



OPEN Summary of EMN Ad-Hoc Query No. [2019.62]

AHQ Possible detention of asylum seekers pending the appeal procedure

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KEY POINTS TO NOTE

- ★ Detention of asylum seekers pending an appeal procedure after the rejection of his/her application is possible in seventeen (Member) States (**BE, CY, FI, EE, EL, HR, HU, IT, LT, LU, LV, NL, NO, PL, SE, SK, and UK**). Detention pending an appeal procedure is not possible in three (Member) States (**BG, DE, and ES**). **NO** rarely detains asylum applicants until after the final appeal process has been completed.
- ★ Detention in order to determine or verify the identity or nationality is possible in fourteen (Member) States (**BE, CY, EE, EL, FI, IT, LT, LU, LV, NL, NO, PL, SK and UK**). Detention on this ground is not possible in six (Member) States (**BG, DE, ES, HR, HU, and SE**).
- ★ Detention in order to determine elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding, is possible in sixteen (Member) States (**BE, CY, EE, FI, EL, HR, HU, IT, LT, LU, LV, NL, PL, SK, SE and UK**). Detention on this ground is not possible in three (Member) States (**BG, DE, and ES**).
- ★ Detention on other grounds is possible in fifteen (Member) States (**BE, CY, EE, EL, FI, HR, IT, LT, LV, LU, NL, NO, PL, SK and UK**). In five (Member) States (**BG, DE, ES, HU, and SE**) there are no other grounds on which detention of an asylum-seeker pending an appeal procedure is possible.

BACKGROUND

In the Netherlands there is some (legal) debate on the possible detention of asylum seekers pending their appeal procedure. The legal debate focusses on the detention of asylum seekers during the appeal procedure against the rejection of their asylum request. The question is if during that phase of the procedure, the circumstances specified as a ground for detention in article 8, paragraph 3, under letter a and the ground under letter b (of the Receptions Directive, 2013/33 EU) can be applied as a ground for the (continued) detention.

Under upcoming legal cases the policy of the Netherlands is under review. Therefore, the Netherlands would like to know how other Member States have implemented any policy in this regard and if they have encountered legal difficulties. The Netherlands is especially interested if the current national practice of other (Member) States would allow to use article 8, third limb under b of the Receptions Directive as a basis for continued detention pending the appeal procedure.

The Receptions Directive 2013/33 EU, article 8, paragraph 3 states that an applicant may be detained only:

- a) In order to determine or verify his or her identity or nationality;
- b) In order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;
- c) In order to decide, in the context of a procedure, on the applicant's right to enter the territory
- d) When he or she is detained subject to a return procedure (...), in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria (...);
- e) When protection of national security or public order so requires;
- f) In accordance with Article 28 of Regulation (EU) No 504/2013 (...) establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person

MAIN FINDINGS

1. Can the detention of an asylum seeker continue in your Member State pending the appeal procedure after the rejection of his/her application? Yes/No

Most (Member) States (**BE, CY, EE, EL, HR, IT, HU, LT, LU, LV, NL, NO, PL, SE, SK, UK**) indicate that detention of an asylum seeker pending an appeal procedure can be continued. However, **HU** mentions that there is no relevant practice regarding detention after the rejection of an asylum procedure. In **FI**, continued detention is possible, but these are extremely rare cases. This is because detention is applied only when there is an enforceable removal order and the preconditions set in the Aliens Act are met. **NO** detains asylum applicants only if the applicant continues to fall under the legal criteria for detention which are the same throughout the entire application and appeal process.

In **BG, DE, and ES**, detention during the appeal procedure is not possible. In **DE**, this is because the relevant specifications of the Reception Directive 2013/33 EU have not been transposed into German law. In **ES**, detention is not possible pending the

appeal procedure, but the asylum seeker may already be detained, for example when a return order has been issued and subsequently requests asylum last minute.

2. If you answer yes to question 1: can the detention of an asylum seeker continue pending the appeal procedure after the rejection of his/her application in order to determine or verify his or her identity or nationality (based on article 8 third limb under a of the Receptions Directive (2013/33 EU)? Yes/No, please elaborate.

