VIOLATION OF RIGHT TO LIBERTY AND SECURITY IN THE ASSESSMENT OF CLAIMS FOR ASYLUM[1]

Nataša Hrnčárová

Introduction

The European Union's asylum *acquis* has been built on the common understanding that some of those third country nationals who seek to enter the territory of the European Union have a well-founded fear of persecution[2] or, due to the real risk of suffering serious harm[3] they cannot return to their country of origin. Their background distinguishes them clearly from other migrants and has made it necessary to provide them with a special protective status. It can be assumed that, within the European Union, there exist different but overlapping legal institutions for those third country nationals seeking international protection in the European Union and are in need of international protection for the above-mentioned reasons. The most important ones are the 1951 Geneva Convention

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2 For the purpose of the EU's asylum *acquis*, the following situations that amount to severe violations of basic human rights are deemed to constitute "persecution" when they are based on considerations of race, religion, nationality, membership of a particular social group or political opinion: physical or mental violence, including acts of sexual violence; legal, administrative, police or judicial measures that are discriminatory; prosecution or punishment applied in a disproportionate or discriminatory manner or for refusal to perform military service that would include extremely serious crimes, such as war crimes and crimes against humanity; denial of judicial redress resulting in disproportionate or discriminatory punishment; acts of gender-specific or child-specific nature. It is immaterial whether the applicant actually possesses the characteristics on which the discrimination is based; it is sufficient that such characteristics are attributed to him/her by the persecuting parties. Equally, it is immaterial whether the applicant comes from a country in which many or all face the risk of generalized oppression.

3 For the purpose of the EU's asylum *acquis* a real risk of suffering "serious harm," means: torture or inhuman or degrading treatment or punishment; death penalty or execution; serious and individual threat to the life of a military person or a civilian as a result of indiscriminate violence arising in situations of international or internal armed conflict.

relating to the Status of Refugees (the Convention), the Law of the European Union (the Convention's Protocol of 1967), and the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and its protocols.

In the times when the Convention was drafted and agreed upon, and in its first years of application, the recognition of a foreigner as a refugee in Europe was not a large problem.[4] However, in the recent decades European Union states have been increasingly reluctant to recognize people in need of protection as "refugees" in accordance with the Convention. While the Convention remains an effective instrument which provides essential benefits[5] to people who are recognized as falling within its ambit by governments of European Union member states, the number eligible for its protection is steadily decreasing. In addition, it is upon each state's consideration whether asylum is granted. Even if not actually expelled, those who are refused recognition as refugees and are not otherwise provided with the appropriate subsidiary international protection are often left in situations of legal uncertainty. While there is no doubt that the right of every state to admit or exclude foreigners from its territory is a key attribute of national sovereignty,[6] states have to admit third-country nationals onto their territory in situations when exclusion from the state territory would constitute a breach of different provision(s) of international law. The concept of asylum is the most important example of such provision. The Convention considers those who are recognized as falling within the scope of its protection as a privileged group of non-EU nationals. Consequently, it provides them with a comprehensive bundle of rights.

I. The Convention's Provisions for the Detention of Asylum Seekers

Some of the recent administrative actions taken to inhibit migrants from entering the European Union territory have made it considerably difficult for refugees to apply for asylum. In principle, refugees who have entered a state

4 For example, the United Nations High Commissioner for Refugees (UNHCR) saw no need to produce any handbook to guide the process of asylum determination procedures until 1979.

5 Article 18 of the Charter of Fundamental Rights of the European Union guarantees the right to asylum.

6 See, for example, Salah Sheekh v. the Netherlands, application no. 1948/04, ECtHR judgment of January 11, 2007, § 135.

without a valid permit should not suffer administrative sanctions due to their illegal stay in the European Union. Similarly, restrictions of freedom of movement may take place only under exceptional circumstances. The Convention prescribes clearly in Article 31 that: *"Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who (...) enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."* This position was further clearly acquiesced by the Council of Europe's Committee of Ministers in 2003 when it adopted Recommendation *Rec (2003)* 5 to the member states on measures of *detention* of asylum seekers. In 2005 the European Union also expressly accepted this principle in Article 18 of the Council Directive 2005/85/EC on minimum standards on procedures for granting and withdrawing refugee status (Procedural Directive) which states that European Union member states shall not hold a person in detention for the sole reason that he/she is an applicant for asylum. Despite these adopted principles, European Union member states are often reluctant to permit individuals who cannot be immediately expelled to move freely in their territory. This is for a variety of reasons, including the intention to prevent these people from traveling further.

