Detention of asylum seekers on grounds of national security and public order

Findings of the Court of Justice of the European Union

In the *J.N. v. Staatssecretaris van Veiligheid en Justitie* case, the CJEU assessed whether possibility to detain asylum seekers for reasons of national security and public order under Article 8(3)(e) Reception Conditions Directive was in line with the limitations set up in Articles 6 CFR and 5 ECHR.

With regard to the question "When deciding on such issue, in your view what role plays Article 5 ECHR? And the jurisprudence of the ECtHR?"

Article 52(3) EUCFR establishes that: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

The right to liberty and security enshrined by Article 6 CFR belongs to the Charter rights which correspond to the rights guaranteed by the ECHR. This means that the ECHR shall constitute a term of reference not only for the interpretation of the meaning and scope of the terms liberty and security but also for the permissible limitations applicable under Article 5(1) (a)-(f) ECHR. This is also explicitly clarified by the Explanations to Article 6 EUCFR that stipulates '…the limitations which may legitimately be imposed on them may not exceed those permitted by the ECHR'.

In addition to the rule on limitations established by Article 52(3), Article 52(1) EUCFR states that '[a]ny limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by the law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may only be made if they are necessary and genuinely meet objectives of general interest recognised by the Union or need to protect the rights and freedoms of others'.

The text of Article 52(3) EUCFR, however, refers explicitly only to the ECHR but not to its case-law. In other words, it does not specify whether the "meaning and scope" of ECHR articles should be retrieved also in light of the ECtHR jurisprudence. Hence, the question as to what role has the ECtHR jurisprudence remains open. In the literature, many authors have maintained that neither the wording of Article 52(3) EUCFR nor the drafting history of the Charter support the conclusion that the case-law of the ECtHR is binding in all circumstances, but rather that it should be "accorded significant weight", postulate a "duty to duly regard", or "persuasive suggestions". On the other side, it cannot be overlooked that the key object and purpose of Article 52(3) EUCFR was to prevent divergences between the ECHR and the EUCFR, and that both the Preamble and the Explanations contain a specific reference to the case law of the Strasbourg Court, the authoritative interpreter of the ECHR.

In the *J.N. v. Staatssecretaris van Veiligheid en Justitie,* the CJEU recalled that:

"whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of EU law and whilst Article 52(3) of the Charter provides that the rights contained in the

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Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR, *the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law*. Thus, an examination of the validity of point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 must be *undertaken solely in the light of the fundamental rights guaranteed by the Charter*.

In that regard, the explanations relating to Article 6 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it, make clear that the rights laid down in Article 6 of the Charter correspond to those guaranteed by Article 5 of the ECHR and that the limitations which may legitimately be imposed on the exercise of the rights laid down in Article 6 of the Charter may not exceed those permitted by the ECHR, in the wording of Article 5 thereof. However, the explanations relating to Article 52 of the Charter indicate that paragraph 3 of that article is intended to ensure the necessary consistency between the Charter and the ECHR, '*without thereby adversely affecting the autonomy of Union law and ... that of the Court of Justice of the European Union'*.

Furthermore, in accordance *with a general principle of interpretation, an EU measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter"* (§§ 45-48).

With regard to the question "Considering Article 8(e) Reception Conditions Directive, do you think the detention of the applicant can be justified?"

The CJEU found that the detention on grounds of national security or public order under Article 8 (e) Reception Conditions Directive is in line with Article 4 Charter and Article 5 ECHR, and could be justified under Article 5(1)(f) second limb ECHR, i.e. arrest or detention of a person against whom action is being taken with a view to deportation or extradition.

In arriving to such conclusion, the CJEU took into consideration the following arguments:

- The applicant had been subject to a return procedure under Directive 2008/115 which had been halted in view of the submission of an application for international protection
- In the *Nabil v Hungary* case, the ECtHR found that the 'the pending asylum case does not as such imply that the detention was no longer "with a view to deportation" [under Article 5 (1)(f)] – since an eventual dismissal of the asylum applications could have opened the way to the execution of the deportation orders. (§ 38).
- The principle that Directive 2008/115 must be effective requires a return procedure must be resumed at the stage at which it was interrupted, as soon as the application for international protection which interrupted it has been rejected at first instance § 75
- During this period, actions is still 'being taken' for the purposes of the second limb of Article 5(1)(f) ECHR.

See: *J.N. v. Staatssecretaris van Veiligheid en Justitie,* Case C-601/15 PPU, Judgment of 15.02.2016

Follow-Up Question

- In your national context, how do you deal with such situations?
- In your view, can the conclusions of the CJEU be reconciled with the general principles establishing that the grounds of detention specified under Article 5 ECHR are exhaustive, should be given a narrow interpretation, and that detention should be carried out in good faith and be in genuine conformity with the purpose of the ground listed in Article 5(1) ECHR?

  For a critical assessment of the case you can consider the following points:

  - *In this case, the CJEU strongly based its conclusion on the Nabil v Hungary case of the ECtHR. However, there are several differences between the Nabil v Hungary & the J.N. v. Staatssecretaris van Veiligheid en Justitie.*

    First, while in the Nabil v Hungary case Hungarian national law provided that the execution of the deportation order was only suspended, in the present case Dutch national law provided that the applicant was no longer subject to an ongoing return procedure because the return decision was elapsed (not suspended) and that in the case of a rejection of the asylum application the Secretary of State would have been required to make a new return decision raise doubts as to whether this detention could fall under Article 5(1)(f) second limb.

    Second, in the Nabil v Hungary case, the applicants' detention was ordered explicitly with a view to their eventual deportation, while in the present case the Dutch authorities justified the detention on the basis of national security and public order.

  - *In other cases, the ECtHR had decided in the opposite way (Ahmade v. Greece, App. No. 50520/09, Judgment of 25 September 2012, at 142-144; ECtHR, RU v. Greece, App. No. 2237/08, Judgment of 7 September 2011, at 88-96, in particular 94).*

  - *Article 8(3)(d)Reception Conditions Directive specifically provides that "when he or she is detained subject to a return procedure under Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (9), in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision".*