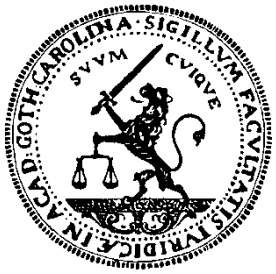


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# Locked in Limbo:
## Administrative Detention of Asylum Seekers in Sweden and the Diverging Perspectives of the Strasbourg Court and the Human Rights Committee

JAMM07 Master Thesis

International Human Rights Law
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## Summary

Due to the large influx of persons seeking refuge within European states in recent years, measures which control the entry, residence and expulsion of aliens have increased both in use and intensity. An example of such a measure is the detention of asylum seekers for administrative reasons. The purpose of this paper was therefore to focus on the Swedish practice concerning the administrative detention of asylum seekers with a view to deportation. In conducting an assessment of Swedish domestic law, case-law and institutional practice, it was concluded that administrative detention is resorted to routinely with the ambiguous reasoning that there is a risk that the alien absconds or keeps in hiding. Reasoning specific to the individual cases or reasons why alternative non-custodial measures are not sufficient are largely absent. Choosing to focus on two bodies to which Sweden has human rights obligations – ECHR and ICCPR – the following discussion concerned how the Strasbourg Court and the Human Rights Committee interpret the issue of the limitation on the right to liberty of asylum seekers. There, it was concluded that while the Committee insists upon a stringent application of the necessity and proportionality tests to each individual case, the Strasbourg Court prioritises the right of sovereign states to control the entry, residence and expulsion of aliens within their borders. These divergent perspectives and inconsistency in interpretations lead to confusion regarding the level of protection that should be provided to asylum seekers concerning administrative detention. Thus, two theories from two scholars were chosen to theorize upon the findings of the paper: 1) the possibility to provide Courts with an alternative approach through strategic argumentation which they could embark upon in their judgments, and 2) the possibility of resorting to political progress when credible legal argumentation is no longer a viable solution.



***Key words:*** Administrative Detention, Asylum seekers, Deportation, Human Rights, European Convention on Human Rights, International Covenant on Civil and Political Rights

# Sammanfattning

Med anledning av den stora vågen av flyktingar som under de senaste åren har sökt skydd inom Europas gränser, har åtgärder implementerats för att kontrollera deras inresa, vistelse, samt utvisning. Användandet av sådana åtgärder, så som förvarstagande, har både ökat och intensifierats i dess användning. Syftet med denna uppsats var därför att fokusera på den svenska praxisen angående verkställighetsförvar. Efter att ha bedömt den svenska gällanderätten, rättspraxis samt myndighetspraxis, drogs slutsatsen att verkställighetsförvar används rutinmässigt med det problematiska resonemanget att det finns risk för avvikelse eller att utlänningen håller sig undan. En sammantagen bedömning förekommer väldigt sällan, samtidigt som alternativa metoder till förvar, så som till exempel uppsikt eller överlämnande av identitetshandling inte undersökes som en möjlighet. Uppsatsen fokuserar på EKMR samt ICCPR då Sverige har människorättsliga förpliktelser gentemot båda – vidare utforskas Strasbourgdomstolens samt Människorättskommitténs tolkning av rätten till frihet för asylsökande inom ramen för verkställighetsförvar. Sammanfattningsvis existerar två avvikande tolkningar gällande rätten till frihet för asylsökande inom ramen för verkställighetsförvar. Dels insisterar Människorättskommittén på tillämpningen av nödvändighets- samt proportionalitetstest i varje enskilt fall; till skillnad från Strasbourgdomstolen som prioriterar statens rätt att ha handlingsutrymme i frågan i och med den så kallade ”margin of appreciation”. Dessa två avvikande tolkningar leder till förvirring när det gäller den skyddsnivå som bör ges till asylsökande. Således valdes två teorier av två forskare med syftet att teoretisera uppsatsens resultat: 1) Möjligheten att förse domstolarna med ett alternativt tillvägagångssätt genom strategisk argumentation som de istället skulle kunna använda i sina domar, samt 2) möjligheten att använda sig av politiska strategier när god juridisk argumentation inte längre är ett lönsamt tillvägagångssätt.



***Nyckelord***: Mänskliga rättigheter, Verkställighetsförvar, Förvarstagande av Asylsökande, EKMR, Utlänningslagen, Människorättskommittén

# Preface

*"I just want to know. I feel like I don't know anything. I don't understand why I'm here, I haven't done anything… if they want to send me back… either let me go or send me back, but… faghat mikham bedonam."*

My interests for questions regarding refugee law and displacement have led me to meet many people in vulnerable situations. People who lack the support of the state they seek protection from; People who have felt the coldness of this place, not only on their skin but in how they are treated. The quote above was said to me by one of them – a friend – who spent ten months in detention outside of Stockholm "with a view to deportation". This is, for the most part, where the inspiration for this paper came from.

It would not have been possible to finish this project and be equally satisfied with the result without the help of my wise supervisor, Leila. Thank you for all of your valuable guidance, for pushing me to do better and also leading me out of the various webs I managed to tangle myself into in the process.

My endless gratitude, always, to my compassionate maman and baba for never failing to give me treasured advice and constantly giving me reason to work harder today than yesterday. Also, to my sweet Atrisa for being my reason to smile.

There are certain individuals without the support of whom I could have gone insane. Thank you for sharing your time with me, listening to me, sharing the boat with me and reminding me to stop and enjoy myself in the process of producing something worthwhile: Maria, Bárbara, Ivan, Lexie, Christina, and many more – the list could go on until the end of this page.

All of my love and appreciation to Rickard, for your endless encouragement and unfailing support; *to infinity embilar*.

Finally, thank you to all of you who have made the fight for justice and equality less about wishful thinking and more about comradery.

یک دنیا ممنون

Lund, May 2019.

# Abbreviations

| | |
|---|---|
| AIDA | Asylum Information Database |
| CAT | Committee against Torture |
| CCPR | Human Rights Committee |
| Charter | Charter of Fundamental Rights of the European Union |
| CJEU | Court of Justice of the European Union |
| CoE | Council of Europe |
| ECHR | European Convention on Human Rights |
| ECRE | European Council on Refugees and Exiles |
| ECtHR | European Court of Human Rights |
| EU | European Union |
| GC | General Comment |
| ICCPR | International Covenant on Civil and Political Rights |
| UK | United Kingdom |
| UN | United Nations |
| UNCAT | Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| UNHCR | United Nations High Commissioner for Refugees |
| VCLT | Vienna Convention on the Law of Treaties |

# Chapter 1 – Introduction

## i. Background

The notion of "immigration detention" has existed in the international legal order since the 1970's.[1] Although the practice existed to a limited extent even prior to this date, its use increased at this point due to economic stagnation which restricted the entry of work-seeking migrants and those illegally residing in the state.[2] The detainment of immigrants did not however decrease once the economic stagnation turned to economic growth in the 1990's.[3] The sub-group of asylum seekers within the group of immigrants grew as more and more individuals sought refuge within developed countries; with this development, asylum seekers (and their detainment) became the first to be of international concern.[4] Indeed, as the historical account by Wilsher demonstrates, the detention of asylum seekers has increased in the last thirty years in incidence and duration.[5]

With the aim of controlling the entrance of aliens and safeguarding national integrity and sovereignty, states have today established a normalized view on detention for asylum seekers in various stages of their application – on arrival, during the process, or prior to deportation from the member state. The focus of this paper is on what is known as 'administrative detention with a view to deportation'[6] – the detention of asylum seekers can pursue many aims, though the objective of administrative detention is to *inter alia* guarantee that another measure such as deportation or expulsion can be implemented.[7] This type of

[1] Daniel Wilsher, "Immigration Detention – Law, History, Politics", CUP 2012, p. 57.
[2] Wilsher, p. 121.
[3] Wilsher, p. 121.
[4] Wilsher, p. 122; This was due to the fact that this group fell within the ambit of the 1951 Refugee Convention and therefore required and received the attention of international human rights bodies.
[5] Wilsher, p. 116.
[6] This will be shortened to simply administrative detention and will refer to administrative detention with a view to deportation, unless provided otherwise.
[7] Report of the Special Rapporteur on the human rights of migrants 04/05/2018, A/HRC/38/41, para 21; There is no particular difference between the terms "deportation" and "expulsion" as they are used by the two bodies explored in this paper – the language here thus only reflects the language used by these relevant bodies.

administrative detention is increasingly being used;[8] the problem which arises is that the duration usually is for a long period of time, as the detaining authority justifies the action with the fact that it is pursued with a 'view to deportation'.[9] It is a security measure with the aim to ensure that the individual will not abscond or flee from the deportation steps that are planned by the state.

### ii. Purpose and Research Question

The overall aim of this paper is to examine the state practice of Sweden regarding the administrative detention of asylum seekers. Having gained an understanding of its domestic laws, court practice and institutional practice, the discussion regarding where Sweden's international obligations lie regarding the administrative detention of asylum seekers is relevant to pursue. Indeed, many international instruments, actors and institutions are involved in safeguarding the right to liberty of asylum seekers. As the European Convention on Human Rights (ECHR) is expressly a part of Swedish law, the guarantees which the Convention provides for the right to liberty of asylum seekers regarding administrative detention is highly relevant. As the supervisory body of this Convention, the European Court of Human Rights (ECtHR) and its jurisprudence regarding the administrative detention of asylum seekers plays a crucial role in this discussion.

Another instrument which expressly provides the right to liberty to which Sweden is a party, is the International Covenant on Civil and Political Rights (ICCPR). The Human Rights Committee (CCPR), being the monitoring body of the Covenant, has also expressed its views on the matter, both in its issued General Comments (GC) and its Communications to states party to the ICCPR. Taking this into consideration in addition to the fact that the Committee indeed has criticised Sweden for its detention policies regarding

[8] See the country reports done by the Global Detention Project (GDP) in 2018, "Annual Report 2018": <https://www.globaldetentionproject.org/global-detention-project-annual-report-2018> accessed 15/06/19.
[9] As the preparation for deportation could in theory take an uncertain length of time, this type of detention is thus additionally problematic.

asylum seekers, studying the ICCPR and the approach taken by the CCPR is also a point of interest for the purposes of answering the research question.[10] By embarking on this road, some clarity regarding the established policies in Sweden in relation to the routine administrative detention of asylum seekers may be provided: if external international influences are present on the current Swedish practice in administrative detention (with specific focus on the ECHR and ICCPR), what are they?[11] In light of the above, the research question which this paper seeks to answer is as follows:

*Does Sweden satisfy its human rights obligations in its practice regarding the administrative detention of asylum seekers?*

### iii. Sub-Questions

To answer the research question and achieve the overall purpose of this paper, the following sub-questions will be answered in relevant chapters:

A. *To what extent is the administrative detention of asylum seekers prior to their deportation lawful under Swedish law? How is it practiced?*

Using the example of Sweden in locating the extent to which asylum seekers are detained with a view to deportation is the first step in achieving the aim of this paper, which is to clarify if there is an incoherence in the level of protection which they provide for asylum seekers. It should be clarified that the ECHR is recognized as part of Domestic Swedish law. Therefore, exploring the legal foundation of administrative detention as well as the extent to which it is used by the relevant authorities will be the first step in the analysis.

[10] See the introduction of Chapter 2.
[11] Other instruments and thus bodies (such as the 1951 Refugee Convention and thus the UN High Commissioner for Refugees) could have been chosen and been equally relevant. However, ECHR and ICCPR have been chosen for the purposes of this paper as the texts of their provisions relating to the freedom from deprivation of liberty differs to a great extent and thus leads us to pose the question of whether they offer differing levels of protection.

B. *Upon examining Art. 5 (1) (f) of the ECHR and the relevant jurisprudence from ECtHR, what is the position of Court in relation to administrative detention prior to deportation? Equally, upon the examination of Art. 9 (1) of the ICCPR, General Comment No. 35 and relevant views adopted by the CCPR, what is the position of the Committee in relation to administrative detention prior to deportation?*

The understanding of the scope of protection offered by these two regimes is used as an analytical tool to understand the results and answers acquired from the previous sub-question. It also paves the way for examining whether there are any discrepancies in the protection the two bodies offer to asylum seekers.

C. *If there are any discrepancies in the interpretations by the two bodies, how should the human rights obligations of Sweden to the divergent interpretations of the ECtHR and CCPR be met?*

Once the scope of lawfulness of administrative detention under these two regimes have been established, it is necessary to understand the potential differences between the two provisions which guarantee the right to liberty. Highlighting such possible differences could provide an insight into any foundational issues within the international system which ultimately leads to a restricted level of protection for asylum seekers.

### iv. Delimitations

Immigration detention is carried out to a great extent and for various reasons by the member states of the Council of Europe (CoE). One branch of such detainment is the administrative detention of asylum seekers and is used in various circumstances; for instance, when the asylum seeker is detained during the assessment of their case, or when the asylum seeker is detained for registrations purposes. While these types of restrictions on the liberty of asylum seekers remain relevant, they will not be examined within the ambit of this paper. Furthermore, as there are limitations in space, time and scope, this paper will not be addressing in detail other instruments such as the 1951 Refugee Convention or detention under the regime of the Dublin Regulation

for the purpose of transfer.[12] For the same reasons, while there is reference drawn to a concluding observation by the Committee Against Torture (CAT) regarding Sweden, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) will not be delved into further within the ambit of this thesis other than the segment of discussion within Chapter two.

### v. Preceding Research and Contribution of the Thesis

Immigration detention generally and the detention of asylum seekers specifically has been examined by scholars with various perspectives and desired outcomes from their problematizations. The previously mentioned scholar, Wilsher, has produced an account of immigration detention and its historical background practically worldwide. This work delves into not only the ECHR and ICCPR, but also the 1951 Refugee Convention and other regional and domestic frameworks. Others have briefly dealt with the relationship between ECHR and ICCPR in order to answer the broader question of the lawfulness of administrative detention under international law – thus, also tackling other international instruments.[13] The right to liberty under ECHR and thus also the standing of Art. 5 (1) (f) in the international legal order has been examined,[14] in addition to an analysis of the jurisprudence of the ECtHR, CCPR and also the Court of Justice of the European Union (CJEU), in order to demonstrate how a "constructive human rights pluralism" would be the best approach in regard to immigration detention.[15]

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[12] Article 31 of the 1951 Refugee Convention and Article 28 of the Dublin Regulation address this topic; regarding Art. 31 of the 1951 Convention, The Commentary by Gregor Noll is interesting and should be referred to, provided in the Commentary edited by Zimmerman, pp. 1243-1276.

[13] Helen O'Nions, *No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience,* European J. of Migration and Law 10 (2008), p. 160.

[14] Xavier-Baptiste Ruedin, *Aliens' and Asylum Seekers' Detention under Article 5(1)(f) ECHR,* 20 Swiss. Rev. Int'l & Eur. L. 483 (2010); Violeta Moreno-Lax, *Beyond Saadi v UK: Why the Unnecessary Detention of Asylum Seekers is Inadmissible under EU Law,* 5 Hum. Rtf. & Int'l Legal Discourse 166 (2011); Helen O'Nions, *Exposing Flaws in the Detention of Asylum Seekers: A Critique of Saadi,* 17 Nottingham L.J. 34 (2008).

[15] Cathryn Costello, *Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law,* 19 Ind. J. Global Legal Stud. 257

One scholar who has produced extensive research on immigration detention is Cornelisse, the work of whom is relied on to a great extent in this paper.[16] Providing an overview of the problem of immigration detention within the European Union (EU), Cornelisse indeed delves into the subject of lawfulness under European and international law, discussing the limits and possibilities of the established notion of "arbitrary" regarding immigration detention.[17] In this way, her work provides excellent guidance for the purposes of this paper. This project aims to build upon the established results of Cornelisse in addition to expanding the temporal perspective, while elaborating the analytical comparison between ECHR and ICCPR regarding the Swedish practice. Turning now to preceding research on the Swedish practice regarding the administrative detention of asylum seekers with a view to deportation, the research that has been carried out is mostly by non-governmental organizations.[18] The aim of this research is thus to demonstrate *in general terms,* the Swedish domestic practice and norms concerning this issue and mainly focus on statistics.[19]

In light of the demonstration of preceding research on this subject, the contribution of this paper is threefold. First, it demonstrates the practice of Sweden regarding the administrative detention prior to deportation of asylum seekers. This allows the analysis of this established practice based on domestic laws and regulations, followed by an analysis of the institutional practice of detaining asylum seekers by Swedish authorities. Where it is

(2012); Costello thus argues that these bodies would benefit from more openness towards one another. The focus of this work is, however, not on administrative detention.

