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Detention of Asylum Seekers and Irregular Migrants and the Rule of Law



Background information

The Treaty on European Union establishes that the rule of law is one of the values on which the EU is founded and one of the principles which the EU is bound to promote in its relations with third countries. Specifically in the field of migration, the Commission adopted the European Agenda on Migration (COM(2015) 240 final) in May 2015, which sets several policy tools in the field of asylum, later complemented by its Communication (COM(2016) 197 final) of April 2016 presenting options for the reform of the Common European Asylum System. The sources of EU secondary law (Reception Conditions Directive 2013/33/EU (recast), Return Directive 2008/115/EC and Dublin III Regulation) in the same field provide the rules on detention of asylum seekers and third country nationals (TCN).

Both the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have developed extensive case-law with regard to detention of TCN and asylum seekers. Numerous principles established therein and the norms offered by the EU legislation in place, may pose a challenge to the harmonised application of common standards in detention cases for the national judges across the EU Member States.

The ELI's project focuses on identifying all due process standards and material law including conditions for detention, and on enhancing the implementation of existing EU law in this field.

Project outline

The project is being carried out in three stages. During the first stage, the Project Team identified and compiled all due process standards and material law on detention from the relevant sources of EU law and case-law of the ECtHR and the CJEU. The compilation includes special positions and safeguards for children and other vulnerable persons and eventual differences in due process standards between EU law (including case-law of the CJEU) and case-law of the ECtHR.

Within the second stage, the members of the Project Team seek to identify challenges and problems that judges may face when applying the selected due process standards and material law including conditions on detention in conjunction with the relevant case-law of the ECtHR. As a result of this analysis and at the end of the second stage, the Project Team will develop a user-friendly check-list with indications and recommendations on how to apply those standards in an integrated manner. The results of the two first stages will be presented and discussed in September 2016.

During the third, last stage of the project, the final product will be disseminated among judges of the EU Member States dealing with detention cases.

Project's objective

The project aims to contribute to an effective implementation of due process standards and material conditions for detention based on an integrated approach in respect of EU secondary law, case-law of the CJEU and case-law of the ECtHR in judicial practices of the Member States (first indent of Article 3(2) of the Association).

The final product of this project will be a user-friendly and well-referenced check list of all due process standards and material law on detention for the competent judges.

Structure of the Statement

- Introduction: the Purpose and the Methodology of the Project
- Part I: Detention and the Rule of Law
- Part II: Interplay between EU Law, ECHR and National Law in the Context of Protection of Human Rights
- Part III: Basic Judicial Check-List:
 - Detention under the Dublin III Regulation and the ECHR, incl. explanatory notes
 - Detention under the Reception Directive (recast) and the ECHR, incl. explanatory notes
 - Detention under the Return Directive and the ECHR, incl. explanatory notes

Chair of the Project:

- **Boštjan Zalar** (High Court Judge, Administrative Court of the Republic of Slovenia; Ad hoc Judge of the European Court of Human Rights)

Members of the Project Team:

- **Samuel Boutruche Zarevac** (Judicial Engagement Coordinator, Bureau for Europe, UNHCR)
- **Marc Clément** (Administrative Judge at the Administrative Court of Appeal of Lyon, France)
- **Mark Clough QC** (Member of the Advisory Board of the British Institute of International and Comparative Law)
- **María-Teresa Gil-Bazo** (Senior Lecturer in Law, Newcastle Law School, Newcastle University)
- **Sergo Mananashvili** (Former Research Associate at the Migration Policy Centre, European University Institute)
- **Pamela McCormick** (Registry Lawyer, European Court of Human Rights)
- **Saša Sever** (Administrator, Research and Documentation Service of the Court of Justice of the European Union)

Members of the Advisory Committee:

- **David Conlan Smyth** (Senior Counsel, Council of Bars and Law Societies of Europe)
- **Alice Edwards** (Head of the Secretariat of the Convention against Torture Initiative - participation is in her personal capacity)
- **Fabrizio Cafaggi** (Professor of comparative law, European University Institute; Director of the Centre for Judicial Cooperation)
- **Michael Fordham QC** (Bingham Centre for Rule of Law – participation partly conditioned by the time schedule of the project)
- **Johan Gernandt** (Member of the Swedish Bar Association, Treasurer of the ELI Executive Committee)
- **Roxanne Manson** (Secretary General, European Women Lawyers Association)
- **Adriano Silvestri** (Head of Sector Asylum, Migration and Borders, Freedom and Justice Department, European Union Agency for Fundamental Rights)

Within the consultation procedure, the draft Statement will also be discussed with **Killian O'Brian** (EASO - European Asylum Support Office) and **Valsamis Mitsilegas** (Queen Mary, University of London).

European Law Institute

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All members of the ELI, regardless of how long they have been involved in the Institute, are welcome to participate in the project through the Members Consultative Committee.

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