Detention Under Scrutiny

A study of the due process for detained asylum-seekers

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Summary

In this study, we have analysed a total of 953 decisions and rulings regarding detention, supervision and placements by the Swedish Migration Board, the Swedish Police and the three migration courts as well as the Migration Court of Appeal. The key findings are summarised below.

The lack of application of the **principle of proportionality** is a running theme throughout the findings of the study. This is expressed in the decisions regarding detention, in the assessments about whether there are particular grounds for extending the detention period, and in decisions regarding placement in a correctional institution, remand centre or police arrest facility. It is not possible to discern from the decisions and rulings whether the principle was in fact given individual consideration in each separate case. In any case, if interests were indeed balanced, this is not justified or documented in the decision or resolution – a factor which ought to be fundamental.

The alternative method to detention enabled by Swedish legislation – **supervision** – is not used to the extent intended by the legislator. The findings show that, in the absolute majority of the decisions, no individual assessment is made about whether the mildest measure for the individual, i.e. supervision, can be employed instead of detention. In the decisions and resolutions of the Swedish Migration Board and the courts, there is seldom any discussion about why supervision is not deemed sufficient. Decisions of the Swedish Police do not even refer to the supervision legislation. Without an explicit legal basis for which measure should be considered initially, it does not seem obvious to the administering authorities to first of all consider whether the purpose of a potential imposition of detention could be achieved by placing the alien under supervision.

The analysis shows that there is seldom an **overall assessment in decisions regarding detention pending enforcement of deportation decision.** This is particularly obvious when individuals have at some point expressed reluctance to return to their home countries. Notwithstanding other circumstances, this is often taken as a pretext to assume that the person will abscond from future enforcement, and can thus give rise to a detention order from the authority. This differs from individuals who have expressed that they will comply with any enforcement. Despite such statements, in certain such cases other, personal circumstances were taken into account which nevertheless gave rise to a detention order.

The study shows that, in practice, **segregation** is not applied as intended by the legislator. The provision regarding segregation is not used independently, but only as a condition for a decision regarding placement in a correctional institution. The main reason for placing detained persons in a correctional institution, remand centre or police arrest facility for security reasons is that the Swedish Migration Board's premises and staff are not equipped to deal with individuals who display threatening behaviour, or with persons with self-harm behaviour. On many occasions, this leads to persons who demonstrate self-harm behaviour being placed in correctional institutions on the sole basis of them constituting a danger to themselves.

Final reflections

The purpose of the project was to study individual detention and placement decisions and rulings, focusing on the justification of the grounds for decisions. This has enabled investigating whether the current regulations are applied in accordance with the intention of the legislator, i.e. that administering authorities observe restrictiveness in assessing detention matters, and that detained aliens only be placed in a correctional institution, remand centre or police arrest facility in exceptional cases. In cases that lead to issuing a detention order, is this preceded by weighing up detention and supervision? Have the intentions of the legislator in terms of alternative methods to detention had an impact in terms of practice? A desire to shed light on these matters was the starting point for the project, and this report is the result.
In this final chapter, the intention is to summarise, to some extent, the findings and add some reflections to the debate. In particular, the analysis has shown three crucial points of particular importance: decisions regarding detention pending enforcement of deportation decision ; the use of alternative methods to detention; and placements in correctional institutions, remand centres or police arrest facilities.

Detention pending enforcement of deportation decision
The majority of the decisions and rulings analysed in the report pertain to detention pending enforcement of deportation decision. It is clearly evident that the assessment regarding the risk of absconding has been key in determining whether there are grounds for detention. The findings show that an overall assessment of the various criteria regarding the risk of absconding is often lacking. In terms of the question of what can be deemed to constitute a risk of absconding, there are no direct preparatory work statements to provide guidance in this respect. Many of the decisions and resolutions regarding detention pending enforcement of deportation decision are referred to the resolution of the Migration Court of Appeal, MIG 2008:23, which has seemingly set a precedent. According to this resolution, aliens who live openly but who, through their behaviour, clearly show that they do not intend to comply with the enforcement of a refusal-of-entry or expulsion order, are detained. In addition, there is a significant number of examples of decisions and resolutions in which the asylum-seeker's statements alone about their reluctance to return to their home country in interviews with the Swedish Police or the Swedish Migration Board have been the determining factor in the assessment. In these cases, there was no overall assessment; rather, the greatest importance in the assessment of the risk of absconding was attached to these statements.

