human Rights & International Legal Discourse, pp. 166-206 (2011), p. 172

[158] Ibid., p. 172

[159] Ibid. pp 166-206

[160] Directive 2003/9/EC Article 7

[161] K. Hailbronner, *Detention of Asylum Seekers*, vol. 9 Issue 2 European Journal of Migration and Law, pp 159-172 (2007), p.167

The proposal for an exhaustive list setting out the grounds for detaining an asylum seeker was thus abandoned when the first Reception Conditions Directive was being drafted.[162]

Thus Member States were given large discretionary power to determine when they could detain asylum seekers, as the term "for legal reasons or reasons of public order" can be very widely and inconsistently interpreted. Detention measures have become widespread and their issuance varied in the European Union because of the vagueness of this Directive; comparative surveys have brought out that there has been some confusion regarding the meaning of the provision, and that furthermore there has been no common definition of conditions, grounds, length and legal guarantees for using asylum detention measures across Europe.[163]

The UNHCR suggested already in its 2005 observations on the Reception Conditions Directive that states provide an exhaustive list in their national legislation of the grounds for using detention measures in asylum application cases.[164]

In it´s preamble, the new Directive emphasizes the need for the sharing, among Member States, the financial implications arising out of the ever growing number of asylum seekers who view the European Union as an attractive destination. The Directive furthermore emphasizes the importance of having equivalent levels of treatment as regards reception of asylum seekers in all the EU member states.[165]

The practice of detaining applicants of international protection is also mentioned already in the preamble of the new Directive, with the Parliament and Council of the EU stating that the detention of applicants of international protection should not be automatic or automatically used in the application process, but should only be used according to the principle of necessity and proportionality and under very clearly defined and exceptional circumstances, which shall be laid down in the Directive. The importance of the applicant having effective access to judicial remedy on the decision of detention is also emphasized. It is furthermore emphasized that detention should be a measure of last resort, and a measure which should be used only after the use of non-custodial

[162] C-534/11, paragraph 55

[163] V. Moreno-Lax, *Beyond Saadi v UK: Why the Unnecessary Detention of Asylum Seekers is Inadmissible Under EU Law*, vol. 5 Issue 2 Human Rights & International Legal Discourse, pp. 166-206 (2011), pp 166-206

[164] UN High Commissioner for Refugees (UNHCR), *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, page 23, 10 February 2005, available at <http://www.refworld.org/docid/42492b302.html> accessed 1 April 2014

[165] Directive 2013/33 EU preamble paragraphs 2-5

alternative measures have been examined. When considering or using detention, applicants should be treated with full respect for human dignity at all times.[166]

The issue of detaining asylum seekers is addressed amply in the preamble of the new Directive, as opposed to the old one, which shows that the Parliament and Council realized the seriousness of the problem of certain Member States treating detention as a normal part of the asylum application process. The EU is finally committed to ending the practice of using detention as a measure to perhaps deter asylum seekers, or as a resort to contain swelling numbers of illegally entering asylum seekers. Detention should not be considered, in any Member State, as a standard part of a procedure for determining the grant of international protection to an individual. It should be considered only as a last resort, with specific reasoning that emphasize the exceptionality of the measure, and with effective judicial remedies available to inhibit the misuse of the measure.

3.1 New provisions on detention

The new Reception Conditions Directive found stronger support for harmonious interpretation and application of grounds for the detention of asylum seekers; the new Reception Conditions Directive contains several new Articles dedicated solely to the issue of detention, the legal grounds for the use of detention and the principles of using detention on asylum seekers in an EU Member State.

Article 7 of the new Directive is more or less equal to the previous one, except the provision on confining an asylum seeker to a certain place for legal reasons or reasons of public order. Article 8 of Directive 2013/33/EU is however a new article, dedicated specifically to the issue of detention. The Article first stipulates that MS shall not hold a person in detention for the sole reason of being an asylum seeker. Article 8 (2) establishes that detention measures can be used, but only if proven necessary, on the basis of individual assessment of each case, and only where other less coercive measures cannot be applied effectively. Article 8 (3) then lists the grounds for detention, which are: in order to determine or verify the identity of the asylum applicant; in order to determine those elements on which the asylum application is based which would not be possible to determine without detention, in particular if there exists a risk of absconding; in order to decide on the applicant´s right to enter the territory of the MS; if that person is being detained subject to a return procedure according to Directive 2008/225/EC on common standards for returning illegally

[166] Ibid. paras 15-20

staying third-country nationals (subject to certain conditions); if national security or public order so warrants; or in a so-called Dublin transfer according to Article 28 of Regulation No 604/2013 (the Dublin Regulation). Furthermore, the Article mandates that the grounds for detention be laid down in national law, as well as the rules concerning alternatives to detention (such as regular reporting, deposit of a financial guarantee, or an obligation to stay at an assigned place).[167]

