THREE CASE STUDIES ON MIGRATION-RELATED DETENTION

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ABSTRACT

The European Union (EU) has recently adopted a series of legal and policy instruments and actions to strengthen protections from various forms of arbitrary asylum- and return-related detention. Further measures are planned, including those with potentially binding legal effects for EU Member States. Such laws and measures—intended to protect asylum seekers and other migrants from arbitrary deprivation of their liberty—involve rather abstract and ambiguous concepts that leave broad margins for legal interpretation and, consequently, a high degree of flexibility and discretionary powers to EU Member States. Therefore, the actual meaning and impact of these provisions is difficult to grasp. This research critically examines the latest jurisprudence of the Court of Justice of the European Union (CJEU or Court) on the (alleged) incidents and practices of arbitrary detention of migrants in EU Member States. It analyses how the supreme judicial authority of the EU construes the concept of 'arbitrariness' of deprivation of liberty of person and related notions, such as 'necessity' and 'proportionality', within the context of EU migration governance and the functioning Common European Asylum System. This analysis can give a preview of where the EU legislator and Court may be heading in terms of their quest for a more humane, dignified, and fair treatment in restricting migrants' liberty. It also yields some valuable insights into the ways in and extent to which the interpretations and decisions of the CJEU uphold the prohibition of arbitrary deprivation of liberty of migrants and uniform international human rights norms—including those enshrined in the EU Charter of Fundamental Rights—that EU Member States are bound by when depriving migrants of their personal liberty.

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1. Introduction

The detention of migrants—people who have violated no criminal law of an EU Member State (except perhaps a criminal law about migration control) but who are detained during their asylum application procedure or pending their return/removal from an EU Member State—is arguably one of the most controversial aspects of EU immigration and asylum law. In the EU asylum debate, too, a controversial issue is how asylum seekers are treated before a decision is made on their asylum application, particularly as regards issues like their detention. A new European migration environment has been shaped, *inter alia*, by the continued effects of flows of refugees and mass arrivals of irregular migrants at the EU's external borders. Consequently, the use of generalised immigration detention (i.e. administrative custody of asylum seekers and immigrants)[2] as a widespread control measure and its 'institutionalization' across the EU (potentially leading to arbitrary use and abuse of detention measures and derivative measures that similarly deprive migrants of their right to liberty) has become a major agenda point for European legislation in recent years.[3] In view of these latest developments in the EU return and asylum frameworks, many experts and commentators have criticised both practices that erode the exceptional nature of immigration detention and thus contravene the applicable provisions in international and EU law as well as the proposed new EU law (the EU legislative measures currently under negotiation). They are noted as not having helped strengthen the protection of the right to liberty and security of returnees and asylum seekers but rather

2 | Immigration detention in the global migration context is a non-punitive administrative measure imposed by an administrative or judicial authority to restrict the liberty of a person through confinement such that another procedure may be implemented in parallel. In the EU migration context, such a detention can be described as the confinement of an applicant for international protection by an EU Member State within a particular place, whereby the applicant is deprived of their personal liberty. Mentzelopoulou and Barlaoura, 2023, p. 2. This kind of administrative measure must be distinguished from criminal detention—the imposition of a term of imprisonment following criminal conviction of an asylum seeker/immigrant on the basis of a criminal offence, which is not the subject of this work.

3 | Angeli and Anagnostou, 2022, pp. 97–131; Imbert, 2022, pp. 63–95. For a more general discussion of this issue, see Moraru and Janku, 2021, pp. 284–307.

undermining it in several important ways.[4] These include broadening the scope of asylum detention and adding new detention grounds primarily over concerns regarding asylum seekers posing a threat or danger to national security or public order of EU Member States as well as legitimising current trends in some EU Member States towards the use of detention as a first response and emergency measure rather than a measure of last resort.[5] In the same vein, the UN Special Rapporteur on the Human Rights of Migrants observed in 2013 that 'the systematic detention of irregular migrants has come to be viewed as a legitimate tool in the context of European Union migration management'[6] and that 'the harmonization of European Union law, and in particular the passing of the Returns Directive, can be said to have institutionalized detention within the European Union as a viable tool in migration management'.[7]

These recent observations are particularly problematic given that European legal standards have established a clear presumption against the detention of migrants and refugees in particular. Everyone (including migrants) must be