An assessment of the risk of absconding in which such great importance is attached to statements made during interviews with the Swedish Migration Board and the Swedish Police requires a well-informed return interview. At the deportation interview with the Swedish Migration Board, information is provided about the various alternatives available regarding return in the individual case, both voluntary and forced. Furthermore, a question is raised regarding compliance with the enforcement of the expulsion order. However, as a rule the alien is not informed that a negative response to the question could potentially form the basis of a supervision or detention order. The new working method of the Swedish Migration Board also involves the individual being called to a notification interview, which takes places after a negative decision from the Swedish Migration Board, but before an appealed decision is determined in court. There is a risk that statements made in this interview too can subsequently form a basis for a potential imposition of detention at a later stage. There may be many reasons why persons express reluctance to return to their home country in interviews with the Swedish Migration Board or the Swedish Police once an expulsion order has been issued. Many asylum-seekers often live under tremendous psychological pressure and an expulsion order can sometimes trigger feelings of anxiety, shock or powerlessness. This does not

automatically mean that the person is not willing to comply with the enforcement of the expulsion order. It may be unreasonable that statements that might have been expressed under emotional stress can have such extensive consequences in individual cases, inherent in depriving a person of his or her liberty, without any information being provided to the applicant. In many of the analysed decisions, the alien had submitted an application regarding enforcement obstacles and/or appealed to the European Court. In such cases, it would have been highly contradictory for the alien to express a will to return to his or her home country and comply with the enforcement of the expulsion order. The same applies to interviews at the Swedish Migration Board prior to legally binding decisions being made.

The use of alternative methods to detention: Supervision

In terms of the use of alternative methods to detention, statistics show that many more detention orders than supervision orders are issued. This insight is hardly revolutionary. In recent years, many observers have indicated that supervision is not used to the intended extent. However, it is important to understand the reasons underlying this fact, and this report can hopefully contribute in this context. Furthermore, the legislator can take it into consideration in future legislative revisions.

In the preparatory work for the provisions regarding detention, it is stated, as already mentioned, that the deprivation of liberty is a deeply coercive measure in the life of the individual, which should not occur in situations other than when it is absolutely necessary. Later preparatory work emphasises the importance of restrictiveness in assessments and that resort should not be taken to detention if the purpose of an enforcement measure can be achieved by the alien being placed under supervision. When Chapter 10, section 2, first paragraph, point 3 of the Aliens Act was introduced, there was consideration as to whether such a rule should even be introduced in terms of adult aliens. In the preparatory work, it was deemed that restricting the detention institution in this manner was unjustified. Instead, it was indicated that, as early as in the introduction of the Aliens Act, it is stated that the act shall be applied in such a way that the liberty of aliens is not restricted more than is necessary in each individual case. It was furthermore stated that this implied that an assessment should always be performed to determine whether the mildest measure for the individual – supervision – can be employed instead of detention.

Also, the imposition of detention can always be subject to judicial review following an appeal, and it shall also be regularly reviewed by the authority processing the matter. These rules were deemed sufficient to fulfil the requirement of due process and respect for personal integrity. The question is whether it is always understood, as stipulated above by the preparatory work, that such an assessment must be made and whether it is made in practice. In cases that lead to issuing a detention order, is this preceded by weighing up detention and supervision? Have the intentions of the legislator in terms of alternative methods to detention had an impact in terms of practice? Our analysis shows that the law is not applied as the legislator intended and that the alternative method to detention available in the Aliens Act, i.e. supervision, has not had an impact in terms of practice as intended by the legislator. The Swedish Migration Board and the Migration Court of Appeal often believe that supervision is not a sufficient measure to achieve the same purpose as detention. Although the Swedish Migration Board and the migration courts often refer to supervision in their decisions and resolutions regarding detention, there is often no individual assessment to be found as to why supervision cannot achieve the same purpose as detention. In other words, why detention was deemed necessary to achieve the purpose. The analysed material does not show whether a detention order is preceded as a rule by a balancing of interests with the aim of assessing if the consequences of the measure are reasonably proportionate to what stands to be gained by it. The Police authority, in turn, does not refer to supervision at all in its decisions, which suggests that detention and supervision are not weighed up at all.

The prerequisite for detention is specified in article 15.1 of the Returns Directive, i.e. that other sufficient but less coercive measures cannot be applied effectively in a specific case. Although it is claimed that the prerequisite for detention of the Returns Directive is met by Swedish law, the findings of the study show that it is not applied as it should be. It can therefore be concluded that it has not been obvious to the deciding authorities, in the absence of an explicit legal basis, that the principle of proportionality is to apply. This might be a reason why supervision is used to a lesser extent than detention. The findings of the study support the proposal of the Detention Report regarding the introduction of an explicit proportionality rule in the Aliens Act. The question is whether this will suffice and lead to supervision being used to a greater extent than it has been to date. It may be worth considering whether further revisions to the wording of the act are needed to avoid interpretation problems. A provision similar to that in Chapter 10, section 2, first paragraph, point 3 of the Aliens Act for minors may be desirable.

This would mean that it is explicitly stipulated that deciding authorities have an obligation to first of all consider if the purpose of a potential imposition of detention can be achieved by the alien being placed under supervision. Research shows that there is a series of advantages, from pure financial benefits to a reduced risk of absconding, in placing a person under supervision instead of in detention. The legislator should also take account of research in the area in future revisions of the wording of the act.

