ADMINISTRATIVE DETENTION OF FOREIGNERS AND ITS JUDICIAL REVIEW IN THE CZECH REPUBLIC

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Interpretation and Application
of Articles 5 and 6 of the ECHR

Participants:
Zuzana Di Falco
David Kolumber
Lenka Lakotová

Trainer:
Eliška Flídrová

"The substance of the man is the freedom."
Georg Wilhelm Friedrich Hegel

1. Legal Background

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "Convention") was signed by representatives of the first twelve states on 4th November 1950 in Rome. According to the Article 66 § 2 of the Convention this document entered into force on 3rd September 1953.[1] The Convention grants many fundamental rights and freedoms, some other were set in the additional Protocols.[2] State parties contract to secure these rights and freedoms to all in their jurisdiction. The Convention also copes with enforcement machinery. The European Court of Human Rights in Strasbourg (hereinafter "the ECHR" or "the Court") was founded to ensure the adherence of the commitments undertaken by the state parties.

In our material, we focus on Article 5 of the Convention, which copes with the "Right to liberty and security". From the historical point of view, the Article 5 of the Convention was constructed in 1949 as the freedom from arbitrary arrest and prosecution. The main aim was to condemn arbitrary arrest and detention. The preparatory committee in 1949 had enunciated the idea that this list of rights should be limited to the absolute minimum, which is necessary to constitute fundamental principles for the "functioning of political democracy".[3]

According to the Article 5 § 1 of the Convention everyone has the right to liberty and security of person. There is a difference if we compare this provision with the Article 9 of the Universal Declaration of Human Rights where there is really brief arrangement which says that no one shall be subject to arbitrary arrest, detention or exile. On the other hand, Article 5 of the Convention does not include only formal exhaustive list of reasons of deprivation of his/her liberty, but there are also essential procedural rights to ensure hasty and effective decision if the detention is lawful. The wording "deprived of his liberty" is designed to cover loss of liberty for any length of time, whether by detention or by arrest.[4] The formulation of this provision

* The front page picture – *Socialistické soudnictví.* 1969, vol. 9, p. [2].

1 Convention for the Protection of Human Rights and Fundamental Freedoms: CETS No.: 005.

2 Up to now there are 16 protocols: Protocol (1952), Protocol No. 2 (1963), Protocol No. 3 (1963), Protocol No. 4 (1963), Protocol No. 5 (1966), Protocol No. 6 (1983), Protocol No. 7 (1984), Protocol No. 8 (1985), Protocol No. 9 (1990), Protocol No. 10 (1992), Protocol No. 11 (1994), Protocol No. 12 (2000), Protocol No. 13 (2002), Protocol No. 14 (2004), Protocol No. 14bis (2009; ceased in 2010), Protocol No. 15 (2013) and Protocol No. 16 (2013).

3 Travaux Préparatoires to the Convention : Right to liberty and security [online]. 1967-07-20, p. 7, 22. <http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART5-CDH(67)10-BIL1338906.pdf>

4 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto.

reflects traditions of the Anglo-American law system. There is the protection against arbitrary state encroachment into individual's fundamental rights thoroughly defended. The importance of the Article 5 could be illustrated by the extensive judicature of the ECHR.

As mentioned above, Article 5 of the Convention contains two different sets of provisions: the conditions when the detention is deemed as lawful and procedural guarantees. The first paragraph contains six categories when the detention is basically acceptable. Every case of arrest or detention is determined by principles mentioned in §§ 2-5 of the provision. Paragraph 2 of this provision requires prompt information about the reasons for the arrest and of any charge against the arrested person. This information must be provided in a language understood by the arrested person.[5] According to § 3, the arrested or detained person has to be brought promptly before a judge or other appropriate officer to be tried within a reasonable time or to release pending trial. The release could be according to the provision conditioned by guarantees to appear for trial. Article 5 § 4 of the Convention creates the right of everyone who is deprived of his/her liberty by arrest or detention to take proceedings on legality of the deprivation of liberty (*habeas corpus*). This means that the competent court has to examine not only compliance with the procedural requirements of domestic law, but also the reasonableness of the suspicion underpinning the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention.[6] According to the last paragraph of this provision, everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation. There is also strong connection between Articles 5 and 6 of the Convention.

This paper copes with the topic of the deprivation of one's liberty under Article 5 § 1 (f), which allows *"the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition."* Under Article 5 § 4 *"everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."* The focus of this paper is primary on the detention of foreigners with a view to deportation and detention of asylum seekers, concretely on the question of the body which

[5] Mutatis mutandis – U.N. Commission on Human Rights Working Group on Arbitrary Detention, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment regarding the situation of immigrants and asylum seekers, U.N. Doc. E/CN.4/2000/4/Annex 2 (1999).

[6] Case of Černák v. Slovakia (Application no. 36997/08), § 78. All ECHR decisions are accessible from: hudoc.echr.coe.int.

decides about the detention and question of the consequent review of the lawfulness of this decision by the court.