4 | For example, the new Pact on Migration and Asylum further endorses provisions on the detention of migrants in asylum border procedures, return crisis management procedures, and the new border procedure for carrying out the return of rejected asylum applicants. A main feature agreed upon by EU Member States as part of the reform of EU asylum law is that more procedures may be managed in detention. In the same vein, the expanded use of border procedures may result in more people being arbitrarily detained at external borders, potentially raising concerns about the upholding of human rights standards in migrants' treatment. Similarly, the proposal for a new regulation on screening third-country nationals at the EU's external borders—aimed at clarifying and streamlining the rules on dealing with third-country nationals who are not authorised to enter or stay in the EU—leaves the determination of the situations in which the screening requires detention and the modalities thereof to national law. According to Recital 12 of this proposal, the EU Member States are 'required to apply measures pursuant to national law to prevent the persons concerned from entering the territory during the screening', which 'in individual cases may include detention'. Thus, during the screening phase, a possible use of detention is generally based on national laws of EU Member States. However, during the border procedure, the use of immigration detention is regulated by EU law. Moreover, in line with the provisions of Directive 2008/115 (the Return Directive), where an applicant who was detained during the asylum border procedure no longer has the right to remain, EU Member States are allowed to continue applying detention for the purpose of the return procedure. It is also possible to detain a person who was not detained during the asylum border procedure and is subject to a return border procedure. Likewise, under the recast Return Directive (Proposal for a regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC)2003/109 and proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund]), irregular migrants in a return border procedure would not be subject to detention as a rule but only in exceptional situations where it is necessary to prevent irregular entry during the assessment of the asylum application or there is a risk of absconding, of hampering return, or a threat to public order or national security. On a more positive note, with the recast Return Directive, a new and shorter maximum detention period for returnees would be introduced, ranging from three to six months, with a possible extension for up to 12 months. Mentzelopoulou and Barlaoura, 2023, pp. 9–10. See also Majcher, Flynn, and Grange, 2020, p. 8.
5 | European Council on Refugees and Exiles (ECRE), 2017, p. 12.
6 | United Nations, 2013.
7 | Ibid.

protected from arbitrary, disproportionate, and discriminatory deprivation of the right to liberty. Detention in the context of immigration is only permissible as an exceptional measure of last resort, which is a particularly high threshold to be satisfied in the context of ascertaining a non-arbitrary deprivation of liberty of migrants. While the use of immigration detention is generally on the rise in European countries as an integral part of their response to migration flows, the detention of persons applying for international protection raises significant questions of legality, necessity, and proportionality. Thus, arbitrary deprivation of migrants' personal liberty in the context of immigration detention may be one of the most pressing concerns of contemporary migration in Europe.

However, empirical data regarding the detention of migrants are lacking and reliable data collection on asylum detention has significant gaps and inconsistencies at the European level. The general unavailability of relevant and reliable data and the lack of systematic data collection have posed challenges to the study of migration-related detention trends in different European countries.[8] However, migration-related detention numbers have increased since the 2015 mixed migration flows to the EU. Approximately 100,000 people are detained yearly in the EU for reasons related to migration.[9] In some EU Member States, the detention of migrants has been broadly applied as an immediate tool in deterring irregular migration, countering irregular border crossings, and enforcing returns. EU Member States continue to largely resort to migration-related detention, despite calls that practices of the default use of immigration detention should be abolished and that the use of such detention, according to the law, should be exceptional, based on individual assessment, and correctly tested for its necessity and proportionality.[10] Thus, automatic detention of migrants continues to be the norm in a number of EU Member States, a situation that deviates from international law.[11] Meanwhile, allegations of ill treatment, violence, and abuse of migrants by officials in EU Member States persist.

Although EU law sets clear and unambiguous constraints to the use of border procedures and accompanying measures of detention, these constraints are not well understood and adequately implemented across all EU Member States. Moreover, there is a lack of clarity over when, for example, detention of migrants in the EU may be legally justified. There is a strange combination of certain provisions in the (recast) Reception Directive (Directive 2013/33/EU) that creates a loophole or an ambiguity in the law that allows EU Member States to legally detain asylum seekers at their borders. In particular, as shown in the joined cases of *FMS and Others* (the second case study) discussed below, under the terms of this directive an asylum seeker in a transit zone may be detained, accommodated, or both.[12] The most pertinent question that arises here concerns the blurred lines between the arbitrary detention and lawful restriction of the movement of migrants. This