The European Court of Human Rights ("ECtHR") has repeatedly emphasized that Article 5 of the ECHR regulates the right to liberty and security of the person and embodies a key element in the protection of an individual's human rights. In this regard, the right to liberty is one of the fundamental principles of a democratic society that states must strictly observe. The underlying aim of Article 5 is to ensure that no one is deprived of his/her liberty in an arbitrary fashion. Another relevant provision of the ECHR is Article 2 of Protocol 4, which is the right to freedom of movement. It stipulates that everyone lawfully within the territory of a state shall have the right to liberty of movement and that every person shall be free to leave any country. This is a "qualified right" under the ECHR, which means that states are allowed to interfere with this right only under certain specific circumstances. All of these rights, enumerated in Article 5 and Article 2 of ECHR as appropriate, apply to asylum seekers. The Committee of Ministers of the Council of Europe in 2003 issued recommendations to the governments of the member states to be applied in their legislation and administrative practice. This recommendation emphasizes that penalties shall not be imposed on persons seeking international protection coming directly from a country of persecution on account of their illegal entry or presence, provided

they present themselves to the authorities without delay and show good cause for their illegal entry or presence. Additionally, the Council of Europe political organs have made it clear that detention should be imposed only following a careful, specific examination of the facts and the necessity of detaining in each individual case. Asylum seekers must be afforded legal and procedural safeguards (such as judicial review and remedies) through which detention can be effectively challenged and standards of detention which respect their rights, welfare and dignity. Still, many of those seeking asylum in Europe now routinely face detention. Such detention is often lengthy, in appalling conditions, or under severe restrictions on the freedom of movement. This occurs either while asylum claims are being processed or before expulsion from the destination country if the asylum claim is rejected.

Many European Union member states are faced with the arrival of mixed flows comprising both asylum seekers and irregular migrants with no claim to international protection. ECtHR has acknowledged difficulties in regard to the reception of asylum seekers at large European airports, ports and borders, and for interception and rescue at sea. ECtHR has recognized that states have a sovereign right to control aliens' entry into and residence in their territory and that detention is an adjunct of that right. However, in doing so, ECtHR has reminded states that the provisions of the ECHR, including Article 5, must be respected. In *Amuur v. France*[7] the Court stated: *"Holding aliens in the international zone does indeed involve a restriction upon liberty [of movement], but one which is not in every respect comparable to that which obtains in centers for the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable states to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to get round immigration restrictions must not deprive asylum seekers of the protection afforded by these Conventions."* ECtHR has emphasized that a clear distinction should be made between asylum seekers and other migrants. Thus, asylum seekers should be afforded a wide range of safeguards in line with their status, going beyond those applicable to irregular migrants.

[7] *Amuur v. France*, application no. 19776/92, judgment of June 25, 1996.

II. The Variability in Interpretation of the Purpose of Detention

The Council of Europe recommendations with regard to the administrative practice of detention of asylum seekers outline that the aim of detention is not to penalize asylum seekers. It may be used only in situations when the identity of asylum seekers needs to be verified, when elements on which the asylum claim is based have to be determined, when a decision needs to be taken on their right to enter the territory of the state concerned, or when the protection of national security and public order requires so. Further, measures of detention of asylum seekers should be applied only after a careful examination of their necessity in each individual case. These measures should be specific, temporary and non-arbitrary and should be applied for the shortest possible time. Such measures are to be implemented as prescribed by law and in conformity with standards established by the relevant international instruments and by the case-law of the ECtHR. As the following legal cases demonstrate, the interpretation of these measures is highly complex and contextual.

