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Article 5 §1 ECHR – right to liberty – detention of asylum seekers – public security – individualised vulnerability assessment .

In K.G. v. Belgium the ECtHR dealt with a case concerning an asylum-seeker placed and kept in detention for security reasons for approximately 13 months, while his asylum application was pending. The Court found no violation of the applicant's right to liberty as protection of public safety had justified his detention, moreover the applicant's state of health had been properly assessed and taken into account with regard to his detention conditions. Lastly, in light of all the relevant

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circumstances of the case, the Court did not consider the duration of the applicant’s detention as excessive and unreasonable.

2. C.J.E.U., 13 NOVEMBER 2018, X & X, c-47/17 and C-48/17 – Rapid processing of the asylum application “in the spirit of sincere cooperation”: the case of failing to reply in a timely manner to a re-examination request in take back and take charge procedures. *Eleonora Frasca*.....7

Asylum – Regulation (EU) No 604/2013 - Determination of the Member State responsible for examining an application for international protection – Criteria and mechanisms for determination – Request to take charge and request to take back an asylum seeker – Negative reply from the requested Member State to take charge or take back an asylum seeker – Re-examination request - Commission Regulation (EC) No 1560/2003 of 2 September 2003

With the ruling X and X of 13 November 2018 (joint cases C-47/17 and C-48/17), the Court of Justice of the European Union established that in case of a failure to reply to a re-examination request within the prescribed period of two weeks in Dublin take back or take charge procedures, the requesting Member State becomes responsible for the examination of the asylum application. The Court of Justice contributes to the interpretation of the Dublin system implementation, stressing that the rules and procedures underlying the allocation of responsibility for the asylum claim should be in compliance with the objective of facilitating a swift examination of applications.

1. ECHR, 6 NOVEMBER 2018, K.G. V. BELGIUM, APPL. NO. 52548/15

Detention of an asylum seeker for reasons of public security: no violation of the right to liberty in the presence of a proper individualised necessity test

Francesco Luigi Gatta

A. Facts and Ruling

1. Principal facts

The case concerns K.G., a Sri Lankan national who arrived in Belgium in 2009. He applied for asylum alleging the risk to be subjected to torture in his home country because of his belonging to the Tamil minority. His request was rejected. He then re-applied for asylum for a total of eight consecutive applications, all of which had a negative outcome.

During his stay in Belgium K.G. was charged with several criminal offences (violent conduct, shop-lifting, sexual assault and threat against minors) for which he was placed in detention, while his asylum claim was pending. K.G. was also notified with several orders to leave Belgium, which he never complied with.

In 2014 a decision was issued by the Aliens Office (*Office des étrangers*) banning K.G. from entering Belgium for a period of 6 years on the ground that he was considered to be a serious threat to public order, due to his previous conviction, the criminal offences committed and the persistent and systematic non-compliance with the orders to leave the national territory.

Overall, on the basis of four consecutive decisions, K.G. was kept in detention for security reason for a period of approximately 13 months. During his detention, he underwent several medical and psychiatric examinations which highlighted a situation of mental disorder. Despite the various legal actions undertaken – including a request to the ECtHR for an interim measure under Rule 39 of the Rules of Court – K.G. remained in detention and, in March 2016, he was finally repatriated to Sri Lanka.

2. Arguments of the parties and decision of the Court

Relying on Article 5 §1 (right to liberty and security) of the European Convention on Human Rights, K.G. complained about the lawfulness of his detention under the following profiles.

- *Clear legal basis*

According to the applicant, his deprivation of liberty did not comply with the requirement of being “in accordance with a procedure prescribed by law” established by Article 5 §1 of the Convention. K.G. had been placed “at the Government’s disposal” (“*mise à disposition du Gouvernement*”) on the basis of a ministerial order which, according to the Aliens Act (“*Lois sur les étrangers*”)¹, allows the Minister, under serious and exceptional circumstances concerning public order and national security, to place an alien “temporarily” at the Government’s disposal while the asylum proceedings are pending. Such procedure, however, does not provide for the maximum duration of the detention. In

¹ Former section 54(2), second sub-paragraph, Aliens Act.

the specific case at hand, moreover, the national authorities had not taken into consideration alternatives to detention.

For the Government such a form of detention is legitimate and can be regarded as a valid exception falling within the scope of Article 5 §1, letter f) of the Convention, considering the applicant's situation (an alien unlawfully residing on the national territory) comparable to the one provided for in the first part of the mentioned provision (an alien unlawfully trying to enter into the country).