As to the duration of detention measures, Article 9 of Directive 2013/33/EU provides that an applicant for international protection shall be detained for only as short a period of time as possible; a person shall be kept in detention for only as long as the grounds for detention are still applicable. If the grounds are no longer valid, then the detainee shall be released immediately. The Article requires that administrative procedures related to the grounds for detention be executed with due diligence, with no undue delay. Detention measures shall be ordered in writing by administrative or judicial authorities, and it shall state the reasons in fact and in law on which it is grounded. The Article further stipulates in its section 3 that if a detention measure is issued by an administrative authority, the lawfulness of the measure shall be speedily reviewed by a judicial authority. Section 4 of the Article stipulates that a detainee shall be informed of the reasons for detention and the procedures for the challenging of that decision, immediately and in a language they understand, as well as of the possibility to request free legal assistance. Detention measures should be reviewed by a judicial authority at reasonable intervals of time or by request of the applicant; furthermore Member States are to ensure that detained applicants of international protection have access to free legal assistance in the case of detention orders being issued by an administrative body. Regarding free legal assistance, although the Directive mandates that it be provided to asylum seekers in certain situations, the Member State can however demand to be reimbursed for the service if and when the financial situation of the applicant improves (Article 9(9)).[168]

As to the conditions of detention, the Directive stipulates that applicants shall as a rule not be held in prison accommodations; if a Member State is forced to resort to prison accommodation, the applicant of international protection shall be kept separate from other, criminal inmates. Also, applicants for international protection should be kept, as far as possible, separately from third-country nationals who have not applied for asylum. Member States must also provide the detainees with understandable information on their rights and obligations in the detention facility; legal

[167] Directive 2013/33/EU Article 8
[168] Directive 2013/33/EU, Article 9

advisors, relevant non-governmental organizations and family members shall have the possibility to communicate with and visit the detainees in private.[169]

3.2 Effect of new Directive

The new Directive addresses most of the problems related to the arbitrary and inconsistent use of detention measures in EU Member States. Detention measures should first specifically be deemed necessary; they should be based on individual assessment; and alternative supervisory measures should always be considered first. Because detention should henceforth be proven necessary based on an individual assessment of each case, and because alternative measures should also always have been considered, it is likely that the use of detention measures will decrease. The exhaustive list of grounds for detention provided for in the Directive as well as the obligation to consider alternative measures will make it harder for national courts to justify any issuance of detention orders.

Article 9 of the new Directive will also make it harder for national courts to extend long periods of detention, as the Directive requires that detention measures be reviewed at reasonable intervals and that detention can only be continued when the grounds for detention still exist; that passes to the national courts the burden of proof that the grounds for detention still exist; if not, the detainee should be released immediately. However, it is disappointing to note that the Directive does not stipulate any maximum lengths of asylum seeker detention, nor does it mandate national law to provide rules to this effect. Thus the length of detention measures, even if well justified, can still vary greatly from state to state also in the future.

The Directive also introduced new, interesting rules on the providing of legal assistance to detained asylum seekers; free legal assistance should be provided for detained asylum seekers for challenging their detention, for at least the preparation of the necessary documents to challenge a detention decision as well as for representing them at the hearing.[170] This measure will certainly be useful for the applicant, as he will now presumably have a real, or at least a better, chance at challenging a detention order. Furthermore, this may in itself help to reduce the use of detention measures as the authorities know that a detained person has the option to turn to legal professionals

[169] Directive 2013/33/EU Article 10
[170] Directive 2013/33/EU, Article 9(6)

without cost to challenge the detention measure, and may thus be less likely to issue such measures light-handedly.

The new Directive will not however affect the UK and persons in similar situations as the applicant in the case of Saadi v UK. In paragraph 33 of the preamble to the Directive, it is stated that the UK is not participating in the adoption of the Directive, and will therefore not be bound by it (as will not be Ireland).[171] This is noteworthy, as the United Kingdom had agreed to be bound by the previous Reception Conditions Directive of 2003, as opposed to Ireland and Denmark who did not part-take in the previous Directive nor will they be bound by the new one.[172] Therefore the Oakington detention facility and the automatic detention measures used in the UK will most likely continue to be applied.

