Threats Stemming from Asylum Seekers: The Assessment of the meaning of the notions Public Order and National Security in regard to Asylum Seekers under Article 8 (3) (e) of the Reception Conditions Directive

Master Thesis, International and European Union Law

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List of abbreviations

ATD	Alternatives To Detention
CJEU	Court of Justice of the European Union
CEAS	Common European Asylum System
EU	European Union
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
MS	Member States
TFEU	Treaty of the Functioning of the European Union
UNHCR	United Nations High Commission for Refugees
UN	United Nations

Abstract

Everyone has the right to seek asylum and States are obliged to provide asylum to those who deserve international protection but equally, to condemn criminal behaviour, perhaps *a fortiori* when some criminals abuse the institution of asylum.

The situation of undesirability of an individual, who falls within the exclusion clause of Article 1F of the Refugee Convention has been well established. However, there is also another group of "*undesirable*" migrants, which I would also like to address in this paper. It is about the category of persons who have applied for asylum, but simultaneously, they have been involved in public security concerns relating to crimes committed after the arrival in the Host-State. The issue becomes more complex, when the Member States make use of the broad discretionary power under Article 8 (3) of the Reception Conditions Directive to detain those migrants, sometimes, under suspicion of criminal activity or low -crimes -threshold and, therefore running against the general principles of international and European refugee law.

In this respect, the aim of this paper is to assess the matter of contention by scrutinizing and evaluating the standards for detention on the grounds of public order and national security developed, in addition to International refugee law, at the European Level, based on the judgments of the European Court of Human Rights and, particularly, the Court of Justice of European Union. By implication, this analysis and findings will be juxtaposed with the practice of Member States with the view to establish their policy practice when assessing a public threat posed by those individuals who are fleeing from persecution.
Ultimately, the author intends to endeavour further research on the issues of asylum law at the European Union level with special focus on the grounds for detention.

Keywords: detention, asylum seekers, European Union.

Methodology

The present paper intends to address the gap of a harmonised and uniform interpretation when considering a risk of public order and national security of asylum seekers under administrative detention, when they have served a criminal sentence or even without committing a crime yet, due to personal circumstances, which amount to a potential public risk. An additional aim is to scrutinise to what extent the protection of fundamental rights are thereby observed.

For that purpose, the focal point of the paper will be directed towards a case study of representative case law and legal documents, predominantly, by making the reference to the recast Reception Conditions Directive. Furthermore, the author will use as a benchmark the settled case-law of the Court of Justice of the European Union in *inter alia* Case C-145/09 Tsakouridis; C‑348/09 P. I; C-554/13 Z.Zh. and O; C-373/13 H.T and, in particular, the recent landmark case, namely C-601/15 (PPU) J.N.

The above-mentioned case-law, will be scrutinized with the objective to understand the appraisal of the notions of public policy or national security within the framework of the European Union *acquis* and to address the question whether, indeed, those concepts as interpreted in other cases, can apply *mutatis mutandis* to criminal asylum seekers under immigration detention. In that regard, analysis of the different positions in national legislation will provide an overview of the situation in order to draw a comparison between the national legal approach and EU regulation. With respect thereof, the author will emphasise the situation in the Netherlands, the country that has initiated the first step in questioning the public order grounds in the Reception Conditions Directive, hence laying down precedents for the development and elucidation of the current stance of law. Additionally, an overview of Danish law will be entertained, which even though Denmark has opted out from the Directive, still presents an interesting point of reference due to its rigorous public security policy and its recent public nuisance policy relating to asylum seekers and refugees.

Finally, for the sake of gathering information, the author will rely on information provided by the European Migration Network, Asylum Information Database Country Reports, UNHCR research papers, academia and relevant NGO documents.

1. Introduction

The Convention relating to the Status of Refugees 1951 (hereinafter the Refugee Convention) is considered to be the cornerstone of the international regime for the protection of refugees,[1] which proclaims the right of every human being to seek asylum and, simultaneously, identifies circumstances under which States should recognize the individual as a refugee.[2] With such a statement, it aims to safeguard the human rights of those who are suffering persecution by proclaiming that States have binding international responsibilities towards refugees. However, there are also compelling interests of the States, for instance when refugees or asylum seekers have served a criminal sentence after their arrival. Hence, governments faced a dilemma between safeguarding the interests of the individual and the preservation of the control and security within their territory.

The current refugee crisis has been one of the most tragic situations of the twentieth century.[3] As a consequence, due to the massive immigration influx in Europe there has been a strong tendency to detain asylum seekers on a daily basis and to shift the protection of refugees in favour of States.[4] These growing trends seriously undermine the already threatened right to seek and enjoy asylum in other countries. Significantly, the increased global security has impacted on the treatment towards asylum seekers as "*dangerous*", to such extent that they have arguably become "*one of the most silenced and at risk groups"* within society.[5] Hence,

[1] European Parliament and of the Council Directive 2011/95/EU of the of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Qualification Directive). 20 December 2011, OJ L. 337/9-337/26. See recital 14.

[2] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) Article 1.

[3] Ingrid Boccardi, "*Confronting a False Dilemma: EU Asylum Policy between "Protection" and "Securitisation"* (2007) Current Legal Problems. http://clp.oxfordjournals.org/content/60/1/204.full.pdf+html?sid=1c8faf34-6989-41ef-809c-af2428f4a67f accessed 10 February 2016

[4] Liz Fekete, "*The Deportation Machine: Europe, asylum and Human Right"* (2005) Race & Class, p. 15. http://rac.sagepub.com/content/47/1/64.full.pdf+html accessed 15 February 2016

[5] Margaret Malloch and Elizabeth Stanley, "*The detention of asylum seekers in the UK: Representing risk, managing the dangerous" (2005)* Punishment & Society, p. 53–71. http://pun.sagepub.com/content/7/1/53.full.pdf+html

not surprisingly, some States are taking restrictive measures when it comes to the criminal acts committed by migrants due to their impact on political debate and the perception of society in regard to tolerance towards immigrants, refugees, and asylum seekers.

It is essential to note that, at the European level, there has been a progressive asylum cooperation among the EU Member States that endeavours to achieve a coordinated policy. With that view, at the Tampere Council in 1999, the European Council agreed to work towards a Common European Asylum System (hereinafter CEAS), the legal basis of which was laid down in the Treaty of Amsterdam (ex. Article 63 TEC), and which allowed for a strong role by the European Union (hereinafter EU) to adopt binding measures in the area of migration and asylum. As a result thereof, the Treaty of Lisbon incorporates Article 78 of the Treaty of the Functioning of the European Union (hereinafter TFEU) recognised as the new legal basis for a common asylum policy by comprising a uniform status and procedures. Respectively, the CEAS integrates the refugee protection in accordance with the Refugee Convention and reinforces the right to have an asylum claim processed and the right to grant a refugee status or subsidiary protection, provided that the necessary conditions are met. Moreover, the CEAS legislation stipulates the grounds for detention pending the asylum procedure and further withdrawal or revocation of the refugee status.[6]

Nonetheless, certain migration matters remain within the discretion and fragmented legislation of the EU Member States, and the supposed harmonisation of asylum and migration legislation has in some cases led to a race to the bottom.[7] Among the issues that have emerged, a shadow one, but currently very politicized relates to the reaction towards asylum seekers who commit crimes while being in the host-country. In this regard, there is a gap of an harmonised and unified European legislation that provides a clear criterion when it comes to the detention of

[6] For further information, see Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, "*European Migration Law,"* (2nd edition Antwerp: Intersentia 2014) p. 243-271.

[7] Siril Berglund, Helen McCarthy and Agata Patyna, "*Migration, Human Rights and Security in Europe,"MRU Student Conference Proceedings University College London* (2012) p. 4 http://www.geog.ucl.ac.uk/research/transnational-spaces/migration-research-unit/pdfs/StudentConferenceproceedings2012.pdf accessed 5 February 2016

asylum seekers that pose a potential threat to public order and national security, as envisaged in Article 8 (3) (e) of the recast Reception Conditions Directive (hereinafter recast RCD).[8]

This recent issue is now being discussed in some European countries labelling the asylum seekers as *"criminals"*[9] and, thus, adopting restrictive measures as they believe that they represent a danger to national interests without ensuring a safeguard of their rights and freedoms. What is questionable here is that, according to the practice of some Member States a mere suspicion or previous conviction for a crime are sufficient to invoke those grounds in order to use administrative detention that can get the character of a double sanction or double penalty in the sense that, following a compliance with a criminal judgment, states might as well extended such detention on public risk grounds within administrative framework and, hence contravene the international obligation to avoid arbitrary detention.

In light of these circumstances, the following study aims to look into the notions of public policy and national security as grounds that enable Member States to exercise the exceptional power *inter alia* to detain asylum seekers according to Article 8 (3) (e) of the recast RCD. In this regard, the settled case law of the European Court of Human Rights in conjunction with the Court of Justice of the European Union will provide the substance for the application and interpretation of the concepts of public order and national security that is applied *mutatis mutandis* to Union citizens and their Family members. By implication, this paper aims to contest the fact that, although Article 8 of the RCD is a non-punitive measure, the "*criminalisation"* of persons seeking international protection is a matter of substantial concern in Europe.[10] Therefore, the detention on account of a threat to national security and public order go beyond the administrative rationale and, for that reason, the distinction between criminal and migration law seems blurred.

[8] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L 180 (Recast Reception Conditions Directive)

[9] Josh Lowe, *"Denmark Could Turn Away Refugees Who Commit Any Crime" Newsweek* (2016) http://www.newsweek.com/denmark-turn-away-refugees-commit-crime-423375 accessed 06 February 2016.

[10] Council of Europe Commissioner for Human Rights, *"Criminalisation of Migration in Europe: Human Rights Implications"* (2010) <https://wcd.coe.int/ViewDoc.jsp?p=&id=1579605&direct=true> accessed 6 February 2016.

2. Detention and Asylum: Criminal Asylum Seekers

When considering the issue of limitations or deprivations on the freedom of movement of refugees or asylum seekers, account should be taken of international instruments, which are applicable for the protection of their rights in case of detention. It is important to note the fact that, neither international law nor European law, prohibit the detention of asylum seekers.[11] However, it is important to bear in mind that, asylum seekers are not ordinary aliens, as there are compelling circumstances for them to seek international protection, *inter alia* being vulnerable due to the violation of their fundamental human rights; therefore, they require special treatment under international human rights protection.[12]

Before addressing the issue at stake, it is thus necessary to analyse the legal framework that underpins the right of liberty and freedom of movement by taking into account primary legal sources *inter alia* International Refugee Law, the European Human Rights regime, and European Union law.

2.1 The 1951 Convention Relating to the Status of Refugees

The right of liberty and freedom of movement are fundamental principles protected under international and regional human rights instruments.[13] Within that assumption, therefore, any interference on the right to liberty constitutes a serious exception that is narrowly interpreted

[11] *P. Boeles and others* (n. 6), p. 271

[12] The UNHCR has reiterated that, "refugees and asylum-seekers are in a different situation than other aliens by virtue of the fact that they may be forced by their circumstances to enter a country illegally in order to escape persecution". See, UN High Commissioner for Refugees (UNHCR), "*Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice"* (4 June 1999) EC/49/SC/CRP.13, par. 7 http://www.refworld.org/docid/47fdfaf33b5.html accessed 15 February 2016

[13] See for instance, Article 9(1) of the International Convention on Civil and Political Rights (ICCPR); Article 5(1) of the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR); Article 37(b) UN Convention on the Rights of a Child (CRC)

and any resort to it shall be subjected to adequate legal safeguards.[14] The United Nations High Commissioner for Refugees (hereinafter UNHCR) has contributed to the promotion of the respect and recognition of international law requirements and has characterised the detention of asylum-seekers as "*inherently undesirable"* practice demanding to be exercised in cases of necessity.[15] As previously stated, the Refugee Convention, remains the cornerstone of the international regime for the protection of refugees, since it deals with the recognition of refugee status and, simultaneously, places the minimum standards for their treatment. *Prima facie*, the Refugee Convention does not explicitly enunciate the right of asylum seekers since it is particularly concerned with the rights of refugees.[16] However, it is essential to bear in mind that, the Convention applies irrespective of whether or not the refugee status determination procedure has been completed.[17] Since asylum seekers might become refugees in that process, the rights under the Convention apply also to those "*presumptive refugees.*"[18] Furthermore, the premise remains that refugee recognition is a declaratory act, which entails that, a person becomes refugee within the meaning of the Refugee Convention, when he fulfils the criteria enunciated in the definition.[19]

For the subject matter at hand, Articles 31 and 32 of the 1951 Convention are potentially relevant provisions in relation to the detention of asylum seekers and refugees.[20] As recalled earlier, there is a general international consensus that detention of refugees and asylum seekers

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[14] Camilla Nevstad, *"Detention on Asylum Seekers: The Case Of Denmark"* (Master Thesis, University of Lund 2001), p. 7

[15] UN High Commissioner for Refugees (UNHCR), "*Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers,"* 26 February 1999 http://www.refworld.org/docid/3c2b3f844.html accessed 15 March 2016

[16] Tara Wolfe, *"The Detention of Asylum Seekers in Europe"* (2012) Essay, p. 9 http://www.guildhallchambers.co.uk/files/Tara_Wolfe_The_Detention_of_Asylum-Seekers_in_Europe_Dissertation.pdf

[17] *Nevstad* (n. 14) p. 28.