The one migration juncture mentioned in Article 5 is in Article 5 §1 (f), which expressly covers most common third-country nationals' migration situation. This includes the arrest or detention of a person to prevent his/her unauthorized entry into the country or an entry of a person against whom action is being taken with a view to deportation or extradition. This provision applies in situations of detention to prevent a person from entering a country unlawfully. This also covers detention while a person is awaiting the execution of a decision to deport or extradite him/her. The ECtHR held that detention under (f) is not subject to a necessity test. Still, if a necessity test is required under the national law, a failure to meet the necessity test will render the detention unlawful.[8] It held in the case of *Chahal v. the United Kingdom*[9] that detention under the second limb of Article 5 §1 (f) does not have to meet the test of necessity as long as the detention is linked to an imminent expulsion. Detention under the second limb is permitted where deportation or extradition is in reality practically enforceable and is "imminent." Hence, there must be a feasible and realistic prospect of expulsion of the third-country national. (Nevertheless, while detained and while the prospect of expulsion was realistic, upon the ECtHR's decision, the

8 *Rusu v. Austria*, application no. 34082/02, ECtHR judgment of October 2, 2008.
9 *Chahal v. the United Kingdom*, application no. 22414/93, ECtHR report of June 27, 1995.

Sikh separatist was not deported to India because of the risk of violations of Article 3, in the form of torture or inhuman or degrading treatment). In *Singh v. the Czech Republic*[10] the detention was held to violate Article 5 §1(f) because the Czech authorities had failed to exercise due diligence in pursuing the necessary documentation from the Indian authorities to effect the return of the Indian migrant to that country. In *Ali v. Switzerland*[11] the Swiss similarly wanted to extradite the applicant to Somalia, but could not as he had no travel documents. Since the extradition was thus impossible, the detention could no longer be related to extradition. In *A. and others v. the United Kingdom*[12] foreign nationals were suspected of offences related to terrorism but they could not be removed to their countries of origin because it was established that they would be at risk of prohibited treatment. Hence, they were detained. The government argued that the possibility of removing them was being kept "under active review" in case the circumstances changed in their home country so their removal would be legal. The Court found that this could not be considered sufficient or determinative to amount to "*action ... being taken with a view to deportation*" and the UK lost the case. The applicants were released in March 2005 but the remaining suspects were the subject of control orders.

Saadi v. the United Kingdom[13] was the first case in which the ECtHR had to deal with detention to prevent unauthorized entry and it held that the first limb under Article 5 §1 (f) was to be interpreted widely. Hence, entry is "unauthorized" until it is authorized and detention may be applied to prevent unauthorized entry.[14] The applicant is a 29-year-old Iraqi national living in London. He fled Iraq and arrived at London Heathrow Airport on December 30, 2000, where he immediately claimed asylum and was granted "temporary admission" to entry. On the January 2, 2001, when reporting to the immigration authorities, he was detained and transferred to Oakington Reception Centre, a center which was used for those who were not likely to escape and who could be dealt with by a "fast track" procedure. On January 5, 2001, the applicant's representative telephoned the Chief Immigration Officer and was told that the reason for the

10 *Singh v. the Czech Republic,* application no. 60538/00, ECtHR judgment of January 25, 2005.

11 *Ali v. Switzerland,* application no. 24881/94, ECtHR judgment of August 5, 1998.

12 *A and others v. the United Kingdom*, application no. 3455/05, ECtHR judgment of February 19, 2009.

13 *Saadi v. the United Kingdom*, application no. 13229/03, ECtHR judgment of January 29, 2008.

14 The Court considered its approach to be consistent with Conclusion No. 44 of the Executive Committee of the UNHCR Program, the UNHCR's Guidelines on detention and the Council of Europe's Committee of Ministers' Recommendation on detention.

detention was that the applicant was an Iraqi who met the criteria to be detained at Oakington. The applicant's asylum claim was initially refused on January 8, 2001, and he was formally refused entry into the UK. He was released the next day. He appealed against this decision and was subsequently granted asylum. The applicant, together with three other Kurdish Iraqi detainees who had been held at Oakington, applied for permission for judicial review of their detention claiming that it was unlawful under domestic law and under Article 5 of the ECHR. Both the Court of Appeal and the House of Lords held that the detention was lawful in domestic law. In connection with Article 5 they both held that the detention was for the purpose of deciding whether to authorize entry and that the detention did not have to be "necessarily" compatible with that provision. They further maintained that the detention was "to prevent unauthorized entry" and that the measure was not disproportionate. The ECtHR firstly examined whether the applicant was detained in order to prevent his unauthorized entry into the United Kingdom. It came to the conclusion that, although the applicant had applied for asylum and had been granted temporary admission to the country on December 30, 2000, his detention from January 2 was nevertheless to prevent his effecting an unlawful entry because, lacking formal admission clearance, he had not "lawfully" entered the country. The ECtHR also noted that the only requirement under Article 5 § 1(f) for the detention of an individual under such circumstances was that the detention should be imposed as a genuine part of the process to determine whether the individual should be granted immigration clearance and/or asylum, and that it should not otherwise be arbitrary. The ECtHR accepted that the applicant's detention at Oakington was a *bona fide* application of the policy on "fast-track" immigration decisions. As to the question of arbitrariness, it noted that the applicant was released once his asylum claim had been refused. The detention lasted a total of seven days, which the ECtHR found not to be excessive in the circumstances. It followed that the applicant's detention from January 2–9, 2001, was not incompatible with Article 5 § 1 (f) of the ECHR. There had therefore been no violation of that provision.

