

Immigration Detention in International Law and Practice (In search of solutions to the challenges faced in Bulgaria)

This paper is a result of academic research in my PhD studies, but it is inspired and based on my experience as a practicing lawyer providing free legal aid at the immigration detention center in Sofia.

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Table of Contents:

I. Introduction

The term “administrative detention”; who are immigration detainees?

II. Legal grounds for detention. The two step proportionality approach:

1. General reasons for the lawfulness of the detention:
 - 1.1. Pre-admission detention;
 - 1.2. Pre-removal detention.
2. Individual reasons for the lawfulness of the detention:
 - 2.1. Failure of voluntary return;
 - 2.2. Risk of absconding or a proven threat to public order, public security or national security;
 - 2.3. Failure of non-custodial measures.

III. Rights of the detainees: procedural safeguards and detention conditions:

1. Procedural safeguards:
 - 1.1. The right to be informed:
 - 1.1.1. on the reasons for the detention;
 - 1.1.2. on the rights in connection with the detention order;
 - 1.2. Right of access to a lawyer;
 - 1.3. Right to appeal;
 - 1.4. Periodic review of detention;
 - 1.5. Enforceable right to compensation for damages;
 - 1.6. Rights of specific groups of persons:
 - 1.6.1. Stateless persons
 - 1.6.2. Protection of families (the right to respect for family life)
 - 1.6.3. Rights of children
 - 1.6.4. Regard for the special needs of other vulnerable groups.
2. Detention conditions

IV. Conclusion

I. Introduction

Worldwide increasing numbers of asylum seekers and immigrants – real people with real rights - are deprived of their liberty through the construct of administrative detention. In spite of this, the general public hardly knows anything about these new prisons and the suffering of the human beings incarcerated in them. There is an alarming legislative deficit with regard to guaranteeing the rights of those administratively detained. This becomes very obvious if we compare the national regulation of administrative detention with the one on criminal detention where, unlike the former, the detained are suspected of or convicted of committing a crime. Furthermore, there is a worrisome gap between the international law and the state practice, which makes the knowledge of international obligations of states of vital importance.

The term “administrative detention”¹. Who are immigration detainees?

The following paragraph aims to contextualize the research by giving a realistic definition and life to the terms used.

The official name of the detention center for immigrants in Sofia, Bulgaria, is “Specialized Home for Temporary Accommodation of Foreigners”. The Law on the Foreigners in the Republic of Bulgaria calls the detention “coercive accommodation” and the detainees are referred to as the “accommodated”. It was not by chance that a journalist from the Bulgarian state television in March 2007 reported on the center as a ‘charity home’ showing on TV how the “accommodated” were given lunch. However this terminology is misleading and diverts public attention from uglier realities.

In “accommodation” people are deprived of a fundamental human right – the right to liberty. These centers are not homes. The detainees in Sofia use bottles to go to the toilet at night and from 2pm to 4pm, because then they are locked in their dormitories. During the rest of the time they are not allowed to move between the floors of the detention center. In September 2007 an Iraqi detainee was severely beaten by the guards until his blood covered his face and body for asking for permission to go to the lower floor. Disciplinary infringements are punished by solitary confinement in an empty cell with a camera. An asylum seeker at the Sofia detention center was held in the isolator from 28 May 2007 to 30 October 2007 because he had shouted in an attempt to have his asylum application registered². The building where detention takes place has the infrastructure of a prison: high walls, barbed wire, grills, security guards, cameras and restricted access. However, unlike prisoners, who have the right to go on home leave for good behavior, detained immigrants are not allowed to leave the center. They do not know the period of time for which they will be detained. Some cases extend for months, others for years. A Cuban citizen at the Sofia detention center remains in detention since 30 April 2004.

It is noteworthy here that the European Parliament amended the term “temporary custody”, used in the EU Commission’s proposal for a directive on the return of illegally staying third country nationals, to “detention”. This demonstrates official recognition of realities in practice “given the deprivation of freedom it entails and its duration, up to six months, which is far from temporary”³.

The use of the term “*administrative* detention” intends to highlight an important difference from detention under the criminal law. Unlike prisoners, administratively detained immigrants are not detained as a result of committing a crime. Immigration detainees are not accused or convicted criminals, they are immigrants in irregular situations and asylum seekers. The former category of immigrants lack the necessary documents required by national law and this has entailed deportation. The objective of administrative detention is to serve the execution of the deportation order. Detention is not a sanction or a punishment, but a coercive administrative measure that is aimed at facilitating the implementation of the removal (deportation or expulsion). With regard to asylum seekers, Bulgarian law⁴ stipulates

¹ This term has been used in the Report of the Special Rapporteur on the Human Rights of Migrants at the United Nations Commission on Human Rights, E/CN.4/2003/85, 30 December 2002; also in the Observation and Position Document of the Jesuit Refugee Service, *Detention in Europe. Administrative Detention of Asylum-seekers and Irregular Migrants*, 17 October 2005, www.detention-in-europe.org

² Ilareva, Valeria, Bulgaria’s Treatment of Asylum Seekers, *Forced Migration Review*, issue 29, December 2007, <http://www.fmreview.org/FMRpdfs/FMR29/FMR29.pdf>, page 61

³ European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *Report on the proposal for a directive of the European parliament and the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*, A6-0339/2007, 20.09.2007, Amendment 10

⁴ Art.47, Para.2, Subpara.1 of the Law on Asylum and Refugees

that those who are in a procedure for determining the state responsible for examining the application for asylum and those who have entered the country illegally and are in an accelerated asylum procedure⁵ are held in “transit centers”. The role of the ‘transit centers’ is currently realized by the immigration detention center in Sofia. However in practice asylum seekers in Bulgaria are often detained as undocumented immigrants on the basis of a deportation order since asylum applications are not registered at the moment of their submission⁶. Despite decreasing numbers of asylum seekers, the number of those detained is increasing.

It is indisputable that the detention of asylum seekers and undocumented immigrants criminalizes them in the eyes of the public. When it comes to conditions of detention, immigrants face even harsher treatment and more restrictions than those accorded to criminal detainees⁷. Guarantees with regard to the rights of detained immigrants are less regulated by law, which makes these people more vulnerable to arbitrary detention and other abuses⁸. State authorities use the administrative character of the measure as a pretext not to apply the procedural safeguards established for criminal detention.

II. Legal grounds for detention. The two step proportionality approach.

“Everyone has the right to life, liberty and security of person ... No one shall be subjected to arbitrary arrest, detention or exile”

(Art.3 and 9, Universal Declaration of Human Rights /UDHR/; Art.9 (1) and 10, International Covenant on Civil and Political Rights /ICCPR/; Art.5, European Convention on Human Rights and Fundamental Freedoms /ECHR/; Art.6, Charter of Fundamental Rights of the European Union /EU/, Art.7, American Convention of Human Rights /ACHR/; Art.6, African Charter on Human and Peoples’ Rights /ACHPR/; Art.5, Convention on Human Rights and Fundamental Freedoms adopted by the Commonwealth of Independent States /CIS/; Art.14, Arab Charter on Human Rights adopted by the Arab league /AL/; Art.16, United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families)

There is a presumption of liberty. All human beings are born free and equal in dignity and rights⁹. Should a state find it necessary to limit one’s right to liberty, it is obliged to give legitimate reasons for that. This is a fundamental requirement for considering proportionality. On the one hand, proportionality requires an objective justification of the imposition of the restrictive measure. Such justification could be, for example, the right of the state to manage migration flows. The aim of dealing with undesirable immigration allows forced removal of those who do not leave voluntarily and therefore measures that facilitate deportation (such as detention) are also permissible. However, this is not sufficient. Deprivation of liberty constitutes a drastic interference with the life of the affected person. Proportionality further requires an individualized assessment as to whether the actual interference is proportionate to achieving the legitimate aim. If that aim can be achieved by less invasive means or if the interference in the concrete case does not serve the advanced aim, detention is not justified. Detention should be used only as a last resort in exceptional circumstances when all other means have failed.

⁵ Accelerated asylum procedure is applied to asylum applications that are considered “manifestly unfounded”.