[18] Guy S., Goodwin-Gill, "Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*", Refugee Protection in International Law: UNCHR's Global Consultations on International Protection* (Cambridge University Press 2003), p. 106 http://www.refworld.org/docid/470a33b10.html accessed 15 February 2016

[19] Mustafa Karakaya, *"The protection of refugees and asylum seekers against Extradition"* (2014) Law & Justice Review V. (1) p. 176.

[20] *Nevstad* (n 14) p. 12.

should be avoided.[21] Hence, exceptionally, States are allowed to curtail the right of the freedom of movement of refugees, *"other than those which are necessary*."[22] Accordingly, paragraph 2 of Article 31 explicitly permits detention until authorisation or removal of the applicant; this however, being subjected to the condition of "*necessity*." In this regard, one might ponder what constitutes a *"necessary restriction*" in the freedom of movement concerning refugees, as it is not defined by the Convention.[23] It appears from the *travaux préparatoires* of the 1951 Convention that it did not intend to deny the use of detention because States have the sovereign right to decide on matters concerning the entry and stay of foreigners.[24] By implication, States have the power to limit the freedom of refugees, for instance, by invoking the interest of national security.[25] For that reason, the UNHCR[26] has developed certain guidelines in order to address the legal lacuna in regard to the detention of asylum seekers by proposing exceptions under particular situations, *inter alia*, when public order and national security are involved.[27] With that purpose, the 2012 UNHCR Guidelines understand the following situations as public order and national security protection:

> *"Where there are strong grounds for believing that the specific asylum-seeker is likely to abscond or otherwise to refuse to cooperate with the authorities, detention may be necessary in an individual case.(…) Detention associated with accelerated procedures for manifestly unfounded or clearly abusive claims (…) Minimal periods in detention may be permissible*

[21] See in this sense, UN High Commissioner for Refugees, ExCom Conclusion No.44 (XXXVII) on Detention of Refugees and Asylum Seekers, 1986, Report of the 37th Session: UN doc. A/AC.96/ http://www.unhcr.org/refworld/docid/3ae68c43c0.html accessed 18 March 2015

[22] Convention relating to the Status of Refugees (n 2) Article 31 (2)

[23] Karen Langren, "The UNHCR position on Detention of Refugees" in Detention of Asylum Seekers", *Detention of Asylum Seekers in Europe: Analysis and Perspectives* (Marinus Nijhoff Publishers 1998) p. 147.

[24] Atle Grahl-Madsen, "*The Status of Refugees in International Law"* (1972), Sijthoff, Leiden, p. 418.

[25] Goodwin-Gill (n 18) par. 121.

[26] The UNCHR is the body responsible for supervising the Refugee Convention according to the mandate in Article 35 of the Refugee Convention and Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), par. 8 (a) http://www.refworld.org/docid/3ae6b3628.html

[27] UNHCR's *Revised Guidelines* 1999 (n 15). Importantly, these guidelines were replaced by UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012 http://www.refworld.org/docid/503489533b8.html accessed 17 March 2016. More recently, the UNHCR has launched a global strategy entitled; *Beyond Detention a Global Strategy to Support Governments to End the Detention of Asylum Seekers and Refugees*, 2014 http://www.unhcr.org/53aa929f6.pdf

> *to carry out initial identity and security checks (…) For the purpose of recording, within the context of a preliminary interview, the elements of their claim to international protection (…)Governments may need to detain a particular individual who presents a threat to national security. Even though determining what constitutes a national security threat lies primarily within the domain of the government, the measures taken (such as detention) need to comply with the standards in these Guidelines, in particular that the detention is necessary, proportionate to the threat, non-discriminatory, and subject to judicial oversight"*[28]

It follows from the foregoing that in the interpretation of the term "*necessary*", as laid down in Article 31 (2), detention can only serve a legitimate purpose, be proportionate and not arbitrary throughout the whole period. Therefore, detention for purposes other than the ones listed above, are presumed to be contrary to international refugee law.

In this line of thinking, it is important to discern that, with regard to article 31 of the Refugee Convention, the use of detention pending the asylum procedure is not a penalty measure, *in lieu*, it is an administrative action, which is not connected with an offence.[29]

On the other hand, Article 32 of the 1951 Convention foresees the expulsion of asylum seekers or refugees, if they constitute a danger to national security or the public order in the host-country. Under such provision, it established an exception to the general rule that a refugee who lives lawfully in the territory of the State cannot be expelled.[30] Hence, States are allowed to use detention for security grounds as a response to serious crimes committed by "*dangerous*" refugees or asylum seekers that violate the State's public order.[31] In words expressed by the UNHCR "*where there is evidence to show that the asylum-seeker has criminal antecedents and/or affiliations which are likely to pose a risk to public order or national security*". [32]

The concepts of public order and national security will be particularly addressed in Chapter three of this paper. Still, it should be pointed out that, regardless of the importance of the

[28] ibid UNHCR *Guidelines* 2012, paras. 22–30.

[29] *Nevstad* (n 14), p. 19

[30] Atle Grahl Madsen, "*Expulsion of Refugees*". Nordik Journal for International Law, 33.1 (1963), p. 41-50,

[31] ibid p. 45

[32] UNHCR *Guidelines 1999* (n 15), Guideline 3, p. 4-5

Refugee Convention, it does not resolve the scope of the "*public order"* and "*national security*" definition, primarily because it does not provide guidance on how to balance them without violating fundamental rights; therefore, States *de facto* use it as deterrence.[33] Contemporarily, States enjoy a wide margin of discretion when maintaining their sovereign control over those who are lacking a formal status and therefore are vulnerable *vis-à-vis* a State's power. On that account, the practice of some States of detaining asylum seekers remains, predominantly, a response to presumed abuses of the asylum application or threats to the security of the State.[34] By implication, the polemical indications of an increased and routine use of detention measures against asylum seekers cannot be targeted as a 21st century phenomenon, because the issue persists as to whether resort to detention by States has been lawfully exercised in light of the standards laid down in the treaty, and if less coercive alternatives have been explored in each individual case.[35]

Having highlighted the above-mentioned consideration, it needs to be recalled that the use of administrative detention as a deprivation of liberty requires a narrow interpretation because, "*States do not have an unlimited or unfettered authority over migration issues. International law and the growth of international human rights law (…) limit state authority over immigration detention."*[36]

[33] It is worth mentioning that pursuant to its mandate, the UNCHR issues guidelines to provide patterns that States should follow with regard to the interpretation of the provisions from the 1951 Convention, however, it should be recalled that they are non-binding resolutions.

[34] UN High Commissioner for Refugees (UNHCR), "*Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection" [Global Consultations on International Protection/Second Track]*, 1 October 2001 http://www.refworld.org/docid/3bf9123d4.html accessed 18 March 2016

[35] International Detention Coalition, "*Draft Guiding Principles on the Right to Challenge the Legality of Arbitrary Detention"* (2013) p. 6 http://www.refworld.org/docid/55673be34.html accessed 18 March 2016

[36] Odysseus Academic Network, *"Alternatives To Immigration And Asylum Detention In The EU Time For Implementation"* (Odysseus Network 2015) p. 16 http://odysseus-network.eu/wp-content/uploads/2015/02/FINAL-REPORT-Alternatives-to-detention-in-the-EU.pdf accessed 20 March 2016

2.2 European Convention on Human Rights

The European Convention of Human Rights (hereinafter ECHR)[37] is entrusted with the protection of the rights of individuals against abuses of State powers.[38] Predominantly, the ECHR protection embraces Western European countries, including all Member States of the European Union.[39]

Per se the Convention does not recognize a right to asylum, however, unlike the Refugee Convention, the ECHR has a substantial judicial body namely the European Court of Human Rights (hereafter the ECtHR),[40] which ensures through its jurisprudence the enforcement and interpretation, of the scope and effect of the rights enshrined in the ECHR. For that reason, it is considered the "*most effective transnational judicial process for complaints brought by individuals against their own governments."*[41] In this respect, the rationale thereof is the fact that, from the perspective of a private party, he has the right to complain before the ECtHR when national remedies failed to protect his human rights.[42]

Accordingly, this begs the question as to what extent asylum seekers are embedded into the scope of the Convention. As mentioned *supra*, the ECHR is not an instrument specifically designed to protect refugees and asylum seekers,[43] since it does not proclaim a right to asylum. Nonetheless, in accordance with Article 1 ECHR, the rights enunciated in the Convention are guaranteed to everyone "*within [the] jurisdiction*" of the Contracting Parties. Such statement implies an obligation to every Contracting Party to secure those rights not only to its own

[37] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (ECHR)

[38] *Nevstad* (n 14) p. 14

[39] Council Europe, *"Simplified Chart of Signatures and Ratifications"* (*Treaty Office*, 2016) http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/214 accessed 20 March 2016.

[40] Article 19 ECHR

[41] Steven Greer, "*The European Convention on Human Rights: Achievements, Problems and Prospects*" (Cambridge University Press 2006) p. 1.

[42] P Boeles and others (n 6) p. 24

[43] *Nevstad* (n 14) p. 14

nationals but also to aliens and stateless persons.[44] Moreover, Article 3 ECHR provides a "*safe harbour"* to refugees and asylum seekers by prohibiting the removal to a country where the individual would be subjected to torture or inhuman or degrading treatment or punishment. In this context, it is important to note that it is the case law of the European Court that has prescribed the importance of the institution of asylum. In particular, starting from the seminal case *Soering v. UK*,[45] the Court confirmed that the obligation under Article 3 ECHR is extended to the expulsion of an individual (thereby also asylum seekers), where there are grounds to believe that in the case of expulsion the person will face those risks.[46] Furthermore, a pivotal ruling in the recognition of asylum-seekers as *"particularly vulnerable*"[47] was attributed by the ECtHR in case *M.S.S. v. Belgium and Greece,* where it confirmed that the special treatment shall be conferred upon such singular group of individuals.

Intuitively, the settled case law of the ECtHR is becoming crucial in regard to the detention of refugees and asylum seekers, named by some scholars as "*jurisprudential boldness,*"[48] since it enhanced the relevance of international protection to asylum seekers. In that regard, the Court has routinely examined complaints on immigration detention and regularly found encroachment on the right to liberty due to the fact that detention conditions in some European States were inhuman and degrading,[49] or in cases connected with the limits of detention under national security measures,[50] or for not considering less restrictive measures of the freedoms.[51]

Moreover, as mentioned above, there is no dissonance between international and European law in permitting recourse to detention of refugees or asylum seekers. For that purpose, Article 5 of the ECHR, which is the cornerstone for the protection of individual's liberty rights at the

[44] Christos Giakoumopoulos, "Detention of Asylum Seekers in The Light of Article 5 of The European Convention of Human Right", *Detention of asylum Seekers in Europe: Analysis and Perspectives* (1st edn, 1998) p. 161

[45] Case *Soering v UK* App no. 14038/88 (ECHR, 20 July 1989)

[46] ibid para 88

[47] Case *M.S.S. v. Belgium and Greece* App no. 30696/09, (ECHR, 21 January 2011) para. 232.

[48] *Giakoumopoulos* (n 44) p, 163

[49] See for instance, Case *M.S.S. v. Belgium and Greece* (n 47)

[50] Case *A. and Others v. the United Kingdom* App no. 3455/05 (ECHR, 19 February 2009)

[51] Case *Van Mechelen v. the Netherlands* App *no.* 42857/05 (ECHR, 03 April 2012); Council of Europe. Research Division, *National Security and European case-law* (2013), p. 40

European level, prescribes the axiom that "*everyone has the right to liberty and security of the person"* but, equivalently, permits deprivation of liberty, albeit, under an exhaustive list of six categories of reasons to be detained. Notably, neither of those grounds establishes a specific reference to detention under public order or national security issues. Instead, those grounds can be expressly found under Protocol No.4 to the European Convention for the Protection of Human Right and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the first Protocol (hereinafter the ECHR Protocol No. 4), which asserts that any restriction must be:

> *"Necessary in a democratic society in the interests of national security or public safety, for the maintenance of order public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedom of others."*[52]

In this context, the chapter that follows will endeavour to scrutinize the issue of detention of asylum seekers based on public order and national security grounds. In addition, I would also venture to explore whether States can curtail the right of liberty by using the derogation clause under Article 15 of the ECHR, whereby it allows for a derogation of rights in case of threat to the nation, thus, with the view to understand to what extent States might resource to it under the claim of public policy and national security.[53]

Finally, what is important to remember from this section is the fact that, under the auspices of Article 5 of the ECHR, resort to detention applies independently of criminal or administrative detention.[54]

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[52] See Article 2 (3), Protocol 4 to the European 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, 16 September 1963, ETS 46.

[53] This general analysis of Article 15 ECHR is particularly interesting in regard to the recent situation in France after the recent terrorist attacks.