[16] Galina Cornelisse, "Immigration Detention and Human Rights – Rethinking Territorial Sovereignty", 2010 Martinus Nijhoff Publishers; Galina Cornelisse, *Human Rights for Immigration Detainees in Strasbourg: Limited Sovereignty or a Limited Discourse?,* European Journal of Migration and Law 6: 93-110, 2004.

[17] The discussion concerning the arbitrariness of administrative detention is carried out largely in Chapter 3, starting from 3.III, and also Chapter 4.

[18] Asylum Information Database (AIDA) coordinated by the European Council on Refugees and Exiles (ECRE), Country Report: Sweden, 2018 update; Global Detention Project, Sweden's profile: <https://www.globaldetentionproject.org/countries/europe/sweden> accessed 29/04/19.

[19] As will be seen in Chapter 2, the study has benefitted greatly from these reports as it has been able to provide specific statistics concerning administrative detention.

established that asylum seekers are subject to routine measures of detainment, it allows for the possibility to explore two bodies to which Sweden has legal obligations. Second, the following in-depth examination of the ECtHR and CCPR's stance regarding specifically administrative detention with a view to deportation provides the possibility to locate a potential foundational problem in the practice of European[20] and international law regarding immigration detention. This foundational problem could arguably be described as the lack of harmonization between the different interpretations and applications of the right to liberty. Third, using established theories, the possibilities regarding how these potential foundational problems can be 'resolved' to allow for a stronger protection of the right to liberty for asylum seekers on the national level will be explored.

### vi. Method and Structure

**Chapter two** maps the current practice of Swedish authorities in detaining asylum seekers for administrative purposes,[21] in addition to the domestic Swedish laws relating to the detention of aliens.[22] In this section, a legal doctrinal method is the most relevant, as the domestic law must be assessed in order to then examine the application of the domestic courts of that law, followed by an assessment of the institutional practice of administrative detention through studies of secondary literature. The compilation of domestic case-law provided in this chapter was carried out by database searches, while certain evaluations concerning the institutional practice of detainment was done in light of a Red Cross Report from 2012.[23] Thus, in mapping out such practice, reports produced by NGOs are relied upon.

**Chapter three** addresses the legal obligations of member states to ECHR and the decisions of its Court, the ECtHR. It will then systematize and analyze the jurisprudence of the ECtHR regarding the detainment of asylum seekers prior

[20] I.e. ECHR.
[21] Förordning (2007:1172) med instruktion för Kriminalvården.
[22] For instance: Polislag (1984:387) and Utlänningslag (2005:716).
[23] Swedish Red Cross, "Förvar under lupp – En studie av rättssäkerheten för asylsökande i förvar", Maite Zamacona Aguirre, 2012.

to deportation. Here, the relevant provision in the ECHR will first be identified prior to delving into the case-law of the ECtHR. When discussing and highlighting certain judgments regarding the administrative detention of asylum seekers, the two pivotal cases discussed in great detail have been chosen due to their establishment as fundamental jurisprudence by the scholarly community, though also due to the fact that these two are the most cited cases by the ECtHR in its subsequent judgments concerning administrative detention of asylum seekers.[24] The chosen cases which follow have been brought forward by an examination of their facts and the Court's reasoning, partly from a Factsheet drawn up by the ECtHR entitled "Migrants in detention" and partly from database searches in order to find illustrative cases regarding the specific approaches taken by the Court.[25] This is done with an *evolutionary* approach.

**Chapter four** begins by investigating the legal obligations of states party to the ICCPR and its monitoring body, the CCPR. Following this, it will explore how the CCPR has approached the question through its platforms of influence – i.e. General Comments and case-law in the form of Communications. A similar method as the one used in chapter three will also be used in this regard, as the two chapters ultimately serve the purpose of clarifying the level of protection the two bodies offer in regard to the right to liberty of asylum seekers. As one of the intentions of this project is to explore the relationship between ECHR and ICCPR regarding administrative detention prior to deportation, the approach here is to after having studied each in turn, compare them by taking into consideration their historical background, their inherent duties as monitoring bodies and also the characteristics of the instruments which they monitor the adherence to. When choosing which Communications to focus on for this chapter, database searches were relied on in order to find relevant Communications which constructively reflect the position of the

[24] *Chahal v the UK* and *Saadi v the UK*, discussed in chapter 3.ii and 3.iii; For instance, Costello, Cornelisse, Wilsher and many more.
[25] ECtHR Press Unit, "Migrants in detention" Factsheet, November 2018.

Committee. Reference was also made to the work of Cornelisse regarding the CCPR.

**Chapter five** provides the theoretical discussion regarding the results of the previous chapters. The theory which will be used as a tool for examining the findings acquired in previous chapters is informed by the work of two scholars, Spijkerboer and Milanovic´,[26] who argue for the strategic argumentation and interpretation of the unsatisfactory reading of the law by the relevant bodies which one examines. "Unsatisfactory" here entails addressing the degree of protection offered to asylum seekers in relation to their right to liberty by having a restrictive or permissive reading of the derogations from the respective provisions of the ECHR and ICCPR. Consequently, the approach will be to provide an understanding of what these two scholars propose, and thus applying it to the specific circumstances of this paper.[27]

### vii. Theoretical Points of Departure

The theoretical framework that is adopted to discuss the acquired results is informed by the works of Thomas Spijkerboer and Marko Milanovic´.[28] The convergence between the approaches taken by these scholars is in regard to the way in which one approaches the interpretation of a certain body of human rights law. Spijkerboer points to the importance of strategic perspectives on argumentation and legal reasoning. This approach could possibly be the answer in situations where the Strasbourg Court delivers inconsistent and disappointing judgments.[29] Using Spijkerboer's approach to strategic legal argumentation and creative interpretation, the possibilities of carrying out the

[26] See infra, n28.
[27] The following sub-section provides more detailed information regarding this approach.
[28] Thomas Spijkerboer, *Analysing European Case-Law on Migration: Options for Critical Lawyers,* EU Migration Law, 2014; Marko Milanovic´, *A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law,* Journal of Conflict & Security Law, 2010.
[29] Following Spijkerboer's line of reasoning, a disappointing judgment from the ECtHR entails one which provides a low level of protection to asylum seekers and a great respect for state sovereignty and margin of appreciation.

same approach in the situation of administrative detention of asylum seekers will be theorized.

Milanovic´ provides an additional perspective on ways to tackle the issue of conflicting interpretations by two different bodies, namely political solutions. Where credible legal argumentations can no longer be made regarding the two conflicting interpretations (of the ECtHR and the CCPR), redress to politics is an option. Thus, for the purposes of this paper, the work by Spijkerboer will be used to theorize on the possibility of approaching the issue as a critical lawyer with strategic argumentations which provides the Courts with alternate routes they may take regarding the administrative detention of asylum seekers. Following from this, Milanovic's approach will be used to theorize on the possibility of using political recourse to further our aims, namely, to protect the right to liberty of asylum seekers in a climate where the ECtHR and the CCPR demonstrate diverging interpretations of the level of such protection.

# Chapter 2 – Sweden as a Case Study

## i. Introduction

While Sweden has traditionally been known as the country with the better practice regarding the detention of asylum seekers compared to other Scandinavian countries,[30] the 'refugee crisis' led to a shift in the country's track record regarding detention of asylum seekers. Where the country used to be restrictive regarding the deprivation of asylum seekers' liberty, it stretched its legal boundaries in order to be able to control the sudden increase of asylum applications. The consistently restrictive measures taken resulted in a change both in policy and public discourse.[31] In December 2014 the Committee against Torture (CAT) stated in its observations regarding Swedish practice in re the detention of asylum seekers that, *inter alia*, detention is not only used as a measure of last resort and not for the shortest possible time.[32] Further, that the use of detention is in practice much more common than supervision, and also that the time limit to be detained as an alien under the 2005 Act is twelve months, which the CAT criticised as too long to be justified.[33] Further, the CAT also criticized the fact that Swedish authorities continued the practice of detaining asylum seekers in remand prisons for security "or other exceptional reasons", which is also provided for under Swedish law.[34] In April 2016, the Human Rights Committee (CCPR)

[30] Global Detention Project, Sweden's Profile.
[31] Global Detention Project.
[32] CAT/C/SWE/CO/6-7, Concluding observations on the sixth and seventh periodic reports of Sweden, 12 December 2014, p. 3; The CAT does not specify whether it is administrative detention prior to deportation which they are referring to or simply the detention of asylum seekers in general. Reading the relevant sections of the concluding observations reveals however, that while the CAT uses general terms, the issue which they are addressing is in fact administrative detention prior to deportation. Speculatively, this could be done in order for other types of detention to not be excluded from the parameters of the observation. See para 10.
[33] CAT report on Sweden, p. 3-4.
[34] CAT report on Sweden, p. 4; Paras 11 and 16 of the 2005 Aliens Act; Accordingly, the relevant provision relating to detention is Articles 2, 11 and 16 in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984. As Sweden acceded to the UNCAT in 1986, it has an obligation to act in accordance with the Convention. Thus, the cited provisions are in regard to the obligation to take all necessary measures to prevent acts of torture (Article 2), the obligation to keep *inter alia* methods and practices concerning detention under review (Article 11), and the obligation to prevent acts committed by or at the instigation of or with the consent of a public official which do not amount to the definition of torture in Article 1 (Article 16).

also expressed its concern regarding the limited use of non-custodial measures for administrative ease in regard to asylum seekers in Sweden.[35] These instruments act as a warning sign for Swedish practices regarding the administrative detention of asylum seekers.

Statistics regarding the detention of asylum seekers show that 4,705 asylum seekers were detained in 2018.[36] The number of detainees has also increased with each year since 2011, when the number of detainees were 1,941.[37] This chapter aims to explore the domestic legislation of Sweden, proceeding to map the domestic court practice regarding administrative detention and followed by an overview of the current practice regarding administrative detention within the relevant authorities – the Migration Agency, Police and the Swedish Prison and Probation Service.

### ii. Swedish Law on the Administrative Detention of Asylum Seekers

The Instrument of Government, one of the components of the Constitution of Sweden, protects the individual against the deprivation of liberty.[38] The possibility to limit this right is also provided for,[39] while it is also clarified that such limitations are only able to be carried out if they cater for purposes which are acceptable in a democratic society.[40] This limitation must not reach over and beyond what is necessary, with specific focus on the purpose of that limitation. However, it is provided that individuals who are not Swedish citizens may have additional particular limitations on, *inter alia*, the protection against the deprivation of liberty.[41] Importantly, it should be mentioned that as the ECHR is a part of Swedish law;[42] It is provided in the Instrument of Government that the Convention is superior to other domestic

[35] CCPR, "Concluding Observations on the Seventh Periodic Report of Sweden", CCPR/C/SWE/CO/7, 28 April 2016; Global Detention Project, para 2.8.
[36] AIDA 2018 report, p. 70.
[37] AIDA 2018 report, p. 71.
[38] "Kungörelse (1974:152) om beslutad ny regeringsform", Chapter 2, Paragraph 8.
[39] The Instrument of Government, Chapter 2, Para. 20.
[40] The Instrument of Government, Chapter 2, Para. 21.
[41] The Instrument of Government, Chapter 2, Para. 25.
[42] The ECHR has been a part of Swedish law since 1994.

legislation and thus must not be violated or trumped by any national legislation.[43]

Detention with a view to deportation was first introduced into Swedish law with its own distinct legislation in 1914.[44] Some years later, the Swedish Government passed the Aliens Act,[45] which with its consequent amendments broadened the state's powers to detain asylum seekers.[46] Following amendments which allowed the state to detain an immigrant prior to deportation, a stricter amendment followed some 30 years later which actually restricted the grounds for immigration detention and specified that an alien was only to be detained if there were reasonable grounds to suspect that they would abscond, partake in criminal activities or if there were unclarities regarding their identification.[47] However, the Aliens act has gone through two further permissive amendments,[48] the last of which is the most recent and applicable law – the 2005 Aliens Act. This amendment is permissive in that immigration detention with a view to deportation is more easily obtained under its established rules and criteria.[49]

The main law which concerns detainment is that of the Aliens Act (2005:716), which generally provides the regulations concerning migration in Sweden.

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[43] The Instrument of Government, Chapter 2, Para. 19; Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna.
[44] 1914 Deportation Act, see section 3.2. *1914 års utvisningslag*, p. 41 from "Invandringen: Problematik och handläggning. Utlänningsutredningens betänkande II, Stockholm 1967, available online at the National Library of Sweden.
[45] 1927 Aliens Act, and its following amendments in 1945 and 1954; Global Detention Project, Sweden's profile, para 2.1.
[46] See the amendments to the Aliens Act in 1976; Global Detention Project, Sweden's profile, para 2.1; See also Chapter 9 *Verkställighet och utlännings tagande i förvar m. m.,* p. 150 from "Betänkande med förslag till Utlänningslag M. M.", avgivet av 1949 års utlänningskommitté, Stockholm 1951, available online at the National Library of Sweden.
[47] Global Detention Project, Sweden's profile, para 2.1; Gerhard Wikrén and Håkan Sandesjö, "Utlänningslagen med kommentarer", 2010 Norstedts Juridik, p. 476.
[48] See the amendments to the Aliens Act in 1989; Wikrén and Sandesjö, p. 476: "sannolika skäl" (reasonable grounds) was replaced with "sannolikt" (probable), and "skäligen kunna befaras" (reasonbale grounds) was replaced with "finns anledning att anta" (reason to believe). Wikrén and Sandesjö point to the linguistic issue which the current author is highlighting, namely that the weight of certain words in legislation ultimately leads to either a wider or narrower scope for leeway for (in this scenario) the institutions applying the law.
[49] See Chapter 10, section 1 of the 2005 Aliens Act: "probable" and "other circumstances to assume".

This act includes measures of all types relating to migration, including chapters regarding "controls and coercive measures" and also "detention of supervision of aliens", the latter provided in in Chapter 10 of the Act.[50] It is specified that:

*"An alien who has attained the age of 18 may be detained if:*

1. *The alien's identity is unclear on arrival in Sweden or when [s/he] subsequently applies for a residence permit and [s/he] cannot establish the* ***probability*** *that the identity [s/he] has stated is correct and,*
2. *The right of the alien to enter or stay in Sweden cannot be assessed anyway,*
3. *It is necessary to enable an investigation to be conducted on the right to remain in Sweden,*
4. *It is* ***probable*** *that the alien will be refused entry or expelled under Chapter 8, Section 1, 2 or 7 or,*
5. *The purpose is to enforce a refusal-of-entry or expulsion order.*

*A detention order under [points 4 and 5] may only be issued if there is reason on account of the alien's personal situation* ***or the other circumstances to assume*** *that the alien may otherwise go into hiding or pursue criminal activities in Sweden."*[51] (emphasis added).

Thus, the legal justification for administrative detention is provided in the final sub-section in this provision. Further, the provision regarding the permitted length of the detention, Section 4 of Chapter 10, submits that:

*"(...) an alien (...) may not be detained for more than two months, unless there are* ***exceptional grounds*** *for a longer period. Even where such exceptional grounds exist, that alien may not be detained for more than three months. If, however, it is likely that an expulsion order will need more time*

[50] Chapter 9 of the Act stipulates the controls and coercive measures.
[51] Chapter 10, Section 1; the provision is presented in a different way here with the purpose of reading comfort – section 1 is in reality divided into two paragraphs, the first with two sub-sections and the second with three.