III. The Necessity of Domestic Law to meet the Convention

The first sentence of Article 5 of ECHR stipulates that any *deprivation of liberty* must not be only for a purpose authorized by Article 5 §1 (a) to (f) but it also must be in accordance with a procedure prescribed by law. As ECtHR

stated in the case of *Amuur v. France*, this primarily requires any arrest or detention to have a legal basis in domestic law. However, the domestic law must meet ECHR standards: "*However, these words do not merely refer back to domestic law; like the expressions 'in accordance with the law' and 'prescribed by law' in the second paragraphs of Articles 8 to 11, they 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. Quality of law, in this context, means that a law which authorizes deprivation of liberty must be sufficiently precise and accessible to avoid all risk of arbitrariness.*"[15] ECtHR especially emphasized the need for reconciliation of the protection of fundamental rights with the requirements of states' policies on immigration and border control.

A quite systematized approach can be found in *Al-Agha v. Romania*[16] where the applicant was a Bucharest-born refugee from the Gaza strip, who later became a businessman in Romania and was unable to obtain an extension to his passport from several embassies to which he applied. The Romanian authorities declared him "undesirable" and ordered that he be detained pending removal as he was a national security risk. The details of the order and the alleged security risk were never disclosed, yet he was under arrest on this basis in the detention center of the Bucharest airport for three years and five months. The applicant was born in 1945 in Bucharest, later relocating to the Gaza Strip. In 1962 he left the Gaza Strip with an Egyptian travel document to study in Cairo. Following the 1973 Yom Kippur War, his travel documents were not renewed by the Egyptian authorities, but he obtained an Iraqi passport for Palestinian refugees, issued by the Iraqi Embassy in Tripoli. In 1993 he arrived in Romania with this passport, together with a Romanian visa, and settled there as a businessman. On July 31, 1998, the Ministry of the Interior revoked Mr. Al-Agha's right to reside in Romania and declared him "undesirable" by Order no. 779, on the basis of the law on the rules governing aliens in the former Socialist Republic of Romania. The order, however, was not immediately reinforced. On August 3, 1998, he was asked to leave the country. As he did not have a passport, Mr. Al-Agha was unable to leave Romanian territory within the prescribed time-limit.

15 *Amuur v. France*, application no. 19776/92, ECtHR judgment of June 25, 1996.

16 *Al-Agha v. Romania*, application no. 40933/02, ECtHR judgment of January 12, 2010.

On February 15, 2000, he was arrested and detained in the reception center at Bucharest Otopeni Airport for failure to comply with Order no. 779. In June 2001 the Bucharest Court of Appeal upheld an application by Mr. Al-Agha for his release, the annulment of Order No. 779 and an award of damages for unlawful detention. It noted that the applicant had not been informed that he had been declared "undesirable," but only that his obligation to leave the country was due to the expiry of his residence permit. In a final judgment of September 25, 2003, the Supreme Court held that, although Order no. 779 had not been served on the applicant since it was a secret document, he had been officially notified of its effects. It observed that he had been informed of the order's existence while in the reception center, where he had been placed in accordance with the law. Mr. Al-Agha claimed that in the center he had endured precarious conditions in terms of hygiene and that there had been a lack of healthy food and physical exercise. He had been examined twice by way of routine medical assistance after going on hunger strikes, but on several occasions he refused the treatment recommended. In February 2003 he was admitted to a hospital and underwent specialist consultations and general tests. In July 2003 Mr. Al-Agha was released as the five-year period during which he had been declared undesirable had expired. Having been granted a refugee permit, he is now living in Romania in a center managed by the National Refugee Office.