[54] Donna Gomien, D. J Harris, and Leo Zwaak, "*Law and practise of the European Convention on Human Rights and the European Social Charte*r "(1996) p. 127

2.3 The EU Regime on Asylum Seekers' Detention

The European Union has acquired competences in migration and asylum areas that were first adopted in the Treaty of Amsterdam and, later, reinforced by the treaty of Nice and Lisbon. The latter one, further aimed to transform the measures on asylum into a common policy through a harmonised asylum procedure and uniform protection status among Member States (hereinafter MS). To that end, the EU has undertaken legislation in all fields listed in Article 78 (2) (a) – (f) TFEU.[55] More specifically, the crux of the present paper centres the attention on the recast EU Reception Conditions Directive that establishes minimum standards for the treatment of asylum seekers, particularly, in the use of detention across Member States. This being said, it is essential to pinpoint that the EU regime relating to immigration and asylum is capable of limiting Members State's power, as laid down in Article 78 TFEU. In this context, the MS are bound by the direct effect of the EU legislative acts and the authoritative interpretation delivered by the Court of Justice of the European Union (hereinafter CJEU).

By the same token, the European Union Charter of Fundamental Rights (hereinafter EU Charter) refers to the right of asylum as a fundamental right protected by the Union, which needs to be in compliance with the international obligations.[56] By implication, the EU Charter clarifies that the rights guaranteed within its scope should reach, as minimum, the same meaning and scope as those laid down by the ECHR.[57] This, accordingly, illustrates that all EU asylum legislation is bound to international obligations of the Member States,[58] including the

[55] See in this sense; Directive 2001/55/EC Temporary Protection [2001] OJ L 212; Directive 2013/33/EU recast Reception Conditions [2013] OJ L 180**;** Directive 2011/95/EU [2011] recast Qualification OJ L 337/9**;** Directive 2013/32/EU recast Asylum Procedures [2013] OJ L 180; and Regulation 604/2013 recast Dublin [2013] OJ L 180.

[56] Charter of Fundamental Rights of the European Union (18 December 2000) C (326/02) [EU Charter] Articles 6, 18 and 19; and judgments by the CJEU, for instance Case T-526/10 I*nuit Tapiriit Kanatami and others v. Commission* [2013] EU:T:2013:215, para. 112; C-398/13 P *Inuit Tapiriit Kanatami and others v. Commission* [2015] EU:C:2015:535, para. 45

[57] Article 52 (3) EU Charter, *"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.*"

[58] *Boccardi* (n 3) p. 210

case law of the ECtHR as a source of inspiration, consequently, forming part of the Union's fundamental commitment to respect human rights.[59]

Having illustrated the above observation, when considering the scope of international protection, it should be noted that the European Union asylum *acquis* differs from international law in the sense that it provides a definition for asylum seekers as "*a third country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken,*"[60] and a refugee as an individual, who has been recognized in a final decision. This is a pivotal assertion, since it creates a legal subject; that is, the asylum-seeker, who falls under EU regulation.[61] Furthermore, it establishes the right of freedom of movement of asylum seekers as fundamental principle, thus, it curtails the recourse to detention.

In that regard, it should be noted that immigration detention has two forms under EU law. On the one hand, the detention pending the outcome of the asylum procedure regulated by the recast Reception Conditions Directive[62] (hereinafter recast RCD) and, on the other hand, pre-removal detention based on the Return Directive (hereinafter RD).[63] The rules on immigration detention provided in both directives are being referred as the *"immigration detention regime."*[64] An important consideration is that immigration and asylum detention are subject to

[59] ibid, p. 210

[60] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast Qualification Directive) [2011] OJ L 337/9. Article 2(i)

[61] Cathryn Costello and Minos Mouzourakis, "*EU Law and the Detainability of Asylum-Seekers"* (2016) Refugee Survey Quarterly 35 (1) p. 56 http://rsq.oxfordjournals.org/content/35/1/47.abstract accessed 05 April 2016

[62] In should be mentioned that the United Kingdom remains bound by the first phase of the Reception Conditions Directive (2003/9/EC), while Ireland and Denmark have opted out from both Directives.

[63] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Returns Directive) [2008] OJ L 348

[64] Izabella Majcher, "*Crimmigration" in the European Union through the Lens of Immigration Detention* (2013) Global Detention Project Working Paper No. 6, p. 5. SSRN: http://ssrn.com/abstract=2340566 accessed 08 April 2016

separate regimes; therefore, the Return Directive cannot be applied to asylum seekers.[65] Hence, as reflected in the EU regulation, the mere fact of seeking asylum cannot constitute a permissible ground for detention. This was reinterred and confirmed by the CJEU when it declared that:

> *"[A]n asylum seeker, […], has the right to remain in the territory of the Member State concerned at least until his application has been rejected at first instance, and cannot therefore be considered to be 'illegally staying' within the meaning of Directive 2008/115, which relates to his removal from that territory".*[66]

Accordingly, the recast RCD is the predominate law that regulates detention of asylum seekers during the assessment of their claim. By way of contrast to the prior RCD, the recast RCD is more elaborated, as it provides more detailed rules for detention grounds.
With the aim of clarifying the scope of the present paper, it should be mentioned beforehand, that Article 7 of the recast RCD embeds the principle of free movement of asylum seekers, which allows for restriction in exceptional cases only to a particular region of residence, if public order and national security reasons arise. Such provision differs from Article 8 of the recast RCD in the sense that it inserted detention with the meaning of *"confinement of an applicant within a particular place, where the applicant is deprived of his or her freedom of movement."*[67] Therefore, unlike Article 7 of the recast RCD, there is a personal deprivation of liberty, which given its profound impact on the asylum seeker and invasive nature, it is regarded as an exceptional measure. For the reasons exemplified above, the predominant focus of this paper will be placed on the assessment under Article 8 of the recast RCD.

As already mentioned, under the recast RCD "*applicants may be detained only under very clearly defined exceptional circumstances.*"[68] The exhaustive list regulating permissible grounds for detentions is enclosed under Article 8 (3) of the recast EU Reception Conditions Directive, which is solely available for:

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[65] See in that regard, Case C-357/09 PPU, *Said Shamilovic Kadzoev* [2009] ECR I-11189, para. 45; C-534/11, *Mehmet Arslan v. Policie* [2013] ECR 00000 para. 49

[66] ibid *Arslan* para. 48.

[67] Recast Reception Conditions Directive (n 8) Article 2 (h)

[68] ibid Recital 15

> *"(a) determining the applicant's identity or nationality; (b) determining elements of the claim, particularly in where there is a risk of absconding; (c) determining the applicant's right to enter; (d) preventing an applicant from delaying or frustrating a return procedure; (e) on national security or public order considerations; or (f) under a Dublin procedure, where detention is only permissible to prevent a "significant risk of absconding".*

Incontrovertibly, the settlement of those grounds should be conceived as a seminal step towards the commitment to restrict the use of administrative detention. However, its wording leaves a considerable margin of appreciation to Member States,[69] as they are broadly formulated, thus, States enjoy considerable discretion when prescribing domestic rules regarding detention of asylum seekers[70] And perhaps, more notoriously, in regard to the interpretation of the notions of public order and national security. Hence, as a consequence of the actual migration crisis, it has been evident that there is still a long way ahead to ensure a uniform practice across Member States when claiming resort to administrative detention. In spite of its exceptional nature, Member States have been increasingly relying on immigration detention as a tool of first response and also as a deterrence to manage the forthcoming immigration challenges.[71] For that reason, I will undertake a closer examination concerning the grounds for administrative detention with the particular focus on "*public order*" and "*national security"* claims.

Having expressed the foregoing considerations, this section solely provided an overall outline of the legal framework at the relevant different levels outlining general rules in regard to detention of a particular group of individuals, namely refugees and asylum seekers. Hereof, the second tier of the analysis will endeavour to illustrate a case law approach from the ECtHR and CJEU regarding the grounds for public order and national security in regard to detention of asylum seekers with the view to juxtaposed the practice followed by the Netherlands and Denmark

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[69] Philippe de Bucker, & Evangelia Tsourdi, *"Introduction: The Challenge of Asylum Detention to Refugee Protection"* (2016) Refugee Survey Quarterly, 35 , p. 3 http://rsq.oxfordjournals.org/content/35/1.toc accessed 15 April 2016

[70] Norwegian Organisation for Asylum Seekers (NOAS), "*Detention of Asylum Seekers. Analysis of Norway's international obligations, domestic law and practice"* (2014), p. 13, http://www.noas.no/wp-content/uploads/2014/02/Detention-of-asylum-seekers_web.pdf

[71] ibid p. 13

3. The Controversial Concepts: Public Order and National Security

3.1 Case Law European Court of Human Rights

As highlighted above, the right to liberty and security are conceived as essential in a "*democratic society.*"[72] To this end, Article 5 of the ECHR aims to prevent arbitrary or unjustified deprivations of liberty of individuals. With this view, it is known that deprivation of liberty mostly occurs during the enforcement of criminal law. On the contrary, administrative immigration detention, which is non-punitive in nature, is resorted to only as a way of exception. However, in the latter case, one might wonder, if detention, expulsion, and deportation of migrants (among them, rejected asylum seekers), should not be regarded as a "*real punishment*" action.[73]

At the outset, we shall recall that, under the ECHR, resort to detention applies independently of criminal or administrative detention. Accordingly, the purpose of providing an exhaustive enumeration of exceptions is to ensure an objective protection of the right to liberty in either type of detention. In the author's view, this axiom should be further magnified when it concerns the detention of asylum seekers. Having that in mind, when it comes to the balance between the grounds of national security or public order against the right of liberty, the ECtHR has clearly stated that they can only be validly invoked by the contracting States, if they fall in the scope of one of the exceptions contemplated therein.[74] Accordingly, as expressed by the ECtHR:

> *"The Court does not accept the Government's argument that Article 5(1) permits a balance to be struck between the individual's right to liberty and the State's interest in protecting its population from terrorist threat. This argument is inconsistent not only with the Court's*

[72] Council of Europe, "*The right to liberty and security of the person: A guide to the implementation of Article 5 of the European Convention on Human Rights*" (2004) Human rights handbooks, No. 5, p, 7 http://www.refworld.org/docid/49f181e12.html accessed 03 May 2016

[73] Alessandro De Giorgi, "*Re-thinking the Political Economy of Punishment: Perspectives on Post-Fordism and Penal Politics"* (2006) Aldershot: Ashgate Publishing, p. 133

[74] *De Bucker and Tsourdi* (n 69) p. 23

> *jurisprudence under sub-paragraph (f) but also with the principle that sub-paragraphs (a) to (f) amount to an exhaustive list of exceptions and that only a narrow interpretation of these exceptions is compatible with the aims of Article 5. If detention does not fit within the confines of the sub-paragraphs as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee."*[75]

To this end, some of the grounds that States may invoke to justify the detention of asylum seekers when claiming a public order or national security threat, could be based upon paragraphs (b) and (c) of Article 5 (1). Accordingly, it foresees detention, "*when it is reasonably considered necessary to prevent his committing an offence*", together with the purpose of securing "*the fulfilment of any obligation prescribed by law*."[76] That could be the case when committing a crime as enshrined in national legislation. Thus, if the individual possesses criminal records, we might surmise that States are inclined to use this ground as a way to justify the detention. Nevertheless, the provision mostly used by States when invoking administrative immigration detention is prescribed under paragraph (f) of Article 5 that appoints, "*the lawful arrest or detention of a person to prevent him effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*"[77] In fact, throughout this paper, it will be illustrated that some States resort to administrative detention of third country nationals, even after they served a sentence in order to secure the expulsion when the individual has previous criminal records on the basis of general preventive grounds. In respect thereof, the European Court has rightly pointed out that States are not allowed to impose preventive detention measures to individuals who are perceived as presenting a danger given their propensity to act.[78] This being said, the starting point used by the Court is the concrete evaluation of the situation of the individual[79] by taking into consideration a combination of factors such as the nature, duration, effects, and the manner of implementation of such a measure.[80] Moreover, the Court has also emphasized

[75] Case *A. and Others* (n 50) para. 171

[76] See Article 5 (b) ECHR

[77] Article 5. 1 (f) ECHR

[78] Case *Shimovolos v. Russia* App no. 30194/09 (ECHR 21 June 2011) para. 54

[79] Case *Engel v. The Netherlands* App.no. 5100/71 (ECHR 8 June 1976) para. 59

[80] Case *Guzzardi v. Italy*, judgment App no. 7367/76 (ECHR 6 November 1980) para. 94

that despite of the suspicion of the individual's involvement in offences of serious nature, yet a relevant factor, it cannot alone justify a long period of detention.[81]

Following the aforesaid consideration, we should embark on the interpretation of public policy and national security as articulated by the ECtHR when they involve a restriction on the right to liberty. Within this context, it is important to mention that in the text that follows, the analysis will be focused on the detention that involves pre- trial detention or expulsion, since they are the ones whereby the risk to public order, as a ground for detention, has been interpreted in accordance with the case law of the ECtHR. However, this situation does not imply that the criteria used in those types of detention, cannot be applicable *mutatis mutandis* to administrative detention. This being said, the European Court acknowledged that:

> *"[…]by reason of their particular gravity and public reaction to them, certain offences may give rise to public disquiet [...]However, this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused's release would actually prejudice public order. In addition, detention will continue to be legitimate only if public order remains actually threatened; its continuation cannot be used to anticipate a custodial sentence."*[82]

From this ruling, we may assume that in order to resort to detention, based upon public order grounds, first and foremost, there must be a concrete and present threat. Hence, this suggests that the danger posed by the individual need to be persistent in order to be legitimate.[83] It follows from this that, the passing of time can be a relevant factor that is taken into account by the European Court in order to accept the lawfulness of detention under public policy grounds.[84] Thus, transposing this to our case at hand, the more time has elapsed, the less probable will be the threat posed by an individual.