The Directive is to be transposed into national law by July 20th 2015.[173]

4. DETENTION IN TWO EU MEMBER STATES; USE OF DETENTION AND EFFECT OF NEW DIRECTIVE IN ESTONIA AND FINLAND

In order to understand the difficulties the harmonization of EU law poses and the importance of the process therein, especially regarding EU asylum law, this research paper will in this chapter focus on the use of detention measures and legislation of, as well as the impact the new Directive will have on, two geographically closely situated but otherwise vastly different EU states: Estonia and Finland. These two countries were chosen because regardless of a common lingual background (both states´ population and language belong to the Finno-Ugric group[174]), common historical background (both were at some point part of the Russian Empire) and close geographic proximity (only about 80km of the Baltic Sea separates the two), the two states have very different socio-economic as well as EU backgrounds. Finland joined the European Union in 1995[175], while Estonia joined almost ten years later in 2004[176]. Estonia is also part of NATO[177],

[171] Directive 2013/33 EU, preamble paragraph 33
[172] Directive 2003/9 EC, preamble paragraphs 19-21, Directive 2013/33 EU paragraphs 33-34
[173] Directive 2013/33/EU, Article 31
[174] Finno-Ugric Peoples, Estonian state tourism website, at <http://estonia.eu/about-estonia/society/finno-ugric-peoples.html> accessed 5 May 2014
[175] Finland in facts, Finnish state info page <http://finland.fi/Public/default.aspx?contentid=160032&nodeid=44491&culture=en-US> accessed 1 May 2014
[176] Estonia´s history, Estonian state tourism website <http://estonia.eu/about-estonia/history/estonias-history.html> accessed 3 May 2014
[177] Ibid.

while Finland is not. Finland has a population of approximately 4 times that of Estonia[178]. Finland has been an independent state for nearly a century, while Estonia has only been independent for a little over two decades. Finland has been a state party to the 1951 Refugee Convention since 1968, while Estonia only joined in 1997.[179] More importantly though, the countries have very different approaches, issues and concerns when it comes to asylum matters; Estonia has traditionally been and is even now an important transit country for asylum seekers attempting to get into Finland, as will be seen below.

When Estonia became independent in 1992, it started being a transit state for refugees illegally passing it to get to Scandinavia; after 1994 the Estonian Police and Border Guard Board (hereinafter the PBGB) dealt with one significant case of human trafficking each year. As Estonia was an important transit country for persons seeking to arrive in Finland or other Scandinavian countries, Nordic countries were the ones who were most affected by the asylum policies, or lack of policies, in Estonia. Therefore, agreements between the Nordic states (except Denmark) and Estonia on the abolishment of visa requirements between the states coincided with Estonia ratifying the 1951 Refugee Convention. Because of the novelty of asylum policy and rules in the country, the implementation of the Convention as well as general human rights standards did not go without difficulty; the issue of the detention of asylum seekers was a major concern in Estonia already in 1996. However, the practice decreased after a UNHCR communication on the unacceptability of the practice (based on Article 31 of the Refugee Convention). Before EU legislation, Estonia only applied one form of international protection, which was refugee status.[180]

Finland takes in 750 UN quota refugees annually for resettling in the country; these are persons who have been pre-screened by the UNHCR and recognized by the UNHCR as refugees. In 2013 for example, this figure included 150 persons from Africa, 200 persons from Asia and the Pacific, 150 persons from the Middle East and North Africa, and 150 persons from Europe (an additional 100 places were allocated for urgent or emergency cases). Finland has been receiving so-called quota refugees proposed by the UNHCR since 1979, and since 2001 the annual quota has been 750. The Minister of the Interior in Finland decides on the annual allocation of

[178] Ibid; Finland in facts, Finnish state info page <http://finland.fi/Public/default.aspx?contentid=160032&nodeid=44491&culture=en-US> accessed 1 May 2014

[179] States Parties to the 1951 Refugee Convention and the Protocol, UNHCR website, available at <https://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSONLINE&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en> accessed 3 May 2014

[180] R. Byrne; G. Noll; J. Vedsted-Hansen, New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union (2002) Kluwer Law International, pp 281-296

resettlement locations, and the Finnish Immigration Service implements the quota and takes decisions on the submitted cases, while the local municipalities being responsible for the reception and integration of the quota refugees. The Finnish authorities still do a screening even with quota refugees; in emergency and urgent cases, a personal interview is not required and the person is admitted on the basis of a written document by the UNHCR.[181] In 2013, the Finnish authorities issued asylum decisions in 4055 cases, out of which 1627 persons received a positive decision.[182] In addition to the usual refugee and subsidiary protection, Finnish law also provides for a third type of international protection based on humanitarian need (in the case of a natural disaster in the applicant´s home country, for example).[183]

By contrast, in 2013 there were 97 applications for international protection lodged in Estonia. Although this is the highest figure in years and the trend is going upwards, as in more and more applications are lodged each year,[184] this figure is nowhere near the thousands of applications being lodged in Finland. Between 1997 and the first quarter of 2014, only 94 persons have received a living permit based on refugee or subsidiary protection status in Estonia (this figure also includes permits issued based on family reunification).[185] Estonia has not committed to accepting any quota refugees from the UNHCR.[186]

The aim of the following chapter is to give a comparative overview of how asylum policy is governed in these two countries (specifically regarding detention of asylum seekers) and how it is possible, if it is, for these two countries to apply EU asylum law harmoniously and consistently even with such big differences in the number of asylum applications lodged in the countries, and the differences in the historical background of asylum policy in the two states.