There are several principles already specified in the case law of the ECHR to be fulfilled for the detention of foreigners to be in compliance with Article 5 of the Convention. It is necessary to distinguish between the first limb of the article (detention to prevent an unauthorized entry) and the second limb of the article (detention with a view to deportation or extradition); nevertheless, some principles apply for both of them. The detention should not be arbitrary. The freedom from arbitrariness in the context of the first limb means detention must be carried out in good faith, must be carried out with the purpose of preventing unauthorized entry and place and conditions of the detention must be adequate (*Saadi v. the United Kingdom*).[7] Restriction upon liberty also includes the holding aliens in the international transit zone. If by the force of circumstances the decision to order holding must necessarily be taken by the administrative or police authorities, its prolongation requires speedy review by the courts, the traditional guardians of personal liberties. (*Amuur v. France*).[8] When it comes to detention under the second limb, it can be justified only as long as deportation or extradition proceedings are in progress (*A. and Others v. the United Kingdom [GC], Chahal v. the United Kingdom*).[9] However, should the official authorities fail to conduct the deportation proceedings with due diligence, the authorities are not entitled to keep aliens in detention if no meaningful "action with a view to deportation" was under way and actively pursued.[10] Differently from the protection under Article 5 § 1 (c), it does not need to be necessary to prevent the person from fleeing or committing a crime (*Chahal v. the United Kingdom*)[11] Deprivation of liberty of aliens could take place only in specific cases where more moderate measures were not effective.[12] These are some of the main principles concerning the detention of foreigners under Article 5

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7 *ECHR 2012: Guide on Article 5, Right to liberty and security* [online]. 2012 [quoted 2014-05-05], p. 17-18. Accessible from http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf.; Saadi v. the United Kingdom (Application no. 13229/03) § 73, 74, 78.

8 Case of Amuur v. France (Application no. 19776/92), § 43.

9 Case of Chahal v. the United Kingdom (Application no. 22414/93), § 113, A. and Others v. the United Kingdom [GC] (Application no. 3455/05), § 164.

10 M. and others v. Bulgaria (Application no. 41416/08), § 75.

11 KRNEC, J., KOSAŘ, D., KRATOCHVÍL, J., BOBEK, M. *Evropská úmluva o lidských právech. Komentář.* 1. ed. Praha: C. H. Beck, 2012, p. 497. *ECHR 2012: Guide on Article 5, Right to liberty and security*, p. 17-18, Chahal v. the United Kingdom (Application no. 22414/93), § 112.

12 Case of Bozano v. France (Application no. 9990/82), Case of Quinn v. France (Application no. 18580/91), Case of Amuur v. France (Application no. 19776/92), Case of Čonka v. Belgium (Application no. 51564/99), Affaire Shamsa c. Pologne (Requêtes nos 45355/99 et 45357/99), Affaire Singh c. République Tchèque (Requête no 60538/00), Affaire Rashed c. République Tchèque (Requête no 298/07), Case of Nolan and k. v. Russia (Application no. 2512/04), Case of A. and Others v. the United Kingdom (Application no. 3455/05), Decision of the Supreme Administrative Court, no. 7 As 139/2012 (2013-04-05). All decisions of the Supreme Administrative Court are accessible from: http://www.nssoud.cz/main0Col.aspx?cls=JudikaturaSimpleSearch.

formulated by the ECHR, which will be supplemented in the following chapter by the concrete conclusions concerning the detention of foreigners in the Czech Republic.

2. Relevant case law of the European Court of Human Rights regarding the detention of aliens in relation to the Czech Republic

In case-law of the ECHR there have been two important decisions in relation to violation of Article 5 § 1 (f) in the Czech Republic – decisions Rashed[13] and Singh[14] – both of them the question of the violation of Article 5 § 4 was also examined. Another decision of the ECHR in relation to the Czech Republic concerning the Article 5 § 4 was the case Buishvili.[15]

2.1. Test of the arbitrariness / trial test of lawfulness of the detention (RASHED Case)

The Egyptian national Mohamed Magdi Mansour Rashed applied in August 2006 for asylum upon arriving at Prague international airport and he was placed in the reception centre in the airport's transit zone. In September 2006, he was transferred to the Velké Přílepy facility of the Ministry of the Interior, where he remained until April 2007. He was then returned to the reception centre. In June 2007, he left the country on the voluntary-return basis after his asylum application had been rejected. The applicant alleged that his detention in the Velké Přílepy facility had been unlawful and his complaint about the lawfulness of his detention had not been examined speedily. The Court noted that the applicant had been deprived of his liberty without any formal decision. He had thus been entitled to speedy and effective review by a court. No judicial decision on the lawfulness of his detention had been expressly given during the ten-month detention period. Furthermore, the Court observed that the quality of the Czech asylum law in force at the relevant time had not been sufficient to constitute the legal basis for the applicant's deprivation of liberty, as it did not afford adequate protection or necessary legal certainty to prevent arbitrary interference by the public authorities with the rights guaranteed by the Convention. The Court therefore found that there had been a violation of Article 5 § 1 and Article 5 § 4.

In RASHED case, the weakness of legal system and legal certainty was shown in situation when it was not clear which legal measures were to guarantee the applicant's right to the judicial review of the length and lawfulness of the detention while having been detained in the closed and guarded facility out of the airport. The law on deprivation of liberty must be accordingly to

[13] Affaire Rashed v. République Tchèque (Requête n° 298/07).
[14] Affaire Singh v. République Tchèque (Requête n° 60538/00).
[15] Case of Buishvili v. The Czech Republic (Application no. 30241/11).

Article 5 § 4 of the Convention sufficiently precise and accessible to avoid all risks of arbitrariness[16]. Specific troubles of so-called transit zones, which are considered as places out of the territory of the state (typically international airport zones) arise from the uncertainty of law applied on detainees after their arrival in the state in which they seek asylum. In RASHED case (§76, 77) the Court stated that "insufficiently clear law gave rise to failure of the trial review in the case, since the whole time the detention lasted no trial decision was adopted on the lawfulness of such a measure concerning the deprivation of liberty". With regard to the facts mentioned above, the Court held that the Czech legal system, applied in this case and was valid in the relevant time they did not offer to the applicant a sufficient guarantee of the right of the personal liberty."

