ecre
European Council
on Refugees and Exiles

TAKING LIBERTIES: DETENTION AND ASYLUM LAW REFORM

ECRE'S CONCERNS ABOUT THE RESTRICTIONS ON ASYLUM SEEKERS' LIBERTY IN THE REFORM OF THE COMMON EUROPEAN ASYLYM SYSTEM AND IN PRACTICE

I. INTRODUCTION

European countries are increasingly resorting to restrictions on and deprivation of liberty against people seeking protection from persecution and harm, to pursue a range of objectives. Current trends show constraints on freedom of movement being imposed on asylum seekers and enforced by detention, for reasons of administrative convenience. Other initiatives have led to special, freedom-restrictive reception regimes for individuals deemed "uncooperative" or violent, with the ostensible aim of protecting public order.

The reform of the Common European Asylum System (CEAS) negotiated by the European Union (EU) institutions is liable to exacerbate these tendencies. The almost agreed proposal to recast the Reception Conditions Directive foresees further possibilities to deprive asylum seekers of their liberty throughout the refugee status determination process. Through the introduction of powers to impose general movement restrictions, as well as the inclusion of non-compliance with some restrictions as a ground for detention, the reform risks fuelling negative trends by pushing states to systematically constrain asylum seekers' liberty, and to detain those who fail to observe such constraints.

In this policy note, ECRE analyses the proposed changes to the Reception Conditions Directive to demonstrate how they will lead to an increased use of detention through codification of general restrictions on freedom of movement and expanded grounds for detention as punishment for non-compliance with rules while in a situation of restricted freedom. It argues that the reform will legalise practices which contravene human rights law and which contradict broader policy aims of the CEAS. The policy note concludes with specific recommendations for changes to the legislative proposal to limit the increased use of detention.

II. ANALYSIS

One of the objectives of the CEAS reform package as a whole is to reduce secondary movements within the EU, reflected in the legislative proposals drafted by the Commission. The recast Reception Conditions Directive aims to contribute to this by reducing "reception-related incentives to secondary movements" including through restrictions on freedom of movement.

With the "trilogue" negotiations between Council and European Parliament near completion, an agreement on the reform of the Reception Conditions Directive is likely to be reached soon. The text equips states with broader powers to impose various restrictions on asylum seekers' freedom of movement, or to resort to detention, to pursue an array of policy objectives going beyond prevention of secondary movements.

INTERFERENCE WITH LIBERTY IN THE RECAST RECEPTION CONDITIONS DIRECTIVE

The addition of two new provisions by the Council has introduced possibilities for states to lay down restrictions on asylum seekers' movement without a formal, legally challengeable decision:

» Under Article 6a on "Organisation of reception systems", an applicant can be allocated to "accommodations" for reasons of management of asylum and reception systems.

» Under Article 6b on "Allocation of applicants to a geographical area", applicants can be allocated to a "geographical area" within the territory for the purposes of swift, efficient and effective processing of their asylum claim, or a geographic distribution of the asylum-seeking population.

The absence of any duty on Member States to adopt a formal decision when allocating an applicant to "accommodations" or geographical areas within their territory is justified by the Council through reference to the need to enable states to swiftly address challenges in reception and caseload management, i.e. for reasons of administrative convenience. Issuing individualised decisions on the place where applicants can receive material reception conditions is considered too cumbersome for reception authorities. However, allocations under the proposed Article 6a and 6b in such a fashion may result in *de facto* restrictions of freedom of movement. In such cases, applicants would be deprived of their right, under the European Convention on Human Rights (ECHR) and the right to good administration under EU law, to be issued with a reasoned decision on any individual measure adversely affecting them. The absence of a formal act would also bar those restrictions from judicial review, a crucial safeguard to protect individuals from unlawful and disproportionate restrictions on freedom of movement.

Article 7 of the proposal, already present in the European Commission's draft, allows states to order an asylum seeker to reside in a "designated place" – not clearly distinguished from "accommodations" referred to in Article 6a – under a formal decision which would be amenable to judicial review. Residence in a "designated place" can be imposed for reasons of public order or to prevent the applicant from absconding, particularly when he or she is not in the country responsible for his or her asylum claim under the Dublin system.