4.1 Relevant legislation

[181] Country Chapter - Finland, UNHCR website <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3c5e57f07&query=quota refugee> accessed 6 May 2014

[182] Statistics on asylum and refugee decisions in Finland, Finnish Immigration Board website at <http://www.migri.fi/tietoa_virastosta/tilastot/turvapaikka-_ja_pakolaistilastot> accessed 5 May 2014

[183] Article 88b of the Finnish Aliens Act

[184] Police and Border Guard Board of Estonia, statistics on international protection, <https://www.politsei.ee/dotAsset/218156.pdf> accessed 1 May 2014

[185] Ibid.

[186] UNHCR Resettlement Handbook, 2011, UNHCR, page 66 available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=46f7c0ee2&query=resettlement handbook> accessed 20 April 2014

The following chapter will first identify the relevant legislation in force currently in the two countries that regulate the detention of asylum seekers, and then consider, whether or not the new Directive has been transposed into the legislation and what changes need still to be made in order for the law to be in accordance with the new Directive regarding detention of asylum seekers.

4.1.1 Estonian Act on Granting International Protection to Aliens

In Estonia the detention of asylum seekers, as well as the asylum application process in general, is governed by the Act on Granting International Protection to Aliens (Välismaalasele Rahvusvahelise Kaitse Andmise Seadus), of which the latest version is from 2013. The provisions which deal with detaining asylum seekers are primarily Articles 36/1, 36/2, 36/3 and 36/4, which were all added in the reform of last year, due to the changes in EU asylum legislation (the adoption of the revised Directives and Regulations). The previous version of the Act did not have specific provisions on the detention of asylum seekers, except to stipulate that an asylum seeker can be detained for 48 hours after which an extension of the detention can be applied for and ordered in court[187].

Article 36/1 of the new Act stipulates the specific grounds for detention. These grounds are listed as: to identify or verify the identity of the applicant; to verify or confirm the applicant´s nationality; to verify the conditions of the applicant´s arrival into Estonia and the legal grounds for his being in the state; in order to examine important factors of the applicant´s asylum claim, especially if there is a risk of absconding; if there are grounds to believe that the applicant has applied for asylum in order to prevent or delay deportation measures; for reasons of public security and public safety; for transfers according to EU Regulation 604/2013 (the Dublin Regulation). This Article also stipulates that detention measures can only be applied if the other measures of supervision as stipulated in the Act cannot be applied efficiently; furthermore detention measures should be issued in accordance with the principle of proportionality, and the individual circumstances of each case shall be taken into account when issuing detention measures.[188]

Article 36/2 of the Estonian Act provides that the Police and Border Guard Board or the Estonian Internal Security Service can detain an asylum seeker for 48 hours on the grounds listed

[187] Articles 15 and 32 of the Estonian Act on Granting International Protection to Aliens of 2005
[188] Article 36/1 of the Act on Granting International Protection to Aliens

in §36/1. In order to keep the asylum seeker detained for longer, the authority in question must obtain a court order for a detention measure lasting up to two months. If a foreigner applies for asylum in the detention center or when deportation proceedings have already begun against him, the authorities have to apply for a court order within 48 hours in they wish to keep him in detention for up to two months on the grounds listed in §36/1. Detention for the purpose of deportation will be stayed in such cases, until an asylum decision is made. The court can extend the period of detention with two month periods if the grounds listed in §36/1 exist.[189]

Article 36/3 contains provisions on the detention of persons with special needs (such as minors, handicapped persons, persons who have suffered grave psychological or physical violence as well as elder persons) as well as provisions on essential translation services and transportation. Article 36/4 of the Act contains provisions on the freeing of an asylum seeker from detention; it stipulates that the detention center´s head should free an asylum seeker from detention the moment the grounds for detention cease to exist. If a detained asylum seeker is arrested as a suspect in a criminal case, he shall be released into police custody.[190]

Article §29 of the Act rather specifically brings out the alternative supervisory measures that can be applied to asylum seekers in Estonian territory. The Article stipulates that in order for an effective, easy and fast asylum evaluation procedure, the PBGB can effect the use of the following supervisory measures on an applicant for international protection;

1. issuing a place or residence for the applicant;
2. registering oneself at regular intervals at the Police and Border Guard Board office;
3. an obligation to inform the PBGB when leaving the place of residence for more than three days;
4. the deposit of travel or other id documents with the Police and Border Guard Board.

