



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

Fact of the case

Mr N.J. is a foreigner residing in the Netherlands, who, in the period 1999-2015, had been convicted of 21 charges, mostly for theft-related offences. Mr N.J. had been subjected in the past to a return decision, which became final in April 2014. On 27 February 2015, while serving a sentence of imprisonment for failure to comply with an entry ban, Mr N.J. submitted his fourth asylum application, this time based on new grounds based on health reasons. Once he had served his sentence on criminal grounds, the authorities decided that Mr N.J. should be maintained in detention in his capacity of asylum seeker on grounds that he posed a threat to national security or public order, given that he was convicted of a number of offences in the past and was suspected of having committed others.

The applicant challenged that decision arguing it to be contrary to Articles 6 CRF and 5 ECHR, in that detention could be justified only when action is being taken with a view to deportation and extradition, but not against a foreigner who is lawfully residing in the Member State pending his asylum procedure. Consequently, the Dutch Council of State referred the question to the CJEU.

Legal Framework

Relevant European Law

Article 5 ECHR

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) *the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*



ECtHR, *Nabil and others v. Hungary*, App. No. 62116/12, Judgment of 22 September 2015

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. The detention nevertheless had to be in compliance with the national law and free of arbitrariness’ (§ 38).

Directive 2013/33/EU (Recast Reception Conditions Directive)

Article 8

- ‘1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant in accordance with Directive [2013/32].
2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.
3. An applicant may be detained only:
 - (a) in order to determine or verify his or her identity or nationality;
 - (b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;
 - (c) in order to decide, in the context of a procedure, on the applicant’s right to enter the territory;
 - (d) when he or she is detained subject to a return procedure under Directive [2008/115], 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;
 - (e) when protection of national security or public order so requires;
 - (f) in accordance with Article 28 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 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 [(OJ 2013 L 180, p. 31)].

The grounds for detention shall be laid down in national law.

4. Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law.’

Questions

1. Considering Article 8(e) Reception Conditions Directive in light of Articles 4 CFR and Article 5 ECHR, do you think the detention of the applicant can be justified in the present case?
2. When deciding on such issue, in your view what role plays Article 5 ECHR? And the jurisprudence of the ECtHR?