However, even though the Czech Republic have partially solved the problem of the facility in question in Velké Přílepy[17] by closing it after all, and by the new legislature[18] which provides the speedy judicial review of asylum seekers in transit zones, yet we can ask whether the trial test on lawfulness of the detention should be common or rather exceptional? Doubts supporting this thought are arising namely from the fact that asylum seekers are still in the Czech Republic deprived of their personal liberty *ex lege* by a state administrative body (no judicial body). There is no automatic *ex oficio* trial revision on the lawfulness and length of their detention in each of the cases, although it is natural in criminal matters of deprivation of liberty…

Therefore, we can only guess how many migrants are "lost in transit" for too long unlawfully. The Court so far has not done any pronouncement on the question, nevertheless it is up to the state to settle the national procedural rules within the implementation of Article 5 § 1 (f) of the Convention. But it can be only a matter of time when such a case pops up because such a comparison of disproportional rights in case of detention in non-criminal cases of aliens v. imprisonment in criminal cases is more than eye-catching.

2.2. Lack of speed decision procedure / lack of due diligence of the state (SINGH Case)

Two applicants – Balbir Singh and Bakhschisch Singh, both Indian nationals lawfully residents in the Czech Republic, were arrested in the Czech Republic in November 1996. They were prosecuted for assisting others to cross the border illegally. On 9 April 1998, the District

[16] See also Soldateko v. Ukraine (Application no. 2440/07) §110, Bozano v. France (Application no. 9990/82) §58, Amuur v. France (Application no. 19776/92) §43, 50, Saadi v. United Kingdom (Application no. 13229/03) §73.

[17] On 30. April 2007.

[18] See also p. 9 of this document.

Court of Prague 7 sentenced them to 21 months' imprisonment and orders were made excluding them indefinitely from national territory. After serving their sentences, the applicants were placed in detention pending deportation from 11th August 1998, on the ground that it was impossible to deport them immediately since they did not have passports. The applicants applied on two occasions to be released and to be granted refugee status. All their appeals were dismissed. The applicants were released only on 11th February 2001 after two and a half year and were subsequently issued with travel documents enabling them to leave the Czech territory. The applicants alleged that their detention pending deportation had been unlawful and disproportionate, particularly on account of its excessive length. They also submitted that the courts did not rule speedily on their applications for release. The Court noted that, under the Czech legislation, detention could only be extended beyond two years if there were serious grounds for assuming that the release of the person concerned would endanger or complicate the proceedings. In the present case, there had been no substantial change in the courts' submissions throughout the applicants' detention. In addition, the Court noted that the applicants had been convicted for an offence that was not particularly serious, and that the length of their detention pending deportation had exceeded that of the prison sentence imposed on them. Consequently, the Court considered that the Czech authorities had not shown due diligence in handling the applicants' case, especially once the Indian Embassy had expressed its unwillingness to issue the applicants with passports and that the length of their detention had not been reasonable. Accordingly, it concluded unanimously that there had been a violation of Article 5 § 1 (f).

Though in the SINGH case both applicants originally had committed a crime on the territory of the Czech Republic, it cannot be overseen that the extradition procedure and their detention lasted extremely long – considering it was already about 11 months (all together) already after the expiration of the term of their imprisonment. In addition, in this case the Court pronounced on the protection from the arbitrariness (§74). Requirement of appropriate length of the detention under article 5 § 4 of the Convention was not observed by the government, no matter how complicated the judicial system is (two instance system and necessity of observing procedural rules concerned handling the file in question between courts). The Court with regard to its ruling in case Navarra v. France took into account that applicants furthermore in comparison with Navarra v. France could not present a new application on the release since there was no decision on the longtime-pending application taken by the trial (§76) and hold that the case was not decided speedily and in that context of Article 5 § 4 of the Convention was

violated. The government bodies also did not performed due diligence[19] when they neither urged the answer in short terms from the embassy of another state nor did they reacted in a short term on concrete situation when it was clear no travel documents would be procured on such a request by the embassy. Even though this case was based on breach of the measures of the criminal proceedings primarily – as for the administrative expulsion length – we might conclude that nowadays the prompt examination of the lawfulness of detention is guaranteed. It is so since it has been in force 7-day-time-limit for the decisions of the court of the first instance and the duty of the appellate court to decide on such cases with priority.

The ruling of the Court sets the responsibility of the state to assure speedy review of lawfulness of the detention and protection from arbitrariness although heavy obstacles or procedural difficulties can occur in particular case. This strict ruling can be "heavy" to cope with in the situation when different procedural terms according to national law are quite long.

2.3. Lack of effective judicial guarantee of the detention lawfulness (BUISHVILI Case)

Artur Buishvili, a Georgian national, was transferred to the Czech Republic from the Netherlands under the Dublin procedure in March 2011 and claimed asylum. He was refused entry and remained in the reception centre at Prague airport. He was eventually granted entry in June 2011 so that he could have medical treatment for Hepatitis C. Relying on in particular Article 5 § 4 (right to have lawfulness of detention decided speedily by a court) of the Convention, he complained that he had had no access to judicial proceedings in which his release could have been ordered. The applicant complained that his detention contravened the domestic law because due to his illness he was a vulnerable person who should have been released under section 73 (7) of the Asylum Act. He further argued that due to his illness his detention was not necessary or proportionate. The Court noted that the Czech courts could only quash the administrative decision, having no power to release the applicant. The Ministry of the Interior would then be bound by the court's legal opinion and would have to issue a new decision releasing the applicant if the court so found. The Court concluded that the applicant could not have instituted any proceedings before a court which could have directly ordered his release as required by Article 5 § 4 of the Convention.

In BUISHVILI case (§38) the Court explicitly and repeatedly held that the Article 5 § 4 of the Convention is *lex specialis* in relation to the more common requirements of the Article 13 of the Convention and the Court besides others shall have power to "decide" the

[19] See also A. and Others v. the United Kingdom [GC] (Application no. 3455/05) § 164.