In addition, the new detention ground introduced by the Commission in Article 8(3)(c) of the proposal, in its current formulation, permits detention "in order to ensure compliance with legal obligations imposed on the applicant" under Article 7 to stay in a "designated place" and where a risk of absconding still exists. The provision constitutes a departure from the non-punitive nature of administrative immigration detention: asylum seekers are ordered to stay in a specific place to refrain from absconding, and are then subject to detention if they fail to abide by the residential obligations.

The obligations imposed on asylum seekers without a formal decision under Articles 6a and 6b of the proposal cannot be the basis for detention according to the text; Article 8(3)(c) only refers to legal obligations imposed under Article 7. Yet, the overall direction of the reform signals an encouragement to states to subscribe to the use of deprivation of liberty as a logical and permissible continuation of movement restrictions imposed on asylum seekers in case of non-compliance. This could apply to convenience-based restrictions as well as to those imposed to prevent absconding.

Finally, the compromise text negotiated between the co-legislators so far inadvertently lowers the current standard of access to free legal assistance and representation, an indispensable procedural guarantee to

protect asylum seekers from arbitrary detention, as acknowledged in Strasbourg case law. Whereas the current Article 9(7) of the Reception Conditions Directive only allows for a "means test" to be applied in case of detention, under the compromise text access to free legal assistance and representation, including to challenge detention decisions, is now governed by the general provision on appeals. The latter explicitly provides for the possibility for Member States to make free legal assistance subject to "merits testing" and therefore deny it where the appeal "is considered to have no tangible prospect of success". Such a measure raises serious concerns of procedural unfairness and effective judicial protection.

INTERFERENCE WITH LIBERTY IN NATIONAL PRACTICE

The current legal framework already allows for excessive use of detention, as illustrated by trends in national practice identified through the AIDA database, due to the discretion afforded to Member States by the current Reception Conditions Directive, as well as their dubious interpretations. These national trends, which have emerged as the co-legislators debate the reform of the Reception Conditions Directive, illustrate how states are likely to exploit additional opportunities to generalise movement restrictions and expand detention for reasons of administrative convenience. From the detention of asylum seekers who violate duties to remain on their assigned island in Greece, to the designation of movement zones with detention to follow if they are not respected in Bulgaria, to residence restrictions enforceable by administrative fines and detention in Austria, detention is already widespread. As the compromise text stands now, the adoption of the cited provisions of the recast Reception Conditions Directive is likely to trigger a proliferation of similar measures in the future.

The current context also seems to inspire states to resort increasingly to freedom restrictions and deprivation of liberty in response to asylum seekers failing to observe house rules of reception facilities or exhibiting violent conduct. Making use of their discretion under the Reception Conditions Directive, a number of countries apply restrictions on freedom of movement or even detention in such cases, although practice varies as to the degree of intrusion into applicants' liberty. Countries such as the Netherlands and Switzerland are setting up specific reception centres with stricter reporting obligations for violent or "uncooperative" asylum seekers, an approach pursued by other states in the past and abandoned as problematic.

Other countries have resorted to detention on public order grounds under the Directive to punish violent behaviour, including participation in riots, in lieu of prosecuting individuals under criminal law. Immigration detention in response to violent or inappropriate conduct in reception facilities as a substitute to criminal justice may be seen as more convenient to the authorities. Yet, carving a separate sphere from criminal law risks subjecting asylum seekers to different standards from the general populations, leading to broad interpretations of violent or undesirable conduct and therefore disproportionate sanctions, given that the stricter standards and safeguards that operate in criminal law will not be present. It may also undermine justice when individuals are hastily deported before a conviction is delivered.

CAN HARMFUL EVER BE "EFFICIENT"? THE POLICY CONTRADICTIONS OF DETENTION

The devastating effects of detention on individuals' physical and mental health, well-being and social interactions continue to be thoroughly documented and can never be overstated. However, beyond dehumanising people and disregarding basic human rights set out *inter alia* in the EU Charter of Fundamental Rights, detention also runs counter to EU policy objectives and the aims of the CEAS reform.