⁶ Ilareva, Valeria, Bulgaria’s Treatment of Asylum Seekers, *Forced Migration Review*, issue 29, December 2007, <http://www.fmreview.org/FMRpdfs/FMR29/FMR29.pdf>, page 60-61

⁷ See Section III.2. below

⁸ Office of the United Nations High Commissioner for Human Rights, *Administrative Detention of Migrants*, a paper based on report E/CN.4/2003/85 of the Special Rapporteur on Migrants, page 2, <http://ohchr.org/english/issues/migration/taskforce/docs/administrativedetentionrev5.pdf>

⁹ Universal Declaration of Human Rights, Article 1

This two-steps proportionality approach (general legitimate aims and individual assessment of the interference) is gaining strength in Europe. It is enshrined both in the Council of Europe Twenty Guidelines on Forced Return¹⁰ and in the European Union proposal for a directive on returning illegally staying third country nationals (hereinafter referred to as “the proposed EU Return Directive”)¹¹. Recital 4 of the proposed EU Return Directive, as amended by the European Parliament, stipulates that according to general principles of EU law, decisions under this Directive should be made on a case-by-case basis and should take individual and objective criteria into account¹². Recital 11 of the same document points out: “the use of detention is limited and bound to the principle of proportionality. Detention should only be used if necessary to prevent the risk of absconding and if the application of less coercive measures would not be sufficient.”¹³

The paragraphs, that follow, present the two steps of the proportionality approach: the general and the individual reasons for the lawfulness of the detention.

1. General reasons for the lawfulness of the detention

The following section will examine the two groups of general reasons that could justify deprivation of liberty in immigration law. They correspond to two types of immigration detention: pre-admission and pre-removal detention.

Under **Art.9 (1), ICCPR**, “no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”. The Human Rights Committee, in its General Comment No8 on Article 9 of the ICCPR, expressly points out that paragraph 1 applies to all deprivations of liberty, including the ones related to immigration control.

According to **Article 5 (1) (f), ECHR**, detention is only justified “to prevent (a person’s) unauthorized entry into the country” or where “action is being taken with a view to deportation or extradition”.

Examining these documents, two categories of cases where immigration detention can be justified emerge: 1) persons at the frontier seeking unauthorized entry and 2) persons pending deportation or extradition¹⁴.

1.1. Pre-admission detention

Deprivation of liberty can be justified if it aims to *prevent unauthorized* entry. It is important to pay attention to the wording of the provision. Its scope is narrow and contains two requirements against arbitrary application: “prevention” and “unauthorized entry”. These limitations should be kept in mind when answering the question whether there are legal grounds in international law for detaining asylum seekers.

Legal access to the territory of potential host states is often impossible for persons who are forced to flee, and asylum seekers may be driven to resort to irregular ways of entry into a state territory¹⁵. Art. 31 of the Geneva Convention Relating to the Status of Refugees

¹⁰ Council of Europe Committee of Ministers, Twenty Guidelines on Forced Return, 4 May 2005, Guideline 6, Paragraph 1

¹¹ European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *Report on the proposal for a directive of the European parliament and the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*, A6-0339/2007, 20.09.2007

¹² *Ibid.*, Amendment 8

¹³ *Ibid.*, Amendment 10

¹⁴ Blake Nicholas, Raza Husain, *Immigration, Asylum and Human Rights*, Oxford University Press, 2003, page 125

¹⁵ This is acknowledged by UNHCR: see UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999, Guideline 2

provides that refugees coming directly¹⁶ from the country of persecution should not be punished on account of their illegal entry or presence as long as they present themselves without delay and show good cause for not meeting regular immigration procedure. The “*non-refoulement*” principle obliges the states not to reject asylum seekers and not to return them to territories where their life or freedom could be threatened. An immigrant who seeks asylum does not seek unauthorized entry, but the realization of the right to asylum, which the states have vowed to respect under international refugee and human rights norms.

International law does not provide for justifying legal grounds to detain asylum seekers. Real life situations also weigh in favor of asylum seekers when comparing the administrative convenience in having asylum seekers detained and the human cost of depriving them of their liberty. Detention is especially harmful for those who have been traumatized by persecution. In detention conditions it is difficult to find a climate of trust and talk openly about the experience suffered so that genuine asylum claims can be truly identified. It is cruel and faulty to suggest that detention of asylum seekers facilitates the process of examining their applications. Better results can be achieved by increasing the number of personnel and by training it. Having in mind the ever decreasing number of asylum seekers in Europe, it is disproportionate to suggest that their detention serves a pressing social need.

In spite of the said above, the fact is that authorities routinely detain asylum seekers and it would be unrealistic to deny that the tendency is growing. European Union law reflects that. Article 7 of the Reception Conditions Directive¹⁷ guarantees in principle that “asylum seekers may move freely within the territory of the host Member State ...”. However, it also states the exception that “when it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.” According to Article 18 of the Asylum Procedures Directive¹⁸, “Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum”. However, it continues that “where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review.” Article 17 (2) of the Council Regulation No 343/2003¹⁹ provides that “The requesting Member State may ask for an urgent reply in cases ... where the asylum seeker is held in detention.”

UNHCR has also acknowledged the fact of detention and has elaborated guidelines for minimum guarantees against arbitrary deprivation of liberty. Firstly, UNHCR highlights that detention of asylum seekers is “inherently undesirable” and, as a general principle, asylum seekers should not be detained.²⁰ Detention is only acceptable if it is brief, absolutely necessary and is instituted after all other options have been implemented.²¹ Permissible exceptions defined by UNHCR are:

¹⁶ “The expression “coming directly” in Article 31 (1) covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured” - UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999, Introduction, point 4

¹⁷ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of sylum seekers

¹⁸ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

¹⁹ Council Regulation No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

²⁰ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999, (hereinafter referred to as the UNHCR Guidelines on Detention), Guideline 2

²¹ UNHCR EXCOM Conclusion No44 (“Detention of Refugees and Asylum seekers”), UN Doc A/AC.96/688

- i) to verify identity;
- ii) to determine the elements on which the claim for refugee status or asylum is based;
- iii) in cases where asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum;
- iv) to protect national security and public order.

At first glance, these exceptions seem rather broad²². However if we read them strictly, they provide important safeguards for their implementation. Point i is related with point iii where the UNHCR Guidelines state that detention is “only permissible when there is **an intention** to mislead, or a refusal to co-operate with the authorities. Asylum seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason”. The statement in point ii refers exclusively to a preliminary interview and is not extended to a determination of the merits of the claim. “This exception to the general principle cannot be used to justify detention for the entire status determination procedure or for an unlimited period of time”. The fourth point explicitly conditions its application on evidence that proves the alleged threat.

It is important to stress that asylum seekers should not be treated as undocumented immigrants. Their asylum applications should be registered at the moment of their submission and their eventual detention should never be based on a deportation order. Unfortunately at the present moment in Bulgaria the legal ground on which asylum seekers are detained in practice is a pending removal. This flagrant breach of the *non-refoulement* principle is a consequence of the unlimited lapse of time between the submission of the asylum application and its registration²³.

1.2. Pre-removal detention

Deprivation of liberty can be justified if action is being taken with a view to deportation or extradition of the person detained. This involves two requirements: a deportation or an extradition order that is in force and implementation of action with regard to realization of that order. In its jurisprudence, the European Court of Human Rights has given decisive weight to the requirement that “*action is being taken*”. Furthermore, action should be taken with “*due diligence*”²⁴. If removal proceedings are not prosecuted with the requisite diligence, detention will cease to be permissible under Art.5 (1) (f), ECHR²⁵. From this it follows that “when it appears that removal within a reasonable period is unrealistic for legal or other considerations, detention ceases to be justified and release must follow.”²⁶ There should be a chance of timely realization of the forced repatriation. The detention serves the order for deportation or extradition; it is not an end in itself. The Human Rights Committee (HRC) has adopted the same position on the application of Art.9 (1), ICCPR. In *Jalloh v. the Netherlands*²⁷, it concluded that there was no violation, because once a reasonable prospect

²² Concerns have been expressed that points 1 and 2 are too far reaching. See Jesuit Refugee Service, *Detention in Europe. Administrative Detention of Asylum-seekers and Irregular Migrants*, 17 October 2005, Para.19.8.

²³ Ilareva, Valeria, Bulgaria’s Treatment of Asylum Seekers, *Forced Migration Review*, issue 29, December 2007, <http://www.fmreview.org/FMRpdfs/FMR29/FMR29.pdf>, page 60-61

²⁴ See, for example, *Quinn v. France*, European Court of Human Rights, Application number 18580/91, judgment as of 22 March 1995, Paragraph 48; *Bordovskiy v. Russia*, European Court of Human Rights, Application number 49491/99, judgment as of 8 February 2005, Paragraph 50

²⁵ *Chahal v. the United Kingdom*, European Court of Human Rights, case number 70/1995/576/662, judgment as of 15 November 1996, Paragraph 113

²⁶ Proposed EU Return Directive, A6-0339/2007, 20.09.2007, Amendment 59; Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), *Commentary on the Twenty Guidelines on Forced Return*, published in September 2005, Commentary on Guideline 7

²⁷ Communication No794/1998, final views of 23 March 2002

of expelling the foreigner no longer existed, his detention was terminated. The HRC also points out that Art.9 ICCPR excludes detention for extended periods when deportation might be impossible²⁸. This attitude has also been adopted in the proposed EU Return Directive²⁹.