Let us now examine the case from the legal standpoint. The ECtHR assessed the situation of the applicant's detention under the first paragraph of Article 5 of ECHR. Afterwards, ECtHR considered the "lawfulness" of detention according to national law (in substantive, procedural terms and in terms of whether or not the period of detention is consistent with the purpose of Article 5 of ECHR). It states that, to be "prescribed by law," not only must detention have some basis in domestic law but it must possess the necessary "quality" in order to be compatible with the rule of law. The ECtHR ruled that Mr. Al-Agha's stay in the center for three years and five months, without any possibility of leaving except with the authorities' consent, had amounted to deprivation of liberty. Detention in a center with a view to deportation had a basis in Romanian law, and the relevant instrument satisfied the criteria of accessibility, having been published in the Official Gazette. However, although the Government had justified keeping the applicant in detention by citing a risk to national security, no proceedings had been brought against him on that account and the Romanian authorities

had not referred to any specific accusations against him. The ECtHR further noted that in any event, even where matters affecting national security were concerned, individuals could not be deprived of safeguards against risks of arbitrary conduct by public authorities. Since Mr. Al-Agha had not been afforded the minimum level of protection against such risks, his prolonged deprivation of liberty had had no legal basis satisfying the requirements of the ECHR.

IV. The Convention's Guarantees of Procedural Justice

The ECHR stipulates in its Article 5 §2 that everyone who is arrested shall be *informed promptly* in a language which he/she understands about the reasons for his/her arrest and of any charge against him/her. The ECtHR interprets this provision to mean that any arrested person must be told, in simple, non-technical language that he/she can understand, the essential legal and factual grounds for his/her arrest so he/she can apply to a court to challenge its lawfulness. However, in the 2009 case of *Eminbeyli v. Russia*, the ECtHR made it clear that, because expulsion or extradition proceedings do not fall within the ambit of Article 6, the information which a detainee under Article 5 §1(f) has to be given does not need to be as detailed as that which must be provided to those who are subject to criminal charges in the country of detention. In the *Saadi v. the United Kingdom* case (see section II above), although the ECtHR found no violation of Article 5 §1(f), it did find a violation of Article 5 §2 on the ground that the reason for detention was not given sufficiently promptly. The reason for the applicant's detention was administrative convenience for the processing of fast-track claims, but he was given no reasons at all for 76 hours after he was detained. The ECtHR agreed that general statements could not replace the need for the individual to be informed of the reasons for his arrest or detention.

In regard to access to a court and periodic reviews, Article 5 §4 states that everyone who is deprived of his/her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his/her detention shall be *decided speedily* by a court and his/her release ordered if the detention is not lawful. Article 5 §4 not only requires *access to a judge* to have the initial lawfulness of the detention decided but also requires *access to regular periodic court reviews* of the need for a continued detention. In the 2007 case of *Garabayev v. Russia* the applicant's detention pending extradition had never been reviewed

by a court, despite his complaints. The review which eventually occurred after the extradition had taken place could not be considered effective because the question of the lawfulness of the detention had been resolved only in the context of the review of the extradition procedure. He had thus been unable to obtain judicial review of his detention prior to extradition, in violation of Article 5 §4 of ECtHR, which states that the purpose of Article 5 §4 is to assure the persons who are arrested and detained the right to a judicial supervision of the lawfulness of the measure to which they are thereby subjected. The remedies must be made available during a person's detention with a view to that person's obtaining speedy judicial review of the lawfulness of the detention capable of leading, where appropriate, to his or her release. The accessibility of a remedy implies, inter alia, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy.

It is important to note, that Recommendation (2003) 5 clearly states that measures of detention of asylum seekers should be reviewed regularly by a court and should be applied only under the *conditions* and *maximum duration* provided for by law. If a maximum duration has not been provided for by law, the duration of the detention should form part of the review by the court. With regard to access to the asylum procedure detention should not constitute an obstacle to asylum seekers in being able to submit and pursue their application for asylum. It further states that asylum applications from persons in detention should be prioritized for the purposes of processing. Asylum seekers should be screened at the outset of their detention to identify torture victims and traumatized persons among them so that appropriate treatment and conditions can be provided for them. With regard to the place of detention, this should be appropriate and, wherever possible, be provided for the specific purpose of detaining asylum seekers. In principle, asylum seekers should not be detained in prison. If special detention facilities are not available, asylum seekers should at least be separated from convicted criminals and prisoners on remand. Detained asylum seekers should also have the right to contact a legal counsel or a lawyer and to benefit from their assistance.