"lawfulness" of the detention and both to "order release" if the detention is unlawful[20]. This is not met by practice when the national court only decides on the lawfulness but has no power to decide on release and when (there is another step to wait for) such decision is to be done by the ministry, which cannot be considered as an independent "court[21]".

In conclusion, the legal system, where the competencies of the courts to decide on further detention or on the release of persons deprived of their personal liberty are twisted to any administrative body with no powers of an independent "court of judicial character", should not be sustainable under the Convention.

3. The law on detention of third-country nationals in the Czech Republic

After presenting main flaws in national law in previous years from the view of ECHR, we will now turn to the current sources of detention in the Czech Republic and to legal means of protection against it. Detention of third-country nationals within the meaning of the Article 5 § 1 letter f) of the Convention is regulated by the Act No 326/1999 Coll. on stay of aliens in the territory of the Czech Republic (further referred to as "the Alien Act") and by the Act No 325/1999 Coll. on asylum (further referred to as "the Asylum Act"). Current form of the Alien Act is mostly influenced by the transposition of the Return Directive[22]", while the Asylum Act is influenced by the transposition of the Reception Directive[23] and the Procedural Directive[24].

The Alien Act regulates the detention of third-country nationals for the purpose of administrative expulsion (section 124), for the purpose of preparation of the return (section 124b) and detention for the purpose of the transfer based on international agreements (section 129). The foreigner must be older than 15 and the detention period should not, in principle, exceed 180 days (with the exception of cases when the removal process is likely to last longer due to lack of cooperation of the third-country national). In case of foreigners younger than 18 and families with children, detention period shall not exceed 90 days.[25] While the Return Directive allows states to choose whether detention shall be ordered by administrative or judicial authorities, competence to order detention in the Czech Republic was confided in the

[20] See Benjamin and Wilson v. the United Kingdom (Application no. 28212/95), § 34, with further references, and A. and Others v. the United Kingdom [GC] (Application no. 3455/05), § 202.
[21] See also p. 10 of this document.
[22] The Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals.
[23] The Directive 2003/9/EC on minimum standards for the reception of the asylum seekers.
[24] The Directive 2005/85/EC on minimum standards on procedures in member states for granting and withdrawing refugee status.
[25] The Alien Act, § 125.

administrative authorities – in this case the Police Force of the Czech Republic, Foreigners Police Section (further referred to as Police).

According to the Return Directive, when administrative authorities order the detention, states shall provide for a speedy judicial review of the lawfulness of detention or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review.[26] Until the end of the year 2013, the Alien Act provided for two types of legal action against detention order. Either the foreigner could turn to civil court with the proposal to order his release or he could file a legal action again the detention order to the administrative court.[27] Furthermore, the police had a duty to continuously examine whether the reasons for detention are lasting.

Since 1th January 2014, new provisions are in effect, which revoked the possibility of proposal to civil court. Instead, the foreigner can, under the section 129a (1) of the Alien Act, file a proposal for his release from detention to the police.[28] The possibility to file a legal action again the detention order to the administrative court was maintained in the same way as before amendment of law. The administrative body must deliver a file of the foreigner to the court within period of 5 days and the court must deliver its judgment within 7 working days.[29] In case that the action brought to court is dismissed, the foreigner can file a cassation complaint to the Supreme Administrative Court. The detention of the foreigner must be promptly ended if the court quashes the decision of the police.

As regards the rules applicable to asylum seekers, at the level of EU law they fall under the above mentioned Reception and Procedural Directive. Currently none of them regulates grounds on which the asylum seeker can be detained.[30] Article 7 § 3 of the Reception Directive states that when it is proved 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

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[26] The Return Directive, Article 15 para. 2

[27] *Detention of asylum seekers and migrants and alternatives to detention*. Prague: Organizace pro pomoc uprchlíkům, 2011 [quoted 2014-05-05]. p. 20. Accessible from http://docs.opu.cz/OPU_brozura_ENG_12012012_web.pdf.

[28] The Alien Act, section129a (1). However, such a petition can be only filed after 30 days since the legal effect of detention order, order to extend the detention or former decision about such proposal, if no legal action was filed against these decisions, or after 30 days since the legal effect of last decision of the court if legal action was filed.

[29] The Alien Act, section 172.

[30] Judgment of the Court of Justice of the European Union, 30th May 2013, C-534/11 Arslan, § 55. There are already in force recasts of the new Directive 2013/33/EU laying down standards for the reception of applicants for international protection and Directive 2013/32/EU on common procedures in member states for granting and withdrawing international protection, the new Reception directive lays down the condition for the detention of asylum seekers. These directives should be in effect from 21st July 2015.

law. Importantly, member states cannot hold a person in detention for the sole reason that he is an applicant for asylum.[31]

The Asylum Act regulates detention of asylum seekers. Under the section 46a, the Ministry of the Interior decides on the duty of the asylum seekers to remain in the reception center or in the detention center for up to 120 days. This rule applies only if one of the following conditions is fulfilled: a) the identity of the asylum seeker has not been be reliably proven b) asylum seeker proves his identity with the forged or tampered identity documents or c) it is reasonable to suspect that the applicant might constitute a threat to state security or public order, if such a procedure is not inconsistent with the international commitments of the Czech republic. This provision does not apply to vulnerable groups, which cannot be detained in the regime of the Asylum Act.[32] The asylum seeker can bring an action against decision of the Ministry to remain in the reception center or in the detention center to the administrative court. The court decides in time limit of 7 days since the delivery of the administrative file, which must be delivered to the court within 5 days. It is also possible to file a cassation complaint against the judgment to the Supreme Administrative Court.[33]

The Asylum Act also regulates the detention of asylum seekers on the arrival – the administrative body – Ministry of the Interior – can detain the asylum seeker under the section 73 (1) at the reception center at the international airport. The following provisions are clear reaction to the former insufficient regulation, criticized by the ECHR in the decision Rashed. The Ministry must decide within the period of 5 days since the submission of the application for the asylum whether it will grant the asylum seeker entry to the territory. The entry is not permitted to those asylum seekers, a) whose identity has not been be reliably proven b) who prove their identity with the forged or tampered identity documents or c) by whom it is reasonable to suspect that they might constitute a threat to state security, public health or public

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31 Article 18 § 1 of the Procedural Directive and Article 7 § 3 of the Reception Directive.