Under Art.44, para.6 of the Law on the Foreigners in the Republic of Bulgaria, “the organ that issued the deportation or expulsion order, might, according to its discretion, order the coercive accommodation of the foreigner in a specialized home until the obstacles to the implementation of the forced return cease to exist”. If the legal provision is interpreted literally, the only material law requirements, in order for detention to be lawful, are a removal order and obstacles to its implementation. In its decision as of 22/10/2007 in a case in which the appellant complained that the detention order against him contained no reasoning, the court in Sofia dismissed the appeal and concluded that the detention order was reasoned, because it stated that it was issued in relation with a deportation order, it stated the legal provisions on the basis of which it was issued (the above cited law) and it stated that the “accommodation” was to take place until the obstacles for the deportation ceased to exist³⁰. The law and the judicial decision take into account only the general lawfulness grounds to detain. However, there are no guarantees against arbitrariness, unless individualized reasons for depriving a person from his/her liberty are provided. When such a fundamental human value as liberty is at stake, it worths making an effort and passing the second step of the proportionality test.

2. Individual reasons for the lawfulness of the detention

The following section will examine the individual reasons that allow passing the proportionality test against arbitrary deprivation of liberty in immigration law. Detention can be imposed only if at least three groups of circumstances are cumulatively present: failure of voluntary return, a risk of absconding or a proven security threat, and failure of non-custodial measures.

In its judgment in the case of *Amuur v. France* the European Court of Human Rights points out that where the “lawfulness” of detention is in issue the Convention essentially refers to substantive and procedural rules of national law, “but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness”. The words “in accordance with a procedure prescribed by law” “also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention”. The Court found that France had breached Article 5, paragraph 1, ECHR, since the French legal rules in force at the time “did not sufficiently guarantee the applicants’ right to liberty”. The Court highlighted that “there must be adequate legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention”³¹.

According to the Human Rights Committee, “the notion of “arbitrariness” must not be equated with “against the law”, but be interpreted more broadly to include such elements as inappropriateness and injustice ... proportionality becomes relevant in this context ... For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of

²⁸ Concluding Observations relating to the United Kingdom, (2001) UN doc. CCPR/CO/73/UK, para.16

²⁹ Proposed EU Return Directive, A6-0339/2007, 20.09.2007, Amendment 61

³⁰ Sofia City Administrative Court, Decision as of 22/10/2007 in Case number 1956/2007, page 3

³¹ *Amuur v. France*, European Court of Human Rights, case number 17/1995/523/609, judgment as of 20 May 1996, Paragraphs 50, 53 and 54; Reiterated in *Dougoz v. Greece*, European Court of Human Rights, Application number 40907/98, judgment as of 6 March 2001, Paragraph 55

cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.”³²

The spirit of these judicial decisions has been endorsed with political consensus in Europe. According to the Twenty Guidelines on Forced Return, adopted by the Committee of Ministers of the Council of Europe, a person may be deprived of his/her liberty only after a careful examination of the necessity in each individual case is made and if non-custodial measures are not applicable.³³ These Guidelines are to be given binding legal force in the Member States of the European Union through the adoption of the proposed EU Return Directive. According to Article 14, Para.1, as amended by the European Parliament, a person may be detained only if there is a return decision or a removal order against him/her and “where a judicial authority or competent body has serious grounds to believe that there is a risk of absconding, a proven threat to public order, public security or national security and where it would not be sufficient to apply less coercive measures”. According to Recital 6 of the proposed EU Return Directive, “voluntary return should be preferred over forced return and a period for voluntary departure should be granted”.

Therefore the individual approach in assessing the necessity to deprive a person of his/her liberty has become an essential part of the proportionality test against arbitrariness. This individual examination shall make sure that detention is imposed only if at least three groups of circumstances are cumulatively present: failure of voluntary return, a risk of absconding or a proven security threat, and failure of non-custodial measures.

2.1. Failure of voluntary return

Although this issue lies closer to the question of forced return (removal order) rather than detention, it is listed here because of the direct link between the latter two and because of the existing state practice in which the difference between a return decision and a removal order is blurred. In Bulgaria a situation of irregular stay is usually followed by a removal order (deportation or expulsion), without a chance for the foreigner to voluntarily return with dignity. The removal orders are issued with a ruling for preliminary execution which means that they enter into force immediately. On that basis, the removal order is usually accompanied by an order for detention. That is, the foreigner is detained even if he/she intends and is able to return voluntarily.

Article 6, Para.2 of the proposed EU Return Directive stipulates that as a matter of principle, the return decision shall provide for an appropriate period for voluntary departure of at least four weeks. There is a possibility to extend that period or refrain from setting any time limit, taking into account the specific circumstances of the individual case. To guarantee effective return, states should provide material assistance and counseling. Certain obligations aimed at avoiding the risk of absconding, such as non-custodial measures, may be imposed during the period for voluntary return. An exception to this principle is allowed only if a judicial or administrative organ has objective reasons to believe that the person will abscond or that he/she poses a threat to public order, public security or national security.

2.2. Risk of absconding or a proven threat to public order, public security or national security

Failure of voluntary return does not automatically indicate a need for detention. Stricter measures might be considered only if a circumstance from the second group of “individual

³² A. v. Australia, Communication No.560/1993, UN Doc.CCPR/C/59/D/560/1993 (1997), 30 April 1997, Para. 9.2 and 9.4.

³³ Council of Europe Committee of Ministers, Twenty Guidelines on Forced Return, 4 May 2005, Guideline 6, Paragraph 1

reasons” is also present: risk of absconding or a proven security threat. For example, this will be the case when the time limit for departing from the territory has passed *and* the foreigner has changed his/her residence without notifying the authorities of a change of address.

The proposed EU Return Directive provides a legal definition of the term “risk of absconding”. It means “the existence of serious reasons, defined by individual and objective criteria, to believe that a third-country national who is already subject to a return decision or a removal order might abscond; the risk of absconding shall not automatically be deduced from the mere fact that a third-country national is illegally resident on the territory of a Member State.”³⁴

With regard to the so-called “security threat” ground, an important safeguard in its application is the requirement for it to be proved.

2.3. Failure of non-custodial measures

The presence of the circumstances enumerated in sections 2.2.1 and 2.2.2 is not yet sufficient to justify deprivation of liberty. If less invasive non-custodial measures can ensure compliance with the removal order, there is no need to resort to detention. The UNHCR Guidelines also state that there should be a presumption against detention. “Where there are monitoring mechanisms which can be employed as viable alternatives to detention (...), these should be applied **first** unless there is evidence to suggest that such an alternative will not be effective in the individual case”³⁵ “Detention should only be resorted to where other measures have failed or if there are reasons to believe that they will not suffice.”³⁶

In its views of 13/11/2002 on Communication No900/1999, the Human Rights Committee found Australia in breach of Art.9 (1) ICCPR and noted: “the State party has not demonstrated that, in the light of the author’s particular circumstances, there were not less invasive means of achieving the same ends”.

The question as to which are these less invasive measures arises. The Council of Europe³⁷, the European Union³⁸ and UNHCR³⁹ have been unanimous to suggest that alternatives to detention are regular reporting to the authorities (e.g., to the closest police station), an obligation to stay at a designated address or region and release on bail (deposit of a financial guarantee). UNHCR and CAHAR⁴⁰ also include provision of guarantor/surety. Another non-custodial measure, on which the European Union and CAHAR agree, is handing over of documents (i.e. surrendering the passport or other identity documents to the authorities).

These measures constitute restrictions to the rights to move freely and to choose one’s residence or to the right to respect for private life. In its commentary on Guideline 6, Para.1, CAHAR highlights that it is therefore important to ensure lawfulness of their application, that is, to respect the conditions defined in Article 2 (4) of Protocol No4 to the ECHR and Article 8 (2) ECHR.