The Court notes that, in the K.G. case, public interest and security considerations played a decisive role and the exceptionally serious circumstances required for his placement "at the Government's disposal" were met given the applicant's criminal conduct. Therefore, the detention order had not been arbitrary nor unreasonable and had a clear legal basis.

- *Pursuit of an aim authorised by Article 5 §1 of the Convention*

The applicant claims that his detention in the form of being placed "at the Government's disposal" fell outside the scope of application of Article 5 §1 (f) of the Convention, which enables States to restrict the right to liberty of non-nationals on the basis of two grounds: in order to prevent an unauthorised entry into the country and to execute a removal decision while the procedure is pending.

The Court notes that the fact that K.G. had been unlawfully residing in Belgium for 8 years, being moreover convicted and imprisoned for criminal offences, does not imply that his detention fell outside the scope of Article 5 §1 (f) of the Convention. In particular, as the detention measures were adopted in connection with the applicant's deportation from Belgium, the case is to be considered as falling within the provisions of the second part of Article 5 §1 (f). In any case, concludes the Court, categorising a form of detention established by national law into one or other of the two cases of Article 5 §1 (f) is not that relevant in order to assess the lawfulness of the detention itself.

- *Lawfulness of the applicant's detention: duration, conditions and diligence of the domestic authorities*

The applicant claims that his detention had an excessive duration and its conditions had been inadequate in the light of his specific state of health. The Government, on the contrary, argues that the detention measure was not excessive and that domestic authorities acted diligently, carefully examining all relevant points relating both to national security and to the applicant's health. With regard to this latter aspect, in particular, the applicant's state of health had been duly taken into consideration, as he had received proper medical assistance during his detention.

Sharing the Government's view, the Court unanimously holds that there had been no violation of the applicant's right to liberty as protected by Article 5 §1 of the Convention.

B. Discussion

In its judgment the Court recalls and reiterates its previously established principles concerning the detention of aliens for migration-control purposes with regard, in particular, to systematic and automatic detention of asylum seekers without a proper assessment of their individual position and needs (*Thimothawes v. Belgium*, 2017) and to the necessity for the national authorities to consider and possibly apply less coercive measures than detention (*Yoh-Ekale Mwanje v. Belgium*, 2011).

As to the individual assessment of the applicant's situation, in the K.G. case the Court, after having conducted a necessity and proportionality test, excludes a violation of the right to liberty given that a specific vulnerability assessment of the applicant's individual situation has been made by national authorities, the detention conditions have been adequate and its duration reasonable in light of the specific factual circumstances.

The Court goes cursory through this point, being satisfied with the Belgian authorities' conduct in terms of individualised treatment of the applicant, who has been taken in good care of, especially in light of his state of mental health. Specifically, proper medical and psychological examinations had been conducted, assessing and periodically reviewing the applicant's state of health, without pointing out any specific contraindication as to keeping K.G. in detention. Moreover, while detained, no deterioration of the applicant's condition has been detected.

As to the need for the national authorities to consider the detention as a measure of last resort and to possibly apply less coercive measures, the Court essentially skips such passage by lending decisive weight to the public security reasons invoked by the Government. For the Strasbourg judges, Belgian authorities had properly taken into consideration all the relevant circumstances related to the applicant, coming to the legitimate conclusion that he represented a threat to the national security (criminal offences previously committed, risk of recidivism, state of mental health and psychological disturbance). The Court sees no reason to call such assessments into question. Therefore, the protection of public safety had justified the detention.

In synthesis, what seems to really matter for the Court is that national authorities had "individualised" the assessment of the applicant's detention, conducting a specific necessity test with regard to it. K.G. had been considered dangerous and his state of health had been properly monitored: this is enough for the Court to consider 13 months of detention as a reasonable duration, without really going into further details and analyses on the point.

Such assessment, however, appears as somehow generic and cursory, as the Court does not really provide specific and detailed guidance as to the reasons on the basis of which the conduct held by national authorities may be considered satisfactory in terms of compliance with Article 5 of the Convention. In particular, the reference to public security reasons appears vague and tautological, almost as if the presence of a threat for the public safety would automatically exclude the arbitrariness of the detention.