The applicant can request a review on the supervisory measures applied to him; the application of the measures should be informed to the asylum seeker in writing.[191]

4.1.2 Finnish Aliens Act

[189] Article 36/2 of the Estonian Act on Granting International Protection to Aliens
[190] Article 36/3 and 36/4 of the Estonian Act on Granting International Protection to Aliens
[191] Estonian Act on Granting International Protection, Article §29

The Finnish Aliens Act of 2004 (30.4.2004/301) establishes the principles and procedures governing the asylum application process in Finland, and the detention of foreigners in general. Chapter 7 establishes the use of interim measures that can be applied to aliens who do not yet have a legal ground for residing in Finland. Article 118 first stipulates that an alien may be obliged by authorities preparing his matter to report at regular intervals to certain authorities (police and border guard) at regular intervals for the purpose of establishing that he meets the requirements for entry into the territory or for the preparation of enforcement of a removal measure, the alien must be informed of the grounds for the obligation to report. The obligation to report shall be immediately ordered to cease if it is no longer needed for ensuring the issue or enforcement of a decision. Article 119 provides that an alien may be ordered to hand over his or her travel documents or to provide authorities with his address where he can be reached; a decision must be made by police or border guard authorities to this effect, and the alien shall be informed of the grounds for the decision. The ensuing Article 120 stipulates that a security may be ordered to be provided instead of the previous measures, in order to secure the expenses related to the alien´s residence and return. The security may be returned or used to cover the expenses related to that individual´s residence or return. Finally Article 121 touches upon the conditions for detaining an alien in Finland who does not yet have a legal ground for residency. This Article stipulates that detention measures may be applied if there are reasonable grounds to believe that the alien will prevent or considerably hinder the issuance of a decision concerning him, or the enforcement of a removal decision by hiding or absconding. This is to be established by taking account of the person´s personal and other circumstances. Detention can also be used in order to establish the person´s identity (Article 121(1)(2)). A person can also be detained if there are, taking into account of that person´s personal and other circumstances, reasonable grounds to believe that he will commit an offence in Finland (Article 121(1)(3)). Holding an alien in detention on the grounds that his identity is unclear must entail that the foreigner has given unreliable information or has refused to give required information, or if it otherwise appears that his identity cannot be regarded as established. §121 a, added in 2013, clarifies what the risk of absconding means; there can be considered to be a risk of absconding if the non-custodial measures listed in Articles 118-120 have been used but have been considered as insufficient, or if the alien has changed residence without informing the authorities; when assessing the risk of absconding the individual circumstances of the case have to be taken into consideration. Article 122 stipulates that a social worker must be heard before detaining a minor. The decision for detention can be made by a commanding police officer at a local police department, by the National Bureau of Intelligence or the Finnish Security Intelligence Service, or by the border guard by an official who has the power to arrest an alien or

by someone who ranks lieutenant. The detainee or his legal representative must be informed of the grounds for his detention. A detained foreigner must be moved to a specialized detention facility as soon as possible; however an alien can be detained in police cells if the detention facility is full or if the alien is detained far away from the detention facility, whereas the detention in the police cell can then last for a maximum of four days. A person can be detained in the border guard´s detention facility for a maximum of 48 hours. A minor can only be held in police or border guard detention facilities if his guardian or adult family member is also thus detained (§123). Detention in police or border guard facilities is subject to a court hearing and decision on detention grounds within four days of the detention. Article 127 stipulates that detention should normally last a maximum of two months, while this period can be stretched to a maximum of twelve months if the third-country national does not cooperate in removal proceedings or necessary travel documents are not received from a third country. Article 128 stipulates that detention decision shall be reviewed every two weeks to establish whether the grounds for detention still exist.[192]

4.2 State practice

In addition to currently having differences in how the detention of asylum seekers is regulated by law, the actual practice varies also in the two states. The following excerpts will first contemplate the use of custodial measures on asylum seekers in both countries and then analyze whether these practices will change with the new Directive coming into effect.