32 The Asylum Act, section 46a.

33 It might be questionable whether detention of asylum seekers under these provisions is in full compliance with the Article 5 § 1(f). Under Article 5 § 1 (f), it is possible to detent person to prevent him/her from the unauthorized entry into the country. As the ECHR suggested in the recent case *Suso Musa v. Malta* (Application n. 42337/12), where a State which has gone beyond its obligations in creating further rights or a more favourable position enacts legislation explicitly authorising the entry or stay of immigrants pending an asylum application, an ensuing detention for the purpose of preventing an unauthorised entry may raise an issue as to the lawfulness of detention under Article 5 § 1 (f) (§ 97). According to the Return Directive, recital 9 of the Preamble, asylum seeker should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as an asylum seeker, had entered into force However, it means that an asylum seeker may not be expelled pending an asylum claim, not necessarily meaning the authorisation of his stay. Also the national case-law favours the interpretation that detention of the asylum seeker falls under the first limb of the Article 5 § 1 (f) of the Convention [(e.g. Judgment of the Supreme Administrative Court 5 Azs 13/2013 (2013-09-17)].

order.[34] Similarly, this rule does not apply to vulnerable groups. The asylum seeker can bring an action against the decision of the Ministry not to permit the entry. The administrative court decides about the decision not to permit the entry in a speedy judicial review – in time limit of 7 days since the delivery of the administrative file, which must be delivered to the court within 5 days.[35] The length of the stay in the reception center at the international airport must not exceed 120 days since the submission of the application for asylum.[36]

4. The overview to the trial test of the lawfulness of detention in European context and in general

One of the most problematic issues regarding phenomena of administrative detention of aliens is definitely the trial test of lawfulness of detention. Although there is no precise definition of the model of the trial test and it is up to the national law to settle rules on it, it is without doubts that the 1st instance decision on detention taken by no judicial administrative body can cause problems. First, there is no automatic review of the lawfulness of the detention. Other important fact consists in the length of the time due to the two-instance system and its procedural complexity. The length of the judicial review and thus the speed of the procedure are considered as an overall sum of the periods passed in the 1st and 2nd instance.[37] In EU context, the following countries, among them the Czech Republic, do not require a judge but an administrative body to decide on the administrative detention: Malta, Austria, Belgium, Bulgaria, Greece, Luxembourg, Sweden, Slovenia, Slovakia, Ireland and United Kingdom[38]. However, in other European countries where it is up to a judge to decide on the detention, some problems can arise from the competencies of such a judge; e.g. in Italy it is the competent magistrate of the peace, whose original professional vocation is quite different than to decide of power on the deprivation of liberty. "Without automatic review of courts there is not guarantee of observance of rights of detainees. They have the possibility to file the appeal on the review of the decision and its actual lawfulness, but they barely use such possibility. The

[34] *Detention of asylum seekers and migrants and alternatives to detention*. Prague: Organizace pro pomoc uprchlíkům, 2011 [quoted 2014-05-05]. p. 14 (The Asylum Act, section 73). Accessible from: http://docs.opu.cz/OPU_brozura_ENG_12012012_web.pdf.

[35] The Asylum Act, section 73 (5).

[36] The Asylum Act, section 73 (9).

[37] See Akhadov v. Slovakia (Application no. 43009/10) § 28, Mooren v. Germany (Application no. 11364/03) § 106.

[38] European Union Agency for Fundamental Rights: Detention of third-country nationals in return procedures, Luxembourg, 2010, pg. 40.

reason of that can be insufficient language facilities and the fact that police bodies do not perform their duties according to the law."[39]

In conclusion, there is a more substantial risk of the national practice which is not in accordance with the Convention and namely its *habeas corpus* in cases where there is lack of an automatic trial review of the lawfulness of detention and where there is a complicated several-instance system of such a review settled. Often the *principle of non-detention* (meaning the detention is last resort to be used when no other less sever measures cannot be applied) is in the strict contradiction to the practice of the police or other administrative bodies who are in power to decide on the deprivation of liberty of aliens. In case the judicial review of administrative detention is initiated only upon request of the detained person, it implies lack of awareness of the right to appeal, lack of awareness of the grounds for detention, difficult access to relevant files, lack of access to free legal counsel, lack of interpreters and translation services and lack of information in a language detainee can understand. In such situation in closed facilities where detainees are being held, all these facts could consequently prevent them from exercising their rights in practice. The only systematic solution is available, so any administrative detention is subject to the automatic judicial oversight.[40]

5. The development of the trial test of the lawfulness of detention in the Czech Republic

From the Czech judicial point of view, we can divide the process into the two periods. The first was in a sign of the duality of the procedure under the Civil Procedure Order (CPO as amended by the act. No. 293/2013 Coll.) and under the Administrative Procedure Order (APO), the second is connected merely with the APO. 1st January 2014 was not only a date of the introduction of the new measures in the Alien Act, but also of the massive recodification of the Civil law. Because of the fact that new legal constructions from the new civil code needed also procedural regulation, the new procedural code for non-contentious proceedings has been adopted (no. 292/2013 Coll.). During the process of the so-called recodification of the civil law in the Czech Republic, the regulation of the CPO was not transferred to the aforementioned act. No 292/2013 Coll. Nowadays, there is only the procedure under the APO.