³⁴ Proposed EU Return Directive, A6-0339/2007, 20.09.2007, Amendment 19, Article 3, point (ga)

³⁵ The UNHCR Guidelines on Detention, Guideline 3, Para.2

³⁶ Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), *Commentary on the Twenty Guidelines on Forced Return*, published in September 2005, Commentary on Guideline 6 (1)

³⁷ Council of Europe Committee of Ministers, *Twenty Guidelines on Forced Return*, 4 May 2005, Guideline 6, Paragraph 1

³⁸ Proposed EU Return Directive, A6-0339/2007, 20.09.2007, Art.14, Para.1

³⁹ The UNHCR Guidelines on Detention, Guideline 4

⁴⁰ Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), *Commentary on the Twenty Guidelines on Forced Return*, published in September 2005, Commentary on Guideline 6 (1)

The establishment of the two step proportionality approach to detention comes as a crucial tool to cope with a dangerous gap in national immigration law. The United Nations Special Rapporteur on the Human Rights of Migrants alarms that “the high degree of discretion and the broad power to detain accorded to immigration and other law enforcement officials can give rise to abuses and to human rights violations”⁴¹. As mentioned above, under Bulgarian law⁴² the administrative organ “might, according to its discretion,” order detention of the immigrant when there is a deportation or expulsion order against him. The large margin of discretion is limited only by the requirement for the existence of a deportation or expulsion order against that person. The latter seems to constitute the narrow scope of judicial review under national law. Recently there is an increasing tendency for Bulgarian courts to declare judicial review of the reasons for issuing a detention order inadmissible. In a decision as of 15/11/2007 the court in Sofia finds that the law gives the administrative organ “free discretion” to order detention. “Therefore, the argument of the appellant that the administrative organ did not apply the more lenient measure provided for in law – daily reporting to the local police station – is totally dismissed because, on the one hand, the discretion of the choice of a measure belongs to the administrative organ and it cannot be subjected to judicial control. On the other hand, if the administrative organ finds that there are grounds to apply the more lenient measure, it has the procedural possibility to repeal the detention order and to issue an order for daily reporting to the local police station, but whether it will do so is outside the scope of the current judicial proceedings and outside the scope of judicial review.”⁴³ This trend in the jurisprudence is indicative of the need for a change in national law while in the meantime law enforcement officials should bear in mind the human rights obligations of Bulgaria under international law.

III. Rights of the detainees: procedural safeguards and detention conditions

Rights to which persons deprived of their liberty are entitled could be divided in two groups: procedural safeguards and detention conditions.

1. Procedural safeguards

The following section will examine in more detail the right to be informed, the right to appeal the detention order, the right to access to a lawyer, the right to periodic review of detention and the right to compensation for damages. It will also draw attention to the rights possessed by certain vulnerable groups of persons.

The aim of procedural safeguards is to prevent arbitrary deprivation of liberty. The European Court of Human Rights has reiterated that where “the lawfulness” of detention is in issue, including the question whether “a procedure prescribed by law” has been followed, the Convention “requires in addition that any deprivation of liberty should be keeping with the purpose of Article 5, namely to protect the individual from arbitrariness”⁴⁴. Thus in the case of *Conka v. Belgium* the Court ruled that there was a violation of Art.5 (1), ECHR, when the state authorities used misleading notices to make foreigners come to the police station so that

⁴¹ Report of the Special Rapporteur on the Human Rights of Migrants at the United Nations Commission on Human Rights, E/CN.4/2003/85, 30 December 2002, para.22

⁴² Art.44, para.6 of the Law on the Foreigners in the Republic of Bulgaria

⁴³ Sofia City Administrative Court, Decision as of 15/11/2007 in Case number 2781/2007, page 4,5; The same arguments can be found in earlier decisions of the court, e.g. Decision as of 22/08/2007 in Case number 2200/2007.

⁴⁴ *Chahal v. the United Kingdom*, European Court of Human Rights, case number 70/1995/576/662, judgment as of 15 November 1996, Paragraph 118; *Dougoz v. Greece*, European Court of Human Rights, Application number 40907/98, judgment as of 6 March 2001, Paragraph 54; *Conka v. Belgium*, European Court of Human Rights, Application number 51564/99, judgment as of 5 February 2002, Paragraph 39

they could detain them. In the Court's view, the rule of law "must also be reflected in the reliability of communications..., irrespective of whether the recipients are lawfully present in the country or not."⁴⁵ In the cases of "overstayers" in Bulgaria, authorities often detain them after they voluntarily appear at the Migration Directorate following a notice calling them in order to arrange their status. In addition to the frustration caused by detention and prospective removal, along with the fact that they have not been given a chance to go home and prepare their luggage, these people must live also with the annoyance that they have been deceived by the law enforcement officials. If the State requires respect for its orders, authorities should not abuse the trust in them.

1.1. The right to be informed

1.1.1. The right to be informed on the reasons for the detention

According to Art.5 (2) of the ECHR, everyone who is detained shall be informed promptly, in a language, which he/she understands, of the reasons for his detention. Art.9 (2) of the ICCPR and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment⁴⁶ (hereinafter referred to as "the UN Body of Principles") stipulate that the information should be provided "at the time of arrest".

The phrase "in a language which he/she understands" encompasses two important safeguards. On the one hand, it refers to the obligation to present the information either in written form in a translated document, or to interpret it orally into a national language that the person concerned understands⁴⁷. On the other hand, it means that the detainee must be told, in simple, non-technical language, the essential legal and factual grounds for his/her arrest⁴⁸. The UNHCR Guidelines use the expression "in a language *and terms* which they understand"⁴⁹ thus highlighting the second safeguard for the implementation of this right.

Respect of the right to be informed is a pre-requisite for the exercise of the right to judicial review under Art.5 (4), ECHR. Having understood the reasons of detention, the person is able, if he/she sees it fit, to challenge its lawfulness in court.

Unfortunately in Bulgaria there are numerous cases of people who spend months in detention before they manage to get access to the order for their detention and the reasons for its issuance. In the above cited cases from the recent jurisprudence of the court in Sofia, the judicial decision as of 22/10/2007 concerns a detention order which was effectuated as of 17/08/2006 and the judicial decision as of 15/11/2007 concerns a detention order dating from 15/06/2006. In both cases the appeals were admitted for consideration because the administrative organ failed to prove that it had given the orders to the detainees or informed them thereof.

1.1.2. The right to be informed on the rights in connection with the detention order

The above mentioned safeguards as to promptness and accessibility refer also to the information provided on rights in connection with the detention order. "Member States are advised to ensure that the person detained be promptly informed of his/her rights as granted

⁴⁵ *Conka v. Belgium*, European Court of Human Rights, Application number 51564/99, judgment as of 5 February 2002, Paragraph 42

⁴⁶ United Nations General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by resolution 43/173 of 9 December 1988, Principle 10

⁴⁷ Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), *Commentary on the Twenty Guidelines on Forced Return*, published in September 2005, Commentary on Guideline 6 (2), point 1; The UN Body of Principles, Principle 14

⁴⁸ *Conka v. Belgium*, European Court of Human Rights, Application number 51564/99, judgment as of 5 February 2002, Paragraph 50

⁴⁹ The UNHCR Guidelines on Detention, Guideline 5 (i)

under the national regulations, beyond the minimal information that must be provided under Article 5(2) ECHR.”⁵⁰ Principle 13 of the UN Body of Principles stipulates that the detainee shall be provided “with information on and an explanation of his rights and how to avail himself of such rights”. These include, in the first place, information on the possible remedies against the detention order⁵¹, on the right to legal counsel⁵², on the right to communication with a consular post or the diplomatic mission of the state of nationality⁵³.

The obligation of the authorities to inform the detainees of these rights on arrival in temporary custody facilities has been enshrined in Art.15, Para.1 of the proposed EU Return Directive⁵⁴. The European Committee for the Prevention of Torture (CPT) notes in this regard that “rights of persons deprived of their liberty will be of little value if the persons concerned are unaware of their existence”⁵⁵ Furthermore, the CPT has taken the view that “immigration detainees should be systematically provided with a document explaining the procedure applicable to them and setting out their rights.”⁵⁶

1.2. Right of access to a lawyer

A person deprived of his/her liberty is entitled to the assistance of a legal counsel from the very outset of the arrest. The detainee shall be informed of this right promptly to ensure that the remedy against unlawful detention is effective: Article 5 (4), ECHR, provides for a *speedy* process.⁵⁷ If the person is unable to afford to pay a lawyer, he/she shall be entitled to free legal aid assigned to him/her by the authorities “in all cases where the interests of justice so require”⁵⁸. The detainee shall be allowed adequate time and facilities for consultation with the legal counsel in conditions of full confidentiality. Their conversations may be within sight, but not within the hearing of a law enforcement official.⁵⁹

The above enumerated guarantees are based on the presumption that the lawyer has access to the order for detention and the reasons for its issuance. If that is not the case, the lawyer’s hands are tied. A grave problem currently in Bulgaria is that even lawyers are refused access to the orders of the detainees at the center in Sofia. The official explanation, given to the Sofia Bar for that, is that the executive who has been in charge of the detention center since its creation does not have the hierarchy rank to authorize access to the detention orders, although they are physically in the files in the same building. Lawyers are made to submit

⁵⁰ Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), *Commentary on the Twenty Guidelines on Forced Return*, published in September 2005, Commentary on Guideline 6 (2), point 2

⁵¹ Council of Europe Committee of Ministers, *Twenty Guidelines on Forced Return*, 4 May 2005, Guideline 6, Paragraph 2; United Nations Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, E/CN.4/2000/4 of 28 December 1999, Annex II: Deliberation No5 “*Situation Regarding Immigrants and Asylum Seekers*”, Principle 8