First, it undermines the quality of asylum systems. The adverse effect on asylum seekers' mental state and well-being strongly affects their trust in the process and ability to disclose information and articulate fears and often traumatic experiences to substantiate their claim. The multiple procedural impediments generated by detention are hardly conducive to states' duty to ensure a fair asylum procedure. Detention often implies physical remoteness from urban centres and official authorities, civil society organisations and lawyers, all of whom play a crucial role in refugee status determination. Processing claims in detention means that applicants usually navigate the procedure without indispensable counselling and legal assistance, while interviews with asylum authorities and court hearings are increasingly held by phone or videoconference, with dubious quality. These obstacles create risks of unfair denial of protection and contestation of decisions, thereby calling into question both the credibility and the efficiency of the asylum process.

Second, it is counter-productive regarding societal inclusion of refugees. Many applicants placed in detention are ultimately released into the community with expectations to settle, find employment, join relatives and friends, and become productive members of host societies. Yet, in their emphasis on fostering "efficient" integration of beneficiaries of international protection, states underestimate the impact of vulnerability, trauma and alienation inflicted by their own policies on the very individuals then welcomed into their communities. The damage caused by detention adds to an already heavy process of adjustment and takes significant time and effort to remedy. Emerging evidence indicates that the "refugee gap" – the lower integration outcomes for beneficiaries of international protection compared to other third-country nationals – can best be tackled by creating similar conditions for refugees as for other migrants, including access to networks, access to the labour market, opportunities to learn the language through daily interactions and so on. Detention militates against this approach by isolating people from communities and wider society. Support to inclusion measures from day one, i.e. before status determination and regardless of likelihood of success, is well-established as of benefit to new arrivals and to host societies alike.

The wider scope for deprivation of liberty under the recast Reception Conditions Directive, be it for the purpose of administrative convenience, avoidance of criminal law standards, or prevention of secondary movements, is counter productive. The proliferation of detention serves neither the "efficient, fair and balanced" asylum procedure envisioned by the Asylum Procedures Regulation proposal, nor the aim to "increase applicants' integration prospects" promoted by the Qualification Regulation proposal. It further undermines EU policy objectives set out in the Integration Action Plan and the effectiveness of the substantial EU funding allocated to support integration.

III. RECOMMENDATIONS

As negotiations on the Commission proposal to recast the Reception Conditions Directive are in the final stage, ECRE provides the following recommendations:

In the context of the reform of the Directive, EU co-legislators should:

» Strictly limit the scope of Article 6a of the proposed Directive to the management of reception systems through the deletion of the reference to "asylum systems" in Article 6a(2) and Recital 15a;

» In case of allocation to "accommodations" or a geographical area under Article 6a and 6b, include an obligation to provide the applicant concerned with an individual decision stating the reasons for such allocation, in line with the right to good administration;

» Delete Article 8(3)(c) in order to break the connection between allocation to "accommodations" or a geographical area, restriction on freedom of movement, and detention;

» Ensure that asylum seekers have access to free legal assistance and representation as an integral part of the right to an effective remedy against arbitrary detention, in line with state obligations under the ECHR and the EU Charter of Fundamental Rights. To that end, the possibility of making access to free legal assistance and representation contingent on "merits testing" under Article 25 of the proposal must be deleted;

At the level of practice, Member States should:

» Refrain from resorting to detention on public order grounds in response to violation of house rules or undesirable conduct by asylum seekers in reception facilities, but resort to proportionate measures and sanctions within the open reception systems as far as possible. Where applicants' conduct amounts to a criminal offence, immigration detention should not be used as a substitute to criminal proceedings in line with the right to a fair trial.

At the level of practice and programming, the relevant Directorate Generals of the European Commission should:

» Conduct monitoring and contribute in inter-service consultations on the negative impact of detention on refugee integration, and the likelihood of it undermining the policy objectives and results to be achieved by funding for which it (DG EMPL) is responsible.