*to be carried out due to lacking cooperation from the alien, or that the relevant documents are taking time to obtain, the time limit for the alien to be kept in detention is* ***twelve months****."* (emphasis added)

The term "exceptional grounds" is quite strong legal language which should create a higher level of evidential burden on behalf of the authorities ordering such detention. However, it can be argued here that the inclusion of "exceptional grounds" in this provision, in addition to the permission to extend this time to twelve months instead creates a permissive atmosphere for the authorities to be able to argue that any situation is an exceptional ground. This could therefore enable the authorities to interpret this terminology liberally in order to justify the continued detention of asylum seekers. It is also provided in Chapter 1, Paragraph 8 of the 2005 Act that it is to be *"applied so as not to limit the freedom of aliens more than is* ***necessary*** *in each individual case"*.[52] This provision is applied in Swedish jurisprudence as a source for the principle of proportionality, by stating for example that the alien's freedom cannot be limited more than what is necessary, in accordance with this provision.[53]

Furthermore, Chapter 1, Section 15 of this Act dictates that the determination of whether there indeed exists a risk of the alien absconding should be based on whether the alien:

*"1. Has earlier kept themselves in hiding,*

1. *Has stated that s/he does not intend to leave the country if s/he receives a decision of deportation,*
2. *Has provided false identification,*
3. *Has not cooperated in clarifying their identity and therefore complicated the administration of their case,*
4. *Has knowingly provided false information or withheld crucial information,*

[52] Emphasis added.
[53] MIG 2006:5.

5. *Has ignored an exclusion order,*
6. *Has been convicted of a crime which calls for imprisonment, or*
7. *Has been expelled by a general court after committing a crime."*[54]

As the assessment of relevant Swedish law has demonstrated, the use of ambiguous terms such as "probable", "assume" or "exceptional circumstances" is a recurring theme in legislation concerning the administrative detention of asylum seekers. While this cannot be explained as the *only* problem in the practice of administrative detention in Sweden, it could open the door for interpretations which inevitably *contribute* to endorsing the establishment of a culture of administrative detention regarding asylum seekers.

### iii. Domestic Court Practice

As the Courts are inherently assigned a supervisory role, it is important to see what kind of analysis or perspective the Swedish Courts have regarding the administrative detention of asylum seekers. The Swedish Court system includes a specific court system for the purpose of adjudicating on migration cases.[55] Individuals who seek asylum in Sweden activate a case at the Swedish Migration Agency and if the individual does not agree with the rejection decision of the agency, they may appeal to the Migration Court. If the decision of this Court upholds that of the agency, the individual may seek to appeal to the Migration Court of Appeal, which is the final domestic instance.[56]

The issue of administrative detention has been dealt with to a large degree by the Migration Court and Migration Court of Appeal.[57] In a case from 2008,

[54] Law (2012:129).
[55] Sveriges Domstolar, "Migration Courts": <http://www.domstol.se/Funktioner/English/The-Swedish-courts/County-administrative-courts/Migration-Courts/> accessed 30/04/19.
[56] The laws governing migration procedures in this respect are the 2005 Aliens Act para 13, and the 2001 Swedish Nationality Act, paras 22 and 26.
[57] "Verkställighetsförvar", this paper will focus on jurisprudence concerning the 2005 Aliens Act and not the cases which relied on its earlier versions.

the Appeal Court held that administrative detention is permissible where there is reason to believe that the individual will "keep in hiding"[58] – the Court clarified that the hiding did not have to have the element of an actual attempt at living in hiding from the relevant authority – in this case, the police.[59] Instead, the Court of Appeal meant that an assessment of the alien's actions "in the wider sense"[60] (generally) had to be made. This assessment, they meant, was to be made in light of the alien's personal affairs or other circumstances specific to the case.[61] Thus, in a situation where the relevant authority has made the assessment that the individual concerned might "keep in hiding" based on their general actions, other less intrusive measures such as reporting requirements will not be enough – the reasoning as to why exactly, in reference to the specific case of the asylum seekers, is in this case and most other cases regarding administrative detention, not provided.

In another case from 2010, the "exceptional grounds" criteria in Section 4 of Chapter 10 of the 2005 Act – i.e. the extension of detention – was not fulfilled in regard to an individual who had been detained for over two years.[62] Here, the Court of Appeal clarified that the condition of "exceptional grounds" is only fulfilled when the circumstances of the case clearly derogate from what is commonly prevalent. They point to the fact that the jurisprudence does not allow the application of the "exceptional grounds" criteria to situations where the individual has been detained during such a long period of time, if the reasoning is only that the detainee does not cooperate with detention restrictions and there is a risk of them staying away if released.[63] However, a case from 2013 showed that the Appeal Court considers the twelve-month limit that an alien may spend in detention to begin when the decision to deport him is issued; in other words, if the alien was detained prior to that for another

[58] "Hålla sig undan".
[59] MIG 2008:23.
[60] "I vidare bemärkelse".
[61] Here, the court cites jfr RÅ 1994 ref. 36.
[62] MIG 2010:15.
[63] Here, the Court refers to RÅ 1991 ref. 8, RÅ 1993 ref. 15, RÅ 2005 ref. 60; the question was, in the present case, whether there is reason to believe that the detainee would behave criminally if released, in order to trigger the "exceptional grounds" criteria. The Court decided that there was not.

reason, that period of detention is not included in the twelve-month limit.[64] Thus, in practice, an asylum seeker may be detained lawfully for more than what Sweden considers the detention limit.

The importance of the decision to deport the alien in order for the administrative detention with a view to deportation to be lawful was stressed in a case from 2013.[65] The time limit of two months in regard to administrative detention with a view to detention may be extended where there are exceptional grounds to do so. However, the decision to deport the individual must be issued for this type of administrative detention to be permissible.[66] Where the deportation of an alien who is detained is unlikely to be carried out, or it is questionable that it can be carried out, the criteria of "exceptional grounds" cannot be relied on in order to keep them detained.[67] The continued detainment of the asylum seeker was not "reasonably proportionate" to the need of easing the administrative burden. The Court states in its judgment that the fact that the asylum seeker has in certain earlier situations shown uncooperativeness towards an official does not justify his continued detainment with the reasoning that he may pursue criminal activities if released.[68] They also criticise the Migration Court for their inadequate reasoning and also for not conducting a proportionality test when the case was referred to them: "the conclusion reached by the Migration court that the deportation of the asylum seeker cannot be deemed to be hopeless, is disappointing as the deportation is still, after almost six years, not reasonably executable." This statement condemns any future attempt at justifying an overly lengthy detention period without conducting a proportionality test. Furthermore, the Court uses this case to clarify that what the Court in the lower instance did in its reasoning, examining the necessity of the detention,

[64] MIG 2013:3; The Court relies on a decision by the CJEU which dictates the same line of reasoning: Case C 357/09 PPU form 30 November 2009, in light of the Returns Directive.
[65] MIG 2013:7.
[66] The Court refers to MIG 2013:3 mentioned above, and Wikrén and Sandesjö 9th edition, p. 481.
[67] MIG 2014:15, concerned an alien who was detained with a view to deportation for five years and eight months, due to criminal activity.
[68] The Court relies on jfr MIG 2010:15, mentioned above.

was not a complete proportionality test; rather, the necessity test, the Migration court of Appeal believes, is the first step in conducting a proportionality test in regard to a case. I.e. a *necessary* detention may be a *disproportionate* one. They clarify that a proportionality test allows for a more in-depth assessment of the competing interests regarding a coercive measure such as administrative detention. The reason for detention is to be balanced with the impact of such an action on the detainee.[69] Therefore, the Court of Appeal decided in the present case that the asylum seeker should bear reporting duties as opposed to continued detention, as the execution of deportation proceedings were unable to be carried out in the foreseeable future. This judgment is notable in that the Court stresses the need for a necessity *and* a proportionality test when making a decision regarding the detainment of an alien – an assessment which has not frequently been seen in the reasoning of neither the Migration Court nor the Migration Court of Appeal, both before and after this decision. While the need for the necessity and proportionality tests have been highlighted in other judgments following this one, it has not been as stressed as it was in the present case. Neither were the two tests submitted to be applied *together*. Thus, while the precedent was followed in subsequent judgments, it stands alone in the strength of the Court's stance due to the gravity of the case.

However, in a case where the asylum seeker had not cooperated with the officials during her removal from Sweden, the Court argued that "exceptional grounds" existed for her continued detention.[70] The Appeal Court discussed the fact that domestic jurisprudence dictates the need for an assessment of whether the relevant authority has handled the case with "purposefulness and endurance" or if the case (and thus the feasibility of the individual's deportation) has been paused for "acceptable reasons".[71] The asylum seeker's own behaviour, how long they have been detained already and also the risk of absconding and engaging in criminal activity if released are all relevant

[69] Para 1.2 – Europakonventionen; the Court of Appeal relies on the ECtHR's judgments in re Art. 5 (1) (f) ECHR.
[70] MIG 2014:17.
[71] Para 2, Rättspraxis; "målmedvetenhet och uthållighet" and "godtagbara skäl".

factors in this assessment. Thus, "exceptional grounds" should by definition be something outside of what is within the parameters of the standard state of affairs. The Court here points to the fact that it has in earlier instances established that generally, where the individual does not cooperate or makes the execution of their deportation difficult or impossible, the criterion of "exceptional grounds" has been fulfilled. As was viewed in the earlier case, however, the time during which an asylum seeker has been detained as well as how likely their deportation is in the near future plays a great role in the Court's decision.

In a recent case from the Migration Court of Appeal, the risk of the alien absconding was examined.[72] There, it was clarified that the determination of whether there indeed exists a risk of the alien absconding, one should refer to Chapter 1, Section 15 of the 2005 Aliens Act.[73] Thus, in their argumentation, the Court expressed that since the alien had absconded in two other occasions and used false identities in different European states, there is a real risk that the alien will keep in hiding or complicate the administration and any executive measures necessary for his case if he was released from detention. Furthermore, the Court was of the opinion that since he had been detained only for a short period of time,[74] his continued detention was proportional to the aims of the detainment and the impact of his deprivation of liberty. This case illustrates the current use by the Swedish Migration Court of the legal provision regarding the risk assessment of an alien absconding.[75]

The chosen cases illustrate a pattern within the Migration Court and Migration Court of Appeal's reasoning: namely that the length of time during which an asylum seeker has been administratively detained plays a big role

[72] Mål nr UM 4751–19.
[73] P. 5 of Mål nr UM 4751–19; the Migration Court of Appeal accepted the reasoning and conclusion of the Migration Court.
[74] His detention began on the 13th February 2019, and the appeal was decided on the 21st March 2019.
[75] Further, in the case UM 17460-18 from 2018, the Court reasoned that since the alien had not provided a reliable identification, there was a risk that he would abscond if released from detention.

in which direction the Courts decide to take their determination. While the necessity and proportionality test have been referred to as a necessary reference in certain judgments, the Migration Court of Appeal does not apply the same stringent test regarding necessity and proportionality when the asylum seeker has been detained for what they deem to be a "relatively short time".

Having examined a few of the relevant cases from Swedish jurisprudence regarding administrative detention, a review of the relevant authorities in this regard is needed. This, together with an examination of the practice of administering administrative detention by those institutions provides a practical insight to the use of administrative detention in Sweden.

### iv. Institutional Practice

The primary institution for executing an order for the administrative detention of an asylum seeker is the Migration Agency, and this has been the case since 1997 when the Swedish Government reassigned the work of detaining and deporting aliens from the Police to the Migration Agency.[76] Until then, detained aliens were kept under the custody of police and their deportation was handled by private security firms; after criticisms in regard to the treatment of aliens and the way the police and the private security firms handled the cases, the Swedish Government transferred the responsibility to the Migration Agency.[77] The law which provides the details on which authorities have the mandate to decide in regard to detention is the 2005 Aliens Act, Chapter 10.[78] There, it is provided that the Migration Agency is responsible for the enforcement of detention orders,[79] and that once such an order is made, the police "shall provide the assistance needed to enforce the order".[80] Thus, the Swedish Police is the subsidiary authority to the Migration

[76] Proposition 1996/97:147, Ändring i utlänningslagens förvarsbestämmelser.
[77] Shahram Khosravi, *Sweden: detention and deportation of asylum seekers,* 2009 Institute of Race Relations Vol. 50(4), p. 40.
[78] "Decision-making authorities", sections 12–20.
[79] 2005 Act, Section 18.
[80] 2005 Act, Section 19.

Agency in executing the detention of aliens. The Swedish police does not have the authority to make decisions regarding the detention of alien unless an express authorization has been given to them by either the Swedish Government or Migration Agency.[81] However, it is provided in the 2005 Act that even where the police is not the deciding institution, it is authorized to make a decision regarding the detainment of an alien if there is not time to await the order from the deciding institution.[82] Thus, the police is recently increasingly the institution which detains aliens, basing their actions on this provision followed by handing over the case to the deciding authority.[83]

The Migration Agency and the Police are obliged to produce a document for the alien, stating the reasons for the detention.[84] It has been noted that the Migration Agency increasingly omits to provide reasons specific to the individual, and instead uses the section where it ought to write "reasons for the decision to detain" to cite the relevant law.[85] In addition to this, there is in most cases also no reference by the Migration Agency to the jurisprudence of the Migration Courts or for instance the 2012 detention guidelines by the United Nations High Commissioner for Refugees (UNHCR). A majority of decision are concerning administrative detention with a view to deportation, and the fact that the alien has previously shown a tendency to keep in hiding, abscond, provide false identification or generally shown uncooperativeness has been deemed a risk factor.[86] Neither does the Migration Agency provide any reasoning as to why alternative methods to detention cannot be used in their decisions.[87] In regard to the police deciding on the detainment of aliens, the same issues as explored above can be seen here. The decisions are mostly regarding administrative detention and it is not elaborated why this decision is being taken specifically considering this individual and whether non-

[81] MIG 2006:6.
[82] Chapter 10, Section 17.
[83] Case nr UM 15156-18 from 2018, where the Migration Court of Appeal reasoned that the actions of the police were necessary and in good faith.
[84] Förvaltningslagen (2017:900), the Swedish Administrative Law, para. 32.
[85] Swedish Red Cross, Aguirre, 2012, p. 24.
[86] Swedish Red Cross, Aguirre, 2012, p. 24-27.
[87] Swedish Red Cross, Aguirre, 2012, p. 29.

custodial measures would suffice or not.[88] There are alternatives to detention in the form of reporting duties and surrendering documents,[89] which authorities are obliged to always consider prior to resorting to detention.[90] Indeed, in most cases the police fail to even mention the possibility of non-custodial measures in their written decisions.[91]

As stated above, 4,705 asylum seekers were detained in 2018, in the five detention facilities across Sweden.[92] These detention facilities are mostly used for administrative purposes prior to deportation. As Swedish authorities resort to detention rather than alternative methods of supervision of aliens for administrative purposes, there have been concerns raised from, *inter alia*, the Swedish Red cross as to the "lack of extensive and qualitative argumentation" as to why alternative methods are not used instead of detention.[93] The criticism is essentially towards the fact that the decisions to detain asylum seekers for administrative purposes do not explain why an alternative method would not have the same effect or result – it is merely provided that an alternative method would not suffice. Thus, supervision is rarely a measure resorted to by the relevant Swedish authorities, as only 1,156 were put under supervision during 2018, which is a small number compared to the number of aliens detained.[94]

Accordingly, the CAT has in its 2014 report recommended that Sweden review the law and practice relating to detention to effectively end the "exceptionally lengthy detention of asylum seekers".[95] The CCPR also stressed in its 2016 report that Sweden should ensure that the detention of asylum seekers *"is a measure of last resort and for the shortest period of*

[88] Swedish Red Cross, Aguirre, 2012, p. 40-41.
[89] Chapter 10, Section 6 of the Aliens Act.
[90] AIDA 2018 report, p. 72.
[91] For example, a decision by the police to detain with the number M24; Swedish Red Cross, Aguirre, 2012, p. 43.
[92] Gävle, Märsta, Flen, Kållered and Åstorp.
[93] Swedish Red Cross, Aguirre, 2012, p. 29; AIDA 2018 Sweden report, p. 72.
[94] AIDA 2018 Sweden report, p. 72.
[95] CAT report on Sweden, p. 4.