4.2.1 Use of detention measures in Estonia

In Estonia, in the years before the newest version of the Act on Granting International Protection to Aliens, there was a practice evolving where such asylum seekers who applied for asylum when they were already in the deportation center had to remain in the deportation center for the entirety of their asylum application proceedings (that was because the previous legislation had thus stipulated). In addition to the new criteria for detention listed in the new version of the Act, case-law has also brought out a requirement to take into account the cultural background of the applicant as well as the circumstances of his/her arrival in Estonia. There has, however, previously been a discrepancy between two relevant courthouses in Estonia in interpreting and applying the Act; namely the Tallinn district court and the Tartu district court. The Tartu district

[192] Finnish Aliens Act 301/2004 Articles 118-131

court has in the past taken a much more restrictive view to freeing detained asylum seekers; the court has most importantly taken into account and added as a grounds for detention the fact that the asylum-seeker has entered Estonia unlawfully (when such has been the case). The Tartu court has reiterated in many cases its opinion that since the applicant has entered Estonia unlawfully, there is a real danger of absconding and furthermore it cannot be proven that the asylum application has not only been lodged in order to avoid deportation. Another often used ground for detention used by the Tartu court is if the applicant doesn´t have any identification documents. Although the court has stated in several cases that it is important to assess the proportionality of the detention measures as well as whether other, less intrusive measures could be applied, there is no reference in court manuscripts that such evaluation has in fact ever taken place. Instead, the court has often ruled that if there are no specific circumstances that exclude the use of detention measures, then detention is justified. In some cases, the court has even gone so far as to say that detention is in fact in the applicant´s best interests, as in the detention center the applicant gets three meals a day and has the opportunity to mingle with his compatriots; furthermore the court opinioned that releasing the applicant from custody would cause him even more stress and mental anguish, as he would then have to look after himself independently.[193]

Such statements are, as well as being against any reasonable person´s sense of logic, worrisome in a legal context. To claim that a person is better off being detained than not, because being a free person would cause more anguish than being in custody, is ludicrous as well as it is contrary to any study regarding the effects of detention on the mental and physical health of a detainee, mentioned previously in this paper. The court´s opinion that detention benefits the asylum applicant because he or she could mingle with compatriots in the detention center is ignorant and patronizing, to say the least; the atmosphere in a detention center is hardly optimal for making friends, the situation is quite the opposite as representatives of opposing religious groups may be forced to cohabit in small quarters (such as sunni and shiah muslims, for example). Furthermore, there is a formal asylum reception center in Estonia, where inhabitants have a place to sleep and the chance to cook their own food on a government supplied allowance[194], which makes the court´s assumption that being able to live independently would cause mental anguish to asylum applicants even more illogical and absurd.

[193] ”Legal problems in detaining asylum seekers” (Ôiguslikud probleemid varjupaigataotlejate kinnipidamisel), issued in 2014 by the Estonian Human Rights Center and the Estonian Refugee Council, available at <http://www.pagulasabi.ee/sites/default/files/public/kinnipidamise_analuus_-_kujundet.pdf> accessed 10 April 2014

[194] Act on Granting International Protection to Aliens, articles 32-36

The Tartu appellate court has stated that detention is permissible when the asylum applicant lacks identification papers for the purpose of ascertaining the applicant´s identity if necessary. The Tartu appellate court has also previously found that detention is permissible if there is a risk of absconding; when assessing this the court has taken into account the sayings of the applicant, so that if the applicant has made a statement that his objective was to arrive in Europe, the court has construed this as an indicator of flight risk, and thus a ground for detention. This is also the case if the asylum applicant has crossed many other states on his journey to Estonia; the court has found in such cases that detention is allowed, as it can be presumed that if the applicant´s life and health were in real and serious danger in his home country, he would surely have applied for asylum in a transit country instead of waiting to come all the way to Estonia through several other countries (like Russia). However, lately the court has taken a more restrictive view to the grounds for detention, partly due to the changes in national law on detention. This year the Tartu appellate court has issued a decree explaining in further detail the legal grounds for detention of asylum seekers in Estonia; the decree stipulated, inter alia, that detention should be absolutely necessary (the necessity should be assessed in each individual case and alternatives to detention should also have been explored and proven inadequate before detention measures should be applied); furthermore the length of applied detention measures should always be specified as well as the justification for that length, instead of always issuing the standard two month detention as has been done before. However, the appellate court is still of the opinion that a lack of identification documents and the entering into the state illegally, together with the individual circumstances of the applicant, are legal grounds for detention measures.[195]

4.2.2 Effect of new Directive on state and court practice

The Estonian law on Granting International Protection to Aliens currently already includes the most important rules relating to the issuance of detention measures and the obligation to consider alternative measures before resorting to custodial detention. With the changes to the Act, persons should no longer be detained in the detention center (previously the deportation center) for the entirety of their asylum application procedure if they had been detained there before their application, as was the practice previously; now there should be a clear justification for that