Furthermore, the ECtHR has expressed that the gravity of the offence does not constitute automatically a ground for detention under public order concerns. In this respect, the ECtHR

[81] Case of *Van der Tang v. Spain* App no. 19382/92 (ECHR 13 July 1995) paras. 19- 63

[82] Case of *Tomasi v. France* App no. 12850/87 (ECHR 27 August 1992)

[83] ibid para. 91

[84] ibid paras. 91-99

in *Letellier v. France,* [85] made it clear that "*the* (need to) *continue deprivation of liberty from a purely abstract point of view, taking into consideration only the gravity of the offence*" [86] might also entail a violation of the right of liberty.

In this context, the Court has imposed the duty upon national courts to demonstrate, precisely enough, the reasons for incarcerating the claimant in detention. By implication, the sole seriousness of the offense or the disturbance to public order are not sufficient claims, if they are not based upon a precise ground on whether the disturbance to public order was concrete and present.[87] Nonetheless, it will be demonstrated that in practice some States afforded the mere disturbance as a sufficient ground in order to use detention or expulsion under public order threats.[88]

A further noteworthy exception, arises from Article 15 ECHR[89] which allows to impose restrictions on rights in cases of a "*state of emergency.*" In this respect, I should underline that, although the present paper does not have the intention to provide an in-depth analysis on this situation,[90] it is sufficient to note that, it provides with the States the possibility for derogating certain rights and freedoms in exceptional circumstances *inter alia* on national security grounds when there is a danger of terrorist attacks. It is, therefore, an exceptional circumstance that States might enforce in order to restrict the liberty of individuals (therefore, asylum seekers). Until now, the only case brought before the Court is *A v. UK*,[91] which relates to the detention of suspected terrorists. This is a pivotal judgment since the Court reiterated that even in where there is a risk to national security, the contracting states are still obliged to base their detention

[85] Case *Letellier v. France* App. no. 12369/86 (ECHR 26 June 1991) par. 51

[86] Emphasis added

[87] Case *Tiron c. Roumanie* (in French) Requête no. 17689/03 (ECHR 07 July 2009) par. 42

[88] See subchapter 3.3.2

[89] Article 15 ECHR *"In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law"*

[90] However, along this paper an interesting point will be entertained in regard to Article 15 ECHR, see subchapter 3.2 of this chapter.

[91] Case *A and others* (n 50)

on one of the five exceptions as laid down under Article 5 ECHR. By implication, within administrative detention, preventive detention on security grounds is not allowed.[92]

On this line, I pondered, what should be the degree afforded to the right of liberty of asylum seekers when counterbalanced against the State's rights?
It shall be pointed out that, on the one side, the Court affirmed that States cannot balance their national security interests with those of the detainee[93] and, on the other hand, that detention of asylum seekers remains an undesirable measure as it concerns the deprivation of liberty of a *"member of a particularly underprivileged and vulnerable population group in need of special protection.*"[94] Thus, it is reasonable that States need to afford a different level of protection compared to illegal migrants.

However, there are shortcomings on that premise, because the concerns in cases involving detention for the reasons of public order or national security persist due to the legal uncertainty surrounded by these terms, since they remain to be defined by each State, which allow them a wide margin of "*manoeuvre."*

Similarly, the fact that the ECHR has failed to impose time limits on detention,[95] creates a great degree of vagueness that might cast some doubts on the observance of the exceptional nature of detention, unfolding an arbitrary character, thereby, boosting a deterrent effect which is not the purpose of administrative immigration detention.

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[92] Ibid, paras. 163 and 172; In this vein, according to the case law of the ECtHR, if a EU Member State issues the detention of asylum seekers on the basis of Article 8 (3) (e) recast RCD, it has to be with a view to deportation. See, REDIAL *"J.N. V Staatssecretaris Voor Veiligheid En Justitie: The ECJ On The Detention Of Asylum Seekers For The Protection Of Public Order*" (*REDIAL*, 2016) http://euredial.eu/blog/j-n-v-staatssecretaris-voor-veiligheid-en-justitie-judgment-court-grand-chamber-15-february-2016-ecj-detention-asylum-seekers-protection-public-order/#_ftnref4 accessed 10 June 2016.

[93] Ibid Case A and others (n 50) para. 171

[94] *Case M.S.S. v. Belgium and Greece,* (n 47) p. 251.

[95] Laura Pasternak, "*Conduct a critical and comparative study on the lawfulness of immigration detention in Spain and the United Kingdom. Examine the human rights implications in the context of each legal system's vertical implementation of International and European law. Evaluate the effectiveness of the Common European Asylum System in terms of immigration detention"* (Honours Dissertation, University of Glasgow 2014) https://detentioninquiry.files.wordpress.com/2015/02/laura-pasternak.pdf accessed 15 May 2015.

In conclusion, on account of these weaknesses, we might doubt whether resort to detention of asylum seekers based on public order grounds can be lawful in a democratic society in view of the difficulty to define such terms with sufficient certainty, since they may be easily abused by the States.[96] This situation implies that, public order and national security are conceived as an extra tool granted to the States in order to "*legitimize"* a prolonged and uncertain immigration detention.[97] As a consequence, there has been a shift in the aim pursued by administrative detention for the reason that the States are increasingly criminalizing asylum seekers by adopting rules on the basis of national interests;[98] thus, it strengthens the deterrent effect of administrative detention by alienating its non-punitive nature.

3.2 The Applicability of the Court of Justice of European Union Case Law by reference under the Citizenship Directive and Asylum acquis

Since the creation of the European Union, the EU has been involved in a variety of issues that have diverse and far reaching implications upon the Member States' national regulations. The reason behind that is that there is an increasing awareness that there are certain areas and goals which are better administered and achieved at the EU level. Therefore, the Member States have agreed to confer and transfer powers to the EU with the implications for the EU of having an influence upon them. The areas of competences include *inter alia*, the area of free movement, migration, and asylum, where the EU has subsidiary competence to regulate (principle of subsidiarity).[99] With that premise, we can say that, nowadays the EU migration law contains a

[96] United Nations, "Human Rights and Arrest, Pre-Trial Detention and Administrative Detention", *Human Rights In The Administration Of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (1st edn, 2003). p. 180

[97] Amnesty International, *'The Netherlands: The Detention of Irregular Migrants and Asylum-Seekers'* (Amnesty International 2008) https://www.amnesty.nl/sites/default/files/public/rap_nederland_vreemdelingendetentie_0.pdf accessed 05 June 2016.

[98] Kathrani Paresh, "*Asylum Law or Criminal Law: Blame, Deterrence and the Criminalisation of the Asylum Seeker"* (December 2011). Jurisprudence. 2011, 18(4) University of Westminster Research Paper No. 12-04, p. 7 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2057756 accessed 08 June

[99] Article 4 (2) (j) TFEU; Article 5 TEU "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be

comprehensive and almost fully-fledged migration law system, however, not fully harmonized.[100] Having that in mind, and regardless of such interventionist approach, there are important areas that are still at the discretion of the Member States. In this context, Article 45 (3) TFEU confers upon the MS a right to impose restrictions upon the free movement on the grounds of public security, public policy, and public health grounds. Likewise, Article 72 TFEU pinpoints that MS retained their responsibilities with regard to the maintenance of law and order and safeguarding of internal security.

Following the paramount ruling in *Yvonne Van Duyn v. Home Office,*[101] the CJEU has reaffirmed the Members States' discretion when defining the scope of public order and national security, since they are conceived as "*national concepts*". This, accordingly, suggests that their interpretation is attached to their traditions, periods of time, history, laws, political references, culture etc., of each Member State. As a result thereof, for more than three decades, it has been generally accepted that the circumstances under which resort to public policy grounds are justified, will differ among MS. Nonetheless, the Court has also upheld that such discretion is restrained by the limits imposed by the *acquis communitaire.*[102] Consequently, the Court has laid down a well-established set of case law on the notions of public policy and national security, namely in the area of internal market freedoms; that is, free movements of persons, goods, services and capital.

In this regard, a recent academic research observed that public policy was the most commonly invoked grounds concerning the derogation from the free movement of persons.[103] By implication, it might be argued that given the dissonance in the interpretation on this notion across all the EU member states, it is the most contentious derogation. Intuitively, the CJEU

sufficiently achieved by the Member States, (…) but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

[100] P. Boeles and others (n 6) p.37

[101] Case 41/74, *Van Duyn v. Home Office* [1974] ECR 1337

[102] Ibid, para. 18. "*Nevertheless, the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the treaty".*

[103] Dora Kostakopoulou and Nuno Ferreira, "*Testing Liberal Norms: The Public Policy and Public Security Derogations and the Cracks in European Union Citizenship"* (2013). Warwick School of Law, Legal Studies Paper No. 2013/18, p. 23

has ruled on various types of conduct under the public policy derogations limiting the free movement of individuals, *inter alia*, issues relating to combating organization not conducive to the public good, individuals with criminal records, combating the use of drugs, and, overall, the fight against criminal activities. In this vein, the essential question to be asked is to what extent certain *"crimes*" or circumstances can label asylum seekers to pose a potential threat to public order and national security.

At the outset, it is worthwhile to mention that, for some time, it was rather uncertain whether the Court's case law, in respect to the interpretation of public policy threats, could be applied *mutatis mutandis* among directives that aim and pursue different purposes and objectives. In this context, in Zh *and O. v. Statessecretaris voor justitie*[104] case, the Court was asked whether the Member States were allowed to reject or refuse a residence permit on the grounds of public policy as interpreted in the Directive 2004/38 on the freedom of movement and residence of EU citizens and their family members (hereinafter the Citizenship Directive).[105] The case concerned a decision for an illegal staying: hence a return decision was at stake. Albeit, the noticeable fact was that for the Dutch national court, the concepts of a "*risk to public policy*" under the Return Directive seemed to have a widely broader scope than the Citizenship Directive with the consequence that:

> *"the mere suspicion" of a criminal offence committed by a third country national was sufficient to establish that the individual poses a risk to public policy under the (Return) Directive 2008/115)".*[106]

This case provides important insights with respect to the application of the public policy claims, in the sense that the Court revived the criteria used under free movement cases when requiring an analysis on *"a case-by-case bas*is" of the individual circumstances in order to ascertain

[104] Case C-554/13, Z. Zh v. v Staatssecretaris voor Veiligheid en Justitie ECLI:EU:C:2015:377

[105] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) (Citizenship Directive) [2004] OJ L 158

[106] Case Z. Zh v (n 104) para. 34

whether the personal conduct of the third country national truly poses a genuine and present risk to public policy.[107] Hence, the Court based his argument upon the requirement of an individual examination, however, it left national authorities with the discretion to scrutinize whether the individual pose a risk on the sole grounds that he was convicted or suspected of a criminal offence. Therefore, following the interpretation of public policy with respect to EU-citizens or family members under the EU law, the only mandatory task explicitly required by the Court, when claiming public order or national security risk, is that Member States must clearly link them to the "*personal conduct*" before an action is taken against them. In this respect, as illustrated in the *Van Dyn case*, the membership or participation in activities of an organization which are considered socially harmful, are perceived contrary to the public good of the State.[108]

In the same year, the Court was, again, compelled to assess the situation on how to interpret the notions public policy and public order, however, this time under the *asylum acquis*. In the judgment *H.T* v *Land Baden-Württemberg,*[109] a refusal for a residence permit of a refugee was at issue due to the individual's involvement in an organization listed by the German Government as terrorist. In this case, the CJEU interpreted that:

> *"The Court has already had an opportunity to interpret the concepts of 'public security' and 'public order' contained in Articles 27 and 28 of Directive 2004/38. While that directive pursues different objectives to those pursued by Directive 2004/83 (The Asylum Qualification Directive)*[110] *and Member States retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another."*[111]

Following this ruling, we can observe that the Court was more assertive in the sense that even though Article 24 of the Asylum Qualification Directive did not provide for a definition of these notions, the Court reiterated that they were already interpreted in its case- law as referred in *Zh. And O* in relation to the Citizenship Directive.

[107] ibid para. 50

[108] Case *Van Duyn v. Home* (n 101) para.24

[109] Case C-373/13, *H. T. v Land Baden-Württemberg* ECLI: EU:C:2015:413

[110] Emphasis added.

[111] Case *H.T.* (n 109) para. 77

Within the asylum seekers framework, on 15 February 2016,[112] the Court pronounced a pivotal judgment in regard to detention of asylum seekers for the first time under the second phase of the CEAS.[113] This is an important acknowledgement because the Court has not departed from the well-established principles when interpreting the terms of national security and public order within the asylum framework. In general terms, the Court reiterated the exceptional nature of the public policy and national security grounds, as it has been interpreted consistently within EU free movement law. In principle, the case was raised due to Mr. JN's prior criminal offences (over twenty criminal convictions) in conjunction with the expulsion order, which were sufficient basis for the Court to consent to the justification of his detention. This, however, may raise the question as to whether those prior criminal records are sufficient for a given State to enforce the use of detention or whether the fact that, together with the expulsion order, such synergy impels recourse to detention under public policy grounds.[114]

As mentioned above, by reference to the cases under the EU free movement law, prior criminal conduct alone could justify detention if the seriousness or number of offences are considerably relevant as to favour the use of detention;[115] provided that the person poses *"a real, actual and sufficiently serious threat*" to public order and national security. By implication, the Court has established a test whereby, on the one hand, restrictive measures must be based on an actual threat and cannot be justified merely by a general risk.[116] On the other hand, the personal

[112] Case C-601/15 PPU *J.N v. Staatssecretaris voor Veiligheid en Justitie* EU:C:2016:84

[113] The first phase in the creation of a Common European Asylum System that should lead, in the longer term, to a common procedure and a uniform status, valid throughout the Union, for those granted asylum, has now been achieved. After the completion of the first phase, a period of reflection was necessary to determine the direction in which the CEAS should develop. New EU rules have now been agreed, setting out common high standards and stronger co-operation to ensure that asylum seekers are treated equally in an open and fair system, among them, the revised Reception Conditions Directive. For more information, see 'Dgs - Migration And Home Affairs - *What We Do - Policies - Asylum'* (*Ec.europa.eu*, 2015) http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm accessed 20 May 2016.