8 | WHO Regional Office for Europe, 2022, p. 31.
9 | Mentzelopoulou and Barlaoura, 2023, p. 2.
10 | Ibid.
11 | United Nations, 2016.
12 | European Council on Refugees and Exiles (ECRE), 2018, p. 15.

gives rise to an apparent ambivalence, whereby some provisions of the Directive allow the use of detention of migrants in a wide range of circumstances, while pursuant to other provisions of the same directive, such a detention should only be an exceptional measure. This contradictory nature of the provisions in question constitutes a potential source of legal uncertainty and leaves a high degree of flexibility and discretion to EU Member States with regard to both the applicable legal regime as well as procedural guarantees intended to protect asylum seekers from arbitrary detention.[13] EU Member States detain, without exception, persons applying for international protection at the border or in transit zones, even though EU asylum law does not *per se* impose such an obligation on them.[14] A precise and accessible legal framework governing the use of detention under human rights law and refugee law is also clearly lacking. Furthermore, national laws and regulations of EU Member States are often insufficient, leaving too much discretion to immigration officials, while their detention policies are not always transparent. Consequently, migrants are vulnerable to abuse and arbitrariness as far as their detention is concerned.

Rather than at the time of their adoption, the actual impact and meaning of abstract and vague legal provisions often becomes better understood once courts of law have begun to interpret and clarify the content of such norms and define the scope and limits of their application in concrete instances. This is particularly true of the EU directives that have been adopted to enhance the protection of migrants from arbitrary detention and the legislative measures taken by EU Member States to transpose and implement them. EU asylum and immigration legislation tends to be based on certain complex concepts and terms that EU Member States are required to adequately transpose and implement through the adoption and application of appropriate legislative, policy, and other measures. EU law relating to the detention of migrants involves or refers to a number of highly abstract concepts and principles, such as 'arbitrariness', 'necessity', and 'proportionality'. Indeed, the language and scope of EU asylum and immigration *acquis* pertaining to the deprivation of liberty of a person for reasons related to their migratory status is of such a general and imprecise nature that it leaves many questions relating to the detention of migrants unanswered.

These complexities and ambiguities in wording and content of asylum and immigration legislation may leave bewildered even the most advanced and experienced legal expert who is well versed in various aspects and issues of immigration detention, not to mention a lay person. Such abstract legal definitions and principles leave a considerable margin of interpretation to both immigration and monitoring authorities as well as judges who are to apply them, thus exposing asylum seekers and other migrants to great uncertainty. For the same reasons, many of the state representatives and politicians voting in favour of such laws may not fully understand the content, meaning, and possible impacts of the measures they are adopting. While it can certainly be a gratifying feeling for a state representative or a politician to have stood up against the various incidents of arbitrary

13 | Ibid.
14 | Ibid.

detention of migrants, the practical consequences of such a political action might, if examined more closely, turn out to be far less appreciated. Because of the lack of legal clarity, the legal and factual implications of the EU law regulating migration-related detention are difficult to predict.

The tension between the migrants' right to liberty and migration control prerogatives has been mediated both before the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU or Court). Jurisprudence of the two most important judicial authorities in Europe has been seminal in shaping standards on the control of migration-related detention in European countries. The CJEU has thus become a key part of the supranational human rights adjudication over most of the immigration detention by EU Member States. However, the CJEU has failed to clarify existing ambiguity on the legality of detention of asylum seekers in light of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and EU Charter of Fundamental Rights.

The present research examined a number of recent cases where asylum and migration laws regarding arbitrary detention of migrants have been used by the court at the supranational level. The author aimed to elucidate how CJEU judges interpret the concept of 'arbitrariness' of deprivation of liberty of persons and related notions of 'necessity' and 'proportionality' in the context of EU migration governance and the functioning Common European Asylum System (CEAS). The author also aimed to shed light on how these interpretations seem to depart from more traditional conceptions of lawfulness, as well as elements guarding against arbitrariness, including appropriateness (reasonableness), justice, and predictability. To achieve this goal, the author focused on the legal regimes regulating—albeit under different legal bases—the detention of irregular migrants and asylum seekers, given the links between these two policies and increasing use of generalised deprivation of liberty policies when it comes to these two categories of migrants. Adopting a critical approach and seeking to distil common trends and highlight exceptional approaches and particularities, the author also commented on the impact of the Court's decisions and legal interpretations on the EU instruments concerned.