[195] ”Legal problems in detaining asylum seekers” (Ôiguslikud probleemid varjupaigataotlejate kinnipidamisel), issued in 2014 by the Estonian Human Rights Center and the Estonian Refugee Council, available at <http://www.pagulasabi.ee/sites/default/files/public/kinnipidamise_analuus_-_kujundet.pdf> accessed 10 April 2014

person´s continued detention. The Tartu appellate court has however in the past justified detention measures with the risk of absconding, as well as with the reason that it is likely that the individual has lodged an application only to avoid deportation measures. These continue to be legal grounds for detention orders; however, as the new rules stipulate that alternative measures must be first considered, and that detention should only be issued when necessary and based on an individual assessment, the authorities may have a harder time justifying detention measures even on the ground of risk of absconding or obstruction of an expulsion measure. The discrepancies in the Courts of Tartu and Tallinn should become more harmonized, as the law became more specific and there is no longer as much room for interpretation as was in the previous Act.

While the Tartu Court has used the lack of identification documents as a reason for detention, this can no longer be used as a grounds according to the new Act. A person can be detained in order to determine his identity if he lacks identity documents, but the lack thereof of identity documents alone cannot be used as a basis for detention. This can however be circumvented by issuing detention measures based on the risk of absconding because of a lack of identity documents; it will take some future cases to determine whether such a factor can in fact be considered enough to establish a real risk of absconding, especially when taking into account the need for an individual assessment. How a risk of absconding can be established or manifest is unfortunately not explained by the Directive, nor by national law, so this ground gives authorities and courts most interpretative discretion and can lead to uneven outcomes depending on which court is assessing the case. The new provisions on the length of detention and the extension of detention measures for up to two months at a time can lead to the courts continued practice of issuing automatic two month detention sentences, as the Directive does not issue specific guidelines on this matter either.

It is difficult to predict how the new law will affect detention practices in Estonia, as the Directive and the national law on detention still leaves the courts some interpretative discretion on the issue of, for example, the risk of absconding, as well as on the length of detention. However, it is likely that detention measures will be more specifically grounded; not issued automatically as they have to be based on necessity and individual assessment; and that the lengths of detention will be shorter than the previously issued standard two month detention, as the Tartu appellate court has issued a decree stipulating instructions to that effect.

4.2.3 Use of detention measures in Finland

According to information received from the Finnish Refugee Advice Centre[196], it is difficult to estimate the real scale of the use of detention measures on Finland, as the authorities don´t publicize any official figures. If detention measures are used then it is usually at the point when the asylum seeker enters the country or when the asylum seeker is being removed from the territory. If a person is detained on entry it is generally because of uncertainties regarding that person´s identity or his travel route. If a person is detained for the purpose of expulsion then this is generally justified by a risk of absconding. According to the Finnish Refugee Advice Centre, the use of detention measures varies greatly from municipality to municipality, due partly to the ambiguity of the current law.

In Finland there exists one immigration detention facility, located in the capital, Helsinki. This facility can accommodate up to 40 persons; in other areas of the country detained persons are held in police cells or detention facilities. The basis for detention is usually in order to clarify the individual´s identity or to resolve any discrepancies in that person´s route to Finland; individuals who have received a negative asylum decision and are awaiting deportation may also be detained. The detention period in Finland can vary from a few days to several months, and its extension is decided in the regional court periodically every two weeks. [197]

According to Amnesty International Finland, in 2008 1000 persons were detained while in 2009 the figure was 1200. This figure is high, when taking into account that officially Finland has the capacity to detain only 40 persons at a time in an immigration detention facility; the majority of detainees are thus held in police cells or detention centers. According to also this organization´s information, there is large discrepancy in how detention is used depending on the municipality the immigrant is located; the use of detention by the police forces compared to the border guard also varies greatly. This disparity and inconsistence leads to unfair and uneven conditions for asylum seekers, where they might be detained by one authority in one municipality, but not in another.[198]

In a report on the application of the Dublin II Regulation in Europe, Finland stated that applicants of international protection are not normally detained in relation to a Dublin transfer, but

[196] Anu Koikkalainen, Pakolaisneuvonta Ry, email 19th March 2014
[197] "Turvapaikkamenettely Suomessa" Refugee Advice Centre, Finland 01.02.2010 <http://www.pakolaisneuvonta.fi/?lid=35> accessed 20 March 2014