[114] Steve Peers, *"Detention Of Asylum-Seekers: The First CJEU Judgment"* http://eulawanalysis.blogspot.nl/2016/03/detention-of-asylum-seekers-first-cjeu.html accessed 25 May 2016.

[115] Case C-30/77 *Régina v Pierre Bouchereau* [1977] ECR 01999

[116] European Commission, Communication from the Commission to the European Parliament and the Council on Guidance for Better Transposition and Application of Directive 2004/38/EC on the Right of Citizens of the Union

conduct has to be as such as affecting "*one of the fundamental interests of society*."[117] In this line, more obscure is the fact that the Court has also recognised the predictability of the commission of a crime as a reason to detain. In his words, it maintained that:

> *"[I]n general, a finding that such a threat exists implies the existence in the individual concerned of a propensity to act in the same way in the future".*[118]

It follows that the term of *"actual*", should be interpreted it in the light of the likelihood of the conduct with the serious prejudice to public policy on the society - a situation that might be reflected in the future, albeit how far in the future? Hence, is there a limited period of a crime commission that ceased to be a threat? The Court does not provide that information.

Thus, it follows from the foregoing, that there is no reason to deny that Member States are granted a broad discretion when assessing the degree of "*foreseeable criminality*" that an asylum seeker might constitute.

Having that in mind, some Member States have already enacted laws with the intention of crime prevention that have implications upon asylum seekers. In this respect, it is worth to mention that most of the national legislations by the Member States do not provide an independent category of offences made by asylum seekers. Hence, the term aliens includes both refugees and asylum seekers. Therefore, the question as to which offences pose a threat to public policy and national security, can be found by looking into their alien's acts. This being said, one might wonder that inasmuch as asylum seekers and refugees are coming from conflicted areas where suffered unimaginable physical and psychological ill- treatment, the commission of certain acts or behaviours should be outweighed by account of their vulnerable status.

As referred *supra*, an exemplification of some measures taken by Member States in regard to the use of administration detention in a precautionary fashion could be found in the Norwegian

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and their Family Members to Move and Reside Freely within the Territory of the Member States, COM (2009) 313 final.

[117] Case *Bouchereau* (n 114) para. 35.

[118] ibid para. 29.

Immigration Act,[119] which states that foreigners may be detained *inter alia* where there is a risk of absconding, for crime prevention purposes, and in national security cases. In that context, paragraph (d), anticipates that a foreign national may be arrested and detained where he or she:

> "*[Has] been expelled on account of being sentenced to a penalty and [when] there is a risk, in view of the foreign national's personal circumstances, that the foreign national will commit new criminal offences*." [120]

On that basis, I would opine that this practice clearly goes against what the European Commission has stressed that, *"Community law precludes the adoption of restrictive measures on general preventive grounds.*"[121] In the author's view, if a state presumes the existence of a threat, it is unlikely to be considered as genuine. Indeed, it is difficult to understand the scope of "*general preventive grounds*," since it is a broad and vague concept. However, it is clear for the author that without actual threat, evidence, strong probabilities etc., restrictive measures, following a criminal conviction, must take into account the personal conduct of the offender and, therefore, cannot be automatic.

Pursuant to the discussion of the existence of a threat, it has been argued that the sensibility of the notions of public order and national security required an appreciable and sufficient risk that represents the gravity of the requirement of public policy. To this end, it should be noted that when analysing the case law of the CJEU in the Citizenship Directive and the Long Term Residence Directive, it appears that the Court applies a certain threshold when interpreting those grounds. For instance, in the case of holders of a right of permanent residence, an expulsion measure cannot be taken if it is not based on "*serious grounds of public policy and public security*,"[122] while under Article 28 (3) Citizen's Directive, the persons can only be expelled on "*imperative grounds of public security.*" Such difference in the wording provides

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[119] Ministry Security, *"Immigration Act"* (*Government.no*, 2010) Article 106 (1) https://www.regjeringen.no/en/dokumenter/immigration-act/id585772/ accessed 22 May 2016.

[120] NOAS *Detention of Asylum Seekers* (n 70) p. 71

[121] *Guidance for Better Transposition and Application of Directive 2004/38/EC* (n 115) para. 3.2

[122] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2011] OJ L 132, Article 22 (3)

us with an understating that the gravity of the offence together with the nature of the interest involved is the core for the assessment. In this respect, the Court has provided some guidance by describing the types of crimes. For instance, in *Tsakouridis,*[123] the Court interpreted Article 28(3) of the Citizenship Directive within the context that the fight against crime in connection with the membership of an organized group dealing with narcotics was capable of being labelled as "*serious grounds*". On the other side, in case *P.I,*[124] the CJEU interchanged the words and left it to the national court to regard sexual exploitation of children as to pose a direct threat to the calm and physical security of the population and, thus be covered by "*imperative grounds"* and to that end, justify the expulsion measure.

Following the already mentioned judgment in *H.T* concerning the expulsion of a refugee, the national court was essentially asking whether there was a difference between "*serious reasons*" contained in Article 21 (2) (a) of Directive 2004/83 (Asylum Qualification Directive) and "*compelling reasons of national security or public order*" under Article 24 (1) of that Directive. In this respect, the Court interpreted that the main difference is that in the first prong, the consequences are *"potentially drastic*" since the refugee might be returned to the country. Therefore, the conditions of *"serious reasons*" involve a judgment of a "*particularly serious crime*" that is regarded as constituting a *"danger to the community*". One the other hand, under Article 24 (1), the consequences are less onerous, since it involves the revocation of the residence permit, but it cannot justify the loss of the refugee status, and even less, the option to *refoul* the alien.

Overall, pursuant to the interpretation exemplified in the foregoing case-law, the CJEU suggests that "*compelling reasons of national security or public order,"* comprise of a threat to the functioning of the institutions and essential public service and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of the nation or a risk to military interests that have a profound impact on the public security. In contrast, "*imperative grounds of public security*" presuppose the existence of a threat that has a particular degree of seriousness. In this regard, the Court has confirmed that an example of an act that amounts to a "*compelling reason of national security and public order*" can be found, where a third country national belongs to an association, which supports

[123] Case C-145/09, *Land Baden-Württemberg v Panagiotis Tsakouridis* [2010] ECR I-11979

[124] Case C‑348/09 *P.I. v Oberbürgermeisterin der Stadt Remscheid*. ECR [2012] ECR 00000

international crimes.[125] However, I would venture to assert that in practice, there is not a clear-cut distinction between "*serious*" and "*imperative*" qualifications; nevertheless, there is a strong likelihood that the Court will engage in a distinction, and to that end it might induce different outcomes for the understanding of the degree of a threat.

In this vein, when we take into account the recent terrorist attacks in the central European capitals, it is without doubts that terrorism had an influence on refuelling a policy securitization with impacts on the stringency of migration rules.[126] Intuitively, a more growing concern is how this spreading disconcert over global terrorism might mould asylum determination.[127] In fact, there have been statements that due to the actual refugee crisis, terrorists might take advantage to enter the EU.[128] Hence, this brings me to the question, whether in the aftermath of those attacks, an asylum seeker should be penalized and detained under public security grounds as a way to prevent a "*potential*" threat, for instance, when he is found to be involved with some radical religious groups? Secondly, what should be the degree of threat in that case?

According to international law, there is a customary ruled known as "*pre-emptive self-defence*", which somehow mirrors the right of "*self-defence*" under Article 51 of the UN Charter.[129] Likewise, as already mentioned above, Article 15 of the ECHR allows States to derogate temporarily from certain rights when the country is under a public emergency that threatens the life of the nation. In other words, the measure allows for a "*dilution and nullification of*

[125] Case *H.T.* (n 109) para. 80

[126] Nazli Avdan, "*Do asylum recognition rates in Europe respond to transnational terrorism? The migration-security nexus revisited"* (2014) Department of Political Science, Kansas University, USA in European Union Politics.

[127] ibid p. 2

[128] The guardian, *"Border force warns terrorists could enter EU by abusing asylum checks"* (*The Guardian*, 6 April 2016) http://www.theguardian.com/world/2016/apr/06/eu-border-force-terrorist-asylum-checks accessed 25 May 2016.

[129] United Nations Charter (24 October 1945) 1 UNTS XVI, Article 51 provides that: *"Nothing in the present Charter shall impair the inherent right of individual or collective selfdefense if an armed attack occurs against a Mem- 10 her of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security […]"*

rights"[130] - including the freedom of movement. In that regard, it has been illustrated, based upon the ECtHR jurisprudence, that terrorism is one of the main denominators used by States in order to invoke this derogation.[131] In the judgment *A. and Others v. the United Kingdom*, the British government decided to issue a derogation under Article 15 of the Convention to allow detention of foreigners under the belief that they were supporting a terrorist organization. For the UK government, this was a threat to the nation. Accordingly, this case pinpoints that the fundamental element that triggers the resort to such derogation has to be provided by the actual or imminent emergency. Thus, one might suggest that to a certain extent, these conditions can be juxtaposed and applied *mutatis mutandis* with the European Union interpretation of "public policy and national security threats" in the sense that, in a situation of actual and absolute threat, Member States can justifiably rely on the existence of compelling reasons of national security or public order. By implication, only in a crisis or extreme danger, the Member States are permitted to detain asylum seekers under these exceptional grounds. However, since migration is increasingly being associated with security issues, some Member States are associating risk of terrorism as a tool to implement harsh immigration policies, including the detention of asylum seekers.[132] By implication, the response to protect public interest and national security has entailed that, detention is:

> *"[A] preferred means for States to maintain and assert their territorial authority and legitimacy, and respond to mounting political pressures regarding border security."*[133]

These findings invite to draw the conclusion that the tendency to link migration and terrorism will continue increasing in the coming years. However, the complexity of this situation persists given the antagonistic interests that are implicated; granting refugee protection *vis à vis* the

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[130] Julian M Lehmann, *"Limits to Counter-Terrorism: Comparing Derogation from the International Covenant on Civil and Political Rights and the European Convention on Human Righ*ts" (2011) 8(1) Essex Human Rights Review, p. 108. < http://projects.essex.ac.uk/ehrr/vol8no1.html>

[131] ibid p. 104

[132] Gergely Szakacs, "*Illegal Migration Clearly Linked with Terror Threat: Hungary PM*", (2015) Reuters, <http://www.reuters.com/article/2015/07/25/us-europe-migrants-hungary-idUSKCN0PZ08F20150725> accessed 30 May 2016.

[133] Robin Sampson & Grant Mitchell, "*Global Trends in Immigration Detention and Alternatives to Detention:*Practical, Political and Symbolic Rationales", Journal on Migration and Human Security (2013) 1(3), p. 98 http://jmhs.cmsny.org/index.php/jmhs/article/view/14/10 accessed 30 May 2016

presumption of dangerous personal circumstances of the individual. Having this in mind, it is essential to ask, what is the interpretation followed by the Member States? Secondly, are they interpreting these grounds in cases of extreme danger for the interests of the society? Thirdly, which right should outbalance another one and how should this be approached? Finally, should a legislative measure be enacted in order to list the types of crimes that amount to a national and public order threat for the EU as a whole?

In the light of the foregoing consideration, I would opine that it is for the Court to establish a definition of the types of threats that fall within public policy and national security sphere. To this end, a potential definition shall be clear and comprehensive, albeit it shall be construed in an exhaustive manner.[134] In view of the fact that the directive still provides room for flexibility to the Member States, this situation creates disparities between the practice of the Member States and the obligation not to instigate legislation that can have a deterrent or preventive effect.[135] Moreover, further issues arise from the failure of the directive not to set a maximum period of confinement, which gives a broad discretion to impose longer period of detention by the Member States. By implication, this is exacerbated by the lack of the recast RCD to clarify that detention must not extend to the entire asylum determination.[136] Consequently, I would posit that, since there is no fixed time limit for detention, this implies that states can easily detain asylum seekers according to their wish. Accordingly, the purpose of administrative detention, which is not punitive, takes the form of a punishment, which is a classical characteristic of criminal law.