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[39] VYHNÁNEK, Ladislav. Interakce Českého a Evropského práva, Administrativní detence cizinců. Evropské a vnitrostátní aspekty. In: *Sborník příspěvků doktorského studia k výzkumnému záměru „Evropský kontext vývoje českého práva po roce 2004*. Brno: Masarykova univerzita v Brně, 2009, p. 175.

[40] See also Memorandum by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe Following his visits to the United Kingdom on 5-8 February and 31 March-2 April 2008 CommDH(2008)23, Strasbourg, 18 September 2008, § 52.

The provisions of section 200o et seq. CPO dealt with the matter of the release of aliens from detention. From the procedural point of view this proceeding was non-contentious proceeding, which material frame was in the Alien Act, which also introduced this regulation into the CPO. This draft tried to accomplish commitments from the Convention in the connection with introduced possibility of the police authority to decide about the detention of aliens. The specified conditions of the police decision were in the Alien Act. The regulation in the CPO was formerly the sole procedural guarantee in the matter of the detention, but after the rebirth of the administrative judiciary in the Czech Republic in 2002 the former regulation was fragmented between the CPO (the release of aliens) and the Administrative Procedure Order (APO; the legality of the detention decision and the remaining protection). The competence for proceedings belonged to district courts, which were obliged to try the petition preferentially and as quickly as possible. These requirements were the main problem for the Czech courts. They were section 200o CPO proceedings only at district courts in Mladá Boleslav, Břeclav (because there were facilities for aliens) and the Municipal Court in Prague.[41] It had been analyzed that e.g. at the District Court in Mladá Boleslav had been 82 proceedings under the Sec. 200o CPO between year 2009/11-2010/04 and only two aliens were released.[42]

According to the decisions of the Czech Constitutional Court, the Convention is the part of the so-called constitutional order.[43] That was the reason why the Constitutional Court evaluated the conformity with the Convention in one of the most important judgments no. Pl. ÚS 10/08. The plaintiff was given a sentence of the expulsion in the criminal proceedings (decision of the District Court in Kladno from 1999/11/16, 1T 69/1999-203). However, this sentence had not been executed and the plaintiff was still presented in the territory of the Czech Republic. Then, the Police Local Authority in Prague decided to administrative expel the plaintiff from the Czech Republic, despite the older court decision. The plaintiff was still presented in the territory of the Republic. After 4 months, the Police Local Authority in Prague decided to detain the plaintiff according to the section 124 of the Alien Act. The plaintiff invented a new identity because he did not have a passport and after his entrance in the Czech Republic in 1999 he also had a child there, but in the birth certificate of a child there was the fictitious name of the plaintiff. The argumentation of the then plaintiff mentioned the fact that after the execution the care of his child will not be provided which is contrary to Article 6 of

41 Judgment of the Supreme Administrative Court ref. no.7 As 97/2012-26 (2012-09-04).

42 *Analýza právního postavení zajištěných cizinců* [online]. 2010-04 [quoted 2014-05-03]. Accessible from: <http://docs.opu.cz/Analyza_pravniho_postaveni_zajistenych_cizincu.pdf> p. 26.

43 Decision of the Constitutional Court, Pl. ÚS 36/01 (2002-06-25). All decisions of the Constitutional court are accessible from: http://nalus.usoud.cz/Search/Search.aspx.

the Convention on the Rights of the Child. The Municipal Court in Prague with its judgment rejected the petition and its substantiation and said that the Police authority procedure was according to the law and the conclusion was duly evaluated. Then, the plaintiff brought a cassation complaint[44] against the decision of the Municipal Court. His argumentation was connected with the fact that his child is the citizen of the Czech Republic so that there was the legal reason why expulsion should have not been executed. In the period of the cassation complaint, the plaintiff was not in the Czech Republic. The Supreme Administrative Court suspended the proceedings because the generally binding legal regulation concerning the matter was from its point of view in conflict with the constitutional order of the Czech Republic and it assigned the proposal to the Constitutional court. Judges of the Constitutional court decided the permission for the police authority to detain of the alien who received the decision in the matter of the administrative expulsion in the case of danger that the alien could threaten the national security, seriously disrupt public order or thwart or complicate the execution of the expulsion is not in the contrary of the principle of proportionality. The Constitutional court decided that the detention in the matter of the administrative expulsion is not the same as the arrest during the criminal proceedings. The comparison of the regulation of two or more matters from dissimilar situations cannot be impersonated as the principle of the equality between people. The principle of equality is provided by the fact that all aliens have the same conditions according to their stay in the Czech Republic and have same rights and duties (§ 100-106). The right on the court protection is provided by the administrative petition (according to the APC) and the petition of section 200o CPO (§ 91), which were sufficient measures according to Article 5 § 4 of the Convention. The Constitutional court also decided that only citizens of the Czech Republic and other states of the European Union have the right of residence or sojourn on the territory of the Czech Republic, other aliens have only the right to leave the territory of the state (§ 117). No dissenting opinion to this decision was publicized.

The resolution of the Constitutional Court IV. ÚS 3755/11 indicates that just the fact that the alien disagrees with the decision about his administrative expulsion is not the intervention into constitutional rights.[45]

It is not quite common that the higher court explicitly castigates inferior courts. The exception is the decision of the Supreme Administrative Court from April 2009. The Supreme

[44] The administrative proceedings in the Czech Republic know only extraordinary remedies – cassation complaint and reopening of proceedings petition. After 13 years of service of the Supreme Administrative Court it could be said that the cassation complains became the usual remedy, on the other hand, there was no admissible reopening of proceedings petition.