The majority of (Member) States (**BE, CY, EE, EL, FI, IT, LT, LU, LV, NL, NO, PL, SK, UK**) mention that continued detention based on the verification or determination of identity or nationality is possible. Most (Member) States (**CY, EE, EL, IT, LT, LU, and PL**) mention that continuation of detention during the appeal procedure is only possible within an established maximum time frame. For example, in **IT**, continued detention is possible only for the necessary amount of time to undertake the verification process, which may not exceed 30 days. If nationality or identity determination is not possible, the asylum seeker can be detained for a maximum period of six months. **LV** mentions that in this context, an asylum seeker may be detained for more than six days only on the basis of a decision of the district court. In **NL**, continued detention is possible, but will only be proportional if other measures cannot be effective. Moreover, it is common practice that at the very least a risk of absconding must be established as well in order to accept the ground for detention. In **SK**, continued detention is possible, but the competent authorities in **SK** assess whether the purpose of detention persists.

This is different in other (Member) States (**BG, DE, ES, HR, and HU**), where (continued) detention in order to determine or verify his or her identity or nationality is not possible. In **HR**, rejection of application implies that identity and nationality has already been established, or it has been established that there are no means to determine the identity or nationality of the asylum seeker. In **HU**, the only basis of detention is the risk of absconding. In **SE**, it is not possible to detain someone due to identity or nationality issues after the decision for the application.

3. If you answer yes to question 1: can the detention of the asylum seeker continue pending the appeal procedure after the rejection of his/her application in order to determine those elements on which the application for international protection is based which could not

be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant (based on article 8 third limb under b of the Receptions Directive (2013/33 EU))?

Continued detention pending the appeal procedure, in order to determine elements which could not be obtained in the absence of detention, is possible in **BE, CY, EE, EL, FI, HR, HU, IT, LT, LV, LU, NL, PL, SE, SK** and **UK**. However, this practice is rarely used in **CY**, as these grounds must be accompanied with other grounds of a more serious nature, such as a threat to public security. **EE, HR, IT, LT, LV, LU** and **SK** mention that this is particularly the case when a risk of absconding is detected. In **NL**, this is possible, but Dutch courts generally interpret the wording of Article 8 of the Receptions Directive to be only applied for the asylum procedure, which does not include the appeal procedure.

In **BG, DE, ES** and **NO** (continued) detention based on these grounds is not possible. In **NO**, detention is not possible for the sole purpose of determining elements on which the application for international protection is based.

4. If you answer yes to question 1: are there any other grounds on which an asylum seeker can be detained in your Member State pending the appeal procedure after the rejection of his/her application?

BE, CY, EE, EL, FI, HR, IT, LT, LV, LU, NL, NO, PL, SK mention other grounds on which an asylum seeker can be detained pending the appeal procedure. Most notably, all these (Member) States mention protection of national security or public order as a ground for detention pending an appeal procedure, in accordance with criteria e of Article 8 of the Receptions Directive. Secondly, **FI, LT, LV** and **SK** explicitly mention the Dublin Regulation as a ground for detaining an asylum-seeker, as the asylum-seeker should be transferred to another EU Member State. Finally, **FI** mentions that detention can be used if an applicant has submitted a new asylum application with the sole purpose of delaying the removal process or if the person is in any other way attempting to delay the removal process.

BG, DE, ES, HU, SE and **UK** mention no other grounds on which an asylum seeker can be detained pending his or her appeal procedure. In **HU**, the basis of detention is generally the risk of absconding; there are no other relevant practices regarding detention during an appeal procedure. As mentioned before, in **BG, DE** and **ES**,

(continued) detention pending an appeal procedure is not possible on any grounds.

EMN NCPs participating: Responses from Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Slovakia, Spain, Sweden, United Kingdom, Norway (23 in total). The responses from Austria, the Czech Republic and France were not for wider dissemination and are therefore not included in this summary.

Disclaimer: The responses of the Member States regarding this ad-hoc query have been provided primarily for the purpose of information exchange among the EMN National Contact Points (NCPs) in the framework of the EMN. The contributing EMN NCPs have provided information that is (to the best of their knowledge) up-to-date, objective and reliable. Note, however, that the information provided does not necessarily represent the official policy of an EMN NCPs' Member State. The responses are interpreted by the EMN to write this summary.