⁵² The UN Body of Principles, Principle 17; The UNHCR Guidelines on Detention, Guideline 5 (ii)

⁵³ Article 36, paragraph 1 (b) of the Vienna Convention on Consular Relations of 24 April 1963; See *Germany v. United States of America (LaGrand Case)*, International Court of Justice, judgment of 27 June 2001; *Mexico v. United States of America (Avena and Other Mexican Nationals Case)*, International Court of Justice, judgment of 31 March 2004; United Nations General Assembly, The UN Body of Principles, Principle 16 (2)

⁵⁴ “*On arrival in temporary custody facilities, they shall be informed that they may without delay establish contact with legal representatives, family members and competent consular authorities as well as with relevant international and non-governmental organisations.*”

⁵⁵ European Committee for the Prevention of Torture, 12th General Report, CPT/Inf(92)3, Para.44

⁵⁶ European Committee for the Prevention of Torture, 7th General Report, CPT/Inf(97)10, Para.30

⁵⁷ Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), *Commentary on the Twenty Guidelines on Forced Return*, published in September 2005, Commentary on Guideline 6 (2), point 3

⁵⁸ The UN Body of Principles, Principle 17(2)

⁵⁹ The UN Body of Principles, Principle 18

applications for copies of the detention orders before the Director of the Migration Directorate. The addressees of the orders wait in detention and the lawyers have to provide arguments in court why the appeal is still admissible in spite of the fact that the 14-days limit to submit it has elapsed.

According to Principle 11 (2) of the UN Body of Principles, “a detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons thereof.” Otherwise the procedural safeguards remain on paper only. In the case of *Conka v. Belgium* the objection of the government, that the applicant had not exhausted the national appeal possibilities, was dismissed, because the Court found that they were inaccessible. “The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness.”⁶⁰ The facts of that case showed that the information on the available remedies handed to the applicants was printed in tiny characters and in a language that they did not understand; only one interpreter was available for a large number of people; in these circumstances the applicants did not contact their lawyer; their lawyer was informed too late of the order to be able to react; no legal assistance was offered by the authorities. The Court concluded that the applicants did not have a realistic possibility of using the appeal remedy: “The Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective”⁶¹

1.3. Right to appeal

Creation of the above mentioned obstacles to judicial review of detention orders would be discouraged if the detainee had a right to **automatic** review. The UNHCR Guidelines appeal for such a legal guarantee⁶². It is envisaged in the proposed EU Return Directive, which stipulates that detention orders shall be issued by administrative or judicial organs and, if they have been issued by administrative authorities, orders “shall be subject to review by judicial authorities within 48 hours from the beginning of the temporary custody”.⁶³

International law requires that any person deprived of his/her liberty be given an effective opportunity to be heard *promptly* by an independent authority⁶⁴. According to Art.5 (4), ECHR, and Art.9 (3), ICCPR, the detainee shall be entitled to take proceedings by which the lawfulness of his/her detention shall be decided *speedily* (ECHR) or *without delay* (ICCPR) by a court and his/her release ordered *immediately*⁶⁵ if detention is not lawful.

1.4. Periodic review of detention

The procedural safeguard under Art.5 (4), ECHR, and Art.9 (3), ICCPR, applies not only at the moment of the arrest, but also to the duration of detention. “Any detention pending removal shall be for as short a period as possible. In any case, the need to detain an individual shall be reviewed at reasonable periods of time.”⁶⁶ The two step proportionality test against arbitrariness must be made also with regard to the *continuance* of the deprivation

⁶⁰ *Conka v. Belgium*, European Court of Human Rights, Application number 51564/99, judgment as of 5 February 2002, Paragraph 43

⁶¹ *Ibid*, Paragraph 46

⁶² The UNHCR Guidelines on Detention, Guideline 5 (iii)

⁶³ Proposed EU Return Directive, A6-0339/2007, 20.09.2007, Amendment 56, Article 14, paragraph 2

⁶⁴ The UN Body of Principles, Principle 11 (1), in connection with the definition of “judicial or other authority” given in point (f) of the introduction

⁶⁵ Council of Europe Committee of Ministers, Twenty Guidelines on Forced Return, 4 May 2005, Guideline 9, Paragraph 1

⁶⁶ Council of Europe Committee of Ministers, Twenty Guidelines on Forced Return, 4 May 2005, Guideline 8; The UNHCR Guidelines on Detention, Guideline 5 (iii)

of liberty. This need arises because of **the purpose of the detention**⁶⁷. As mentioned above, immigration detention does not aim to punish the person, but to facilitate his/her removal. Among the factors taken into account in determining whether the deprivation of liberty is still lawful are the reasons for detention, the length of time for which detention has already taken place and for which it is likely to continue, lack of diligence with regard to the removal proceedings, and the existence of alternatives to detention. The review procedure shall be “simple and expeditious”⁶⁸.

Bulgarian judges have been sensitive to cases of indefinitely prolonged detention and have found it unlawful in many cases. The Supreme Administrative Court of Bulgaria has stated in a related case that “the abnormal length of the time, throughout which no effective measures for the deportation of the person were taken, reflects on the lawfulness of his factual detention and constitutes in its essence imposition of a punishment ‘deprivation of liberty’”⁶⁹. The decision on the case cited was issued during the proceedings on the *initial* appeal against the detention order while in the meantime the person waited detained. As mentioned earlier, the detention orders in Bulgaria are executed from the moment of serving them to their addressees. For example, on 24 August 2007, in a ruling on an application to cease the preliminary execution of the detention during the pending judicial procedure on the *first* appeal against the order, the court in Sofia found that from the factual detention of the foreigner to that moment a period exceeding two years had elapsed and no respective measures for deportation were taken, which was in “grave contradiction to Art.5 (1) (f), ECHR.”⁷⁰ In a ruling with regard to a similar application to cease the preliminary execution of another detention which had lasted for over 27 months, the court allowed it with the argument that the administrative organ had not provided reasoning as to the need to impose preliminary implementation of the order⁷¹. This jurisprudence is both favorable and unsettling. It shows good will on the side of the judiciary to stop indefinite detention, but at the same time, the fact that it concerns *first* appeal of detention reveals the flaws mentioned in the earlier paragraphs as to the obstacles to exercising the right to appeal and the non-availability of speedy protection.

All of these rulings of the court were made during the procedure of first review of the lawfulness of a detention order. In all those cases the long time that had passed influenced the findings of the court.

The right examined in this section refers to a *subsequent* review of detention in cases where the order was lawful at the time of its issuance. The underlying idea is that the grounds for detention may change over time and therefore *periodic* review is required⁷². Is there a possibility in Bulgaria to challenge the lawfulness of the *continuance* of detention once the detention order had been confirmed at the first appeal? Currently the answer is *no*. Once a detention order is confirmed by the court at its first appeal, there is no procedural possibility to review it in court. Under general *administrative* law, the detention order is considered a stable administrative act, which has lawfully entered into force and to which realization is owed. The order states that the foreigner is to be detained until the obstacles to his/her removal cease to exist.

⁶⁷ *Chahal v. the United Kingdom*, European Court of Human Rights, case number 70/1995/576/662, judgment as of 15 November 1996, Paragraphs 127, 129

⁶⁸ The UN Body of Principles, Principles 11 (3) and 32

⁶⁹ Supreme Administrative Court of Bulgaria, Decision №7273 from 30.06.2006 on case №4312/ 2006

⁷⁰ Sofia City Administrative Court, Ruling as of 24/08/2007 in Case number 2781/2007

⁷¹ Sofia City Administrative Court, Ruling as of 05/09/2007 in Case number 2257/2007

⁷² *Bezicheri v. Italy* (1989) 12 EHRR 210

Here it is appropriate to make a comparison with the regulation of this issue under Bulgarian *criminal* law. The pre-trial detention of defendants shall cease when the risk of absconding or of committing another crime ceases to exist. Under Art.65 of the Code on Criminal Procedure, the defendant is entitled *at any time* to take proceedings to review the pre-trial detention. The hearing on the application is scheduled within three days of its submission in the court. If the application is dismissed, a new application can be made after two months. However, the latter limitation is not applicable where there is deterioration in the health condition of the detainee. There is a maximum two-month time limit to the pre-trial detention beyond which deprivation of liberty is considered unlawful in any case. This time limit may be extended to one year where the person is accused of committing of a grave⁷³ intentional crime, and two years where the person is accused of a crime for which a punishment of at least fifteen years of imprisonment is envisaged.