2. Grounds for detention and arbitrary deprivation of liberty: *I. L. v. Politsei- ja Piirivalveamet*

2.1. Facts of the case

The first recent case is the *I. L.* Judgment of the CJEU,[15] which builds on previously developed jurisprudence of the Court based on preliminary ruling procedures under Article 267 of the Treaty on the Functioning of the European Union

15 | *I. L. v Politsei- ja Piirivalveamet*, Case C-241/21, Court of Justice of the European Union, Judgment of the Court (Second Chamber) of 6 October 2022, ECLI:EU:C:2022:753.

(TFEU). It is particularly extensive as regards the detention of irregular migrants (as opposed to the relatively modest Luxembourg case law on the detention of asylum seekers).[16]

The facts of the case are as follows. I. L. is a Moldovan national and a resident in Estonia on the basis of a visa exemption. The Estonian Police and Border Guard Board (Politsei- ja Piirivalveamet, PPA) prematurely terminated his stay in Estonian territory and ordered his detention at the Estonian district court, justifying this decision by the presence of a 'risk of absconding' within the meaning of Paragraph 15(2)(1) of the Estonian Law on forced departure and prohibition on entry (VSS). The PPA ordered I. L. to leave Estonian territory on the grounds that he was residing there illegally. The PPA also found reasons to believe, in the existing circumstances, that I. L. might seek to evade removal, despite his promise to leave the country voluntarily and his request for an order for voluntary departure. Upon the application lodged by the PPA, the administrative court in Tallinn issued an order authorising I. L.'s placement in a detention centre until the date of his removal. This order was subsequently reviewed and confirmed by the Court of Appeal in Tallin. In the meantime, I. L. was removed to Moldova. He then appealed to the Estonian Supreme Court to have his detention declared unlawful and the order of the Court of Appeal set aside. I. L. stated that he would be entitled to bring an action for damages against the PPA if the Supreme Court ruled that his detention was unlawful.

The Estonian Supreme Court referring the case to the CJEU for a preliminary ruling stated that the dispute in the main proceedings relates solely to the question of whether I. L.'s detention was authorised. Disagreeing with the PPA's assessment, the referring court considered that I. L.'s detention could not be ordered on the basis of a 'risk of absconding' within the meaning of the relevant provisions of the VSS and that none of the situations listed in that law—the purpose of which is to define the concept of 'risk of absconding'—matched the circumstances of the main proceedings. The decision sentencing I. L. became final only after the decision of the administrative court to authorise his detention. Such a detention, according to the referring court, could not be based on Paragraphs 15(2)(2) and (3) of the VSS, which refer, respectively, to a failure to cooperate and the absence of the necessary documents for the return journey. Therefore, the Estonian Supreme Court

16 | A recent example of the Court's decision on detention of the applicants for international protection is *European Commission v. Hungary* (Reception of applicants for international protection), Case C-808/18, Court of justice of the European Union, Judgment of the Court (Grand Chamber) of 17 December 2020, ECLI: EU:C:2020:1029. Previous cases concerning the detention of asylum seekers include the following: *J. N. v. Staatssecretaris van Veiligheid en Justitie*, Case C-601/15 PPU, Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 15 February 2016, ECLI:EU:C:2016:84; *K. v. Staatssecretaris van Veiligheid en Justitie*, Case C-18/16, Court of Justice of the European Union, Judgment of the Court (Fourth Chamber) of 14 September 2017, ECLI:EU:C:2017:680; *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor and Others*, Case C-528/15, Court of Justice of the European Union, Judgment of the Court (Second Chamber) of 15 March 2017, ECLI:EU:C:2017:213; *Mohammad Khir Amayry v. Migrationsverket*, Case C-60/16, Court of Justice of the European Union, Judgment of the Court (Third Chamber) of 13 September 2017, ECLI:EU:C:2017:675.

found that the lawfulness/non-arbitrariness of I. L.'s detention was dependent on whether the list of detention grounds in Paragraph 15(2) of the VSS transposing the Return Directive (Directive 2008/115) was to be considered exhaustive: risk of absconding, failure to cooperate, or absence of the necessary documents for the journey.