[45] Judgment of the Constitutional court no. IV. ÚS 3755/11 (2012-02-21).

Administrative Court was strongly outraged that inferior court decided in the matter after the 180 days period. The importance of the immediate submission of the cassation complaint to the Supreme Administrative Court was also accented. This decision was also important because the Supreme Administrative court implemented in its decision-making activity the concept of reasonable prospect of a removal, which is not explicitly present in the Czech acts, but it has been mentioned by the ECHR.[46]

In the cases 2 Aps 4/2007 and 9 Aps 6/2007 Supreme Administrative Court explained that the situation when the alien is in the airport transit area his/her protection is not provided by the sec. 200o et seq. CPO, but by the APO which covers the wide range of the so-called interventions of administrative authorities in the case of missing special regulation. Detention of the aliens and the staying in the receiving centre of the airport transit area are completely different matters. The regulation in the CPO requires a prior decision of the administrative authority, but in the lack of it, there is still the protection provided by the APO. Nowadays, when there is no similar regulation in the act no. 292/2013 Coll. the situation is different: protection in both cases is provided by the APO.[47]

According to the aforementioned court decisions it could be said that the main problem in relation to Article 5 § 4 of the Convention were delays in proceedings and also problems with the application of the proper regulation during the period of existence of different regulation in CPO and APO. We do not share the opinion of our Constitutional court that there is no similarity between detention and arrest, in the case that the liberty of someone is interfered by the authority there must be provided protection by the court and this court has to pay a strong attention on the matter of detention of aliens. What is also important is the fact that the Supreme Administrative Court also overstepped the loophole in the Czech measures when it decided that the foreigner has to be immediately released in the case of the revocation of the detention order by the court.[48]

Nevertheless, we can found much more serious problem in the Czech regulation. In the criminal proceedings a strong attention is being paid to the automatic judicial oversight in the case of arrest. The Czech Criminal Procedure Order (CrPO) precisely provides the protection for a person who could commit a crime,[49] but on the other hand, in the case of the foreigners,

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46 Judgment of the Supreme Administrative Court no. 1 As 12/2009 (2009-04-15).

47 Judgments of the Supreme Administrative Court: no. 2 Aps 4/2007 (2007-12-11), no. 9 Aps 6/2007 (2007-11-22).

48 See also p. 17 and the following of this document.

49 This could be connected with the the bad experiences with injustice in the 1940's and 1950's. Until 1957 the CrPO had not known the judicial oversight in a connection with an arrest. Before an indictment in the criminal proceedings were involved only police officers and prosecutors. Then, people could have been under arrest for

there is not a similar regulation. This is a gap which could be solved by the law-making body or by the decision of the Supreme Administrative Court. This is quite interesting because in the Czech legal system precedents[50] are not the source of the law.

6. Critical analysis and conclusions

The Czech Republic belongs to the countries which chose the model of administrative decisions about the detention of foreigners with the consequent judicial review based on the application by the foreigner. In the case-law of the ECHR in relation to the Czech Republic, we have demonstrated several problems connected to detention of foreigners in our country, some of which were solved by new legislative measures adopted during the previous years. In the case of Singh the ECHR concluded there was a violation of Article 5 § 1 (f) due to the excessive length of the detention pending deportation and Article 5 § 4 due to the failure of state to secure a prompt examination of the applications for release by the first-instance court and the appellate court (first application for release lasting almost 4 months, second almost 8 months). Though in this case the applicant's detention pending deportation was based on the Code of Criminal Procedure, we can relate the conclusions of the ECHR also to administrative detention. We conclude that in administrative detention nowadays there should not be a problem with the prompt examination of the lawfulness of detention, due to the 7 day – time-limit for the decisions of the court of the first instance and duty of the appellate court to decide these cases with priority. However, due to procedural obstacles in particular cases the problem with the overall length of proceedings might occur. In 2007 in the Rashed case there was a main problem with the lack of clear legal measures on which kind of judicial review was applicable in the case of asylum seeker in a transit zone with the result that no judicial decision on the lawfulness of his detention had been given during the ten-month detention period. This problem was consequently solved by the new legislature. In a more recent case Buishvili from 2011, the ECHR held that the court shall have power to "decide" the "lawfulness" of the detention and both to "order release" if the detention is unlawful. According to the law applied on this case – section 73 of the Asylum Act – the Ministry decides about refusing entry to the Czech Republic to an asylum seeker who was held at an airport reception centre and if the judicial review

several months without any possibility of the judicial oversight [Decision of the Regional Court in Plzeň, no. 9 Rt 49/92 (1992-12-11)].

50 In the Czech legal system precedents are not the source of the law, but it's quite common that judiciary and administrative bodies proceed in compliance with existing court decisions. Since the 1st January 2014 the new Civil code in its sec. 13 has indicated a new principle that judges are obliged to respect prior decisions in similar matters. The factual application of this measure (which indicates precedents) will be the question for the future.

quashes the decision, the Ministry must issue a new decision within three days or grant the asylum seeker entry. The Court assessed such an arrangement whereby a finding of unlawful detention can lead only indirectly to release, as not sufficient to comply with the requirements of Article 5 § 4 of the Convention.