V. Additional Conditions for Children

Refugee and migrant children are among the world's most vulnerable population and face particular risk when separated from their parents and carers. The

phenomenon of separated or "unaccompanied" children seeking international protection exists in all European Union member states. Some are victims of trafficking for economic or sexual exploitation, minors fleeing from persecutors and war zones, or even from other family members or associates.

As a rule, minors should not be detained unless as a measure of last resort and for the shortest time possible. Minors should not be separated from their parents against their will or from other adults responsible for them whether by law or custom. If minors are detained, they must not be held under prison-like conditions. Every effort must be made to release them from detention as quickly as possible and place them in other accommodations. If this proves impossible, special arrangements must be made which are suitable for children and their families. For unaccompanied minor asylum seekers, alternative and non-custodial care arrangements, such as residential homes or foster placements, should be arranged and, where provided for by national legislation, legal guardians should be appointed, within the shortest possible time.

In the case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*[17] the applicants, Ms. Pulchérie Mubilanzila Mayeka and her daughter Tabitha Kaniki Mitunga, were Congolese nationals, born in 1970 and 1997 respectively. They now live in Montreal, Canada. The application related to Tabitha's detention for a period of nearly two months and her subsequent removal to her country of origin. Ms. Mubilanzila Mayeka arrived in Canada in September 2000, where she was granted refugee status in July 2001 and obtained indefinite permission to remain in March 2003. After being granted asylum, she asked her brother, a Dutch national living in the Netherlands, to collect Tabitha, who was then five years old, from the Democratic Republic of the Congo and to look after her until she was able to join her in Canada. On August 18, 2002, shortly after arriving at Brussels airport, Tabitha was detained in Transit Center No. 127 because she did not have the necessary documents to enter Belgium. The uncle who had accompanied her to Belgium returned to the Netherlands. On the same day a lawyer was appointed by the Belgian authorities to assist Tabitha. On August 27, 2002, an application for asylum was lodged on behalf of Tabitha but was declared inadmissible by the Belgian Aliens Office. Its decision was upheld by the Commissioner General for Refugees and Stateless Persons on September 25, 2002. On September 26, 2002, Tabitha's lawyer asked the

17 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, application no. 13178/03, judgment of October 12, 2006.

Aliens Office to place Tabitha in the care of foster parents, but did not receive a reply. On October 26, 2002, the *chambre de conseil* of the Brussels Court of First Instance held that Tabitha's detention was incompatible with the New York Convention on the Rights of the Child and ordered her immediate release. On the same day the Office of the High Commissioner for Refugees sought permission from the Aliens Office for Tabitha to remain in Belgium while her application for a Canadian visa was being processed and explained that her mother had obtained refugee status in Canada. The following day, October 17, 2002, Tabitha was removed to the Democratic Republic of the Congo. She was accompanied by a social worker from Transit Center No. 127 who placed her in the care of the police at the airport. On board the aircraft she was looked after by an air hostess who had been specifically assigned to that task by the chief executive of the airline. She traveled with three Congolese adults who were also being deported. No members of her family were waiting for her when she arrived in the Democratic Republic of the Congo. On the same day, Ms. Mubilanzila Mayeka rang Transit Center No. 127 and asked to speak to her daughter, but was informed that she had been deported. Finally, at the end of October 2002 Tabitha joined her mother in Canada following the intervention of the Belgian and Canadian Prime Ministers.

VI. Distinguishing between Asylum Seekers and Irregular Migrants

Asylum seekers and irregular migrants must be distinguished as separate categories of persons. Asylum seekers and refugees have been forced to leave their country due to persecution. Irregular migrants have crossed international borders, inevitably in very risky conditions, but for other (economic, social, political, cultural, environmental) reasons. Asylum seekers, unlike other migrants, may not be in a position to comply with the legal formalities for entry (they cannot wait at embassies to get passports issued when they are fleeing for their lives) and they are often traumatized by their experience. Ultimately, their backgrounds and personal histories are fundamentally different from irregular migrants and this must be taken into account by decision makers when considering the need to detain an individual. As mentioned above, asylum seekers cannot be detained solely on the basis of their lodging a claim for international protection. Article 31 of the 1951 UN Refugee Convention (the so-called "non-penalization clause") provides that states shall not impose

penalties on refugees on account of their illegal entry or presence in the country without authorization. Irregular migrants do not fall within this scope. However, human rights law is applicable to *everyone* without distinction and the exceptional nature of detention means that individuals should not be detained purely on the basis of their illegal status in national law. Human rights law also requires an individual and specific assessment of the necessity to detain any person. Such an assessment would necessarily entail taking the distinct situation of asylum seekers and irregular migrants and their respective needs into account.