Bulgarian law does not provide for a time limit to administrative detention of immigrants. So far attempts to review the continuing implementation of administrative detention orders have been dismissed by the court with the reasoning that there are no grounds for such a review in either material or procedural law. In June 2007 the Legal Clinic for Refugees and Immigrants⁷⁴ assisted several immigrants in submitting applications to the court to order their release on the ground that their detention had lasted for over six months and had ceased to serve a lawful purpose. The procedural approach chosen was a possibility under the Code on Administrative Procedure to challenge unlawful factual actions of the administrative authorities. However all applications were dismissed by the court with one and the same reasoning: the actions of the Migration Directorate to detain the immigrants were not unlawful since they were based on a detention order issued in accordance with the law and no order to repeal the detention order had been issued. With regard to the prolonged detention exceeding six months, the court stated that “the Law on the Foreigners in the Republic of Bulgaria does not establish such a time limit to discharge the right of the organ to hold the foreigner in the home as long as the removal obstacles, on which his accommodation is based, haven’t ceased to exist”⁷⁵.

Official statistics as to the number of administrative detainees and the period of their detention are lacking in Bulgaria. Amnesty International reports that in June 2007 at least 36 persons in the Sofia immigration detention center had been held there for over six months⁷⁶.

There is an urgent need for changes in the Bulgarian national law to allow for periodic review of administrative detention. In the meantime, Bulgaria should adhere to its obligations under international human rights law. As the Human Rights Committee states, “every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed.”⁷⁷ An inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.⁷⁸

⁷³ Under Bulgarian law, a “grave” crime is a crime for which the law envisages a punishment of over 5 years of imprisonment.

⁷⁴ The Legal Clinic for Refugees and Immigrants is an NGO hosted at the Law Faculty of the University of Sofia – www.lcri.hit.bg

⁷⁵ Sofia City Administrative Court, Ruling as of 24/07/2007 in Case number 2659/2007

⁷⁶ Amnesty International, Europe and Central Asia: Summary of Amnesty International's Concerns in the Region: January – June 2007 (AI Index: EUR 01/001/2007), November 2007, Country entry: Bulgaria

⁷⁷ A. v. Australia, Communication No.560/1993, UN Doc.CCPR/C/59/D/560/1993 (1997), 30 April 1997, Para.9.4.

⁷⁸ C.v. Australia, Communication No900/1999, UN Doc.CCPR/C/76/D/900/1999 (2002), 13 November 2002, Para. 8.3.

The duration of detention varies significantly throughout Europe. It ranges from several days to several weeks to several months, and in some cases is not limited at all.⁷⁹ The time limit for immigration detention in Denmark is 72 hours, in Cyprus – 8 days, in Hungary – 1 month, in France – 32 days, in Spain – 40 days, in Ireland – 8 weeks, in Italy, Estonia and Austria – 2 months, in Belgium – 2 months, extendable to 8 months, in Portugal – 60 days, in Luxemburg and Greece – 3 months, in Finland – 100 days, in Slovenia – 4 months, extendable to 6 months, in Lithuania, Slovakia and the Czech Republic – 6 months, in Poland – 1 year, in Germany and Malta – 18 months, in Latvia – 20 months, in the Netherlands – 28 days or undetermined, in the United Kingdom and Sweden – undetermined⁸⁰. According to the proposed EU Return Directive, the time limit for detention should be 3 months, extendable to 18 months “in cases in which in spite of all reasonable efforts the removal operation is likely to last longer due to a lack of co-operation on the part of the third-country national concerned or due to delays in obtaining the necessary documentation from third countries or if the person is a proven threat to public order, public security or national security.”⁸¹ Against the background of prevailing practice with regard to time limits in the EU Member States, the establishment of eighteen months as a permissible period of detention lowers the standards of human rights protection in the majority of states concerned. It is precisely with regard to this provision of the proposed directive that the European Council on Refugees and Exiles (ECRE) and Amnesty International (AI) have expressed serious concerns: “we consider the proposal to allow Member States up to 18 months to detain persons who have committed no crime shocking and excessive, and simply unacceptable as a common EU standard.”⁸² ECRE and AI cite reports that show that longer detention periods do not directly lead to more effective removals. They are therefore unnecessary and inhumane. The criteria for extending the time limit of detention to eighteen months need to include stricter guarantees for their application. Currently these are too broadly written and might open the door to abusive practices at national level.

It is indisputable that a time limit to detention should be present in national law. The position that a time limit to immigration detention is a necessary guarantee against unlawfulness has also been adopted by the United Nations bodies: “A maximum period should be set by law and the custody may in no case be unlimited or of excessive length”⁸³ It seems that now with Europe lays the responsibility of setting an example that strikes a balance between the respect for human dignity and the limitations to the right to liberty deemed necessary.

1.5. Enforceable right to compensation for damages

According to Art.5 (5), ECHR, and Art.9 (5), ICCPR, anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. Damage incurred because of acts or omissions by a public official contrary to the rights contained in

⁷⁹ Jesuit Refugee Service, *Detention in Europe. Administrative Detention of Asylum-seekers and Irregular Migrants*, 17 October 2005, www.detention-in-europe.org, para.3.1.3

⁸⁰ The data is updated as of the years 2004-2005. The source for citing it is the paper requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs “*Centres for Third Country Nationals*”, prepared by Mathieu Bietlot (GERME-Université Libre de Bruxelles), 10 July 2006, IP/C/LIBE/FWC/2005-22-SC2, pages 5, 21

⁸¹ Proposed EU Return Directive, Amendment 60, Article 14, Paragraph 4b (new)

⁸² AI/ECRE letter to LIBE Member of Parliament, 6 September 2007, Brussels, http://www.ecre.org/files/AI_ECRE_LIBE%20letter%20detention%200609071.pdf

⁸³ United Nations Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, E/CN.4/2000/4 of 28 December 1999, Annex II: Deliberation No5 “*Situation Regarding Immigrants and Asylum Seekers*, Principle 7

international law with regard to respect for liberty of person shall be compensated⁸⁴. The latter include both procedural safeguards and detention conditions.

1.6. Rights of specific groups of persons

1.6.1. Stateless persons

Stateless persons are particularly vulnerable to prolonged and indefinite detention because they do not maintain ties to a nationality willing to receive them once deportation orders have been issued. UNHCR has formal responsibility for this group of persons⁸⁵. UNHCR notes that the inability of stateless persons to return to their countries of habitual residence once having left them, has led to unduly prolonged or arbitrary detention. Similarly, individuals whom the State of nationality refuses to accept back (on the basis that nationality was withdrawn or lost while they were out of the country, or who are not acknowledged as nationals without proof of nationality, which in the circumstances is difficult to acquire), have also been held in prolonged or indefinite detention only because the question of where to send them remains unresolved. Guideline 9 of the UNHCR Guidelines on Detention stipulates that “in the event of serious difficulties in this regard, UNHCR’s technical and advisory service pursuant to its mandated responsibilities for stateless persons may, as appropriate, be sought”.

1.6.2. Protection of families (the right to respect for family life)

Family life and family unity enjoy special protection under international law⁸⁶. Detention as such separates detainees from undetained family members. Restrictive visiting rules further impede family life. The authorities must ensure that the right to respect for family life can be exercised by the detainee. If couples or family members are detained, their separation should be avoided.⁸⁷

1.6.3. Rights of children

Given the negative effects of detention on the psychological well being, children **should not** be detained⁸⁸. According to Art.3 of the United Nations Convention on the Rights of the Child, the best interest of the child shall be the primary consideration in any action taken by the State Parties.

Competent child care authorities should ensure that unaccompanied minors receive adequate accommodation and appropriate supervision. If minors do not have family members in the host country, residential homes or foster care placements may provide proper conditions for children until longer term solutions are considered.⁸⁹

If none of the alternatives can be applied and States detain children, Art.37 of the UN Convention stipulates that detention should be a last resort and then only applied for the shortest possible time. A child shall be separated from adult detainees unless it is considered in the child's best interest not to do so. As a general rule, a child shall not be separated from

⁸⁴ The UN Body of Principles, Principle 35

⁸⁵ The UNHCR Guidelines on Detention, Introduction, point 6; Guideline 9.

⁸⁶ Art. 23 ICCPR, Art.8 ECHR

⁸⁷ Jesuit Refugee Service, *Detention in Europe. Administrative Detention of Asylum-seekers and Irregular Migrants*, 17 October 2005, www.detention-in-europe.org, para.14.1.9

⁸⁸ The UNHCR Guidelines on Detention, Guideline 6; Jesuit Refugee Service, *Detention in Europe. Administrative Detention of Asylum-seekers and Irregular Migrants*, 17 October 2005, www.detention-in-europe.org, para.20.8.