3.3 Divergences in the Interpretation

When analysing the measures taken within the EU asylum framework, it is worth noting that they are subjected to different rules among the Member States by reason of their partial or non-participation in the CEAS, especially, so in the case of Denmark, the United Kingdom, and Ireland. This, accordingly, creates concerns in the sense that there are different rules that are binding upon them. With respect thereof, the text that follows will endeavour to pinpoint the

[134] *Kostakopoulou and Ferreira* (n 103) p. 14

[135] ibid p. 6

[136] *Majcher* (n 64), p. 16

situation in the Netherlands as a follower of the EU policies in asylum and immigration,[137] which can be used as a yardstick to analyse the approach of Denmark, since the latter one is not bound by the EU asylum *acquis*. As a result, the actions taken by it do not observe the pattern prescribed by the EU and, therefore, neither the recast of the Reception Conditions Directive. In addition, the case of Denmark presents an interesting point of reference due to its rigorous public security policy and its recent public nuisance policy relating to asylum seekers and refugees.

3.3.1 Policy practice in EU Member States: Netherlands

The norms governing the immigration policy in the Netherlands are laid down in the Aliens Act 2000.[138] With respect thereof, Chapter V contains the measures for a restriction and, deprivation of liberty, and hence, foresees the detention of asylum seekers on grounds of public policy, public security, or public health.

Before analysing the crux of the matter, it is worth to mention that there are two types of detention of asylum seekers under the Dutch legislation. On the one hand, border detention regulated in article 6(1) and (2) of the Aliens Act, which permits detention of the asylum seeker who has been refused entry, and, thus is obliged "*to stay in and by the border control officer designated area or place, which (…) can be protected against unauthorised departure."* Under this form, asylum seekers are detained during their asylum procedure.[139] On the other hand, asylum seekers can also be detained on the Dutch territory based on Article 57 of the Aliens Act, "*If necessary in the interests of public policy (ordre public) or national security, (…) with a view to expulsion*". In order to deploy this type of detention, a rejection of the asylum application must be enforced. This means that, if the (rejected) asylum seeker is not willing to

[137] Netherlands is, moreover, a State party of the United Nations Charter and the European Convention on Human rights, and other international instruments in which "*presumption against detention is enshrined or which are otherwise relevant to immigration detention.* See Amnesty International, *The Netherlands* (n 97) p. 13

[138] Aliens Act the Netherlands 2000 (Vreemdelingenwet 2000), available at http://www.asylumlawdatabase.eu/en/content/en-aliens-act-netherlands-2000-vreemdelingenwet-2000

[139] According to the information provided by the Asylum Information Database, in 2014, a total of 261 asylum seekers who applied for asylum at the Dutch border were detained during their asylum procedure on the basis of article 6 of the Aliens Act. For more information, 'Country Report: The Netherlands' (AIDA 2015) http://www.asylumineurope.org/reports/country/netherlands accessed 14 June 2016.

return on voluntary basis or there is a danger to public order and national security, such provision dictates the use of detention.

In this respect, a study conducted by the European Migration Network has illustrated[140] that, in the case of the Netherlands when deciding whether a person constitute a risk to public policy, the relevant criterion taken into account is; whether the alien has been convicted of a crime for which he or she received a sentence or imprisonment: this might also include and take account of public peace and morality, for which there are no specific guidelines established.[141]Accordingly, the Ministry of Security and Justice of the Netherlands asserts that when a (rejected) asylum seeker tries to avoid a removal, or by virtue of criminal offences of the alien, those circumstances are considered to threaten public order or national security.[142]

This being said, when it comes to crimes committed by a third country national, be it an asylum seeker or a migrant, he will be considered to pose a danger to national security after the assessment made by the AIVD[143] or a report by the Military Intelligence and Security Service of the Dutch Government;[144] stating that the individual poses a "*tangible indication*" of a danger to national security.[145] However, there is not a well- defined concept of national security under the Dutch legislation nor a sufficient case law that would help to assess when a measure can be taken in light of the national security exception. Consequently, this makes it hard to know when a person is classified as a threat, since there are no criteria disclosed to the general public.[146] In this regard, we might surmise that the degree of threat in a case of national security must be very high to resort to detention. Accordingly, in cases where there is a significant

[140] European Migration Network, *Ad- hoc Query on the understanding of the notions of "public order" and "public security*" (2009). http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/eu-acquis/140._emn_ad-hoc_query_notions_of_public_policy_and_public_security__25june2009_wider_dissemination_en.pdf accessed 30 May 2016

[141] ibid p.8

[142]See for more information, Immigration and Naturalisation service. Ministry of Security and Justice of the Netherlands. https://ind.nl/EN/individuals/residence-wizard/other-information/leaving-the-netherlands

[143] Helen Oosterom-Staples, "*Using National Security and Public Policy to Combat Terrorism: The Case of the Netherlands"* (2008), European Journal of Migration and Law 10 (1), p. 61.

[144] Article 48.4 of the Dutch Aliens Act.

[145] Oosterom-Staples (n 143) p. 61.

[146] ibid p. 61

(high degree) of threat which jeopardize national security objectives, national security may take precedent over certain rights, namely the right of liberty and likewise less potent rights *inter alia* the right of the alien of voluntary departure laid down in Art. 57 (3) of the Alien Act.[147]

Concomitantly, in the context of public order, an individual can be considered to constitute a danger to the community when he has been convicted by a final judgment of a crime that qualified as "*particularly serious*" or "*serious,*"[148] subjected on whether the individual has a refugee status or subsidiary protection. To this end, the national authority will assess the alien's danger on the basis of the seriousness of the offense, namely the nature and gravity of the offense and the time that has elapsed since the offense occurred.[149] In this context, by reference to the practice put forward by the Immigration and Naturalisation Service (hereinafter IND), when interpreting a risk to public order, the IND has classified a danger to the community *inter alia* drugs, violent crimes, human trafficking, and others that might have such consideration.[150] Having that in mind one might wonder, what are the implications for an asylum seeker when he/she is considered a threat to public order and, to what extent such outcome can prevail over the asylum application?

In respect thereof, the aliens Act contains the possibility to impose an exclusion order to a third country national, by declaring him an "*undesirable alien*"[151] in order to justify detention as a

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[147] Article 57 (3) Dutch Aliens Act, "*An alien shall not be remanded in custody or the remand shall be ended as soon as the alien has indicated that he wishes to leave the Netherlands and also has the opportunity to do so."*

[148] In the old Dutch Aliens Act, a withdrawal of residence was only possible after committing a serious breach of public order. In the actual legislation, the term has been changed to "danger", this, supposes that even minor crimes such as shoplifting can be a reason to refuse residence on public order grounds. See the analysis by, Hinde Chergui and Helen Oosterom-Staples, "*The Impact of Terrorism On Immigration And Asylum Law In The Netherlands*", *Terrorism and the Foreigner: A Decade of Tension around the Rule of Law in Europe* (1st edn, Martinus Nijhoff 2007).

[149] Article C2/7.10.1 of the Aliens Act Implementing Guidelines (Vreemdelingencirculaire 2000) Section C, available at, http://wetten.overheid.nl/BWBR0012288/2016-04-01

[150] ibid Article C2/7.10.1 of the Aliens Act Implementing Guidelines.

[151] Article 65 of the Dutch Aliens Act appoints that, "*An alien may be declared by Our Minister to be an undesirable alien: (a) if he is not lawfully resident in the Netherlands and has repeatedly committed an act that constitutes an offence under this Act; (b) if he has been convicted by final judgment of a court for an indictable offence that carries a term of imprisonment of three or more years or has been given a non-punitive order within*

measure to protect public and national security interests. Correspondingly, the main consequence is that the individual will no longer have a legal right to reside in the Netherlands. This accordingly suggests that, asylum seekers can be considered to pose a risk to public order and, therefore, they will not succeed in obtaining a refugee status. Controvertibly, the issue of an exclusion order does not have the effect of suspending expulsion proceedings, either being an application for a residence, or even a pending asylum application.[152] Taking this perspective, further issues arise as to whether those "*criminal*" asylum seekers can, in fact, be returned due to the risk of "*refoulement*". Consequently, on that account I venture to ask, will they fall within the category of undesirable and unreturnable migrants that end up in a legal limbo?[153]

Overall, it can be observed that the Dutch legislation has transposed the interpretation of the EU acquis by taking into account the personal conduct of the individual in the sense that it must represent a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society. However, there are still certain concerns in relation to the length of detention, since there is not a statutory limitation for the administrative detention.[154] In this respect, there is a case law that has developed and set a general duration of detention of six months. However, when asylum seekers are declared undesirable migrants, the authorities can prolong the administrative detention as a ground beyond the limited- period with a view to prompt the expulsion order.[155] By implication, "*the State's margin for manoeuvre is much wider before the non- national can claim rights on the territory*".[156] Therefore, the target has focused on illegal migrants and unwanted aliens. This situation has been evaluated by Amnesty International as a criminalization of migrants that can reinforce stereotypes and prejudice

the meaning of article 37a of the Criminal Code for such an offence; (c) if he is resident in the Netherlands other than on the grounds of section 8, (a) to (e) or (m), and he constitutes a threat to public policy (ordre public) or national security; (d) pursuant to a treaty, or (e) in the interests of the international relations of the Netherlands".

[152] Martin Bolhuis, 'The Issue of "Undesirable and Unreturnable" Migrants in The Netherlands. Working Paper', *international conference on "Undesirable and Unreturnable" migrants* (2016) London.

[153] The notions of *"undesirable* and "*unreturnable"* migrants derived from the international conference "Undesirable and Unreturnable? Policy Challenges around Excluded Asylum-Seekers and Migrants Suspected of Serious Criminality but who cannot be removed. January 2016. London.

[154] *Amnesty International, The Netherlands* (n 97) p. 24

[155] ibid p. 24

[156] *Chergui and Oosterom-Staples* (n 148) p. 294

against all aliens being "*criminals*". Moreover, it questioned the legality of the "*exclusion measures*" in the light of the 1951 Refugee Convention.[157]

3.3.2 Contested Practice in Denmark

The Danish Aliens Act,[158] is the law that sets up special rules for third country nationals when entering or living in Denmark. On that basis, it should be mentioned that, the Danish Aliens law has passed through polemical changes over the last years, and with every reform seems to have tightened the asylum and immigration policies. For our purposes, the amendment proposed in 2001 triggered important concerns in regard to the detention of asylum seekers due to the apparent augmentation of the number of criminal acts committed by asylum seekers.[159] Moreover, the new amendment of the aliens legislation introduced a paragraph according to which the police will also be entitled to detain an asylum-seeker in the context of his arrival to Denmark, for the purpose of verifying his identity, conduct registration and establish the basis for his/her application. [160] What it is controversial is that, on that account, the authorities might enforce the use of detention on the grounds of public order protection, when nonetheless, the purpose behind is to facilitate administrative expediency.[161]

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[157] *Amnesty International*, *The Netherlands* (n 97) p. 28

[158] The Danish Aliens Act (Consolidation Act No. 863 of 25 June 2013), available at https://www.nyidanmark.dk/en-us/legislation/legislation.htm

[159] *Nevstad* (n 14) p. 27

[160] On January 26, 2016, the Danish Parliament, adopted several measures meant to reduce the number of asylum seekers arriving in Denmark. (Forslag til lov om ændring af udlændingeloven [Bill of the Law on Amending the Aliens Act] (final text of the proposal as adopted) (Amending Bill), Law No. 87 (Jan. 26, 2016), FOLKETINGSTIDENE C [FOLKETING HANSARD C]; Afstemning Afstemningsnummer 245 [Vote Number 245], FOLKETINGET (Jan. 26, 2016) The measures are based on the asylum packet that the government presented to the public on November 13, 2015. (*Asylpakke*[Asylum Packet], STATSMINISTERIE. See for more information, 'Denmark: Law To Stem Asylum-Based Immigration | Global Legal Monitor' (*Loc.gov*, 2016) http://www.loc.gov/law/foreign-news/article/denmark-law-to-stem-asylum-based-immigration/ accessed 05 June 2016.

[161] The UNHCR has expressed concern of such amendment owing to the risk of arbitrary detention. UN High Commissioner for Refugees (UNHCR), *UNHCR Observations on amendments to the Danish Aliens Act as set out in Lovforslag nr. L 62*, January 2016 http://www.refworld.org/docid/5694ecf64.html accessed 01 June 2016

In respect thereof, pursuant to Article 25 of the Aliens Act, a foreigner can be expelled, if he or she is deemed to pose a danger to national security or serious threat to public order, safety, and health. With that aim, by reference to the practice of the Danish immigration authorities, an alien can be administratively expelled if an individual has committed crimes, *inter alia*, theft, usury, and similar offences - the value of which exceeds 500 Danish crowns (an equivalent to 70 euros). Moreover, if the asylum seeker is subjected to two warnings for a petty crime with a damage of less than 500 crowns, he can also face an expulsion order.[162] Even in cases when an alien has not committed a criminal offence he can also be administratively expelled for reasons of disturbance to the public order.[163] This situation illustrates that, for the Danish Government, the consideration of danger to public security is determined by trivial circumstances that cannot constitute a genuine and sufficiently serious threat for the life of the nation.

In addition, in 2004 and then 2009 the Danish parliament introduced a legislation in order to strengthen the efforts against disturbances to public order. With that purpose, the policy was authorised to make administrative "*preventive arrests*" if the alien was considered to pose a danger to public order, even when the individuals were not suspected or accused of criminal offences.[164] With respect thereof, the new Article 36 adds an extra "*safeguard*" in order to secure the realization of a judgment concerning expulsion.