Placement in correctional institutions, remand centres or police arrest facilities

With respect to placement in correctional institutions, remand centres or police arrest facilities, the starting point of the report was to study whether deciding authorities take account of restrictiveness and proportionality in their decisions and resolutions – that is, if detained aliens are only placed in correctional institutions, remand centres or police arrest facilities in exceptional cases.

In order to answer these questions, an analysis was made of the decisions and resolutions regarding placement in correctional institutions, remand centres or police arrest facilities. In terms of aliens placed due to criminal activity, the analysis shows that the latest resolution from the Migration Court of Appeal in the matter – MIG 2011:3, has not had an impact in terms of decisions. In MIG 2011:3, it is ascertained that, already from the wording of Chapter 10, section 20, first paragraph, point 1 of the Aliens Act, it is set forth that even aliens expelled due to criminal activity and who are remanded in custody may not, without special assessment, be placed in correctional institutions, remand centres or police arrest facilities. It is not apparent from the justifications of the decision that an individual assessment was made in which the decision-maker deemed there to be a security risk due to the level of severity and type of criminal activity for which the alien was convicted. This differs from resolutions from the migration courts. Although the number of analysed resolutions was very limited, it is apparent that MIG 2011:3 has had a greater impact in these resolutions than in the analysed decisions from the Swedish Migration Board during the same period.

In terms of placements for security reasons, our analysis shows that the segregation is not applied as intended in practice. The provision regarding segregation is not used independently, but only as a condition for the decision regarding placement in a correctional institution. Several reports and investigations have indicated that many of the aliens placed outside of detention facilities are subjected to harm. They show that remand centres are particularly unsuitable and can even involve a heightened risk for detained persons who have already shown clear signs of psychological ill health and self-harm behaviour. On several occasions, the Committee for the Prevention of Torture (CPT) has criticised Sweden for placing detained aliens, who are neither convicted nor suspected of any crime, in correctional institutions. According to the committee, these aliens should reside in purpose-built premises. Although a placement in a remand centre is deemed to be more coercive than a placement in the detention facilities of the Swedish Migration Board, there is no discussion about this in the analysed decisions and resolutions. There is a lack of balance in individual cases between

the interest of being able to maintain order and safety in the detention facility, and the requirement of not limiting the freedom of the alien more than necessary. There are also examples of decisions and resolutions in which persons have been placed in correctional institutions solely due to the fact that they pose a serious danger to themselves.

The reason for placing detained persons on security grounds is stated in the decisions as being that the premises and staff of the Swedish Migration Board are not equipped to deal with individuals who exhibit such behaviour. Also, there are differences between detention and correctional institutions in terms of the scope and availability of healthcare for detainees showing signs of psychological ill health. The legislator has assumed that, before the Swedish Migration Board makes a placement decision, it shall first assess if it is possible to place the individual in the detention facilities. The problem is that, as the study has shown, the segregation is not a real alternative for aliens who behave in a threatening manner or who show signs of psychological ill health. Even if the principle of proportionality were applied as intended, it would nevertheless be ineffective in practice. A real balance of interests is not possible if the Swedish Migration Board's premises do not have the capacity to deal with people who demonstrate threatening behaviour or psychological ill health.

Concluding thoughts

Stringent requirements on due process must be placed in terms of decisions regarding deprivation or limitation of liberty. The findings show the difficulties in analysing and contesting decisions which do not provide an account of the real grounds that justify the measures, and not merely conclude that it can be assumed that the alien will abscond from enforcement. It thus does not suffice solely to state that e.g. there is reason to assume that the alien will abscond. The legal and factual grounds for an authority to deprive a person of liberty should be carefully justified and clearly apparent in the decision. It is crucial for the individual, for efficient review and ultimately for due process, that decisions and resolutions are justified as thoroughly as possible. Clearer and more detailed decisions and resolutions can contribute to higher predictability and greater uniformity in the application of the law.

According to the principle of proportionality, each control or enforcement measure taken should be preceded by a balancing of interests with the purpose of assessing if the disadvantages in the measure are reasonably proportionate to what stands to be gained by it. The lack of application of the principle of proportionality is a theme that runs throughout all analysed decisions. The findings show that, as a rule, such balancing is not performed today. This is clear not only in decisions regarding detention, but also in the assessment as to whether there are particular grounds for extension, and when detainees are placed in e.g. remand centres even though this cannot be deemed a measure proportionate to the action that led to the placement. Although it has been claimed that the principle of proportionality applies without a legal basis, the analysis in the report shows that it is not applied as intended. The findings from the report show that it is unclear to administering authorities whether the principle of proportionality is applicable or not. The Detention Report has suggested that a provision should be introduced in the Aliens Act stating that a control or enforcement measure may only be used if it is reasonably proportionate to the measure's purpose. Our findings show that a codification of the principle, which clearly sets forth that balancing interests must precede both a decision regarding a control or enforcement measure and its implementation, is desirable.