⁸⁹ The UNHCR Guidelines on Detention, Guideline 6; The proposed EU Return Directive, Art.15a (4)

his or her parents against their will⁹⁰. In this relation, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with in a positive, humane and expeditious manner⁹¹. Art.22 of the Convention requires that States Parties take appropriate measures to ensure that minors who are seeking refugee status or who are recognised refugees receive appropriate assistance. A legal guardian or adviser should be appointed for unaccompanied minors⁹².

Children have a right to education and a right to leisure, including a right to engage in play and recreational activities appropriate to their age.⁹³

1.6.4. Regard for the special needs of other vulnerable groups.

The Special Rapporteur of the United Nations on the Human Rights of Migrants has expressed concerns that “administrative measures to contain irregular migration, such as deprivation of liberty, are undertaken without due regard for the individual history of migrants.”⁹⁴ This refers especially to victims of trafficking who are criminalized, detained and deported for offences committed as inevitable consequence of the violations they themselves suffered. The Special Rapporteur received information and testimonies of women and children who had been held in slavery-like conditions and had suffered physical and sexual abuse. After managing to escape from their exploiters, they were detained, suffering further traumas.⁹⁵ It is for fear of being detained and deported that undocumented immigrants often do not denounce abuses against them.

UNHCR pleads that in the cases of unaccompanied elderly persons, torture or trauma victims and persons of mental or physical disability, an examination by a qualified medician is made whether detention wouldn't adversely affect their health and well being. They should have access to medication and support by a relevant skilled professional.⁹⁶

It is difficult to imagine a civilized state of the rule of law to keep in detention these vulnerable people, but since it is a fact of life, at least proper legal guarantees should be established with regard to preserving a degree of dignity in this situation. The Special Rapporteur of the United Nations on the Human Rights of Migrants advocates for including special provisions in national legislation regarding administrative detention of vulnerable groups, “such as children, pregnant women, the elderly and the physically and mentally ill”. The Special Rapportuer notes that in these cases the harm inflicted seems to be wholly disproportionate to the policy aims of immigration control.⁹⁷

2. Detention conditions

The following section will search for solutions to the most frequent human rights violations taking place with regard to the detention conditions of immigrants in Bulgaria. Special attention is dedicated to guarantees for the lawfulness of disciplinary punishments, the rights

⁹⁰ United Nations Convention on the Rights of the Child, Art.9

⁹¹ United Nations Convention on the Rights of the Child, Art.10

⁹² The UNHCR Guidelines on Detention, Guideline 6; Jesuit Refugee Service, *Detention in Europe. Administrative Detention of Asylum-seekers and Irregular Migrants*, 17 October 2005, www.detention-in-europe.org, para.14.1.8.

⁹³ Council of Europe Committee of Ministers, Twenty Guidelines on Forced Return, 4 May 2005, Guideline 11, Paragraph 3; The proposed EU Return Directive, Art.15a (3)

⁹⁴ Report of the Special Rapporteur on the Human Rights of Migrants at the United Nations Commission on Human Rights, E/CN.4/2003/85, 30 December 2002, Para.66

⁹⁵ *Ibid.*, para 42

⁹⁶ The UNHCR Guidelines on Detention, Guideline 7

⁹⁷ Report of the Special Rapporteur on the Human Rights of Migrants at the United Nations Commission on Human Rights, E/CN.4/2003/85, 30 December 2002, Para.43

of the detainees to receive visits, the right to engage in meaningful activities during detention and the right to health.

Conditions of detention must be humane, with due respect shown for the inherent human dignity of the person. Art.7, ICCPR, and Art.3, ECHR, stipulate that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Certain conditions of detention can amount to such treatment, as the case of *Dougoz v. Greece* illustrates. The European Court of Human Rights found Greece in breach of Art.3, ECHR, in this case, because the detention conditions where the applicant was held, combined with the length of period during which he was detained in such conditions, amounted to degrading treatment.⁹⁸

The climate of hostility fostered by the immediate administrative supervisors of the detainees (officially called “interviewers”) at the Sofia detention center and their disdainful attitude towards the immigrants is the most immediately pervasive negative characteristic of the conditions experienced by detainees. The detained are divided into groups “supervised” by young female officials of the Migration Directorate at the Ministry of the Interior. They treat the immigrants rudely and shout at them with offensive qualifications. The “interviewers” prevent a responsive reaction to their provocations by threatening the detainees with disciplinary punishments among which the solitary confinement in the isolator is frequently used. The fact that one is treated as a criminal or an inferior human being and the constant instilling of guilt are the worst part of the psychological burden of detention. This is further aggravated by the fact that the prevailing male population of the detention center is humiliated by young girls vested with official powers. Apparent lack of acknowledgement of universally recognized rights concerning respect of religion aside, placing a predominantly male (and significantly Muslim) population under the effective control of young female officers, can also aggravate trends towards psychological breakdown among migrant populations, well documented elsewhere.⁹⁹

Lawfulness of disciplinary punishments

Disciplinary measures at the Sofia detention center frequently violate the rights of detainees, and are regularly applied through arbitrary determination. Perhaps this is best illustrated with a recent case: following a complaint by two “junior specialists” for aggressive shouting at and personal offense, on 28 May 2007, Khaled¹⁰⁰, a Chechen asylum seeker, was put in the isolator as a disciplinary punishment. He was not provided any legal justification for the imposition of this measure. He was only told that he would stay in solitary confinement until he signed a declaration admitting that he had breached the internal rules of the center (which he had never seen) and promising that he would not do that again.

⁹⁸ *Dougoz v. Greece*, European Court of Human Rights, Application number 40907/98, judgment as of 6 March 2001, Paragraph 46, 48

⁹⁹ See CRISP, J. (2003) *No Solutions in Sight: The Problem of Protracted Refugee Situations in Africa*, Geneva, Office of the United Nations High Commissioner for Refugees. Evaluation and Policy Analysis Unit; ERUESTO, J. (2002) The Breakdown of Cultures in Refugee Camps. *Forced Migration Review*, 14, 20.; INDRA, D. M. (Ed.) (1999) *Engendering Forced Migration: Theory and Practice*, New York; Oxford, Berghahn.; ROWE, M. T. (2007) The Experience of Protest: Masculinity and Agency Among Young Male Sudanese Refugees in Cairo. *Sociology-Anthropology*. Cairo, The American University in Cairo.; LAMMERS, E. (1999) *Refugees, Gender and Human Security: A Theoretical Introduction and Annotated Bibliography*, Utrecht, International Books.; TURNER, S. (1999) Angry young men in camps: gender, age and class relations among Burundian refugees in Tanzania. *New Issues in Refugee Research Working Paper No. 9*. Geneva, United Nations High Commissioner for Refugees

¹⁰⁰ This name has been changed to protect the participant.

In the “accident” on 28 May that led Khaled to be disciplinary punished, he had tried to have his asylum application submitted. He was detained since 1 November 2006 and in spite of the numerous applications for asylum that he had sent, none of them had been registered and there was a deportation order against him. Khaled suffered torture in Russia. During the final experience, he ‘disappeared’ for seven months during which time he was interrogated daily and subjected to electric shocks, suffocation, injection of ‘panic-inducing’ substances, the squeezing of his legs between metal presses and other acts. Nevertheless, since he entered Bulgaria illegally, he was detained as an undocumented immigrant and treated as such. Khaled’s asylum application was finally registered on 30 May 2007, an asylum interview was carried out in the isolator building in the presence of a female detention center official and his application was rejected in the accelerated procedure.

Khaled refused to sign a declaration that he had breached the internal rules of the center saying that he did not know them as he had never been informed of them (they are not published) and he believed that he had not breached these rules. As a result, he was left in the isolator room - an empty cell with nothing else in it, but a camera. After the first week of solitary confinement, Khaled cut his veins and wrote with his blood on the wall “Where is my freedom”. This act was used as an argument for prolonging his time in the isolator, suggesting that he was “aggressive”. In June, Khaled’s lawyer submitted a court appeal under the accelerated procedure to stop the unlawful actions of holding him in solitary confinement. The court decided on the appeal as late as on 8 October 2007¹⁰¹. The judicial ruling only formally looked at whether there was an official document for the imposition of the solitary confinement, without examining its lawfulness and the duration of the application of the punishment. The court dismissed the appeal of Khaled on the ground that the actions of the administrative organ were not unlawful since they were based on a protocol for imposing the disciplinary punishment which was reasoned on the complaint by the two junior specialists. The court concluded that only if there was a protocol repealing the first protocol, the solitary confinement would be unlawful. The court further noted that although the applicant claimed that he was subjected to torture, inhuman and degrading treatment, it was unfounded because he hadn’t specialized how exactly he was tortured by the detention authorities and he hadn’t provided proofs for that. The court made this statement in spite of the undisputed evidence that Khaled hadn’t been released from the isolator cell since 28 May 2007. Khaled remained in the isolator until 30 October 2007. Since 8 November 2007 he is put again in the isolator for exhibiting “problematic behavior”. Prolonged solitary confinement lasting, thus far lasting over 5 months, already has a devastating effect on his psychological health.