VII. The Principle of Non-Arbitrariness in Detention

Despite some overlap, several ingredients make up the broad notion that detention is *not arbitrary* where it is fair, just, non-capricious, exceptional and legal safeguards are in place. It is not arbitrary if it is applied following an individual, specific assessment of the case, and if it is necessary, proportionate and appropriate, applied in good faith, and the duration is reasonable in the given circumstances (meaning for the shortest possible time). Clearly, the prohibition of arbitrariness is interpreted to mean something more than mere conformity with the law. More specifically, detention will be considered arbitrary unless it is: (a) authorized by a court/a judge (or an official with judicial power), or pursuant to a procedure set in law; (b) clearly prescribed by national law and sufficiently accessible, precise and foreseeable in its application, and in order to avoid all risk of arbitrariness; (c) necessary in all the circumstances of the case, for example to prevent flight or interference with evidence; (d) imposed only as a measure of last resort, other less severe measures having been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained; (e) proportionate to the objective to be achieved; (f) carried out in good faith with no element of deception; (g) appropriate or just.

Furthermore, the Committee of Ministers has agreed that measures of detention of asylum seekers should be applied only after careful examination of their "necessity" in each individual case. This is because article 31 of the 1951 UN Refugee Convention stipulates that any restriction on free movement of asylum seekers must be necessary. So there appears to be general agreement that in exceptional circumstances it is necessary to detain an asylum seeker or irregular migrant in order to verify his/her identity, determine the elements

on which the claim to refugee status or asylum is based, and deal with cases where asylum seekers and irregular migrants have destroyed their travel and/or identity documents or have used fraudulent documents to mislead the authorities of the country of refuge or to protect national security or public order. The latter case means that, for example, the asylum seeker or irregular migrant has criminal antecedents or affiliations that are likely to pose a risk to public order or national security or he/she is under criminal investigation or is likely to abscond with a view to take up illegal residence in the territory of the state (or of another state).

Conclusion

The legal framework governing detention is frequently misunderstood. Furthermore, the automatic use of detention gives rise to a long list of serious problems including that, too frequently, detention is used as the option of first resort and not last resort. Alternatives to detention are used too infrequently. It is also the case that conditions and safeguards afforded to immigration detainees who have committed no crime are often worse than those of prisoners in criminal custody. The Committee of Ministers of the Council of Europe clarified 10 guiding principles on the legality of detention of asylum seekers and irregular migrants. The detention of asylum seekers and irregular migrants in Council of Europe member states has increased substantially in recent years. While the cause of this increase is in part due to the growing number of arrivals of irregular migrants and asylum seekers in certain parts of Europe, it is also to a large extent due to policy and political decisions resulting from a hardening attitude towards third-country nationals.

While it is universally accepted that detention must be used only as a last resort, it is increasingly used as a first response and also as a deterrent. This results in mass and needless frequency of often prolonged detention. This excessive use of detention and the long list of serious problems which arise as a result are regularly highlighted by Council of Europe human rights monitoring bodies such as the European Court of Human Rights, the European Committee for the Prevention of Torture and the Human Rights Commissioner and the Assembly's Committee on Migration. Detention has a high cost in financial terms for the states which resort to detention and which detain persons for lengthy periods of time. The European Union's Return Directive, which has a fixed duration for detaining an irregular migrant for a maximum of 18 months, can be criticized

for adopting the lowest common standard in regard to detention length and consequently allowing European Union member states to practice overall long-term detention, and for increasing the possibility that states increase their minimum duration of detention. Of particular concern is the detention of asylum seekers who should be systematically distinguished from irregular migrants. Under the 1951 UN Refugee Convention there are only specific and narrow exceptions to the right to freedom of movement.

Nataša Hrnčárová, lawyer and faculty at the Department of Administrative Law, Financial, and Environmental Law, School of Law at Trnava University, Slovakia.