If interpreting the three grounds for pre-removal/pre-return detention set out in Paragraph 15(2) of the VSS as being exhaustive, then the referring court regarded that none of those grounds would be applicable to I. L., thereby rendering his detention unlawful. However, if those grounds were to be interpreted, by way of teleological interpretation,[17] as being non-exhaustive, they could instead be seen as being only illustrative of a general criterion—the risk that the effective enforcement of the removal would be compromised. The referring court considered that the circumstances of the main proceedings could entail such a risk, in so far as there was a genuine risk that I. L. would seek to resolve the conflict between him and his former partner and, while doing so, he would commit another criminal offence. Therefore, if such an incident was to happen, the prosecution, establishment, and punishment of a new offence by a court decision and, where appropriate, the enforcement of the sentence imposed, would result in the enforcement of I. L.'s removal being postponed indefinitely. This would frustrate the underlying purpose of the Return Directive, which seeks to establish an effective removal and repatriation policy that fully respects the fundamental rights and dignity of irregular migrants. To achieve this goal, the Return Directive imposes the obligation on EU Member States to take all necessary measures to ensure the return of illegally staying third-country nationals.[18]

Against this backdrop, the Estonian Supreme Court questioned the compatibility of the latter interpretation (that is, the list of the three pre-removal/pre-return detention grounds in Estonian law not being exhaustive) with Article 15(1) of Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals (the Return Directive). In particular, the referring court was interested in whether Article 15(1) of the Return Directive may be interpreted as authorising detention on the basis of the general criterion identified above—the risk that the effective enforcement of the removal would be compromised. It was also concerned over whether the correct interpretation of this provision requires that one of the two grounds explicitly set out in that provision needs to be satisfied. In such circumstances, the Estonian Supreme Court referred the case to the CJEU for a preliminary ruling, asking whether under the Return Directive (Directive 2008/115) EU Member States may detain a third-country national who, while at liberty prior to removal, presents a risk of committing a criminal offence the establishment and punishment of which

17 | Teleological interpretation may be defined as the method of interpretation used by courts when they interpret the purpose, values, legal, social, and economic goals of legislative provisions.

18 | See also *M and others v. Staatssecretaris van Justitie en Veiligheid*, Case C-673/19, Court of Justice of the European Union, Judgment of the Court (Fifth Chamber) of 24 February 2021, ECLI:EU:C:2021:127, para. 28.

is likely to considerably hamper the effective enforcement of their return/removal process.

2.2. Court's judgment

The CJEU ruled in I. L.'s favour, stating that any deprivation of liberty of a third-country national for the purposes of their removal procedure is subject to compliance with strict safeguards, namely, the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness.[19] According to the CJEU, a general criterion based on the risk that the effective enforcement of the removal would be compromised does not satisfy these requirements of clarity, predictability, and, in particular, protection against arbitrariness. Regarding the legal basis for a limitation on the right to liberty in the form of detention, the CJEU took the view that the individual discretion of the authorities concerned needs to be exercised on the basis of and within certain predetermined limits/criteria. Essentially, these limits/criteria need to be clearly defined by a legislative act that is binding and foreseeable in its application, to help the relevant authorities avoid any danger of arbitrariness. The safeguards relating to liberty of a person, such as those enshrined in both Article 6 of the EU Charter of Fundamental Rights and Article 5 of the ECHR, serve precisely the objective of protection of the individual against the competent authorities' arbitrariness in authorising detention measures. In other words, the execution of a measure depriving a person of liberty needs to be consistent with the objective of protecting the individual (in our case, the irregular migrant) from authorities' arbitrariness, which requires, in particular, that there is no element whatsoever of bad faith or deception on the part of the decision-making authority.[20] Therefore, the CJEU held,

> By reason of its lack of precision, in particular as regards the determination of the factors to be taken into account by the competent national authorities for the purposes of assessing the existence of the risk on which it is based, such a criterion does not enable the persons concerned to foresee, with the necessary degree of certainty, in what circumstances they might be placed in detention. For the same reasons, such a criterion does not offer those persons adequate protection against arbitrariness.[21]

In essence, fundamental rights, such as the right to personal liberty, are individual rights calling for an autonomous individual assessment. They can be complemented but not replaced by a general assessment. Only where, in the light of an assessment of each specific situation, the enforcement of the removal decision risks being compromised because of the conduct of the person concerned (trying to abscond, non-cooperation with competent authorities) could a Member State deprive that person of their liberty and detain them, whereby such a detention

19 | *I. L. v. Politsei- ja Piirivalveamet*, 2022, ECLI:EU:C:2022:753, para. 50.
20 | *I. L. v. Politsei- ja Piirivalveamet*, 2022, ECLI:EU:C:2022:753, para. 49.
21 | *I. L. v. Politsei- ja Piirivalveamet*, 2022, ECLI:EU:C:2022:753, para. 54.