[198] "Säilöönottokäytännöt uudistettava" Amnesty International, Finland <http://www.amnesty.fi/kampanjat/paattyneet-kampanjat/vaalit-2011/sailoonottokaytannot-on-uudistettava> accessed 20 March 2014

that if the transfer is scheduled to happen soon (within one week) then the applicant will be detained before the transfer. This is based on Article 121 of the Aliens Act that allows for detention if the alien is likely to prevent or hinder the enforcement of a decision to remove him from the territory. In the report, the Finnish authorities stipulate that the same criteria are used for the detention of Dublin transferees as are for other groups of aliens.[199]

4.2.4 Effect of new Directive on Finnish state practice

The Finnish Aliens Act has not yet incorporated the rules of the new Reception Conditions Directive; it has until the summer of 2015 to do so. As in Estonia, also in Finland there is a pattern of inconsistency in the use of detention measures depending on the municipality. As with Estonia, this should be reduced and practices harmonized once the Directive is transposed, as the Directive gives much more specific rules on the issuance of detention measures. The Finnish law does actually provide most of the criteria for grounds of detention introduced in the new Directive; namely the requirement that a decision to detain be based on an individual assessment, and that using alternative measures of supervision requires that the asylum seeker be informed in writing of the grounds for the measures. It is welcoming to see that the Act has specified what entails a risk of absconding; here it is said specifically that a risk of absconding can be established when the non-custodial measures have been used but considered insufficient. The necessity requirement is yet to be added to the Act; there is also no mention of the length of detention, but then this is not required by the Directive.

The new criteria listed in the Directive will hopefully streamline practice also in Finland in the different municipalities. This is difficult to assess as even if the law stipulates the criteria and the need for an individual assessment, it is another matter whether these rules will manifest in actual cases. The new necessity requirement will most likely reduce the issuance of detention measures where they have been used more prominently, however ambiguity on the length of detention in national law as in the Directive will not help to provide equal treatment to asylum seekers in the different Finnish municipalities or between the two states.

[199] Report on the Application of the Dublin II Regulation in Europe, March 2006, page 33, European Council on Refugees and Exiles, available on ECRE website at <http://www.refworld.org/pdfid/47fdfacdd.pdf> accessed 10 April 2014

5. CONCLUSION

The objective of the new Reception Conditions Directive is, as always with EU law, to further harmonize and standardize the national laws governing asylum and the receptions conditions offered to asylum seekers arriving in any EU Member State. Regarding the most prominent problems present with the variability of detention measures used on asylum seekers in the EU; namely the issue of arbitrariness, proportionality, necessity and the use of alternative measures; the Directive does seem to provide the answers to ending the disparities that have been present in the issuance of detention measures in Europe. The Directive stipulates a need for the necessity of a detention measure, based on individual assessment, only to be applied when alternative measures have first been contemplated and found wanting. This fact might lessen the use of detention measures; it should most certainly stop the practice of automatic or mandatory detention as used in some countries. The Directive gives an exhaustive list of grounds for detention, which will most definitely harmonize this part of issuing detention on asylum seekers in the MS; however, some of these grounds, such as risk of absconding or for the purpose of determining the person´s right to entry in the country, still leaves Member States too much discretion in interpretation. Furthermore, the fact that any time limits for detention measures were omitted from the Directive, and that Member States are not required by the Directive to stipulate maximum detention lengths in their national legislation, will most certainly prove problematic and cause discrepancies in this regard to continue.

Estonian and Finnish legislation are coming close to being identical on the issue of detaining asylum seekers, due of course to the directive being rather specific. However, the Estonian law stipulates some temporal limits or rules on detention measures, while the Finnish Act does not, as of yet, and probably won´t as it is not required by the Directive. Finnish law on the other hand has a rather clear definition of how to establish risk of absconding, while Estonian legislation does not; this will most likely remain the case as this too is not an aspect elaborated on or obligated to be defined by the new Directive.

In conclusion, the new Directive will somewhat harmonize state practice, especially regarding the grounds a state can use for issuing detention, but still leaves important issues to the discretionary powers of the States themselves. Estonian and Finnish law on the rules for issuing detention of asylum seekers will eventually be almost identical; however there are important aspects that are present in one but missing in the other state, which might cause some inequality in the treatment of asylum seekers in each country. Although the grounds the two states can henceforth use to detain asylum seekers should become identical, the length of detention sentences

can still vary greatly as can the assessment on the risk of absconding. This is something the EU asylum legislation does not provide an answer for, and something that will affect detention measures used on asylum seekers. After all, it can be argued that what most affects court practice and state policy towards detaining asylum seekers is found in the national laws of the state and the relevant EU guidelines, not in the history of the state nor in the number of immigrants seeking to apply for asylum in that state. Therefore, even when one state attracts thousands more asylum seekers annually, it is possible to have equal rights and safeguards in use in both countries, if the legislators in those countries so wish.

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