*time, is necessary and proportionate in the light of the circumstances, and that alternatives to detention are resorted to in practice".*[96]

There were towards the end of 2018, 456 places in the five detention facilities across Sweden, and due to the lack of space and an increasing amount of detention decisions by the relevant authorities, many aliens were instead detained in prisons.[97] Indeed, the CAT recommended in 2014 that Sweden reviews the law and practice in order to *"improve the capacity of the detention centres run by the Migration Board, with a view to avoiding the placement of asylum seekers in remand prisons*".[98] Thus, this illustrates that the increasing use by the Migration Agency and the Police of detention in regard to asylum seekers has also had certain consequences – the authorities do not increase the use of other non-custodial measures when faced with this issue, rather the solution is to create further spaces in which asylum seekers can be detained.

### v. Concluding Remarks

This chapter has explored the domestic laws, jurisprudence, and institutional practices regarding the administrative detention of asylum seekers. The chapter began by mapping out the relevant domestic law relating to the detention of aliens, various rules regarding the reasons for detention, the permitted length of detention and also the provision obliging the authorities using the 2005 Act to apply it using the proportionality principle. Swedish law is not expressly permissive of detaining asylum seekers for administrative purposes. However, ambiguities in terminology in addition to the fact that there is a *possibility* to detain, essentially sows the seed for the use of administrative detention when there is strain on the Migration Agency.[99] In

[96] CCPR Concluding Observations 2016, para 32-33.
[97] Migration Agency: <https://www.migrationsverket.se/Om-Migrationsverket/Pressrum/Nyhetsarkiv/Nyhetsarkiv-2018/2018-05-04-Utbyggnaden-av-forvarsplatser-pagar---i-Flen-oppnas-nya-platser-i-maj.html> accessed 04/04/19; there are also plans to extend the spaces available by opening new detention facilities until 2020, allowing there to be 935 spaces for detainees overall.
[98] CAT report on Sweden, p. 4.
[99] While ambiguous terminology cannot be the sole cause of the detainment trend in Sweden concerning asylum seekers, it is suggested here that it is one of the roots of the problem.

such circumstances, the proportionality test as provided in the 2005 Act also loses its weight and relevance for the assessment made by the relevant institutions.

This was followed by a review of the most relevant case law for the purpose of examining the application of the law by the Courts in relation to the administrative detention of aliens. The question of whether the Swedish Migration Court and perhaps most importantly due to their hierarchical nature, the Migration Court of Appeal are permissive or restrictive in their application of the law is difficult to answer with certainty. One case illustrated the fact that the Migration Court of Appeal requires a stricter application of the law when the alien has been detained for a longer period of time. The same level of strictness was not applied in certain other cases explored above, and the Migration Court of Appeal did not require a necessity and a proportionality test to be done in respect to each individual case. Neither did any of the Courts delve into the question of alternative methods to detention, which do not entail the same level of deprivation of liberty. Thus, a reasonable though generalized conclusion might lead as follows: the Swedish Migration Court of Appeal conducts a permissive reading of the limitation on the right to liberty relating to the administrative detainment of asylum seekers, unless it is a question of an "excessive" amount of time spent in detention, with no reasonable justification. Thus, the Migration Court of Appeal does not have a critical approach to the general trend of detaining asylum seekers, therefore applying a high threshold for what kind of practices are unacceptable.[100]

Finally, the institutional practice regarding the detainment of asylum seekers was assessed. It was then shown that the two authorities which are relevant in issuing detainment orders, the Migration Agency and the Police, do so routinely. There is generally no justification provided for choosing detention over non-custodial measures in neither the Migration Agency decisions nor

[100] The reason for only mentioning the Migration Court of Appeal here is the hierarchical nature – thus, unless expressly demonstrated otherwise, the same analysis is applicable to the Migration Court.

the Police orders. This has led to foundational issues in relation to administrative detention, in the form of spatial limitations, forcing the authorities to detain asylum-seekers in prisons. This, again, raised the question of why authorities were so reluctant to consider non-custodial measures even when faced with such serious shortcomings. As the burden of proof is on the detaining authorities to provide evidence and reasons for detaining an asylum seeker, there is an inbuilt need for self-critical analysis in the process on behalf of the Migration Agency and the Police.[101] Such self-critical analyses were not generally witnessed in the discussion carried out above.

It should be noted, however, that the inadequacy in reasoning is an institutional problem – whether an effective self-critical analysis is being carried out by the detaining authorities is something which the Courts must evaluate as they are the supervisory bodies. Ergo, in addition to a self-critical analysis being required of the authorities, a sceptical approach is also required of the Courts on the authorities' method.[102] Such tactics are however absent in Swedish practice regarding the administrative detainment of asylum seekers. Thus, the question of whether the relevant institutions violate Swedish law as interpreted by the Migration Court of Appeal does not have a clear-cut answer. If one views the stance of the Migration Court of Appeal in the cases in which it has highlighted the need for a *stringent* application of the necessity and proportionality tests, it is evident that the institutions do not follow these standards. However, as the Court applies different standards depending on how long the asylum seeker has been detained, the institutions have considerable leeway to justify their approach.

Some criticisms of the Swedish practice in relation to administrative detention of asylum seekers were highlighted in the final section of this

[101] The need for a self-critical analytical approach was mentioned in a handbook from the Council of Europe on the application of Art. 5 written by Macovei, which is cited below in the following chapter, p. 8.
[102] The need for skepticism on behalf of the Courts is also something mentioned by Macovei, cited below, p. 8.

chapter, two of which were international in nature – the CAT and the CCPR. Both of these Committees had expressed their concern regarding the fact that Sweden does not use detention as a last resort; Sweden does not use detention for the shortest possible time; Sweden continues detaining asylum seekers within prison, though it is not a question of criminal detention; Sweden should ensure that each detainment decision is put through the necessity and proportionality tests.[103] Therefore, it is argued here that Swedish authorities use administrative detention routinely and have a generally permissive approach regarding this question.

[103] These conclusions are drawn from statements by the CCPR and CAT, as demonstrated in this chapter.

# Chapter 3 – The European Court of Human Rights

## i. Introduction

The right to liberty generally is a notion that is so deeply entrenched in law that it is rarely a contested subject in legal academia. It is mentioned in all major EU law documents, domestic constitutions and legislations of member states – Article 6 of the EU Charter of Fundamental Rights ensures to everyone the right to liberty and security of person; Article 5 of the ECHR guarantees the right to liberty and security. The latter provision provides exceptions where the right to liberty can be restricted, the last of which – (f) – provides: "the lawful arrest or detention of a person to prevent his affecting an unauthorized entry into the country *or of a person against whom action is being taken with a view to deportation or extradition*" (emphasis added). This allows member states to deviate from the "standard" degree of protection under Art. 5 to a certain extent.

It has been suggested, however, that there is a presumption in favor of liberty in the first paragraph of Art. 5; this is shown by the wording of the provision, which begins by declaring the right of everyone to liberty, and follows on to asserting that "no one shall be deprived of liberty save in the following cases and in accordance with a procedure prescribed by law".[104] Thus, there is an imperative requirement that liberty should only be lost for an amount of time that is absolutely necessary and where such loss becomes unjustified, there should be remedies in place to recover the individual's liberty speedily. This is also evidenced in the following text of the provision, which delivers a burden of proof on the detaining authority to show that a) it has the power to detain for one of the reasons specified in the text of Art. 5 and b) the power to detain as specified in Art. 5 is applicable to the particular case in which detention was resorted to.[105] By following an interpretation of the provision which is ultimately in favor of liberty, one is creating a burden of proof which

[104] Monica Macovei, "The right to liberty and security of the person: a guide to the implementation of Article 5 of the European Convention on Human Rights", Council of Europe, Human rights handbook No.5 (2002), p. 8.
[105] Macovei, p. 8.

is higher than when such an interpretation is not endorsed. Thus, providing justification for the deprivation of liberty, the necessity, the proportionality and also the time-limit of the deprivation becomes an even greater essentiality.

### ii. The Aims of this Chapter

The ECHR became a part of Swedish law in 1995, thus creating direct obligations on Sweden to adhere to its provisions.[106] Further, as ECtHR is the monitoring body regarding ECHR, Sweden is bound by the judgments of the ECtHR and is obliged to execute them.[107] Although there is a certain level of ambiguity on the binding nature of the ECtHR's decisions,[108] Sweden has historically implemented the decisions of the Court. In light of this, the chapter aims to answer the following questions:

- *After mapping out how Article 5 is interpreted and applied by the ECtHR in cases concerning the administrative detention of asylum seekers, how does this, if at all, inform and impact the protection of the rights of asylum seekers to liberty (in cases of administrative detention)? In other words, is the Court permissive or restrictive in its judgments towards the domestic practice of states in re administrative detention of asylum seekers?*

This question will be answered by examining a selected number of judgments by the ECtHR regarding the administrative detention of asylum seekers, in an evolutionary manner.[109] Therefore, the chapter will begin with two of the first

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[106] Lag 1994:1219.
[107] Elisabeth Lambert Abdelgawad, "The execution of judgments of the European Court of Human Rights", Council of Europe Publishing 2nd edition, Human rights files No. 19, 2002, p. 7; The Committee of Ministers of the Council of Europe monitors the execution of the executed judgments of the Court.
[108] The nature of the Court's decisions is noteworthy in this respect, though not pivotal for this discussion. The ambiguous nature mentioned can for instance be seen in the ECHR itself, Section II concerning the Court, specifically Art. 46.
[109] While the exact number of cases in which the Court deals with administrative detention with a view to deportation is difficult to state with certainty, there are close to 100 cases from the ECtHR which tackle this issue, see for instance the Factsheet (which is not exhaustive) from the ECtHR Press Unit, "Migrants in Detention": <https://www.echr.coe.int/Documents/FS_Migrants_detention_ENG.pdf> accessed 02/07/19.

and pivotal cases regarding this subject, and end with some of the most recent judgments regarding the administrative detention of asylum seekers. By doing this, the approach of the Court in relation to this question will be viewed to measure the consistency of its argumentation, the trigger points of where the court finds it must draw a line and other factors which ultimately result in the assessment of the level of protection offered to asylum seekers within member states of the CoE regarding the right to liberty.[110] While doing this, the circumstances in a few selected cases will be concisely described for the purpose of providing perspective on potential argumentations by the ECtHR, i.e. any specific facts which might have led the Court to assess the case in a specific way. There are cases which are not discussed to the same extent within the text of this chapter though referred to regardless – the reason for this is that these cases do not add anything further to the discussion. Rather, these cases and judgments corroborate the position of the Court or any other conclusion reached in that regard. In this way, they further the aims of this chapter and validate arguments or established trends regarding the Court's approach. The chapter is finalized with concluding remarks regarding the findings of the assessment.

### iii. *Chahal v the United Kingdom*

One of the first cases in which the Court discussed the issue of detainment of asylum seekers in great depth is *Chahal v the United Kingdom*.[111] Although an old case, it has provided the foundation for the Court's reasoning since its execution. Thus, it is still being cited in the Court's opinions regarding the administrative detention of asylum seekers and can thus be classified as reflective of the Court's view to a certain extent. For this purpose, the argumentation by the Court in the areas which are relevant to the aims of this chapter will be highlighted and discussed.

In this case, the ECtHR coined the famous statement that "states enjoy an undeniable sovereign right to control aliens' entry into and residence in their

[110] In re administrative detention.
[111] Application no. 22414/93, 15 November 1996.

territory".[112] The court used this judgment also to maintain the rather low standard of protection regarding immigration detention by stating that there is no requirement that the detention "be reasonably considered necessary, for example to prevent the person concerned from committing an offence or fleeing".[113] The case concerned Mr. Chahal who became a leading political activist in the Sikh community.[114] Following several instances of activities which the UK condemned as violent and against the public good and national security, the state notified the applicant of its intentions to deport him in August 1990 and detained him shortly after. Upon applying for political asylum, his application was refused and since the decision to deport was due to national security, there was no right to appeal to an independent tribunal.[115] Mr. Chahal remained *detained* in prison from August 1990 until the date of the judgment of the Grand Chamber, November 1996.[116] The Court decided that due to the "exceptional circumstances" of the case, there was no violation of Art. 5(1)(f) and the excessively long detention time was not arbitrary.[117]

The reasoning of the court in *Chahal* relies largely on the principle of margin of appreciation, which is the approach of the ECtHR in reconciling the lacking consensus among its member states.[118] Thus, the principle of margin of appreciation is essentially the prerogative of the member states of the CoE to evaluate the case from the perspective of the 'best interests' of their domestic affairs and public policies. The Court begins by stating: "(Art. 5 (1)(f)) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary (…)".[119] Accordingly, it is concluded here in the Court's reasoning that sub-

[112] Para. 73.
[113] Para. 112, upheld in *Conka v Belgium* no. 51564/99 (2002), para 38 and again in *Saadi v UK* (2008), paras 72-73.
[114] The applicant entered the UK illegally in 1971 for employment purposes and was granted an indefinite leave by the Home Office.
[115] *Chahal*, para. 29.
[116] It should be clarified that he was detained "with a view to deportation" in Bedford Prison and not imprisoned due to criminal activity – para 25, *Chahal*.
[117] *Chahal*, paras. 119–123.
[118] N. Voiculescu and M.B. Berna, *Theoretical Difficulties and Limits of the Margin of Appreciation of States in European Court of Human Rights Case-Law,* 2018 Law Annuals Titu Maiorescu U. 11, p. 12.
[119] *Chahal*, para 112.

paragraph (f) provides a different level of protection from sub-paragraph (c) which concerns the detention of an individual prior to bringing them before the competent legal authority when it is reasonably suspected that they have committed an offence.

The only necessary criterion for (f) is therefore that the person is detained during the time that "action is being taken with a view to deportation", which makes the justification of expulsion under domestic or ECHR law irrelevant.[120] The Court proceeds to clarify that the deportation proceeding must be in progress and prosecuted with due diligence, otherwise the deprivation of liberty due to detainment will be arbitrary. The Court reached the conclusion that the applicant's detention indeed was carried out with due diligence; the case involved "considerations of an extremely serious and weighty nature" and therefore demanded detailed and careful consideration.[121] Thus, the length of time which Mr. Chahal spent in detention was considered not to have been excessive and Art. 5(1)(f) was not breached.

Regarding the lawfulness of the detention, the Court stresses the importance of refraining from arbitrariness by following the rules of the Convention.[122] This entails, essentially, the adherence of the relevant authorities of the member state to their established procedural rules and national laws while also being coherent with the purposes of Art. 5 of ECHR.[123] The Court concludes the question regarding Art. 5 (1)(f) by claiming that the national authorities acted with due diligence throughout the deportation proceedings against the applicant and that there has been continuously sufficient guarantees against the arbitrary deprivation of his liberty – ergo, in view of

[120] *Chahal*, paras 112–113.
[121] *Chahal*, paras 113–117.
[122] *Chahal*, para 118.
[123] *Chahal*, para 122; the Court determined that the "advisory panel procedure" provided an adequate safeguard against arbitrariness. It should be noted here, however, that this advisory panel is not an independent body – ergo, the Court found that although Mr. Chahal's detention was never reviewed by an independent body, the detention was reasonable.

the "exceptional circumstances of the case", his six-year, non-reviewed detention complied with the requirements of Article 5 paragraph 1 (f).[124]

So, what happened between *Chahal* and the next case which will be dealt with in detail? In reality, the cases decided by the ECtHR regarding immigration detention during this time are not equally significant and will therefore not be brought up for the purposes of this discussion. It was apparent from the *Chahal* decision that a strong anchor for the Court's reasoning was the national security, i.e. that the administrative detention was authorized due to national security. At a time when states in the CoE began the routine administrative detention of asylum seekers without any risk to national security, the case of *Saadi* arose.