decision must be based on objective criteria.[22] Thus, although detention decisions should be adopted on a case-by-case basis in accordance with the conduct of the person concerned, they should nevertheless be based on certain objective criteria.[23] Moreover, detention of an illegally staying third-country national for removal purposes (i.e., to ensure the effective return procedure in accordance with the Return Directive) must not pursue any punitive purpose.[24] While finding that the two grounds for detention of a third-country national as specified in Article 15(1) of the Return Directive, based on the presence of a risk of absconding and on the fact that the person concerned avoids or hinders the preparation of the return or removal procedure, are not exhaustive (meaning that Member States may provide for other specific grounds for detention, in addition to the two grounds explicitly set out in that provision), the CJEU concluded that Member States are not permitted to detain an illegally staying third-country national solely on the basis of a general criterion based on the risk that the effective enforcement of the removal would be compromised. For a Member State to be able to authorize a detention, one of the specific grounds for detention must be provided and clearly defined by its national legislation implementing that provision of the Return Directive in its domestic law.[25] Where a Member State provides in its national law grounds for detention additional to those set out in the Return Directive, these grounds must comply with the Return Directive itself as well as the EU Charter of Fundamental Rights and ECHR.

This analysis of the scope of Article 15(1) of the Return Directive is consistent with the Court's case law on the interpretation of the first sentence of Article 8(3) of Directive 2013/33/EU. This lays down standards for the reception of applicants for international protection, according to which each of the grounds that may justify the detention of an applicant for international protection, listed exhaustively in that provision, meets a specific need and is self-standing.[26] The same is also true of Articles 28(1) and (2) of Regulation (EU) No 604/2013. These establish the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (the Dublin III Regulation), which provides for a single ground for detention—the significant risk of absconding by the person concerned.[27] EU Member States are free to adopt additional grounds for

22 | *WM v. Stadt Frankfurt am Main*, Case C-18/19, Court of Justice of the European Union, Judgment of the Court (First Chamber) of 2 July 2020, ECLI:EU:C:2020:511, para. 38.
23 | See also *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, Joined Cases C-924/19 PPU and C-925/19 PPU, Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 14 May 2020, ECLI:EU:C:2020:367, para. 274 and the case law cited.
24 | *I. L. v. Politsei- ja Piirivalveamet*, 2022, ECLI:EU:C:2022:753, paras. 31–32.
25 | *I. L. v. Politsei- ja Piirivalveamet*, 2022, ECLI:EU:C:2022:753, para. 55.
26 | See *European Commission v. Hungary*, 2020, ECLI: EU:C:2020:1029, para. 168 and the case law cited.
27 | See *Mohammad Khir Amayry v. Migrationsverket*, 2017, ECLI: EU:C:2017:675, para. 25. In this judgment, the CJEU noted that a Member State may not detain a person to secure transfer procedures for the sole reason that that person is subject to the procedure established by the Dublin III Regulation.

detention other than those referred to in Article 15(1) of the Return Directive and to define the criteria for applying them, provided that the objectives pursued by that directive are met. They may thus supplement the provisions of Article 15(1) of the Return Directive by providing for other grounds for detention precisely defined by law, based on objective, specific, actual, and current elements. This requires the Member States to set out, for example, the criteria that may indicate the existence of a risk of absconding and qualify under national legislation certain objective circumstances as constituting a rebuttable presumption. In this regard, as the CJEU observed, the possibility of detaining a person on the grounds of public order and public safety cannot be based on the Return Directive.[28]

When making choices regarding the grounds for detention, EU Member States should follow several principles, given that the right of an individual to liberty is at stake in such decisions. First, recital 16 of the Return Directive indicates the intention of the EU legislature for the use of detention to be strictly limited; recourse to measures less coercive than detention should be made by both legislators and immigration authorities in the Member States. In this context, the CJEU held the following in its previous judgments.