C. Suggested Reading

To read the case: ECtHR, judgment of 6 November 2018, *K.G. v. Belgium*, Appl. No. 52548/15

Case law:

- ECHR, judgment of 4 April 2017, *Thimothawes v. Belgium*, Appl. No. 39061/11
- ECHR, judgement of 20 December 2011, *Yoh-Ekale Mwanje v. Belgium*, Appl. No. 10486/10

Doctrine:

L. LEBOEUF, « Rétenion des demandeurs d'asile. De la subsidiarité et des imprécisions du contrôle strasbourgeois », *Newsletter EDEM*, mai 2017

R. WISSING, “Systematic detention of asylum seekers at the border: on the need for an individualised necessity test”, *Strasbourg Observers*, 9 June 2017

To cite this contribution: F.L. GATTA, “Detention of an asylum seeker for reasons of public security: no violation of the right to liberty in the presence of a proper individualised necessity test”, *Cahiers de l'EDEM*, December 2018.

2. C.J.E.U., 13 NOVEMBER 2018, X & X, C-47/17 AND C-48/17

Rapid processing of the asylum application “in the spirit of sincere cooperation”: the case of failing to reply in a timely manner to a re-examination request in take back and take charge procedures

Eleonora Frasca

A. Facts and Ruling

1. Facts and circumstances of the case

The two joint cases concern a Syrian and an Eritrean nationals who lodged applications for a temporary asylum residence permit in the Netherlands after having, according to the EURODAC database, respectively lodged an application for international protection in Germany (C-47/17), and in Switzerland arriving via the Mediterranean Sea in Italy, where the second applicant was not fingerprinted (C-48/17).

In both cases, the Dutch authorities (State Secretary for Security and Justice) deemed that the Netherlands was not the Member State responsible for examining the applications for international protection on the basis of Article 18(1)(b) of the [Dublin III Regulation of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member](#), and made requests to Germany and to Switzerland to take back the applicants. The Swiss authorities claimed that they had themselves submitted a request to take charge to Italy. Consequently, in the second case, the Dutch authorities made a take charge request to the Italian authorities. Both the German and the Italian authorities rejected those requests.

In both cases, the Dutch State Secretary submitted a timely re-examination request, on the basis of Article 5(2) of [Commission Regulation \(EC\) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation \(EC\) No 343/2003 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](#). The German authorities did not respond to the request of re-examination while the Italian authorities, on the other hand, accepted that request of re-examination beyond the prescribed period of two weeks.

Actions were brought under the Dutch General Administrative Law before the District Court of the Hague in reliance upon a failure to take a timely decision on the application for international protection. The parties in the main proceedings are in dispute as to whether the State Secretary for Security and Justice did or did not become responsible for examining the application for the grant of a temporary asylum residence and on whether the period within which the State Secretary was required to take a decision had expired.

In the context of those similar disputes, the District Court of the Hague decided to stay the proceedings and to refer six questions to the European Court of Justice. Since the six questions were identical (except the first one), case C-47/17 and case C-48/17 were joined. The Court of Justice was

asked to interpret the time limit for responding to a request for re-examination in case of a negative reply to take charge or take back an asylum seeker. The six consequent questions concern Article 5 of the [Dublin Implementing Regulation](#) and are formulated as follows:

- 1) Must the requested Member State, having regard to the objective, the content and the scope of [the Dublin III Regulation] and [Directive 2013/32], respond within two weeks to a re-examination request provided for in Article 5(2) of the Implementing Regulation?
- 2) If the answer to the first question is in the negative, does the time limit of a maximum of one month as provided for in Article 20(1)(b) of [the Dublin II Regulation] (now Article 25(1) of [the Dublin III Regulation]) apply, having regard to the last sentence of Article 5(2) of the Implementing Regulation?
- 3) If the answer to the first and second questions is in the negative, does the requested Member State, due to the use of the word 'endeavour' in Article 5(2) of the Implementing Regulation, have a reasonable period of time to respond to the re-examination request?
- 4) If there is indeed a reasonable period of time within which the requested Member State should actually respond to a re-examination request under Article 5(2) of the Implementing Regulation, can a period of six months, as in the present case, still be regarded as a 'reasonable period of time'. If the answer to that question is in the negative, what might be meant by a 'reasonable period of time'?
- 5) What should be the consequence of the requested Member State not responding within two weeks, one month or a reasonable period of time to a re-examination request? In those circumstances, is it the requesting Member State that is responsible for the substantive examination of the asylum application made by the foreign national, or is it the requested Member State?
- 6) If one should proceed on the assumption that the requested Member State becomes responsible for the substantive examination of the asylum application due to the lack of a timely response to the re-examination request as referred to in Article 5(2) of the Implementing Regulation, within what period of time should the requesting Member State, the defendant in the present case, notify the foreign national of that information?

