



## Restriction of liberty in asylum proceedings I

### *Findings of the Court of Justice of the European Union*

This exercise is based on the Court of Justice ruling in the case C-18/16, K.

#### **1. Is the Charter of Fundamental Rights applicable to third-country nationals placed in detention centres during asylum procedures?**

In this case the Charter of Fundamental Rights is applicable, namely Article 6 of the Charter.

In the case C-18/16 the Court of Justice held that

*(...) the first subparagraph of Article 8(3)(a) of that directive (directive 2013/33/EU) allows an applicant for international protection to be detained in order (...) to determine the elements on which his application is based which could not be obtained in the absence of detention, in particular when there is a risk of the applicant absconding. By authorizing such a measure, that provision provides for a limitation on the exercise of the right to liberty enshrined in Article 6 of the Charter. (pp. 33).*

#### **2. Was the detention of Mr Magomed justified?**

In the case C-18/16, the Court of Justice held that:

*34. Under Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. In observance of the principle of proportionality, limitations may be imposed on the exercise of those rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. (...)*

*39. In those circumstances, the detention of an applicant (...) in order to determine the elements on which the application for international protection is based which could not be obtained without that detention, in particular where there is a risk that that applicant will abscond, allows the applicant to be available to the national authorities so that they are able, inter alia, to interview him (...).*



40. (...) in view of the importance of the right to liberty enshrined in Article 6 of the Charter and the gravity of the interference with that right which detention represents, limitations on the exercise of the right must apply only in so far as is strictly necessary (judgement of 15 February 2016, N., C-601/15 PPU, EU:C:2016:84, paragraph 56 and the case-law cited). (...)

44. (...) Article 8(1) of the directive makes clear that Member States may not hold a person in detention for the sole reason that he has made an application for international protection. Furthermore, under Article 8(2) of the directive, detention may be ordered only when it proves necessary and on the basis of an individual assessment of each case, if other less coercive alternative measures cannot be applied effectively. (...)

45. Similarly, Article 9(1) of Directive 2013/33 provides that an applicant is to be detained only for as short a period as possible and may be kept in detention only for as long as the grounds set out in Article 8(3) of that directive are applicable. Moreover, in accordance with Article 9(2) to (5) of that directive, when a decision is taken to detain an applicant, significant procedural and legal safeguards must be observed. (...)

46. (...) first, detention may be used only exceptionally and that, secondly, detention is to be used only as a last resort, when it is determined to be necessary, reasonable and proportionate to a legitimate purpose (see, to that effect, judgement of 15 February 2016, N., C-601/15 PPU, EU:C:2016:84, paragraph 63). (...)

48. Although the proper functioning of the Common European Asylum System requires, in practice, that the competent national authorities have at their disposal reliable information (...) to the elements on which his application is based, that provision cannot justify detention measures being decided without those national authorities having previously determined, on a case-by-case basis, whether they are proportionate to the aims pursued. Such a determination involves ensuring that all of the conditions referred to in paragraphs 44 to 46 of the present judgement are satisfied and, in particular, that, in each individual case, detention is used only as a last resort. Moreover, it must be ensured that that detention does not exceed, in any case, as short a period as possible. (...)

50. Finally, it should be noted that, in so far as the Charter contains rights corresponding to the rights guaranteed by the ECHR, Article 52(3) of the Charter seeks to ensure the necessary consistency between the rights contained in it and the corresponding rights guaranteed by the ECHR, without thereby adversely affecting the autonomy of EU law and that of the Court of Justice of the European Union (see, to that effect, judgement of 28 July 2016, JZ, C-294/16 PPU, EU:C:2016:610, paragraph 50 and the case-law cited).

Detention of an asylum seeker in order to determine those elements on which the application for international protection was based, which could not be obtained in the absence of detention, restricts a fundamental right enshrined in article 6 of the

Charter. In order for the restriction to be compatible with the Charter it must meet several criteria.

Detention of an asylum seeker must be preceded by an individual assessment of the case, it can be applied only in so far as is strictly necessary, it has to meet the proportionality criterion and be used only as a last resort. Detention should be ordered only for as short a period as possible. Furthermore during the whole period of detention the detention must be necessary in order to determine those elements on which the application for international protection was based which could not be obtained in the absence of detention. It means that when all necessary evidence was gathered there is no longer a need for detention. It is unacceptable to detain an asylum seeker for the sole reason that he or she applied for asylum in the EU.

In the case of the detention of Mr Magomed it is necessary to determine whether his detention met the strictly necessity test given that in an asylum proceedings no evidence was taken with his presence necessary. It has to be analysed whether in reality the sole reason for the detention of Mr Magomed was not the fact that he applied for an asylum.

## TRAINING MATERIALS

### *Follow-Up Questions*

1. Is the standard for the protection of liberty of asylum seekers enshrined in the EU law lower, equivalent or higher than the standard provided for by the European Court of Human Rights?
2. Is the test of "strict necessity" also applicable to other grounds for detention of asylum seekers under EU law?