This is a constant problem in conditions of current law, not only according to the above mentioned section 73 which is still in force, but also according to detention under the Alien Act – the detention must be promptly ended if the court quashes the administrative decision of detention and if the police does not issue a new decision within 3 days (section 127 (1) letter b of the Alien Act), but there is still no automatic power of the court to order a release. This means the current national law when the court itself does not have a power to order a release of a foreigner is at variance with the conclusions of ECHR. Though the legislator has not so far adjusted the Alien Act to be in compliance with the above-mentioned conclusions, this deficiency was compensated by the interpretation in the national case-law. According to the decision of the Supreme Administrative Court no. 9 As 111/2012, the result of the revocation of the detention order by the court must be the immediate release of the foreigner and the application of above cited provision is excluded.[51]

When it comes to a question who should decide about the detentions under Article 5 § 1 (e), neither the Convention nor the ECHR demand that it must be a court decision about the lawfulness of the detention in the first place, however, in case the administrative body decides first, Article 5 § 4 grants a consequent speedy judicial review of this decision. Even the Constitutional court of the Czech Republic examined whether the fact that the administrative body (in that case the police) decides about the detention of aliens is compatible with the principle of proportionality, but found that it is in compliance with constitutional order. The Constitutional court distinguished the matter of the administrative expulsion from the arrest during the criminal proceedings and claimed that the right to the judicial review of the administrative decision is provided by the administrative petition (according to the APC) and the petition of section 200o CPO (which was obviated from the current law since the beginning of 2014). What is interesting is that the constitutional court argued that it is crucial to realize that it is in alien's disposition to avoid his detention to voluntarily leaving the territory.[52] This conclusion might be problematic to apply nowadays in cases of detention of asylum seekers, who apply for an asylum in the territory and might not be just referred to voluntarily leave the territory back to their country of origin. Furthermore, the Constitutional court admitted it might

[51] Judgment of the Supreme Administrative Court, no. 9 As 111/2012 (2012-11-01).
[52] Judgment of the Constitutional court no. Pl. ÚS 10/08 (2009-05-12), § 126.

be appropriate for the future to consider change towards the automatic *ex offo* judicial review of detention at certain time.[53]

Since the findings of the Constitutional Court in 2009, there have been almost no changes in how the detention is being reviewed. There is still no automatic *ex offo* review, one of the main changes in recent time was just the elimination of the double-track in judicial review of the lawfulness of detention (petition for the release to the civil court and action to the administrative court). Currently there is only action to the administrative court left. According to the explanatory report, the aim was to unify the regulation, with the vision that the police would decide about the petition for the release, and the administrative court would decide about action against denial of release by the police, and also about action against the detention order itself.[54] However, the result of this "unification" is rather counterproductive – due to the fact that the petition to the civil court for the release order was basically the only instrument by which direct release ordered by the court was possible, leaving apart the completely different question whether these petitions were actually being used or not.

The fact that the administrative authority decides about the detention of foreigners has both its advantages and disadvantages. On the one hand, in case of detention with a view of expulsion, it is the police which has all information immediately due to fact that the police controls foreigners residence permits and consequently starts proceedings on administrative expulsion. However, the decisions of administrative body can never be a guarantee of independence, due to clearly opposite interests to those being unlawfully on the territory. The court might also have enough information to decide about the detention taking into consideration that all that is necessary is to promptly hand over the administrative file. In condition of the Czech republic, the potential shift to the court as a body which decides about detention instead of an administrative body would require organizational changes, because it would obviously mean a higher burden on administrative courts, with a whole agenda which was so far executed by the police, or the ministry of interior in case of asylum seekers.

Even though the decision process would remain the same but only the new automatic *ex offo* judicial review would be brought in effect, it would also mean a higher demand on courts, which so far review the lawfulness of detention only on demand of detainee. Nevertheless, it might be worthy to consider such changes, because initiation of the judicial review only upon

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53 Judgment of the Constitutional court no. Pl. ÚS 10/08 (2009-05-12), § 130.

54 *Sněmovní tisk č. 930/0: Důvodová zpráva k zákonu č. 303/2013 Sb.* [online]. 2013 [quoted 2014-04-10]. Accessible from: <http://www.psp.cz/sqw/historie.sqw?o=6&t=930>.

request of the detainees is connected with several risks as mentioned in this work earlier, e.g. the lack of awareness of the right to appeal or lack of a free legal counsel, these risk would be eliminated in case of *ex offo* judicial review.

Another issue is the guarantee of the speedy judicial review. The speediness of the judicial review (no matter whether the review is only on request of the detainee) is the necessity, since the detention is the serious restriction of the human freedom. It seems that the Czech legislation in theory fulfills this criterion since in all cases of possible detention in national law nowadays the court has to deliver a decision within 7 days from the day he receives an administrative file. It is disputable what might be the consequence of the non-fulfilment of these deadlines. The law itself does not contain any sanctions and taking into account the provision of the Article 5 § 1 of the Convention which states that "*No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law"*, it could be argued that non-fulfilment of the procedural requirements should also lead to the release.[55] The problem might be with the length of the overall proceedings including the cassation complaint to the Supreme Administrative Court. Even though cases of detention are supposed to be decided preferentially, there is no time limitation for the delivery of the judgment and there are several procedural acts within the process, e.g. the condition of compulsory legal representation. As was demonstrated in the work, it has already happened that even the court of the first instance has not respected the preferential regime for the decision about detention and decided after more than 180 days. In such cases, the original aim of the protection against the arbitrary detention loses its meaning, due to the fact that 180 days is under normal circumstances the maximum length of the detention with a view to deportation.

This work has attempted to point out the practical risks connected to the decision of detention made by the administrative body instead of the independent court. Although the consequent speedy judicial review is guaranteed, it is not ridden of various difficulties whether it comes to not having direct power to order a release, or the overall length of the proceeding. Therefore, the model of the court deciding on the lawfulness of the detention in automatic *ex offo* review should be considered as the most suitable solution, which would guarantee the better compliance with the Article 5 of the Convention.

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[55] The ECHR stated in *Chachal vs. UK*: *"Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to the obligation to conform to the 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 (art. 5), namely to protect the individual from arbitrariness."* (Section 118). Compare with Association for Legal Issues of Immigration 2013. *Project on reception conditions and access to asylum procedure in detention. Annual Report*, Czech Republic, p. 22.