### iv. *Saadi v the United Kingdom*

Arguably the most illustrious case regarding detention of asylum seekers is that of *Saadi v the UK*.[125] Although this case does not directly delve into the topic of the administrative detention of asylum seeker *with a view to deportation,* it does concern the detention of asylum seekers to ease the administrative burden upon the state – thus, a different type of administrative detention. Nevertheless, the argumentation by the Court remains relevant for the purposes of this chapter as it highlights the discussion regarding the state's right to control the presence of aliens within its territory. This judgment, also delivered by the Grand Chamber, follows the reasoning in *Chahal* by stressing once again – and more clearly – that member states would not violate their obligation under the ECHR if they routinely detain asylum seekers.[126] However, what makes *Saadi* an important case regarding detention is that the Court had to, for the first time in its jurisprudence, interpret the definition of the words in the *first limb* of Art. 5 (1) (f): "(…) lawful… detention of a person to prevent his effecting an unauthorized entry into the

[124] *Chahal*, para 123.
[125] App 13229/03, judgment of 29 January 2008.
[126] This is done by the Court inherently deciding that "short-term" administrative detention does not violate the right to liberty, and that there is no reason to prove an element of necessity, as per *Chahal*.

country (…)".[127] Here, the Court begins by referring to the VCLT, Articles 31 and 33 relating to the ordinary meaning of words with respect to the object and purpose of the instrument. They recognize that the context of the ECHR is to safeguard the human rights of individuals within the EU,[128] and that the object and purpose of this specific provision is to protect the fundamental human right of every individual against "arbitrary interferences by the State" with their right to liberty.[129]

After establishing the above, the Grand Chamber declares that despite this, States enjoy an "*undeniable sovereign right* to control alien's entry into and residence in their territory" (emphasis added).[130] Essentially approving the categorization of certain individuals as illegal with the support of the first limb of Art. 5 (1) (f), the Court explicitly states that any person entering a country without authorization is doing so illegally and the state therefore has the power to resort to detaining them until that status has been deemed to have changed. Being wary of applying a too narrow interpretation on the provision, the ECtHR uses its platform in *Saadi* to reinforce the idea that state sovereignty prevails in the dilemma of state sovereignty vs. the right to liberty.[131]

*Saadi v the UK* concerns the applicant, Dr. Saadi, who arrived in England in December 2000 and upon his arrival at the airport, claimed asylum. Due to logistical issues,[132] the applicant was granted "temporary admission" to stay elsewhere and report back the following morning. On the fourth day of his reporting back, the immigration officers detained him within the confines of

[127] *Saadi*, para 61.
[128] Not only member states of the CoE, due to the fact that the EU also has ratified the Convention and is therefore bound by it as an organization.
[129] *Saadi,* paras 62 – 63; *Stec and Others v the UK*, 2005 Grand Chamber 65731/01 para 48; *Winterwerp v the Netherlands*, 24 October 1979, para 37.
[130] *Saadi,* paras 64 – 65; *Amuur v France*, 25 June 1995, para 41 and *Chahal,* para 73.
[131] *Saadi,* para 65: "To interpret the first limb of Art. 5 (1) (f) as permitting detention only of a person who is shown to be trying to evade entry restrictions would be to place too narrow a construction on the terms of the provision and on the power of the State to exercise its undeniable right of control referred to above."
[132] The lack of available rooms at the relevant detention facility.

a detention facility.[133] Aside from a standard form, the applicant was not given any information regarding the reason or duration of his detention.

The Court in *Saadi* defines "freedom from arbitrariness" within the context of its jurisprudence and maps them out in this judgment. Firstly, for instance, it states that a general principle that has been established through case-law is that a decision to detain may be arbitrary where despite being in line with domestic law, it is carried out through deception or bad faith on behalf of the relevant authorities.[134] This entails, essentially, that the purpose of the restriction in Art. 5 (1) (f) corresponds with the order and execution of the detention.[135] The place and condition of detention must also correspond to the reason for detention – an asylum seeker from whom there is no reason to believe any criminal activity has or will occur, should not be constrained in prison-like circumstances.

By recognizing that the detainment must be necessary and a last resort in *other* sub-paragraphs of the provision, the Court directly distinguished sub-paragraph (f) from the level of protection guaranteed by its preceding sub-paragraphs.[136] Here, the Grand Chamber relies on its judgment in *Chahal* regarding the criterion "with a view to deportation". In reference to the principle of proportionality, the Court reminds its member states that it is only relevant in regard to the fact that detention "should not continue for an *unreasonable* length of time" (emphasis added).[137] What the Court deems to be unreasonable remains unclear. The Court goes onto clarifying that this level of proportionality assessment applies equally to the second limb of the provision also. Thus, detention prior to deportation is under the same minimal scrutiny of proportionality as the detention carried out upon entry of the alien.[138] The Grand Chamber then examines whether the applicant's detention was indeed arbitrary, and reaches the conclusion that it was not; Since the

[133] Oakington Reception Centre.
[134] *Saadi,* para 69; *Bozano v France*, 18 December 1986 and *Conka v Belgium* 2002.
[135] Here, the court refers to *Winterwerp*, para 39.
[136] *Saadi,* paras 70 – 72.
[137] The applicant had been detained for a week in the present case.
[138] *Saadi,* para 73.

national authorities had declared that the purpose of detention was for the "speedy handling of the case", the Court found that they had acted in good faith. The Court concludes this segment of its judgment with an understanding note of the UK's difficulties in administration at the time of these occurrences due to an increase of asylum-seekers. Thus, it seems as though the Court relieves its member states of their human rights duties towards individuals within their borders if their national authorities are under administrative strain.[139]

Cornelisse fittingly summarized the position of the Court regarding *Chahal* and *Saadi* as viewing administrative detention as "unnecessary and disproportionate, but lawful detention".[140] The list of permissible deviations from the right to liberty is exhaustive and according to general international law,[141] merely a narrow interpretation of the exceptions to the right to liberty is consistent with this provision – in other words, arbitrary detention must be avoided by member states at all costs.[142] Thus, while Art. 5 does not explicitly contain the notion of arbitrariness, it is nonetheless an established criteria under, *inter alia*, the jurisprudence of the ECtHR.[143]

Since *Chahal* and *Saadi*, the nature of the political and social situation in the world has changed drastically. Conflicts within several states around the world has resulted in the forced displacement of millions of individuals globally.[144] This has resulted in more stringent measures taken by the EU member states to control the flow of "irregular migrants", and thus we see a more rapid growth of case law from the ECtHR regarding the most frequently

[139] There was no violation of Art. 5 (1) in *Saadi v the UK*.
[140] Galina Cornelisse, "Immigration Detention and Human Rights", MN Publishers 2010, p. 291.
[141] Cornelisse, "Immigration Detention and Human Rights", p. 279; in the cited chapter, Cornelisse executes an interesting discussion regarding the ECtHR's interpretation of Art. 5 (1)(f) as being a "necessary adjunct".
[142] See for instance: *Winterwerp v the Netherlands,* 24 October 1979, A-33
[143] Cornelisse, *Human Rights for Immigration Detainees in Strasbourg: Limited Sovereignty or a Limited Discourse?,* European J of Migration and Law 6, 2004, p. 96.
[144] For specific figures, see UNHCR's Figures at a Glance: <https://www.unhcr.org/figures-at-a-glance.html> accessed 22/04/19.

used measure – detention. The following sub-chapter aids in providing an insight into how the ECtHR has dealt with this development.

### v. Subsequent Judgments – the Evolution of Article 5 (1) (f)

The cases decided by the ECtHR since *Saadi* have not been consistent enough to outline a definitive pattern. Disappointingly, the category of administrative detention prior to deportation has not been equally explored as, for instance, airport-detention cases.[145] The following cases have been chosen to distinguish how the ECtHR has been handling cases of immigration detention since its landmark judgments in 1996 and 2008. These cases have been chosen specifically because they reflect the position of the Court regarding the administrative detention of asylum seekers today. They are strategically presented to provide a coherent overview of the argumentation adopted by the ECtHR.[146]

The Grand Chamber produced a judgment in 2016 where the importance of legal certainty was stressed – *Khlaifia and Others v Italy*.[147] The case concerned applicants who left Tunisia for Italy on makeshift boats, and were subsequently taken to an Early Reception and Aid Centre (CSPA) by Italian coastguards.[148] During the entire time that the applicants had remained in Italy, they had received no documents while the Government had produced three refusal-of-entry orders which were accompanied by a document specifying that "the addressee" i.e. the applicants, had refused to sign or receive a copy.[149] The Court begins its judgment by commenting on the fact that there was a clear lack of legal basis for the detention of the applicants in

[145] In other words, where the asylum seeker applies for asylum upon arrival to the airport of the state and the national authorities detain them within the confines of the airport (the transit zone) for various degree of time while their claims are being processed – see for example *Amuur v France*, 25 June 1996 and also *Riad and Idiab v Belgium*, 24 January 2008.
[146] While other cases could have been chosen instead of these, the facts of the chosen cases in combination with the argumentation and analysis provided by the Court demonstrate the stance taken by the ECtHR in relation to administrative detention in a straightforward and consistent way. See supra n109 for some quantitative insight.
[147] 16483/12, judgment of 15 December 2016.
[148] It should be mentioned here that Italy and Tunisia have a bilateral agreement regarding immigration from April 2011.
[149] Due to the judgment not being available in English, the information regarding this case is taken from the press release issued by the Registrar of the Court.

this case. The Italian Constitution guarantees the right to liberty and *habeas corpus* safeguards, which the Court meant the national authorities deprived the applicants of in this case, in addition to being deprived of their liberty without a clear and accessible legal basis. Ergo, not even then fundamental national laws and administrative rules in relation to detention were adhered to, let alone the state's Convention responsibilities.[150] The Grand Chamber used this case to stress the importance of the "general principle of legal certainty" regarding the deprivation of liberty in asylum/immigration cases, in order to protect individuals from arbitrary detention.[151]

In *S.K. v Russia*,[152] the Chamber took the opportunity to remind its member states that administrative detention prior to deportation is only lawful where the proceedings relating to removal are "in process and pursued with due diligence".[153] Thus, the Court used its platform in this case to remind member states that expulsion of asylum seekers to areas of conflict is problematic and therefore detention prior to deportation becomes null, as deportation measures cannot reasonably be carried out.[154] Therefore, the detention becomes arbitrary.[155]

The question of due diligence in cases of detention prior to deportation was raised once more in *M. and Others v Bulgaria*,[156] where one of the applicants was detained for almost three years by Bulgarian authorities, ostensibly with a view to deportation.[157] The ECtHR noted in this judgment that if national authorities make the decision to detain an asylum seeker with the view to deport them, this decision needs to be compatible with Art. 5 (1) (f) of the

[150] The Court therefore found a violation against Art. 5 (1) of the Convention.
[151] Furthermore, to guarantee that there exist instruments for detainees to challenge the lawfulness of their detention.
[152] No. 52722/15, judgment of 14 February 2017.
[153] *S.K. v Russia*, para 111; The case was in regard to a Syrian national who was detained with a view to deportation by the Russian authorities.
[154] *S.K. v Russia*, para 115.
[155] The Chamber found a violation of Art. 5 (1), para 117.
[156] No. 41416/08, Judgment of 26 July 2011.
[157] The reason for this decision was that the Director of the National Security Service had found an internal document which showed that the applicant was involved in trafficking migrants, and therefore was a serious threat to national security; *M. and Others*, para 11.

Convention in that deportation proceeding must be in progress and carried out with due diligence.[158] In this instance where there was a two-year delay between the detention order and the first request for identity documents in order to be able to continue with the removal procedures, Art.5 (1) (f) was not adhered to and therefore violated.[159] Ergo, this judgment has a prohibiting nature regarding states continuously and routinely detaining asylum seekers with an alleged view to deportation, while in reality there are no plans to carry out the removal procedures with due diligence and good faith.[160]

In *J.R. and Others v Greece*,[161] however, the Court held that the member state had not violated Art. 5 (1) when detaining the applicants prior to removal to Turkey due to the EU-Turkey Declaration.[162] The Chamber reasoned here that the applicants had only been detained i.e. confined within the boundaries of the facility for one month,[163] prior to it becoming a semi-open detention center. Aside from the fact that this judgment has been condemned for legitimizing the terrible conditions of hotspot and detention centers after the EU-Turkey Directive was brought in force,[164] it also again gives legitimacy to national authorities to detain where this will ease their administrative

[158] *M. and Others*, para 61 and 71.
[159] *M and Others*, paras 75 – 77; It should also be mentioned that there was a 19-month delay between the first and second requests for identification – therefore, it could not reasonably be concluded that deportation proceedings were in action.
[160] For a similar judgment see *Auad v Bulgaria*, No. 46390/10, Judgment of 11 October 2011, paras 128, 132-133 (also in re legal certainty) and finally para 135; *Kim v Russia*, No 44260/13, Judgment of 17 July 2014, paras 47, 49 and 55-57. Also, in re the foreseeability requirement in Art. 5 (1) see *Mathloom v Greece*, No. 48883/07, Judgment of 24 April 2012.
[161] Application no. 22696/16, Judgment of 25 January 2018.
[162] The applicants also complained of the conditions within the detention center "Vial", which had due to the new EU-Turkey Declaration been filled with asylum seekers double to its capacity – indeed, several organizations made reports regarding the conditions of Vial: Human Rights Watch, European Committee for the Prevention of Torture etc: <https://www.hrw.org/news/2016/04/14/greece-asylum-seekers-locked> accessed 03/07/19 and European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, "Report to the Greek Government on the visits to Greece" CPT/Inf (2017) 25.
[163] *J.R. and Others*, paras 114 and 146.
[164] Annick Pijnenburg, *JR and Others v Greece: what does the Court (not) say about the EU-Turkey Statement?*, February 21, 2018: <https://strasbourgobservers.com/2018/02/21/jr-and-others-v-greece-what-does-the-court-not-say-about-the-eu-turkey-statement/> accessed 22/04/19.

burden.[165] The issue here is that if the Court permits its member states to detain asylum seekers for administrative ease for any amount of time with no inherent warning of arbitrariness, a loop hole for future deprivations of liberty will be opened which could last far longer than the instance which the Court approved. In other words, the Court continues to open the door wider for states to justify detention by not defining what amount of time in detainment is "too long".[166] For example, since this judgment in early 2018, the number of asylum seekers who have been detained in facilities like Vial have increased exponentially – the difference is that now, they are detained for much longer due to the inherent administrative difficulties which Greece and many other EU member states suffer from.[167] Since there is no case following this one at the time of writing, it is unknown whether the Court will take a similar stance today, seeing as the "exceptional and sharp increase in migratory flows" will no longer be something exceptional, rather it will (or should be) considered as the current "normal" state, until the moment this state of affairs changes.[168]

### vi. Concluding Remarks

This aim of this chapter was to examine how Article 5 is interpreted and applied by the ECtHR in cases concerning the administrative detention of asylum seekers. As explored above, the main approach of the ECtHR to the question of detainment is that it should not be arbitrary by being a) closely connected to the stated purpose, which must be pursued with due diligence; b) be carried out in good faith; c) the place and conditions of detention should be appropriate, and d) the length of the detention should not exceed that

[165] "(The Court) observed that a detention period of one month should not be considered excessive for the purposes of the *necessary administrative formalities*." (emphasis added), p. 2 of the Press Release issued by the Registrar of the Court.
[166] Comparing this to *Saadi*, for instance, a simple way of comparison is that the applicant in *Saadi* had "only" been detained for a week, while the applicant in *J.R. and Others* had "only" been detained for one month. The Strasbourg Court's temporal definition is highly unclear.
[167] Pijnenburg, *supra*.
[168] J.*R. and Others*, para 139. Thus, the circumstances which the Court refers to as unusual in both this case and for instance *Khlaifia* (para 143) will no longer be able to be justified in the same way. In this case, the applicants arrived in Greece the day after the implementation of the EU-Turkey Directive, though now more than three years have passed.

reasonably required for the purpose pursued.[169] In regard to the first requirement, it is the ECtHR's approach to assure its member states that their sovereignty is not threatened – as is usually the case with the Strasbourg Court, the vagueness of its formulation permits the member states a high level of flexibility when interpreting what is reasonably within the ambit of their "stated purpose".[170] Thus, the assessment regarding what type of action can be considered to have been carried out with due diligence generally becomes ambiguous.