As a consequence thereof, *prima facie* this situation would suggest that an asylum seeker who has committed any offence is considered *per se* as a threat to national security, therefore he or she will be detained during the rest of the asylum procedure. Intuitively, this demonstrates that the Danish government has a clear intention to resort to administrative detention in "*all*

[162] *Nevstad* (n 14)

[163] In July 2010, the Danish state carried out administrative expulsions of 23 Roma EU-citizens. The reason for the expulsion was that they were a disturbance to the public order. None of the Roma citizens has been expelled as a result of having committed a criminal offence in Denmark, other than trespassing and putting up tents and camping without permission. See in this respect, UN Human Rights Office of the High Commissioner 'DENMARK List Of Issues Prior To Reporting & An Assessment Of The Implementation Of The International Covenant On Civil And Political Rights' (*OHCHR.org*, 2011) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=1002&Lang=en accessed 2 June 2016.

[164] ibid p. 5

cases."[165] In doing so, the threshold for the use of administrative detention to protect national security or public order under the Aliens act is considerably low. This, therefore signifies that an asylum seeker who has antisocial or reckless attitudes or has been convicted of any petty crimes, will be subject to administrative detention under the presumption of a risk to public order. [166] Moreover, since detention can stretch out over the initial criminal sentence, such situation can amount to a character of an additional penalty or double sanction. [167] Correspondingly, with the new legislation reform, the Danish government permits to resort to detention during the asylum procedure in order to facilitate administrative expediency under the grounds of public order and national security. In addition, it is questionable that the determination of a real public security threat is made by the policy and not by a judge - a situation, which seriously undermines the guarantee of human rights observance.[168]

Having highlighted the above considerations, we should reiterate that a threat to public order and national security requires, among other factors, a noticeable degree of severity in the crime or offence committed in order to justify detention. This being said, a petty offence cannot be regarded to constitute a threat to public order or national security, since it is not in conformity with the interpretation prescribed by the ECHR and the CJEU (though Denmark is not bound by the latter). Still, international law has pinpointed that the threshold of the offence needs to be higher when the rights of a recognised refugee are at stake.[169] This, therefore signifies that, when it comes to asylum seekers, and "actual" "absolute" and "sufficiently serious" offence that affects the interests of the society, can reach the threshold of public order and national security threats.

Pursuant to the foregoing, it can be inferred that under the auspices of the Danish alien's legislation, asylum seekers can be administratively detained because of criminality factors, and

[165] *Nevstad* (n 14) p. 30; The Danish asylum package from November also contained a paragraph stating that from now on, 'rejected asylum seekers must be detained whenever possible' see Michala C. Bendixen, *"Asylum Seekers Locked Up Like Criminals"* (*refugees.dk*, 2016) http://refugees.dk/en/focus/2016/april/asylum-seekers-locked-up-like-criminals/ accessed 1 June 2016.

[166] ibid para. 40

[167] *Nevstad* (n. 14) p. 29

[168] Ibid p. 29; Article 36 (1) Danish Aliens Act

[169] *Grahl-Madsen* (n 30) p. 41-50

be subjected to expulsion orders as a consequence thereof.[170] This elucidates the resort to administrative detention in an arbitrary manner which is inconsistent with international agreements because it goes against the aim of administrative detention which is non- punitive. In addition, it seems that the Danish government does not really follow an individual assessment on the asylum seekers conduct and their personal circumstances; hence, there is a lack of proportionality when balancing the personal liberty right with the interest to protect the society given that the application of detention measures are prescribed in an extensive fashion.

Accordingly, we might draw a conclusion that, one the one side, the EU regulation is perceived to be stringent and strict in regard to the detention under public policy grounds, even when there is a plethora of secrecy surrounding the process that may contravene the obligation to ensure adversarial proceedings.[171] On the other hand, the position taken by the Danish Government creates concerns if we bear in mind that any restrictions made by authorities which are an interference to the rights of individuals, must be necessary and proportional to the aim pursued.[172] In this view, it is clear that administrative detention is been used by the Danish authorities with the purpose to deter future asylum seekers or to dissuade those who are waiting for their asylum application claim. Thus, the degree of legitimacy in such actions is highly disputable to be in conformity with the norms of international refugee law. In addition, there is a failure to take duly account on the detrimental impact of detention upon asylum seekers who are victims of ill-treatment and persecution. In words expressed by Amnesty International in regard to detention of asylum seekers in the Ellebæk center (Denmark):

> *"Amnesty International has previously outlined the problems with detention of asylum seekers, who are survivors of torture, or due to other reasons, are particularly vulnerable in Denmark. (...) A series of studies indicate that detention generates significant stress for asylum seekers. For example, it can lead to deterioration of physical and mental health and can often provoke depression, angst and PTSD."*[173]

[170] Michaela C Bendixen, Chair of Refugees Welcome- Denmark, in her article she contended that those whose applications are rejected in Denmark are now treated as criminals. See *supra* (n 165)

[171] *Oosterom-Staples* (n 143) p. 74.

[172] Case *Moustaquim v. Belgium* Application no. 12313/86, (ECHR18 February 1991) para. 44

[173] The report by Amnesty is only in Danish but this paragraph has been translated by *Michala C. Bendixen.* See *supra* (n 165.

Amnesty recommends that, detention of vulnerable migrants (asylum seekers) should take after a full consideration to their personal issues, this implies, an evaluation of their physical and mental conditions. Because otherwise, administrative detention could go against Article 3 ECHR that forbids torture and inhuman degrading treatment.[174]

3.4 Concluding Remarks

In accordance with the foregoing deliberation, the present section aimed to provide a succinct approach of the case law from the ECtHR and CJEU concerning the detention of asylum seekers under public order and national security grounds. For that purpose, the above interpretation can illustrate that the practice of some Member States does not follow their line, as it was exemplified in the case of Denmark. Nonetheless, in other Member States, the perception of public order and national security seems to endow the exceptional nature that it involves. This being said, there are still obscure information concerning, firstly, to the limits of time for detention and, secondly, the precise grounds of what represents a danger to public order and national security. This issue need to be resolved in order to clarify when an asylum seeker is to be regarded as a threat, and thus to determine the lawful resort to detention.

Similarly, taking the view that asylum seekers find themselves vulnerable *vis a vis* national offenders, regardless of the criminal offences, it is likely that the fact of having criminal records or attitudes, together with personal circumstances, are sufficient to estimate the existence of a threat and by that, the exceptional nature to detain asylum seekers is neglected. By implication, a main consequence is that, the asylum application may be rejected along with the enforcement of an expulsion order. In a nutshell, I argue that this situation presupposes that, immigration detention can be used when asylum seekers are deemed to pose a danger to public order and national security due to the criminal offences or personal conduct, in lieu of criminal law.

[174] ibid

4 The Balancing Test

Having recognized that States enjoy room for maneuver when deciding what constitutes a danger to public order and national security, it is worth to note that their decision to detain or expel is restrained by a number of important general principles that are present in a society based on the rule of law, one of them being the well-known principle of proportionality.

At the outset, the crux of immigration detention lays down between the tension of personal liberty and state sovereignty.[175] This tension is further intensified when it comes to the international obligation to protect refugees and asylum seekers that clashes against the state's national interests, for instance, when there is a threat stemming from asylum seekers. In this context, some schools of thought opined that:

> *"[T]he issue of asylum opens up a particular contradiction within liberal national states: it puts the universal principle that they should respect and protect human rights by offering asylum to aliens fleeing persecution in direct competition with the principle that they should primarily serve the interests of the state's existing citizens…[and] domestic politics in west European countries has come down firmly on the side of legitimising anti-asylum policies through the logic of defending the national interests of the state's existing citizens."*[176]

With this view, the principle of proportionality is a pivotal tool in order to assess whether the aim pursued, namely the protection of national security and public order, has been properly balanced against the interference in the right to liberty. Accordingly, it stands as a vehicle in order to achieve a "*fair balance.*"[177] This, suggests that, when it comes to the detention of asylum seekers or refugees, the principle of proportionality strikes a balance between three interests. Namely, the right to liberty, the compliance with international human rights obligations, and the national interests of the State.

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[175] "*Any human right of non-nationals [. . . with respect to] their liberty conflicts with the broadly unfettered right of states to control the admission and expulsion of non-nationals conferred by both national and public international law*" by Daniel Wilsher, "*The Administrative Detention of Non-Nationals pursuant to immigration control: International and Constitutional Law Perspectives*" (2004) International and Comparative Law Quarterly, 53, p 898

[176] Paul Statham, "*Understanding the Anti-Asylum Rhetoric: Restrictive Politics or Racist Publics*?" (2003) Political Quarterly.74 (1) Special Edition, p. 165.

[177] *Nevstad* (n. 14) p. 44; Case *J.N (*n 112) para. 68 and the case law cited there.

The importance of the principle of proportionality together with the principle of necessity have been subjected to a reiterated study under international human rights law. For instance, the UNHCR maintained that these fundamental rules are an essential component in order to guarantee that the detention measure is relevant and sufficient in cases where public policy is at stake. For that purpose, the UN High Commissioner has asserted that:

> *"[T]he general principle of proportionality requires that a balance be struck between the importance of respecting the rights to liberty and security of person and freedom of movement, and the public policy objectives of limiting or denying these rights. […]The necessity and proportionality tests further require an assessment of whether there were less restrictive or coercive measures (that is, alternatives to detention) that could have been applied to the individual concerned and which would be effective in the individual case."*[178]

Accordingly, pursuant to the principle of proportionality in administrative detention, it demands deprivation of liberty to be a measure of last resort.[179] Albeit, despite of the exceptional nature of administrative detention, in the recent years, a drastic trend in detaining asylum seekers has hit this presumption. As a consequence, detention of asylum seekers has become too regular and too prolonged in many countries.[180] On that account, the UNCHR has launched a 5 years initiative with the purpose to vindicate the exceptional nature of deprivation of liberty to asylum seekers by bringing forward the relevance of alternatives to detention (hereinafter ATD), which is an expression on the mandate to protect refugees and asylum seekers under the international obligations. To that end, the UNCHR Global- Strategy- Beyond Detention 2014-2019[181] advocates not only to have ATD at disposal of the States, but to ensure that they are implemented in practice. Similarly, the new guidelines disposes that, detention can solely be invoked, when after considering all elements, it is necessary and *unavoidable*.[182]

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[178] UNHCR *Beyond Detention 2014-2019*(n 27) para. 34

[179] Nuala Mole and Catherine Meredith, "*Asylum and The European Convention On Human Rights"* (Council of Europe Pub 2010). p.157-158

[180] Alice Edwards, *"From Routine To Exceptional: Introduction To UNHCR'S Global Strategy – Beyond Detention 2014–2019 Supporting Governments To End The Detention Of Asylum-Seekers*" (2016) 35 Refugee Survey Quarterly, p. 1http://rsq.oxfordjournals.org/content/early/2016/02/09/rsq.hdv019 accessed 05 June 2016.

[181] UNHCR *Beyond Detention* (n 27)

[182] Ibid. para 3

Therefore, the UNHCR strategy aims to illustrate that with ATD States can also achieve their objectives of security or public order even with a limited recourse to detention or even without it and, at the same time, guarantying a right to asylum.[183]

At the European level, the ECtHR also had an occasion to assess the proportionality test in cases of deprivation of liberty. In this regard, the European Court will, predominantly, scrutinize *inter alia* whether there is a connection between detention with one of the grounds laid down in Article 5 or whether the length of detention does not exceed the reasonable time required for achieving the objective of the measure.[184] With respect to the public order claims, I will bring forward the arguments enunciated in Chapter 3, subchapter 1. In that consideration, it has been emphasised that, under the pre- trial detention, there are elements that may be relevant to review the lawfulness of administrative detention of asylum seekers who are subjected to detention/ expulsion, when they have served their criminal sentence, or when they are suspected of committing a crime. These elements are, *inter alia*, the gravity of the offence, the length of detention, and individual circumstances.[185] Similarly, for the reason that the principle of proportionality is inherent in the whole convention, I would opine that these elements should be taken into account among all types of detention. Having this in mind, and following the interpretation by the ECtHR in the *Lettier v. France*[186] case, the European Court concluded that the disturbance of public order could not result solely from the offence, but, only after a careful assessment that the threat was relevant and sufficient. Accordingly, these findings invite to draw a conclusion that the detention based upon petty offences,[187] or under general preventive grounds, are not *"capable of showing that the accused's release would actually prejudice public orde*r." Therefore, there must be a certain degree of the gravity in the offence that need to be "*relevant and sufficient*" as to disturb the public order. Similarly, in accordance to the case law of the CJEU, the degree of threat needs to be genuine, present, and sufficiently "serious" or "imperative"[188] in order to reach the threshold of a public danger.

[183] To name a few of the alternatives proposed by the UNHCR; reporting conditions, designated residence, electronic monitoring, or home curfew, etc.

[184] Case *A and others* (n 50); Case *Saadi v. Italy* App no. 37201/06 (ECHR 28 February 2008) para. 77

[185] Kei Starmer, European *Human Rigs Law, The Human Rights Act 1998 and the European Convention on Human Right*s (LAG Education and Service Trust, 1999) p. 169

[186] Case *Letellier v. France* (n 85) para. 51

[187] see case Denmark, Chapter 3, subchapter 3.3.2

[188] Case *J.N.* (n 112) para. 64 and the case law cited there.

