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Administrative Detention of Migrants in Finland

The Finnish Parliament has recently adopted a new law amending the Finnish Aliens Act of 2004 (Laki ulkomaalaislain muuttamisesta) and the Detainee Treatment Act of 2002 (Laki säilöön otettujen ulkomaalaisten kohtelusta ja säilöönottoyksiköstä annetun lain muuttamisesta). The new law is now waiting for the President's signature. The aim of it is to transpose the recast Reception Conditions Directive (2013/33/EU) into the Finnish law. The Directive was adopted in June 2013 with in order to introduce new clear and unified standards of detention of asylum seekers, which until now did not exist at the EU level. The Directive introduced in particular rules concerning basis for detention of asylum seekers, guarantees for detained applicants, conditions of detention and provisions concerning detention of vulnerable persons and those with special needs. In order to implement the Directive, the law adopted by the Finnish Parliament has, for instance, introduced new grounds for detention and new procedural requirements for detention of children.

The practice of detention in general and adoption of the new law in particular have not been discussed widely in Finland. The prominent exception concerned public actions organized by the Finnish NGOs highlighting the problems of detention of children and conditions in detention, in particular detention in police prisons. Otherwise one can hardly find any academic or public discussion on the topic. This is deeply regrettable as detention practices in Finland indeed point to a number of problems not only regarding conditions of detention or detention of vulnerable persons but concerning procedural rights of detainees, in particular the right to fair judicial review of detention decision. Some of these problems were voiced by international monitoring bodies such as the UN Committee Against Torture or the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment. Others were identified in a recently published study titled *Administrative Detention of Migrants in the District Court of Helsinki*, conducted by my colleague Aleksi Seilonen and myself.

In this short text I would like to put attention on the problematic aspects of detention of foreigners in Finland and present them in light of changes in the Finnish law. Our study was based on monitoring of 167 court decisions, which took place during the first half of 2013. We focused on three main issues: (1) the practice of detention in Finland including statistical information concerning detention of foreigners in Finland as well as the analysis of main grounds of detention and their interpretation by the police and the court; (2) the right to effective judicial proceedings in the District Court of Helsinki; and (3) the conditions of detention, in particular its length and the use of police prisons for the purpose of the administrative detention of foreigners. On the basis of the analysed cases we identified a number of issues, which we found problematic

in light of national and international legal standards. These include: the proportionality assessment in detention decisions; the interpretation and application of the grounds of detention; matters concerning the conditions of detention; and certain aspects of the right to fair and effective judicial proceedings.

In my opinion, one of the most prominent findings of our study concerned fair judicial control of detention, in particular the lack of proper reasoning in the court's decisions on endorsement or prolongation of detention. The analysed case law showed that the court, instead of providing own justification, consistently referred to the reasons found in the police or border guard's applications, which it was reviewing. This practice was particularly problematic since more often than not the argumentation of the enforcement authorities was either non-existent or even at the very best unclear, incomprehensive and filled with irrelevant information. This approach not only affected the position of detained foreigners but also put the lawfulness of detention into question, as recognised in jurisprudence of the European Court of Human Rights.

Such practice also significantly obstructed the aim of the monitoring to identify the actual bases for detention and their interpretation. We had hoped that monitoring would help to clarify the grounds for detention but this was only partially possible due to limited court reasoning. For instance, at the time of monitoring, section 121(3) constituted one of the most controversial bases for detention in the Finnish law allowing for detention when there are reasonable grounds to believe that non-citizen will commit an offence in Finland. Such future-oriented formulation of criminality ground has been clearly problematic and very difficult to apply in practice. The practice of the court showed that majority of detentions based on section 121(3) concerned situations where non-citizen had been detained merely on a mere suspicion of committing a crime. It was however very difficult to assess how the court determined the threshold of suspicion necessary for detention due to its very incoherent practice.

In addition to broad interpretation of the grounds for detention and limited reasoning of the court, the study identified also a serious problem concerning conditions of detention in police prisons. At the time of monitoring practically all detentions began in police prisons rather than in immigration detention units due to the capacity problems of the former. Such practice, even though allowed by the Finnish law, constituted one of most problematic aspects of the Finnish detention system, in particular due to lack of systematic health inspections or screening for vulnerable cases.

New law only partially responds to these concerns and in some situations reinforces the existing problems. First of all it includes a new basis for detention and introduces changes in existing ones (such as section 121(3) of the Aliens Act). Arguably, the adoption of new basis for detention will require the court to pay more attention to its reasoning as these grounds will require interpretation. On the other hand the new provisions raise concerns as they expand the possibilities to detain foreigners. For instance, in the new law foreigner may be detained when convicted

for or suspected of a crime when detention is necessary for securing the preparation or enforcement of detention decision (ulkomaalainen on syylistynyt tai hänen epäillään syylistyneen rikokseen ja säilöönotto on tarpeellinen maastapoistamispäätöksen valmistelun tai täytäntöönpanon turvaamiseksi). Such explicit support in the new law for detaining foreigners suspected of commission of crimes lowers the burden of proof needed for detention in comparison with the old provision. Some of the provisions also raise problems with regard them being in line with the recast Reception Conditions Directive.

The problem of the limited court reasoning has been tackled by the law only in a very limited extent in the context of detention of children. In such cases the court is required to consider the written statement of a social worker concerning the best interests of the child in the context of detention. Also if a child is being detained with a parent for more than two weeks, the court is required to reconsider continuation of detention. A social worker has a right to provide an opinion, and the court is obliged to release the minor unless special reasons exist to support further detention.

Finally, the practice of detaining foreigners in police prisons has changed recently. However, this didn't happen due to the legal changes but because the Finnish government opened a new detention centre in Joutseno in Eastern Finland. This has resolved the capacity problem at least temporarily. However, a provision allowing for the detention of migrants in police prisons due to capacity or security reasons remains in the new law, making such practices likely to continue in the future.

The effects of the new law will only be known in the future as the practice of the Finnish enforcement authorities and the courts develops. New research will be needed in order to analyse such practice. I hope that more scholars and activists will be interested in conducting them, especially since administrative detention of foreigners, in particular asylum seekers, constitutes one of the most significant problems in contemporary Europe.

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