The second criteria – due diligence – together with the criteria of good faith was explored in *Chahal* and *Conka*[171] respectively, meaning that the state must show that deportation proceedings are in progress.[172] The failure of doing so would result in the detainment being arbitrary. The criteria of good faith applied on its own is applicable where for instance the government authority use deceptive measures to capture, detain and expel individuals from the territory of the state in which they have sought refuge.[173] This line of action would make the detention and expulsion arbitrary "even where the arrest would be otherwise legal".[174] Finally, the requirement of "reasonable length" – which is solely applicable in re 'immigration' detention[175] – is the most applicable to the test of proportionality "to the extent that the detention should not continue for an unreasonable length of time".[176] The definition of what crosses the boundary of reasonable onto unreasonable is unclear, as the surrounding specificities of the case play a role in how the Court defines the "reasonability" of the time spent in detention.

[169] Norwegian Organization for Asylum Seekers (NOAS), "Analysis of Norway's international obligations, domestic law and practice: Detention of Asylum Seekers", 2014, p. 40; *Saadi*, para. 74.
[170] NOAS, p. 40.
[171] The case of *Conka v Belgium* was highlighted first in Chapter 3.III.
[172] *Chahal*, para 113; also, *Saadi*, para 77.
[173] NOAS, p. 41.
[174] *Conka*, para. 41; The next requirement, appropriate place and conditions, is mostly applied by ECtHR in cases concerning vulnerable groups, which is outside of the scope of this paper.
[175] *Amuur v France* (1996) Application nol. 19776/92, para. 43.
[176] *Saadi*, para. 72.

Taking into consideration the established criteria mentioned above from the ECtHR's jurisprudence to ensure the right to liberty of asylum seekers, the stance of the Court regarding this question is unsettling. The Strasbourg Court tends to fall back on its reasoning that states must have the ability to detain asylum seekers if this indeed would ease their administrative strain. This is done simultaneously as it is continuously reminding its member states that they must refrain from arbitrary detention by making sure, for instance, that deportation procedures are in progress when the individual is detained prior to expulsion, to ensure due diligence. So, the ECtHR largely decides its cases based on the principle of margin of appreciation and the fact that it is within the sovereign state's prerogative to control the entry, residence and expulsion of aliens. Comparatively then, this entails the subservience of the protection of the right to liberty of asylum seekers concerning administrative detention with a view to deportation.

# Chapter 4 – The Human Rights Committee

## i. Introduction

Article 9, Paragraph 1 of the International Covenant on Civil and Political Rights (ICCPR) provides:

*"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of [their] liberty except on such grounds and in accordance with such procedure as are established by law."*

The ICCPR entered into force in March 1976, and Sweden signed it in 1967 followed by its ratification and accession to the Covenant in 1971, thus becoming a state party to the ICCPR.[177] Consequently, Sweden has been under an obligation to not act contrary to the objects and purposes of the treaty since 1971 – Sweden is therefore bound by the text of the Covenant.[178]

The Human Rights Committee (CCPR) is the monitoring body of the ICCPR, established under Article 28 of the Covenant. The Committee has several tasks, one of which is to produce General Comments, designed to provide aid to States parties to give effect to the provisions of the Covenant by specifying the substantive and procedural obligations of states parties in greater detail.[179] General Comments therefore analyse and clarify a specific article or general issue to guide States parties in applying that provision or principle.[180] Another task of the CCPR is to receive and consider individual complaints, so called "communications".[181] Individuals who assert that any of their rights and freedoms under ICCPR have been violated have the possibility to lodge a complaint regarding the State to the Committee. As Sweden signed the first

[177] OHCHR Indicators: <http://indicators.ohchr.org> accessed 08/05/19.
[178] Civil and Political Rights: The Human Rights Committee, Fact Sheet No. 15 (Rev. 1), p. 3: <https://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf> accessed 08/05/19.
[179] Fact Sheet No. 15, p. 14.
[180] Article 40, paragraph 4 ICCPR is the provision which gives the CCPR the authority to produce General Comments.
[181] The authority to produce these communications derives from the first Optional Protocol to the ICCPR, which entered into force in 1976 in accordance with Art. 9 of the Covenant.

Optional Protocol providing this right in 1967 and acceded to it in 1971, it is obliged to implement the communications provided by the Committee. This entails for instance that if the Committee concludes that Sweden has violated a provision of the Covenant, it is "invited to" demonstrate within 180 days whether and what steps it has pursued to implement the decision in the communication – if Sweden would fail to do so, the Committee would leave the case open in the follow-up procedure with dialogues taking place "until satisfactory measures are undertaken".[182]

### ii. The Aims of this Chapter

Having established the legal standing of the ICCPR and the CCPR regarding Sweden, it is fitting to delve into the question of why this body is examined, pursuant to the aims of this paper. Sweden is a state which has obligations towards, *inter alia*, the ECHR and the ICCPR and the right to liberty is expressly mentioned in the provisions of both of these instruments. This right, which becomes relevant when discussing the administrative detention of asylum seekers, is however phrased differently in the two instruments. Whereas Art. 5(1) of the ECHR provides an explicit derogation from the right to liberty in cases of the lawful detainment of a person "against whom action is being taken with a view to deportation or extradition", Art. 9(1) of the ICCPR generally provides that the right may be derogated from "except on such grounds and in accordance with such procedure as are established by law".[183]

Having dealt with the position of the ECtHR in re administrative detention of asylum seekers with the wording of the ECHR which is a regional instrument, the inspection of the position of the CCPR in re this topic with the wording

[182] Human Rights Treaty Bodies – Individual Communications: <https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#whathappens> accessed 09/05/19; The Committee has a Special Rapporteur on Follow-Up Views which monitors the state action after the communication has been delivered by the CCPR.

[183] Ergo, the ECHR *spells out* the possibility of detaining an asylum seeker in pursuit of deporting them, which ultimately makes it easier for states to rely upon this human rights instrument for justifying an action taken for administrative ease.

of the ICCPR could provide an interesting insight to the level of protection of the right to liberty offered to asylum seekers in Sweden. Thus, the chapter aims to answer the following questions:

- *As the General Comments produced by the CCPR reflect the position of the Committee (and therefore the ICCPR) on a particular provision or general topic, what can be deduced from the most recent and relevant General Comment on the right to liberty?*
- *In light of the answer reached to the first question, how is this reflected in the Communications provided by the Committee? I.e. how is the position taken by the CCPR reflected in concrete examples and cases?*

These questions will be answered by firstly examining General Comment No. 35 from 2014, which is the most recent produced by the CCPR on the right to liberty.[184] By doing this, an overall idea of where the Committee's priorities lie in relation to this right and how it corresponds to the administrative detention of asylum seekers will be gained. In light of this understanding, the Communications regarding the administrative detention of asylum seekers will be observed, beginning with one of the first Communications from 1993, and continuing to the most recent Communications. Taking this approach allows for the observance of the position of the Committee and any argumentative evolution by the CCPR in this regard. Further, it allows for the analysis of the anchors on which the Committee bases its opinions and also the evaluation of whether these anchors have altered with time. This approach furthers the purpose of this chapter and the overall aim of this paper.

### iii. General Comment No. 35

In December 2014, the CCPR produced General Comment No. 35 on Article 9 of the Covenant. This General Comment stresses the fact that the notion of arbitrariness should not be equated with "against the law" – the domestic law

[184] General Comments by the CCPR are not legally binding, though provide recommendations and the position of the body relating to the subject. Thus, they provide the overall foundation on which the CCPR bases its Communications.

of a state may indeed authorize arbitrary detention in practice.[185] It points to its own jurisprudence in the form of communications, to emphasize the importance of predictability, appropriateness and due process of legal systems.[186]

Although the Covenant does not provide a list of permissible grounds to detain an individual, General Comment No. 35 stresses the fact that reasons for which an authority may deprive someone of liberty must be established by the state's domestic law and accompanied by procedures which prevent arbitrary detention.[187] The General Comment continues on to clarify that "detention may be arbitrary if the manner in which the detainees are treated does not relate to the purpose for which they are ostensibly being detained".[188] Hence, the detainment must be in accordance with the law and not be arbitrary, though when it comes to administrative detention this is not enough.

Interestingly, the Committee expressly condemns administrative detention as it presents severe risks of arbitrary deprivation of liberty.[189] Here, the Committee points to the fact that alternative methods of handling the situation aside from detention must be present, thus making detention a measure of last resort. The importance of this is stressed by the fact that if despite alternate measures detainment is resorted to, the burden of proof lies with the detaining authority of the state to show that the detained individual poses a certain level of threat which cannot feasibly be addressed by alternative measures.[190] This burden of proof also increases with the increasing length of the detention. The General Comment takes note of administrative detention in re immigration control in states and clarifies that the practice in itself is not inherently arbitrary in nature.[191]

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[185] GC No. 35, 16 December 2014, para. 12.
[186] These communications do not, however, concern the detention of asylum seekers: 1134/2002, *Gorji-Dinka v. Cameroon*, para 5.1 and 305/1988, *Van Alphen v. Netherlands*, para 5.8.
[187] Para. 14.
[188] Para. 14; Concluding observations: Belgium (CCPR/CO/81/BEL, 2004), para 17.
[189] Para 15; Concluding observations: Jordan (CCPR/C/JOR/CO/4, 2010), para. 11.
[190] Para 15.
[191] Para 18.

However, it stresses the importance of analyzing the necessity and proportionality of each case based on its specific circumstances. Here, the GC points to a communication by the CCPR, *Samba Jalloh v. Netherlands*,[192] where it stated that detention cases must be reviewed on a case-by-case basis with periodic reviews in order to re-evaluate their lawfulness – this is the standard by which "arbitrariness" must be evaluated.[193] Furthermore, the CCPR repeatedly puts emphasis on the fact that administrative detention prior to deportation is an unacceptable measure when it is solely resorted to due to the inability of the State to carry out the deportation of the asylum seeker due to obstacles.[194] Thus, the Committee does not excuse states from their obligations under the Covenant, regardless of the administrative strain they may or may not be under.

### iv. Communications by the Human Rights Committee

One of the first Communications in which the Committee provided its views regarding Art. 9 of the ICCPR is that of *A v Australia*.[195] The case concerned the detainment of A, a Cambodian citizen who sought asylum in Australia and was together with other Cambodian nationals flown to the Villawood Detention Centre in December 1989 while their cases were being processed. He was kept in detention until December 1991. In deciding this case, the Committee began by clarifying that "arbitrariness" should not be equated with "against the law" but should instead be interpreted more broadly to include elements of inappropriateness and injustice.[196] The Committee then mention the importance of proving necessity and proportionality regarding the detention of the individual, as the state party argued that he was detained due to the fact that he had entered the country illegally and there was a risk

[192] CCPR/C/74/D/794/1998.
[193] Samba Jalloh, para 8.2.
[194] Para. 18; The Comment points to its Communication 2094/2011, *F.K.A.G. v. Australia*, para. 9.3.
[195] Communication No. 560/1993, 30 April 1997.
[196] *A v Australia*, para 9.2.

that he would abscond.[197] The CCPR recalls here that every decision to detain should be subject to periodic review and the state should be able to provide justification for the detention at any moment. Thus, since the state party had not provided any reason specific to the case and the author, the Committee found that the detention of A was arbitrary under the scope of Art. 9 (1).[198]

A similar case arose regarding the same state party, *Daniyal Shafiq v Australia*,[199] where the Bangladeshi author was indefinitely detained with a view to deportation between September 1999 – November 2006.[200] Shafiq had at the time of the communication no recourse to a court for legal determination of his refugee status , and equally the grounds for his detention (being an "unlawful non-citizen") may not be reviewed by a Court.[201] Neither was there any reasonable situation in which his deportation to Bangladesh would be feasible, as he faced severe risks of imprisonment and torture by the police or members of the Sharbahara activists, from whom he had sought refuge in Australia.[202] Here, the Committee once again recalls the fact that any deprivation of liberty must be "necessary in all circumstances" and "proportionate to the ends sought".[203] It also stresses, due to the fact that the author had no such recourse, that every detainment decision must be periodically reviewed to reassess the necessity of the detention – additionally, the state must make sure that the detention does not continue beyond the limit of which it can justify.[204] The Committee dismissed the state party's argument

[197] So, while this case does not illustrate administrative detention with a view to deportation, it points to the Committee's stance on the fact that the necessity and proportionality tests must have taken place for any kind of administrative detention – in this scenario, to keep A from absconding.
[198] *A v Australia*, para 9.4.
[199] CCPR/C/88/D/1324/2004, 13 November 2006.
[200] The author was unknowingly recruited into the illegal political party of Sharbahara at the age of 15. Equally unknowing of the nature of the tasks he was carrying out, he was told upon discussing the matter with his recruiter that he would not be leaving the party alive. Eight years later, following internal turmoil within the party, the author decided to flee Bangladesh and sought refuge in Australia.
[201] *Shafiq,* para 3.1.
[202] *Shafiq,* para 3.2.
[203] *Shafiq,* para 7.2.
[204] Here, the Committee relied on the Communication of *Bakhtiyari v Australia* (Communication No. 1069/2002, 6 November 2003), para 9.2.

that he was detained due to their experience that asylum seekers generally tend to abscond if not kept in detainment.[205]

In the Communication of *Zhakhongir Maksudov and Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov v Kyrgyzstan*,[206] the Committee mentioned the need for the provision of detainment in domestic law, and the adherence of the decision to detain to those provisions.[207] Since the authors submitted that their detention was not authorised by the Kyrgyz prosecutor in adherence to Article 110 of the Kyrgyz CPC, and their counsel was not present, the domestic provision regarding detainment was indeed violated.[208] Thus, since this was the case, the Committee found a violation of Art. 9 (1) of the Covenant, without delving into whether the detention was arbitrary. Therefore, the lawfulness of the detention in accordance with national laws is also crucial to the CCPR, as it is seen as a first step prior to determining the arbitrariness.

In the more recent Communication of *F.J. et. al. v Australia*,[209] the Committee confirms that although lawful, detention may nonetheless be arbitrary.[210] Detention, the Committee recalls, must be reasonable, necessary and proportionate in respect of the particularities of the case and must also be continuously reassessed if continued.[211] The case concerned five authors from Iran, Sri Lanka and Afghanistan who entered Australia with boats to seek refuge. They were detained upon arrival in accordance with national law,[212]

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[205] *Shafiq,* para 7.3; The Committee noted also that the author had *due to his prolonged detention* fostered a mental illness. Furthermore, the state's neglect to review the author's case in light of his developing a mental illness during the time he spent detained showed insufficient action by the national authorities and therefore the CCPR concluded that the detainment of Shafiq was arbitrary in respect to Art. 9. (1) of the Covenant.
[206] CCPR/C/93/D/1461, 1462, 1476 & 1477/2006, 7-25 July 2008.
[207] In addition to the detention not being arbitrary; *Maskudov and Others*, para 12.2.
[208] The state party provided no response to this submission, and therefore the Committee decided to assume the correctness of the parties' description of the events; *Maskudov and Others*, para 12.2.
[209] No. 2233/2013, 2 May 2016.
[210] *F.J. v Australia*, paras 10.2–10.3.
[211] The CCPR refers to *Nystrom v Australia*, No. 1557/2007, 18 July 2011, paras 7.2 – 7.3.
[212] S. 189 (3) of Migration Act 1958, according to which Australian authorities must detain a person who is an unlawful non-citizen in an excised offshore place; *F.J. v Australia*, para 2.1.

and were refused visas to remain in Australia due to security reasons, though they were never informed of the reasons for the adverse security assessments made against them.[213] They were also unable to challenge the merits of this assessment.[214] Due to the refusal of visa to all of the parties, they were being held indefinitely awaiting deportation – they spend circa five-six years in detention.[215] To detain asylum seekers beyond the brief initial documenting period upon the individual seeking asylum could be arbitrary if there was no outstanding reason to detain them which was specific to that person. The Committee clarifies that the decision to detain must "consider relevant factors case by case, and not be based on a mandatory rule for a broad category".[216] The Committee considers also that the State party must also prior to detention take into account less invasive means of achieving the same ends and should take into account the mental health condition of the detain individual(s). Furthermore, the CCPR clarifies that where the State is unable to carry out a deportation, it would be arbitrary to detain an individual indefinitely: "the inability of a State party to carry out the expulsion of an individual does not justify indefinite detention".[217] Here, the Committee reminds States party to the Covenant that administrative detention prior to deportation is free from arbitrariness only where the deportation of the individual is reasonably feasible while also in progress. Furthermore, *F.J. et. al. v Australia* is also important for the purpose of recalling that an established routine of detaining asylum seekers merely for seeking asylum without any justification for that specific case is in violation of Art. 9 (1).