Nonetheless, the fact that an asylum seeker has committed a crime, this, cannot constitute a rebuttable presumption to determine that, the person will pose a risk after presenting an asylum application; national authorities are still obliged to carry out an individual assessment.

Following this line, pursuant to the interpretation made under the Citizen's Directive, the Court asserted that before taking an expulsion decision on grounds of public policy and national security, the Member States "*must"* take account of, *inter alia*, the age, state of health, family issues and economic situation, etc. As a consequence, this may suggest that in cases of detention of asylum seekers based on public policy grounds, a similar individual assessment should take place. Indeed, distinction between nationals and non-nationals is a fundamental characteristic of migration law.[189] However, there is an obligation to apply the principle of proportionality in regard to differential treatment of individuals. This being said, it cannot be accepted that, for instance, aliens can be subjected to longer periods of detention because of public order and national security grounds.[190] This situation is clearly disproportionate, and hence, discriminatory. For that purpose, the present and past conduct of the individual, the degree of cooperation, family ties, or community links with the country of asylum, constitute essential factors that the States need to balance in their assessment.

In this vein, the principles of proportionality and necessity also require that national authorities should apply detention only, and in so far, as all non-custodial alternative measures of detention have been duly examined and there is no possibility of less restrictive measures.[191] As a result, this constitutes an obligation under the EU *acquis*. In this context, one might affirm that, the implementation of ATD within the EU immigration framework is indeed a good merit and, a quintessential step to ensure that deprivation of liberty to asylum seekers is, in reality, a measure of last resort. However, the question that arises is whether ATD is being implemented correctly by the MS.

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[189] Michael Flynn, "*Who Must Be Detained? Proportionality as a Tool for Critiquing Immigration Detention Policy*" (2012) Refugee Survey Quarterly p. 4 http://rsq.oxfordjournals.org/content/early/2012/07/04/rsq.hds008.abstract accessed 10 June 2016

[190] Case *Van der Tang* (n 81) para. 63: Case *Tomasi* (n 82) para. 89

[191] Article 8 (2) and Recital 20 of the recast RCD pinpoints that, since detention might affect their vulnerable physical and psychological integrity, administrative detention should only be a measure of last resort.

In principle, I would answer this question by pointing out that, generally, the degree varies among the Member States. For instance, for Slovenia, the national authorities consider that depriving asylum seekers of their liberty in a reception centre constitutes an ATD.[192] In contrast, according to the Dutch Aliens Circular, it provides a list of alternatives to detention such as; obligation to report, financial deposit, or accommodation in freedom- restricted institution.[193] However, after the study made by Amnesty International in 2010,[194] it was found that in practice, ATD was hardly imposed by the Dutch Government, because the State Secretary of Justice enjoys wide discretionary powers to decide upon which cases may replace detention for one of these possible alternatives. This situation signifies that, regardless of the obligation provided by the Reception Conditions Directive to ensure an effective application of less coercive measures, it is highly critical that they are not applied in practice by the Member States. By implication, national authorities are not coerced to enforce less restrictive means when the circumstances of the case allow such option. In view of the aforementioned situation, I questioned the role of the European institutions and, particularly, the CJEU. In light thereof, it is necessary that the Court enforces the compliance with the EU binding legislation by means of setting legal interpretation through its case law that will give a significant status to alternatives to detention, thus, addressing the disparities among the Member States.

Another issue that comes to the fore is the non- feasibility, in the recast RCD, of a limited period of detention under public order and national security grounds and, the consequences on such detention for the asylum application. Regrettably, in the recent case *J.N*, the CJEU did not mention how the proportionality test should be employed to limit the length of detention and, therefore, the Court missed the opportunity to shed some light on this issue, which could fill this gap. In this respect, the Court merely referred to Article 9 (1) of the Directive that ensures detention as short as possible and as long as the grounds under Article 8 (3) are applicable.[195] Nevertheless, these are abstract terms that, arguably, do not clarify the limits of detention.

[192] Odysseus Academic Network (n 36) chapter 1

[193] AIDA, The Netherlands (n 138)

[194] Amnesty International, the Netherlands (n 97) p. 25

[195] Case J.N (n 112) para. 62

Moreover, another shortcoming is the lack of availability of reliable statistical data on the scale of asylum seekers detained under public order grounds. [196] The vague information concerning the different criteria used by the States, to reach a decision of detention to asylum seekers as a threat to public order and national security, together with the secrecy regarding the grounds that trigger this detention, evidently illustrates that neither international nor national scrutiny is possible.

Therefore, due to the lack of transparency, it is it difficult to assess whether the detention measure was undertaken with heed to the principle of proportionality and, therefore, compatible with international obligations.

As a last observation, I would underline the complexity of the issue at hands. As it has been illustrated throughout this paper, under the EU law, a Member State can enforce administrative detention if the asylum seeker threatens the public order. However, this situation rises diverse questions. First and foremost, can we consider the provision of public order and national security to be a non-punitive ground for administrative detention? In other words, does it really fit within the rational of administration detention? The author shares the view adopted by Izabella Majcher,[197] who argues that these grounds go beyond the administrative migration enforcement, since one of the functions of the criminal law is, the protection of the society against public order (even national security) threats. Additionally, regardless that the objective of article 8 (3), which is not to penalize asylum seekers,[198] there is, indeed, a conflict between criminal and administrative law, that *"creates confusion and fees negative perception about*

[196] For instance, there is not information available under the EU statistical office (Eurostat) of the number of asylum seekers in detention.

[197] Izabella Majcher set forth the issue of "crimmigration" of administrative detention. It involves two main issues: *(1) formal criminalization, or the application of criminal procedures (leading to sanctions like incarceration or fines) for immigration-related violations; and (2) the apparent increasing reliance on measures that are more commonly associated—rightly or wrongly—with criminal law enforcement (like detention) for immigration law infractions". Majcher* (n 64) p. 3

[198] Council of Europe: Committee of Ministers, *Recommendation Rec(2003) 5 of the Committee of Ministers to Member States on Measures of Detention of Asylum Seekers*, 16 April 2003, Rec(2003)5, point 3.

migrants amongst the public."[199] Thus, administrative detention under public order threats, appears to be an indirect continuation and extension of criminal offences.

[199] Izabella Majcher, 'EU Law Analysis: Immigration Detention in Europe: *What Are The Facts? A New European Migration Network Study'* (*Eulawanalysis.blogspot.nl*, 2014) http://eulawanalysis.blogspot.nl/2014/12/immigration-detention-in-europe-what.html accessed 14 June 2016.

5. Conclusion

The focal point of this thesis was to answer the following question: Can asylum seekers be detained under Article 8(3) (e) of the Reception Conditions Directive because they are deemed to pose a threat to public order and national security by either having served a criminal sentence or even without committing a crime, yet due to personal circumstances which amount to a potential public risk?

For that purpose, I have exemplified that under the current stance of law, there is a dissonance with respect to a harmonised and unified interpretation that regulates administrative detention of asylum seekers that pose a threat to public order under the asylum framework. In this regard, we have observed that there is obscurity concerning the terms of public order and national security. As a consequence, Member States might "*criminalize*" persons seeking international protection under administration detention -a situation that goes beyond the non-punitive rational.

In Chapter II, I have scrutinized the legal framework with regard to the detention of asylum seekers under different legal systems; that is, on the level of international, regional, and national law. What has transpired is the fact that there is no guidance on how to balance the rights at stake. Moreover, that there is still a long way ahead to ensure a uniform practice across the Member States when claiming resort to administrative detention, which in spite of its exceptional nature, has been increasingly relied on by Member States in the context of immigration detention as a tool of first response and, as a deterrence to manage forthcoming immigration challenges.

In Chapter III, I have analysed the crux of this paper, that is, the definition of notions of public order and national security grounds. In this regard, I have based my analysis on the case law of the European Court of Human Rights and the Court of Justice of the European Union in order to investigate how both Courts have interpreted the terms in their respective jurisprudence -the findings are striking. On the one side, the European Court of Human Rights has denied the possibility of States to balance their national policy interests against the limitation on the right to liberty, if they are not under one of the five exceptions laid down in

Article 5 ECHR. However, I have pointed out that the ambiguity of these terms remain to be define by each States, therefore, it is dubious that, on account of this legal uncertainty, detention of asylum seekers, based on public order grounds, can be lawful under a democratic society that is based on the rule of law.

On the other hand, the CJEU had an opportunity to define public order and national security threats, starting from the area of internal market freedoms, then under the Citizen's Directive, Family Reunification Directive and, recently, under the asylum *acquis*. In this respect, we found out that, the interpretation of public policy threats can apply *mutatis mutandis* to directives that aim and pursue different objectives. In this context, the recent case *J.N* has acknowledged that these concepts can be entirely transposed to the interpretation within the asylum framework. By implication, the findings are that the person need to pose *"a real, actual, and sufficiently serious threa*t" to affect one of the fundamental interests of society in order to enforce detention as prescribe in Article 8 (3) (e) of the recast RCD. In this context, I have also undertaken an assessment of the degree of such a treat in order to reach the aforesaid qualifications. For that purpose, I began by describing the types of crimes that have been interpreted by the Court of Justice. Accordingly, it has been demonstrated that terrorism, sexual exploitation of children, or membership of an organized group dealing with narcotics, are examples of a particularly serious crimes that constitute a danger to the interests of the community. In this respect, I have reiterated that the aim of protecting public order and national security, given the generous and broad terms of their interpretation, might undermine the fundamental rights of the asylum seekers. Therefore, their interpretation should be defined and, should not be determined unilaterally by each Member States. Consequently, there is a need for necessary control from the European Institutions to guarantee that their national law takes account of the rights comprised in the Charter of Fundamental rights of the European Union, in particular, the right to liberty, the right to asylum and the rights guaranteed by the European Convention of Human Rights.

By implication, the analysis from the perspective of the Member States has demonstrated that not all of them follow the case law. In some States, the mere commission of a crime (petty offences as will be often the case), is a sufficient ground to consider an asylum seeker as a threat to public order. In other Member States, a permission to stay for a defined period can be refused, if the alien constitutes a threat to public order or national security. This is the approach taken by the Netherlands. The consequence of these findings is that, in most of the cases, the

issue of a threat to public order, under administrative law, would imply the rejection of the asylum application.

Following in Chapter IV, I have investigated the issue of the balancing test (proportionality test) in order to find equilibrium to the rights at stake, namely, granting asylum protection, the right to liberty, and States national interests.

The most important observation from this chapter to bear in mind is that proportionality should be assessed on a case- by- case basis, by taking into consideration individual factors and, most importantly, by ensuring the use of alternatives to detention before any deprivation of liberty is enforced.

Last but not least, I will propose the following possible alternatives that might attenuate the legal uncertainty and secrecy that surrounds the definition of the notions of public order and national security, with the aim to provide transparency to the current stance of law.

At first, a possible solution might be found in soft law. In this regard, a communication guidance by the Commission as the one made for the *Directive 2004/38/EC on the Right of Citizens of the Union and their Family Members,*[200] might provide a clear criterion for a better understating of the applicability of the notions of public order and national security within the asylum framework. Thus, it can provide an exemplification of the grounds that can target an asylum seeker as a risk to public security, and, therefore, be useful to harmonize the interpretation of the policy practices by the Member States. Moreover, since soft law is more flexible and easy to adopt than a legislative measure, it facilitates the adaptation of legal norms to the developing world and, as a corollary characteristic, it can address the problematic issue with promptness.

On the other hand, a second solution might be found in the implementation of alternatives to detention. This is a pivotal element due to the general misconception of the use of administrative detention. In this respect, I would opine that, again, the Commission could play a significant role by issuing reports, presenting, or exchanging the best practices taken by some Member States. This would be useful in order to equip the Member States with all the possible

[200] Commission Guidance Right of Citizens of the Union and their Family Members (n 116)

tools for providing additional guidance when applying ATD within their national legislation. For these purposes, the reports made by the Fundamental Rights Agency and other bodies, which have acknowledged the use of ATD, can provide an important insight given their advisory role.

Lastly, concerning the issue of the length of detention, here, the Court of Justice could play a significant role by setting a meaningful interpretation of the principle of proportionality in order to define the limits of detention under Article 8 (3) recast RCD. This, therefore, could clarify the question of whether detention can extend to the entire asylum application. Furthermore, an exhaustive list concerning the definition and types of threats that fall within the public policy and national security, could allow the Court to curtail the wide margin of maneuver of the Member States regarding justifications. However, further issues need to be interpreted by the Court in order to know to what extent the administrative detention based on public order grounds can have an influence on the (rejection or not) asylum applications. Having said that, it is to be hoped that this situation can be further elucidated with t forthcoming case law.

Finally, having expressed all the main characteristics and findings of the previous chapters, I would like to make the final observation with respect to my thesis. In my opinion, the use of administrative detention appears to be a continuation of serving criminal offences. In other words, it is to be perceived as an extension of criminal offences since Member States might invoke a threat to public order following a compliance with a criminal judgment. This, accordingly, goes beyond the non- punitive rational of administrative detention. Hence, Member States should not invoke a threat to public order under administrative grounds by claiming pre-emption of an already committed criminal offence. This is disproportional and arbitrary.

Finally, taking into consideration the foregoing findings, it is evident that in any case the foreigner, being an illegal migrant or asylum seeker, the fact of him being suspected, together with the lack of a legal status, will considerably lead to disadvantages with repercussions for his situation.

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