2. Judgment and reasoning of the Court

First, the Court outlines the Dublin Regulation framework for undertaking responsibility for asylum seekers under take charge and take back procedures. After that, the Court recalls that those procedures have to be conducted "without undue delay" in accordance with the "rapid processing of asylum claims" principle, at the core of the Dublin III Regulation. The Court cites its own case law about compliance with the procedural rules and safeguards laid down in the Dublin III Regulation: Member States are responsible for promptly carrying out the determination process and swiftly examining an asylum application. Requested to interpret Article 5(2) of the Dublin implementing Regulation, the Court of Justice ruled that if a Member State does not reply in time, within a period of two weeks, in the spirit of sincere cooperation, to a request of re-examination under Article 5(2) following a timely negative reply to the request of take charge or take back under Articles 21 and 23 of the Dublin III "the additional re-examination procedure shall be definitively terminated". Consequently, "the requesting Member State must, as from the expiry of that period, be considered to be responsible for the examination of the application for international protection, unless it still

has available to it the time needed to lodge, within the mandatory time limits laid down for that purpose in Article 21(1) and Article 23(2) of the Dublin III Regulation, a further take charge or take back request" (paragraph 91).

B. Discussion

1. *The opinion of the Advocate General Wathelet*

In his opinion in joined cases C-47/17 and C-48/17, Advocate General Wathelet explains that "as the transfer of responsibility is extremely radical, only an express rule can provide for such transfer [...]. In the absence of a specific provision under which, in the context of a re-examination request, failure to reply would result in responsibility for the requested Member State, the requesting Member State remains responsible".

However, the Opinion of the Advocate General has not entirely been followed by the Court. Starting with the argument that a failure to reply within the two-week time frame does not cause any legal effect, the Advocate General explores the notion of "reasonable timeframe", resulting from the wording "Member States shall endeavour to reply to a request for re-examination", as formulated by the referring Court. The expression should be interpreted as a call to act "in spirit of sincere cooperation" and it is incumbent on the national courts to assess in the individual case if the requested Member State has acted in the spirit of cooperation and in a "reasonable timeframe".

Differently from the Court, AG Wathelet esteems that in case the requested Member State explicitly accepts its responsibility for examining the asylum application beyond the two weeks period *but* "within a reasonable timeframe", the requested Member State becomes responsible for the asylum application. The Court of Justice did not embark in the interpretation of the "reasonable time" as asked by the referring courts, but stuck to the literal interpretation of Article 5 of the Dublin Implementing Regulation.

2. *Take back and take charge procedure*

At first, the Court recalls in great detail the legal framework for the take charge and take back procedures for undertaking responsibility for asylum seekers, as envisaged under Chapter VI of the Dublin III Regulation. Take back and take charge procedures are part of the Dublin mechanism to ensure that only one Member State is responsible for an asylum claim. Both procedures are subject to tight deadlines. If a request to take charge or take back is not made within the specified periods, responsibility remains with the Member State in which the application was lodged.

A *take back* request (Article 23) is issued when the applicant has previously applied for asylum in a different Member State and is, therefore, irregularly residing on the territory of another Member State. Take back requests should be made as quickly as possible and in any case within two months when a EURODAC hit is applicable. The requested Member State must respond to a take back request no later than one month from receipt of the request (Article 25).

A *take charge* request (Article 21) is issued when the applicant has not previously applied for asylum, but a different Member State is considered responsible based on the Dublin III Regulation's criteria to determine the Member State responsible for the claim. Take charge requests should be submitted by the requesting Member States within three months from the date on which the application was

lodged. If the request is based on data obtained from the EURODAC database, it should be submitted within two months of receiving the EURODAC hit. The requested Member States must respond to the take charge request within two months from receipt of the request (Article 22).

The consequences of a failure to reply within the time limits is equivalent to an acceptance from the requested Member State to take charge or take back the application. However, if the transfer does not take place within a six-month time limit, the Member State responsible for the asylum claim is relieved of its obligation to take charge or take back the applicant and responsibility is then transferred to the requesting Member State.