The fact that in Khaled’s case the judge did not recognize the undisputed solitary confinement lasting over 4 months as torture, inhuman or degrading treatment not only reminds of the Bible verses on the hardened hearts, but also speaks of the fact that there are no provisions under Bulgarian law outlining the lawful imposition of the disciplinary punishment, its length and the defense against it. At the same time, the measure is widely used¹⁰².

Internationally agreed standards provide that “all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by or subjected to the effective control of judicial or other independent authority”¹⁰³ No circumstance whatever

¹⁰¹ Sofia City Administrative Court, Ruling as of 8/10/2007 in Case number 2494/2007

¹⁰² See the case of the fourteen persons punished by solitary confinement reported in Amnesty International, Europe and Central Asia: Summary of Amnesty International's Concerns in the Region: January – June 2007 (AI Index: EUR 01/001/2007), November 2007, Country entry: Bulgaria

¹⁰³ The UN Body of Principles, Principle 4

may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.¹⁰⁴ The types of conduct that constitute disciplinary offences, the description and duration of disciplinary punishment and the authorities that may impose such punishments shall be “specified by law or lawful regulations and duly published”. A detained person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review¹⁰⁵. According to Art.15, Para.1 of the proposed EU Return Directive, the conditions of detention shall be supervised by the judicial authorities.

Visits

One of the basic rights of persons who are deprived of their liberty is the right to receive visits¹⁰⁶. Detainees should have access to lawyers, doctors, non-governmental organizations, members of their families, international organizations, such as UNHCR, and others. They shall be able to communicate with the outside world in accordance with the rules established by law.

The regime for visitors at the immigration detention center in Sofia is stricter than the one applied in Bulgarian prisons. Visitors in prisons have daily access to the detainees, without a need for preliminary subscription. Visiting hours at the immigration center are only on Tuesday and Thursday, from 2:30pm to 4:30pm. A person from outside who wants to visit a detainee must call in advance and reserve a date and a time for a visit. Usually the places for the near future are occupied. Lawyers have access to the detainees on Monday, Wednesday and Friday –with restricted hours on Friday. Depending on the disposition and the discretion of the “interviewers” at the center, a lawyer may wait for up to an hour until she is let in the center and a client is brought for a meeting, significantly affecting the quality of attention which a detainee may receive from his or her lawyer.

Meaningful activities

Detainees shall have the opportunity to pursue meaningful activities¹⁰⁷. According to the proposed EU Return Directive, “all possibilities for giving prospects or a useful occupation” to a third country national in detention should be considered.¹⁰⁸ Principle 28 of the UN Body of Principles stipulates that the detainees shall have access to “reasonable quantities of educational, cultural and informational material”.

Immigrants detained in Sofia are taken out for a 1-2 hours daily “walk” in the asphalt yard of the detention center. However, in the weekend they stay inside the building all the time.

At the detention center in Sofia there is formally a library and a hall for watching television. However, the access to them is hardly possible because of the restricted freedom of movement within the building. Detainees say that they could pass the library ‘by chance’ when their group is escorted for the daily walk in the center’s yard, but then it is usually locked. Access to the television hall is dependent on the discretion of the police officers. Detainees often sign “petitions” asking for permission to watch certain programme or event. No radios are allowed in the center.

¹⁰⁴ The UN Body of Principles, Principle 6

¹⁰⁵ The UN Body of Principles, Principle 30

¹⁰⁶ The UN Body of Principles, Principle 19; Council of Europe Committee of Ministers, Twenty Guidelines on Forced Return, 4 May 2005, Guideline 10, Paragraph 5; United Nations Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, E/CN.4/2000/4 of 28 December 1999, Annex II: Deliberation No5 “*Situation Regarding Immigrants and Asylum Seekers*”, Principle 10

¹⁰⁷ Jesuit Refugee Service, *Detention in Europe. Administrative Detention of Asylum-seekers and Irregular Migrants*, 17 October 2005, www.detention-in-europe.org, para.3.1.4

¹⁰⁸ The proposed EU Return Directive, Amendment 11

Health care

Health care is a fundamental human right which state authorities that deprive personal liberty shall respect. Medical care and treatment, including psychological counselling, shall be provided whenever necessary to detainees.¹⁰⁹ Article 28 of the United Nations Convention on the protection of the Rights of All Migrants Workers and Members of Their Families provides that Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

There should be initial screening of detained persons to identify persons belonging to vulnerable groups so that their special needs could be taken into account.¹¹⁰

In the case of *C. v. Australia*¹¹¹, the Human Rights Committee concluded that the continued detention of the applicant when the State party was aware of his mental condition constituted a violation of his rights under article 7, ICCPR.

Access to the doctor at the detention centre in Sofia is very difficult. The doctor's cabinet is situated in the administrative building of the detention facilities to which the detainees have no free access. Immigrants say that unless they make a scandal, they wouldn't be paid attention if they have a problem. "If you don't shout, you don't go to doctor", this is the conclusion of one of the detainees who was punished with 5-days solitary confinement for demanding to see the doctor. Detention exceeding two years had caused him chronic high blood pressure. At the end of August 2007 he received a hypertonic crisis, but the policemen ignored his appeals to be brought to the doctor. He dared to express his protest, but as a result of that he was only moved to the isolator cell. After spending a night in solitary confinement, his condition worsened and the detention officials had to bring him to the hospital. He was given medication there and then returned for another 3 days in the isolator cell.

Detailed applicable norms and standards with regard to further aspects of the treatment of detainees and the conditions of detention are elaborated in the UN Body of Principles, the UNHCR Guidelines on Detention (Guideline 10), the Twenty Guidelines on Forced Return of the Council of Europe (Guideline 10), the 1955 UN Standard Minimum Rules for the Treatment of Prisoners, the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty and in general human rights law.

IV. Conclusion

The approach that I chose to follow in this paper was a constructive search for positive/ good practices with regard to administrative detention. I have proposed and promoted a two step proportionality test to determine the legal grounds for detention and ensure respect for the human rights of detained immigrants through procedural safeguards and humane detention conditions.

Decisions in the field of immigration and asylum involve politics and there is a constant struggle between the preservation of individual rights and the state's claim to control its borders. As any struggle, however, it should be a fair one. Fairness involves transparency. People should have true information as to the financial and human cost of detention. Detention centers are built and maintained with the money of the tax payers. Estimates made

¹⁰⁹ UN Body of Principles, Principle 24; UNHCR Guidelines on Detention, Guideline 10 (v)

¹¹⁰ UNHCR Guidelines on Detention, Guideline 10 (i)

¹¹¹ Communication No900/1999, UN Doc.CCPR/C/76/D/900/1999 (2002), 13 November 2002, Para. 8.4.

in Germany and Italy show that detention is very expensive. The detention of one person for one month in Bologna was estimated to cost 2,670 Euros, far greater than the average monthly household income in Italy.¹¹² We should ask ourselves a basic question: who has an interest in the existence of administrative detention centers?

There is an increasing trend in Europe to subcontract the management of detention centers to private companies¹¹³. A detention center creates jobs and business opportunities for many people. It is fair to make an objective assessment whether deprivation of liberty truly serves higher national interests or there are too many particular interests involved.

The United Nations Special Rapporteur on the Human Rights of Migrants recommends that “Governments should consider the possibility of progressively abolishing all forms of administrative detention. When this is not immediately possible, Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty”¹¹⁴ The European Court of Human Rights points out that “Account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country.”¹¹⁵

Precisely because these people are incarcerated although they haven’t committed a crime and in spite of that they undergo real deprivation of liberty, the guarantees for their rights should be not less than the ones established in criminal law. Immigrant detainees are people with families, lives, hopes, dreams, and most importantly, *rights*. It is not only a moral duty to protect these, it is a legal obligation.

¹¹² Observation and Position Document of the Jesuit Refugee Service, *Detention in Europe. Administrative Detention of Asylum-seekers and Irregular Migrants*, 17 October 2005, www.detention-in-europe.org, 3.1.9

¹¹³ Mathieu Bietlot, “Centres for Third Country Nationals”, (GERME-Université Libre de Bruxelles), 10 July 2006, IP/C/LIBE/FWC/2005-22-SC2, page 3

¹¹⁴ Report of the Special Rapporteur on the Human Rights of Migrants at the United Nations Commission on Human Rights, E/CN.4/2003/85, 30 December 2002, Paras. 74 and 75

¹¹⁵ *Amuur v. France*, European Court of Human Rights, case number 17/1995/523/609, judgment as of 20 May 1996, Paragraph 43