[213] *F.J. v Australia*, para 2.2.
[214] *F.J. v Australia*, para 2.3; They were informed that they did not have the right to seek a merits review of the Australian Security Intelligence Organization assessment due to the fact that the Australian Security Intelligence Organization Act 1979 instructed that only certain categories of persons were able to seek a merits review and the authors were not included in those categories.
[215] This is depending on when they arrived in Australian territory between the time September 2009 and September 2010.
[216] *F.J. v Australia*, para 10.3.
[217] *F.J. v Australia*, para 10.4; See also Communication No. 2136/2012, *M.M.M. et. a.l. v Australia*, 25 July 2013, para 10.3; Thus, there was a violation of Art. 9 (1) of the Covenant.

## v. Concluding Remarks

The aim of this chapter was to demonstrate the interpretation by the CCPR of Article 9 (1) of the ICCPR relating to the right to liberty, specifically concerning administrative detention of asylum seekers with a view to deportation. By first assessing the most recent and relevant general comment by the Committee, we were introduced to the general idea that the interpretation by the CCPR of the restriction on the right to liberty due to administrative detention is a restrictive one. Following from this, the relevant Communications delivered by the Committee provided a clearer perspective on their interpretation and position regarding this issue. It was made clear that the CCPR expects states party to the ICCPR to carry out a necessity and proportionality test according to the individual facts of the case in order to avoid arbitrary detainment of asylum seekers. This assessment marks the difference between the standard set by the Strasbourg Court and the one set by the Committee in that the tests require that the detention is not only lawful but also *reasonable*.[218] This is an assessment which the ECtHR sacrifices in order to safeguard the sovereign right of states to control the entry, residence and expulsion of aliens.

[218] While the Strasbourg Court has occasionally also stressed reasonability of the administrative detention of asylum seekers, their definition of the term is obscure. Due to the margin of appreciation they allow member states, the reasonability criteria become clouded with a hint of subjectivity as the Court tries to reason whether *a specific amount of time* which the asylum seeker has spent detained is acceptable or not.

# Chapter 5 – Resolving Divergent Interpretations

## i. Introduction

This paper began by providing an overview of the Swedish practice regarding the administrative detention of asylum seekers with a view to deportation. There, it was demonstrated that Swedish law has a tendency of including ambiguous terminology. This facilitates an interpretation by the Swedish Migration Courts which favours the emergence of routine detainment of asylum seekers for administrative purposes prior to their deportation by the relevant authorities, the Migration Agency and the Police. Having highlighted the fact that ECHR is a part of Swedish domestic law and that the state is therefore bound to implement the decisions of the ECtHR, the following chapter illustrated the Strasbourg Court's stance on the subject of the administrative detention of asylum seekers.

Here, the chapter approached the subject from an evolutionary perspective, evaluating the Court's position and argumentation regarding the administrative detention of asylum seekers beginning from *Chahal v the UK* and *Saadi v the UK*. As the analysis continued to more recent cases, it was made clear that the Court through its interpretation of Article 5(1)(f) of the Convention has adopted a permissive approach to the administrative detainment of asylum seekers, in that a) it permits its member states to detain asylum seekers to "ease administrative strain", thus prioritizing the margin of appreciation of these states; b) the reasonability of the detainment depends on the *amount of time* spent in detention and what the limit is for that time to be arbitrary or on the safe side is unclear. It could be argued here that this interpretation has fostered the creation of a normative approach to the administrative detainment of asylum seekers within the member states of the Council of Europe; i.e. for instance, since the ECHR is authoritative in Sweden,[219] the interpretations done by the ECtHR in relation to administrative detention of asylum seekers will have a strong impact on how

[219] The Swedish Instrument of Government, paragraph 19.

Swedish Migration Courts carry out their interpretations of domestic law. This then has a direct impact on how the relevant Swedish authorities carry out their duties in that regard.

As Sweden also has obligations towards the ICCPR and its monitoring body the CCPR, the following chapter reviewed the position of the Committee on the administrative detention of asylum seekers. There, the results of the assessment were different from that of the previous chapter. In comparison to the ECtHR, the CCPR takes a more restrictive approach in their interpretation of the derogations from Article 9 (1) ICCPR (the right to liberty) when it comes to the administrative detention of Asylum seekers. In other words, the General Comment in addition to the Communications demonstrate the CCPR's interpretation that in order for the administrative detention to be lawful, it must satisfy the *necessity* and *proportionality* tests regardless of a time-limit. Thus, it must balance the reasons for detaining that individual with the potential impact and implications of this detainment on them. This is in strong contrast to the position taken by the ECtHR, where if it is not for a "long" time, administrative ease is accepted as a reason to detain.

So, having established that the interpretation of the ECtHR on the right to liberty concerning the administrative detention of asylum seekers with a view to deportation has a different (permissive) approach than the interpretation adopted by the CCPR, what can be done?

This discussion would benefit from its starting point being on the question of interpretations of legal provisions. An interpretation of a provision does not have to be absolute, as the body which carries out the reading does not own the interpretation of that text. Thus, where there are various readings of a provision which in their foundation do not coincide with one another (by bodies to which a state has an equal level of obligation towards), it does not have to be a question of which interpretation is the most authoritative. Rather, as Spijkerboer suggests, it invites the possibility for strategic argumentation in order to encourage the interpretation which benefits our purposes, i.e.

exposing choice.[220] Therefore, instead of relying on argumentation which provides that the Strasbourg Court is wrong in its interpretation of Art. 5(1)(f), Spijkerboer highlights the option of pointing to alternative lines of reasoning which the Court *could* have taken, which would have been preferable on some ground. Additionally, regarding the opposing methods of interpretation by the ECtHR and CCPR, Milanovic´ adds to this line of argumentation by proposing that in certain situations, credible legal interpretations and arguments will not suffice, and requires political progress.[221]

### ii. Necessity and Proportionality

Upon examination of the position of the CCPR in chapter four, it was made clear that the Committee requires a more stringent approach to the administrative detention of asylum seekers with a view to deportation, compared to the Strasbourg Court. The Committee repeatedly stresses the risk of exposing asylum seekers to arbitrary detention when they are administratively detained, especially if the reason for such detention does not first satisfy the necessity and proportionality tests. This obligates the detaining authority to evaluate each case based on their individual circumstances, rather than adopting a "detention-positive" mindset, so to speak.

The Committee separates the notion of arbitrariness – established through an assessment of the necessity and proportionality of the detention – from lawfulness in that it stresses the importance of viewing arbitrariness from the perspective of inappropriateness and injustice. These criteria are not applied to the same level in the assessments done by the Strasbourg Court. There is a similar approach which the ECtHR takes in relation to the arbitrariness

[220] Spijkerboer, p. 188; It should be clarified that Spijkerboer discusses the need for strategic argumentation in regard to the European case-law on migration generally. His theory is extended beyond those limits to be used for the purposes of this paper, namely the administrative detention of asylum seekers with a view to deportation.
[221] Milanovic´ uses this theoretical framework on the conflicts between International Human Rights Law and Humanitarian Law, though its application can be extended to the conflicts in interpretation between the CCPR and the ECtHR also.

assessment,[222] though since the Court merely mentions such criteria when delivering its judgments rather than stress their importance by actually applying them to the case, the importance of them actually being carried out by the member states in practice becomes watered down. Instead, the Court simply mentions the importance of ensuring the freedom from arbitrary detention, while simultaneously deciding the case based on the principle of margin of appreciation.

Thus, in such a situation where the priorities of the two bodies do not correlate to one another, the approach used by Spijkerboer becomes useful. According to Spijkerboer's theory, a critical lawyer uses the technical nature of legal discourse to provide the Courts with alternative perspectives which they can use in their legal reasoning. Thus, in this scenario, the approach taken by the CCPR in relation to the necessity and proportionality tests could be the point of departure in the line of reasoning before the Strasbourg Court. Providing the Court with reason to apply these tests in a stringent manner in the cases which reach the ECtHR could with time lead to a change in the Court's path regarding the administrative detention of asylum seekers. This line of thinking was already present at the time of the *Saadi* judgment, when Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä delivered their joint partly dissenting opinion.[223]

### iii. *Saadi v the UK*, Dissenting Opinion

The dissenting judgment received considerable amounts of credit on account of its progressive nature,[224] noting the vulnerable nature in which asylum seekers arrive to the EU, only to be placed in a further vulnerable position as a detainee because they are an "illegal immigrant". Relying on Art. 12 of the

[222] See Chapter 3.*vi*.
[223] The dissenting judges disagree with the segment of the judgment regarding Art. 5(1), i.e. the majority's opinion regarding the detention of asylum seekers and the first limb of the provision. It begins on the 31st page of the document.
[224] See for instance: Xavier-Baptiste Ruedin, *Aliens' and Asylum Seekers' Detention under Article 5(1)(f) ECHR,* 20 Swiss. Rev. Int'l & Eur. L. 483 (2010).

ICCPR,[225] and jurisprudence of the CCPR,[226] the dissenting judges remind the majority of the fact that asylum seekers who have sought asylum in a member state are *ipso facto* lawfully within that state's territory. The dissenters also stress that the majority take a gravely dangerous stance when claiming that detention is in the interests of the detainee – not just regarding asylum seekers, but also other cases of deprivation of liberty:

**"In no circumstances can the end justify the means; no person, no human being may be used as a means towards an end."[227]**

Being ultimately afraid of the consequence which this judgment could bring about, the dissenting judges stress the legal uncertainty which follows when asylum seekers may be detained purely due to bureaucratic and administrative purposes. This is because there is a real risk that national authorities find themselves being free to detain an asylum seeker at any time during the consideration of their case without any other reason than administrative ease. Thus, they mean, the asylum seeker "becomes an object rather than a subject of the law".[228] The dissenting opinion also points to the fact that the majority have derailed the course of sub-paragraph (f) by accepting a period of detention which it does not generally approve in other cases of deprivation of liberty under Art. 5 ECHR. Embracing this approach in regard to the detention of asylum seekers, they believe, entails the risk that Art. 5 and therefore the scrutiny of the ECtHR of this provision will be substantially weakened.[229]

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[225] Liberty of movement.
[226] *Celepi v Sweden,* CCPR/C/51/D/456/1991, also mentioned in the majority's judgment in *Saadi*, para 32.
[227] *Saadi*, dissenting opinion, p. 33.
[228] *Saadi*, dissenting opinion, p. 34.
[229] The opinion does, however, clarify that detention *prior to deportation* could allow States greater leeway than other cases regarding Art. 5, justifying deprivation of liberty more liberally. This is, however, not expanded further by the dissenters and their exact position on this question is therefore unclear. It could be argued that if the dissenters were to provide this opinion once more today, the criteria on which they base general administrative detention upon would be extended to administrative detention prior to deportation also.

The judges also observe that the elements which encompass arbitrariness, which makes detainment unlawful, are the notions of necessity and proportionality. These principles oblige the State to provide "relevant and sufficient grounds" for depriving an individual of their liberty and reveal whether other less coercive measures were used first, or at least considered. If yes, the State is again under the burden of proof to show why those less stringent measures are insufficient with the specificity of the case at hand. Thus, the dissenting opinion disvalues the administrative nature of detention most often used in asylum cases, and question why the majority did not consider alternative methods in their opinion. The minority, upon mentioning other instruments of international human rights to which EU member states must be loyal, state that the ECHR now disappointingly provides a lower level of protection regarding the right to liberty than what is the norm in other "organizations".[230]

### iv. Strategic Argumentation

Thus, the approach suggested by Spijkerboer arguably already has a basis in litigation before the ECtHR. The difficulty for the critical lawyer is arguably then to identify the inconsistency of the Court's reasoning in their strategic argumentation and reconstruct a more coherent approach.[231] Doing this requires exposing the choices made by judges which do not find their bases in legal necessity,[232] i.e. that there indeed are alternative choices which could be made. One might argue that the Strasbourg Court has remained within the same line of reasoning regarding the administrative detention of asylum seekers basically since the question reached its Chambers, and therefore it is

[230] *Saadi*, dissenting opinion, p. 35-36; By organizations they refer to: the EU – Art. 18 of the EU Charter which recognizes the right to asylum of refugees in adherence with the Geneva Convention, in addition to the Council of Europe – Committee of Ministers Recommendation (2003)5 of 16 April 2003, which explicitly forbids arbitrary detention and maintains that alternative and non-custodial measures should prevail. Also, the ICCPR (CCPR) is mentioned; this will be explored below.
[231] Spijkerboer, p. 190; Here, "inconsistency" refers to the dilemma of the sovereignty of the state to do as it deems best versus the right of the asylum seeker to liberty and freedom from arbitrary detention, see Chapter 3.VI.
[232] Spijkerboer, p. 204.

unrealistic to pursue this theory.[233] The answer here is that it is nevertheless possible to construct an alternative argument which is equally as credible and sound as standing case-law.[234]

This is because, as was the case in the *Saadi* dissenting opinion, if there is a rivalling path which is possible for the Court to embark upon, it can be challenged for not taking that option.[235] Here, Spijkerboer suggests that this alternative path then usually uses a less mainstream and more confrontational tactic. This new path will be equally as convincing as the former path from a legal perspective, which makes the difference between them something outside of law – rather, it will be politics, morality and ethics which will set them apart. One counter-argument here might be that this line of reasoning is characterized as ideology rather than law, thus dismissing its relevance since it has been "contaminated by substantive ideological notions".[236] However, since law does not exist in a vacuum, legal reasoning is always linked to ideology – law and ideologies have mutual influence upon each other.[237]

The cross-reference to ideologies - politics, morality and ethics – is where the necessity and proportionality tests expanded by the CCPR enter the discussion. These tests allow for the expansion of the question from merely the legal (is it lawful according to the state's national law?) to an assessment of whether it is a genuinely reasonable measure taken by the authorities (is it necessary in the current circumstances and is it proportionate to the aims of the detention, balanced with the effects it has on the individual?).[238]

A foundation was laid for fostering strategic argumentation before the Strasbourg Court in the *Saadi* joint partly dissenting opinion. The dissenting

[233] Although it is recognized that the Court in fact *has* changed its position regarding a number of issues, e.g. trans equality, see the Grand Chamber decision of *Christine Goodwin v the UK* (11 July 2002).
[234] Spijkerboer, p. 207.
[235] Spijkerboer, p. 207.
[236] Spijkerboer, p. 215.
[237] Spijkerboer, p. 216.
[238] This consideration of administrative detention of asylum seekers is that directly applied by the CCPR, see *A. v Australia*, Chapter 4.*iii*.

judges pointed to the fact that the provisions of the Convention do not apply in a vacuum and must be read in conjunction with other international fundamental rights protection instruments.[239] In accordance with this, they observe that Article 9 ICCPR has been interpreted by the CCPR to mean that detention must not simply be unlawful "but must also not have been imposed on grounds of administrative expediency".[240] In other words, the interpretation of Art. 5 (1) (f) must require member states to apply the necessity and proportionality tests to cases concerning administrative detention of asylum seekers, and thus obligate the relevant authorities to make sure that these requirements are satisfied. Although this is merely provided in the dissenting opinion, it shows that the foundation for taking the approach of strategic argumentation is already present as a seed which needs watering.