3. The objective of rapidly processing an application for international protection

After having assessed the procedures under the Dublin Regulation for take charge and take back requests, the Court recalls that those procedures have to be conducted “without undue delay” in accordance with one of the core principles permeating through the Dublin Regulation: the “rapid processing of asylum claims”. The Court recalls the Dublin III Regulation’s recital 5, which states that the Dublin method for determining the Member State responsible for the examination of an asylum application should “guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection”. The EU legislature has given primary relevance to this principle.

In support of this reasoning, the Court recalls its own case law about compliance with the procedural rules and safeguards laid down in the Dublin III Regulation and the importance of its effective implementation. The process of determining responsibility is subject to the respect and correct application of the rules on determination criteria as well as the set of mandatory time limits prescribed for submitting requests to other Member States. Such deadlines allow for a prompt implementation of the procedures.

Take back and take charge procedures have been the object of series of recent case law (*Mengesteab*, *Hasan*, *Shiri*) of the Court of Justice of the European Union. In particular, the Court’s interpretation emphasises the need for Member States to rigorously adhere to the rules governing these procedures, such as the respect of the time limits for requesting another Member State to take back or take charge an applicant (*Hasan*). Applicants for international protection can challenge transfer decisions based on the expiry of time limits of take charge or take back procedures, even when the requested Member State is willing to take responsibility for the application (*Mengesteab*). Member States have an obligation to carry out procedures for the assignment of responsibility in an efficient and prompt manner (*Shiri*). Altogether, this case law contributes to the principle that Member States are responsible for promptly carrying out the determination process and swiftly examining an asylum application.

4. Re-examination request

The argument of the primary relevance given by the EU legislature in the Dublin III regulation for Member States to rapidly process international protection applications is used by the Court to interpret the re-examination request under Article 5(2) of the Dublin Implementing Regulation. Just as for the take back and take charge procedures, the re-examination procedure should be implemented in a timely manner. The Court explains that this is an additional option available to the

requesting Member State in case the refusal to take charge or take back the applicant is based on a misappraisal or where there is additional evidence to put forward. The request for re-examination can be submitted to the requested Member State within three weeks from the receipt of the negative reply. The requested Member State is then to “endeavor, in the spirit of sincere cooperation, to reply within two weeks”. A prompt determination of the Member State responsible for the examination of an asylum application is essential to attain the objective of rapid processing of such an application. For this reason, the Dublin Implementing Regulation should be read coherently with the Dublin III Regulation and the re-examination request should be in line with its provisions and objectives.

Contrary to the consequences of the expiry of mandatory time limits with respect to take charge and take back procedures (Article 22(7) and 25(2) of the Dublin III Regulation), failure to respond to a request of re-examination under Article 5(2) is not equivalent to accepting the request and does not entail the obligation to take back the person concerned. The Court explains that “it is not the purpose of that provision to create a legal obligation to reply to a re-examination request, failure to comply with which will mean that responsibility for the examination of application for international protection is transferred”.

To conclude, in the case of X and X of 13 November 2018, the Court of Justice contributes to the interpretation of the Dublin system implementation, stressing that the rules and procedures underlying the allocation of responsibility for an asylum claim should be in compliance with the objective of facilitating a swift examination of the application. In case of failing to reply in a timely manner to a re-examination request, the requesting Member State becomes responsible for the substantive examination of the asylum application.

C. Suggested Reading

To read the case: [CJEU, 13 November 2018, X & X, C-47/17 and C-48/17, EU:C:2018:900](#)

[Opinion of the Advocate General, 22 March 2018, Joined Cases C-47/17 and C-48/17](#)

Case law:

[CJEU, 25 January 2018, Hasan, C-360/16](#)

[CJEU, 25 October 2017, Shiri, C-201/16](#)

[CJEU, 26 July 2017, Mengesteab, Case C-670/16](#)

Doctrine:

M. MOUZOURAKIS, «“We Need to Talk about Dublin” Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union» Refugee Studies Centre, Department of International Development, Oxford University, Working Paper Series n°105, December 2014

E. NERAUDAU, «Retour du demandeur d’asile après un transfert Dublin exécuté : la responsabilité de l’Etat désigné n’est pas définitive et les circonstances postérieures au transfert doivent être prises en compte», *Cahiers de l’EDEM*, août 2018.

F. GATTA, «Dublin transfers and the right to an effective remedy: between efficiency and the protection of fundamental rights», *Cahiers de l’EDEM*, November 2017.

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