What about strategic argumentation before the Courts on the national level? Sweden was discussed as a case study in the second chapter of this paper, where it was demonstrated that the necessity and proportionality tests already are present in Swedish legislation and case-law.[241] Thus, the foundation for being able to strategically litigate is already present on the domestic level – what could be added to this is more reliance on the CCPR's application of these tests rather than on the ECtHR's interpretation. Using the same line of reasoning as discussed above, by doing this, one is providing the domestic Court with an alternative approach to interpreting the right to liberty of asylum seekers regarding administrative detention. Spijkerboer frames this as the tactic of acting as "impersonators of the law",[242] providing arguments for why our approach is the correct application of the law rather than the interpretation which benefits state sovereignty over the right to liberty of asylum seekers.

[239] *Saadi v the UK*, Dissenting Opinion, p. 34.
[240] *Saadi v the UK*, Dissenting Opinion, p. 35, for this they rely on *Van Alphen v the Netherlands*, Communication No. 305/1988, UN Doc. CCPR/C/39/D/305/1988 (1990).
[241] See Chapter 2.*ii* and 2.*iii*.
[242] Spijkerboer, p. 217.

Spijkerboer's approach, namely strategic argumentation was discussed above. There are two scenarios in which the application of Spijkerboer's theory on this issue can play out: the first scenario is that it does not succeed, for a variety of reasons. The second scenario is that there is a realistic prospect of it succeeding, though it might take some time and may therefore need some kind of "push". Accordingly, the second step to proceed with regarding the occurrence of both of these scenarios is discussed below, namely a political solution to a legal problem.

### v. Political Solutions

What is striking when one reads the judgments of the ECtHR regarding the administrative detention of asylum seekers, is how the Court repeats the following at the start of its opinions, much like a mantra:

*"Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the convention, to control the entry, residence and expulsion of aliens"*.[243]

This is not according to established human rights norms,[244] where the individual right (to liberty) is prioritized though may be infringed by states under particular circumstances. Instead, this mantra dictates that the sovereign right of states is prioritized and may be infringed by individuals under certain circumstances.[245] This contrast in position regarding the rights of individuals vs the rights of the state can be seen in the comparison between the ECtHR and the CCPR. The interpretations by these bodies of the relevant provisions in the ECHR and ICCPR regarding the right to liberty, in addition to their application of these interpretations in their respective case-laws and

[243] This is taken from Spijkerboer, p. 214, who states that this is something like a political and legal axiom, nothing expressly stated within international law, though well-established regardless. He questions this, however, as it is not a self-evident rule – nevertheless, the Strasbourg Court does not hesitate to argue its dominance in its judgments; This can be corroborated by reading any of the judgments used and cited in Chapter 3.*v*.
[244] As applied by for instance the CCPR, as seen in Chapter 4.
[245] Spijkerboer, p. 214.

communications oppose one another in what they prioritize. How can this be remedied?

Milanovic´ provides an argument for political solutions to such interpretations which are fundamentally incompatible, where the values of the two bodies do not coincide and thus provide differing levels of protections to, in this scenario, asylum seekers. When it is no longer possible to make stringent and credible legal argumentations, political agendas can be the next step. When the critical lawyer's craft and tools fail and no legal solutions are available, Milanovic´ argues that the scenario can be solved "only in the manner in which they were created – through the political process".[246] How can this be done regarding the current scenario concerning the administrative detention of asylum seekers with a view to deportation? The central problem here is that the two bodies – the ECtHR and the CCPR – provide differing levels of protection of the rights of asylum seekers to liberty due to their divergent interpretations of this right when it comes to administrative detention.[247] In light of this problem, where the instruments concerned (ECHR and ICCPR) are formally of equal stature and their respective bodies interpret the right to liberty of asylum seekers in such a way that one provides a higher level of protection (CCPR) than the other (ECtHR), Milanovic's argument of only a political solution being viable enters the discussion.[248]

Thus, the question no longer concerns legal reasoning, regardless of whether it is strategic or not; the critical lawyer argumenting before the Court could steer the pathway of the decision-making to a political one by highlighting the possibilities of this choice. It is recognized here that Milanovic´ dismisses the possibility of the political agenda being taken by a court. However, this question could arguably be an exception to the rule, for the following reason: in the same way that the Swedish Migration Court relies upon ECtHR rulings

[246] Milanovic´, p. 462.
[247] Therefore, the arguments by Milanovic´ concerning norm conflict resolution and avoidance becomes a moot point as the two regimes do not have such conflicts, rather the characteristic is that they have differing interpretations and therefore provide differing levels of protection to asylum seekers concerning their right to liberty.
[248] Milanovic´, p. 470.

and interpretations,[249] there could be a possibility of them relying upon CCPR communications and interpretations. Thus, by taking the approach which Milanovic´ recommends, the Court will repeatedly be subject to the political choice argument, arguably through strategic reasoning by critical lawyers as suggested by Spijkerboer. The political option provided to the Courts to opt for the interpretation provided by the CCPR would not be legally warranted,[250] as there is no obvious legal hierarchy between the ECHR and the ICCPR. Of course, the fact that the ECHR is a part of Swedish law plays a role in this, as one could argue that the Convention therefore has a greater impact on the interpretation of the Swedish Courts of the right to liberty compared to the Covenant. The reality is, however, that Sweden owes an obligation toward the ICCPR and the CCPR to uphold a certain standard of protection of civil and political rights within its borders. Hence, it would be a political choice which ultimately could lead to a higher level of protection offered to asylum seekers within Sweden regarding their right to liberty in administrative detainment instances. Considering that Milanovic´ is correct in that courts rarely, if ever, are capable of making a political choice such as this, it is submitted that the recourse to politics can be carried out by any authority which has the power to do so – the legislator, the political system of the state concerned, the institutions basing the foundation of their work upon the CCPR's General Comment No. 35 etc. The main objective is to give power and priority to the norm which provides the highest level of protection to asylum seekers' right to liberty, namely the CCPR. The possibility of the national Courts of Sweden, for instance, to make such a choice by relying on the CCPR's communications is however not dismissed at this stage.

Taking the above into consideration, the credibility of *only* using progressive interpretation á la Spijkerboer in regard to the ECtHR may be questioned. It does not feel impossible to see a light at the end of the tunnel with this approach to the issue, as the Court indeed *has* historically changed its position

[249] See Chapter 2.ii, for instance MIG 2014:15.
[250] Milanovic´, p. 473.

in a number of other difficultly reconciled matters.[251] However, perhaps the best way to ensure progress would be to use the approach suggested by Spijkerboer in unison with the political strategy suggested by Milanovic´. By offering the Strasbourg Court an alternative perspective on the interpretation of the issue of administrative detention of asylum seekers with a view to deportation while simultaneously pursuing a political path, the position of the ECtHR may move more towards that of the CCPR.

### vi. Concluding Remarks

Thus, by extending the application of the theories used by Spijkerboer and Milanovic´ to the current scenario, it could hypothetically provide a 'solution' to the problem of conflicting interpretations regarding the protection offered to asylum seekers concerning their right to liberty. Issues such as differing levels of protection being offered to a vulnerable group is something which is intrinsic to the international legal system, "due to its decentralized, non-hierarchical nature, and the consensual character of its law-making processes".[252] This problem is embodied partly in the fact that member states of the CoE generally have adopted a 'blanket policy' regarding the administrative detention of asylum seekers. If a measure is one of last resort, it entails being in a situation of necessity which justifies taking that measure *as a last resort*; if an action becomes ordinary, one finds oneself outside of this definition. This is the situation which for instance Sweden has found itself in; As was highlighted in chapter two, the CAT and the CCPR have recently published reports and recommended that Sweden looks over its practices regarding, *inter alia*, administrative detention of asylum seekers. This points to a real problem which should be addressed, and this chapter – and this paper overall – has attempted at providing a method for being able to address the problem from a novel perspective.

[251] See supra, n233.
[252] Milanovic´, p. 483.

# Conclusion

The act of detaining asylum seekers has increased in Europe as a response to the wave of refugees seeking protection within its borders. Detainment is resorted to for a variety of reasons, and this paper focuses on "administrative detention with a view to deportation", which is the type resorted to most frequently in Sweden. Thus, the research question which this paper aimed to answer was: *Does Sweden satisfy its human rights obligations in its practice regarding the administrative detention of asylum seekers?*

In answering this question, the first step was to assess Sweden's practice concerning the administrative detainment of asylum seekers. This was done by reviewing the domestic Swedish laws – which includes the ECHR – followed by the case-law of the Migration Court and the Migration court of Appeal. It was then established that while the law prohibits arbitrary detention, it is worded in a sufficiently ambiguous manner in order to allow an interpretation which in its foundation is not as restrictive as it perhaps should be when it comes to administrative detention. This was clarified in the assessment of the domestic case-law where the Migration Courts several times had the chance to insist upon a necessity and proportionality test in order to avoid arbitrary detainment but did not seize the opportunity. They instead chose, more often than not, to rely on the fact that there are reasons to believe that the alien will abscond or "keep in hiding" which then justifies the detainment during the time that deportation arrangements are being made.

The outstanding case where the Court of Appeal applied a stringent necessity and proportionality test was when the alien had been detained for five years and eight months; there, the Court emphasized that the deportation must be able to be carried out, and where this was not the case, the detention would not be justified. It was observed, however, that the reason for the Court's determined stance was presumably mostly due to the length of time which the alien spent detained with a view to deportation. Thus, this level of scrutiny is rarely seen in the judgments by the Courts concerning cases which fall within

the 12-month limit of Swedish law for an alien to spend detained. Furthermore, an evaluation of whether non-custodial measures would suffice rather than detaining the alien were disappointingly absent in the case-law of the Swedish Migration Courts.

The assessment of domestic court practice was followed by an excursion into the institutional practice concerning administrative detention of asylum seekers in Sweden – i.e. an evaluation of the decisions to detain by the Migration Agency (primary) and the Police (subsidiary) for administrative reasons. The findings in this section highlighted the following foundational problems in the institutional practice regarding administrative detention: 1) the authorities rarely, if ever, provide argumentation for why alternative, non-custodial measures such as reporting duties and surrendering documents is not used prior to resorting to administrative detention; 2) The decisions to detain are not specific to the alien and the circumstances of the case. Rather, a general and over-arching reason such as the likelihood of absconding or staying in hiding is provided in addition to the citation of the relevant legal provisions; 3) the five detention facilities of Sweden are filled to their capacities and many asylum seekers are detained in prisons. Strictly speaking, these practices are not in line with Swedish *law*. However, the domestic court practice ultimately reflected the same approach i.e. the *amount of time* spent in detention was focused on rather than if the detention was necessary in the first place; the necessity and proportionality tests were not applied to each case delved with by the Migration Courts, and the question of whether alternative methods to detention would suffice were not delved with in their decisions at all. Accordingly, this chapter began and ended with the criticisms and recommendations of the Committee Against Torture and the Human Rights Committee concerning the Swedish practice of detaining asylum seekers for administrative purposes.

The second step in answering the research question was identifying the human rights obligations of Sweden – the scope of this paper was then delimited to encompass its obligations according to the European Convention

on Human Rights and the International Covenant on Civil and Political Rights. Thus, an investigation into the position of the European Court of Human Rights was initiated. This investigation was inherently done in order to gain an understanding of a) how the Strasbourg Court interprets Article 5 (1) (f) and the limitation on the right to liberty for asylum seekers when it comes to administrative detention, and b) where the Strasbourg Court's *priorities* lie in this question. Regarding the first of these questions, it was made clear that the Court is quite permissive when it comes to the derogation from the right to liberty of asylum seekers in administrative detention cases. In regard to the second question, it was rather apparent that the Court, as it is accustomed to do, prioritises state sovereignty and the right of states to control the entry, residence and expulsion of aliens over the right of asylum seekers to be free from arbitrary detention. Comparatively, the assessment of the position of the Human Rights Committee located its priorities in this question: the human right of asylum seekers to liberty and freedom from arbitrary detention. This is because the Committee puts heavy emphasis on the need for the coherent and stringent application of the necessity and proportionality tests to each individual case. Requiring such measures ensures the reasonability and absolute necessity of the detainment, a characteristic which is not a part of the interpretation by the Strasbourg Court. Ergo, the interpretations and positions of the Strasbourg Court and the Committee are divergent in that they provide differing levels of protection asylum seekers. To phrase it differently, if a person was administratively detained and considered this detention to be arbitrary and decided to hold the state accountable, they would have a higher chance of succeeding with their claim if they brought it before the Committee rather than the Strasbourg Court.

So, is Swedish law and practice in line with the ECtHR interpretation of the ECHR? It would appear so. This paper has reached the conclusion that the interpretation carried out by the Strasbourg Court is what the Swedish Migration Courts rely their judgments upon, and they uphold the same level of safeguard of the right to liberty of asylum seekers. There is a 12-month limit for keeping an asylum seeker detained for administrative ease prior to

deportation, and it is unclear whether this time-frame would be condemned by the ECtHR or not, due to the vague position of the Court on temporal boundaries on detention. If in fact there *is* reason to condemn the 12-month limit, the ECtHR has until now adopted a liberal approach and left it wholly within the margin of appreciation of Sweden. Though when it comes to answering the question of whether Swedish law and practice is in line with the CCPR's interpretation of the ICCPR and the right to liberty, the answer would be that it does not seem so. Sweden does not live up to its HR-obligations towards ICCPR in that it a) does not apply the proportionality and necessity tests in each individual case beyond the temporal aspect of the detention, and b) alternative non-custodial measures of supervision are not considered almost at all, even though they are provided for within the institutions (in the form of reporting duties and surrendering documents). Where does this leave us?

At this point, the theoretical discussion in light of the acquired results provided some clarity regarding possible solutions. Inspiration was drawn from the works of Thomas Spijkerboer and Marko Milanovic´ in the final chapter, where the theories of strategic argumentation and political solutions were applied to the findings. Using Spijkerboer's approach of using strategic argumentation in order to further our aims of protecting the right to liberty of asylum seekers, the possibilities of promoting the interpretation and position of the Committee was evaluated. Using this method, one could influence the judgments by the Strasbourg court (but also the national Courts) and provide judges with an alternative line of reasoning which they not only *could* choose, but that they would *want* to choose. This line of thought was already present at the delivery of the *Saadi* judgment, when the dissenting judges expressed their disappointment regarding the reasoning of the majority and highlighted the fact that they could have and *should* have chosen a different path. Following on from this, Milanovic´ provides the prospect of turning our hopes to political progress. Where credible legal interpretations and reasonings are no longer an alternative, politics could provide the solution

that is needed in order to initiate a change in how the question of the administrative detention of asylum seekers is being treated.

Raising questions of legality but also reasonability, the detainment of asylum seekers for the administrative ease of the state is of great concern to the international community at the moment. As states such as Sweden continue their efforts in controlling the entry, residence and expulsion of aliens, they continue to stretch the limits of the Strasbourg Court when it comes to permitting states to take such measures. This highlights the foundational problem that the Court provides ambiguous judgments and interpretations of the provisions of the ECHR in order to provide some leeway (margin of appreciation) for its member states in what level of human rights protection they prefer upholding. In light of this, then, using the theories of Spijkerboer and Milanovic´ could provide us with tools to demand a higher standard of protection for asylum seekers, specifically in regard to the limitation on their right to liberty through administrative detention with a view to deportation. Perhaps then the routine resort to detainment will find an end and asylum seekers will no longer be arbitrarily *locked in limbo*.

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