> The order in which the stages of the return procedure established by Directive 2008/115 are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility; the principle of proportionality must be observed throughout those stages.[29]

The CJEU also stressed that the use of detention, as an exceptional measure, for the purposes of removal should be limited and subject to the principle of proportionality, as provided for in recital 16 of the Return Directive. Any detention covered by this directive and used by a Member State must both strictly comply with the principle of proportionality as to the means used and objectives pursued as well as observe the fundamental rights of the third-country nationals concerned. An implication is as follows:

| The addition of a further ground of detention by a Member State cannot, under any circumstances, cover a situation in which the application of less coercive

28 | *Said Shamilovich Kadzoev,* Case C-357/09 PPU, Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 30 November 2009, ECR 2009 I-11189, para. 70. This observation of the CJEU to exclude such grounds was formulated in general terms. It is based on the strict limitation of having recourse to the deprivation of individual liberty, in line with other provisions of the Return Directive that provide for grounds based on public policy reasons, unlike Article 15(1) of that directive.

29 | *Hassen El Dridi, alias Soufi Karim*, Case C-61/11 PPU, Court of Justice of the European Union, Judgment of the Court (First Chamber) of 28 April 2011, ECR 2011 I-03015, para. 41; *European Commission v. Hungary*, 2020, ECLI: EU:C:2020:1029, para. 248 and the case law cited.

measures, in particular those which respect the fundamental rights of the persons concerned, is sufficient to guarantee the effectiveness of the return procedure.[30]

By the same token, the CJEU explained that authorising the detention of a third-country national who is the subject of return proceedings, to prepare for their return and/or carry out their removal pursuant to Article 15(1) of the Return Directive, constitutes a serious interference with the fundamental right to liberty of a person enshrined in Article 6 of the EU Charter of Fundamental Rights. Furthermore, under Article 52(1) of the EU Charter of Fundamental Rights, any limitation on the exercise of that right must be provided for by law and must respect the essence of that right and be subject to the principle of proportionality. Strictly regulated detention to ensure observance of the fundamental rights of the third-country nationals concerned serves as a constant reminder in the Court's case law on the return procedure for third-country nationals.[31]

2.3. On the Court's ruling

The above ruling of the CJEU elaborates on critical issues concerning the reasons for and lawfulness/non-arbitrariness of detaining irregular migrants in return procedures. As such, it can be hailed as a significant jurisprudential step forward in reinforcing protection against arbitrary migration-related detention in EU Member States. A problem with the Return Directive is that it lacks precision regarding the limits within which the Member States may add grounds for detention to those set out in its Article 15(1), or even amend them. Adopting a teleological approach in its interpretation of the provisions in question (in light of the purpose of the Return Directive to achieve the result pursued by that directive), the CJEU focused on the principles of proportionality and legal certainty rather than on the effectiveness of the return procedure. Where an order to detain is issued, it must be based on sufficiently precise and objective grounds, established and clearly defined in a binding legal provision contained in domestic law, which must also be sufficiently predictable in its application, to prevent any arbitrary deprivation of liberty.[32] Accordingly, EU Member States must define precisely the grounds that justify detention for the purposes of return/removal, whether or not they are provided for in the Return Directive. On the question of arbitrariness of detention in the immigration context, the message of the CJEU is clear: it is not in line with the principle of legal certainty to accept that the detention of an illegally staying third-country national can be decided on the basis of imprecise grounds, not based on objective, pre-established criteria set out in a binding legal act in respect of which their application is foreseeable. In other words, adding a new ground for

30 | *I. L. v. Politsei- ja Piirivalveamet*, 2022, ECLI:EU:C:2022:753, para. 43.
31 | See, in particular, *Hassen El Dridi, alias Soufi Karim*, 2011, ECR 2011 I-03015, para. 42; *Bashir Mohamed Ali Mahdi*, Case C-61/11 PPU, Court of Justice of the European Union, Judgment of the Court (First Chamber) of 28 April 2014, ECLI:EU:C:2014:1320, para. 55; *Sélina Affum v. Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai*, Case C-47/15, Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 7 June 2016, ECLI:EU:C:2016:408, para. 62.
32 | Raimondo, 2022, p. 2.

detention to those listed, by way of example, in Article 15(1) of the Return Directive, must always meet the requirement of legal certainty to do away with any danger of arbitrary deprivation of liberty of the persons concerned. Therefore, the existence of a credible risk that the person concerned will commit a criminal offence before being removed from the territory of a Member State, as in the present case, cannot make up for the vagueness of the general ground for detention. This criterion, in the first place, has no legal basis.

Moreover, such a concept of 'risk that the person concerned will commit a criminal offence' before being removed, which justifies that person's detention, is highly problematic for other reasons. First, it relates to the likelihood that a criminal offence is committed in the near future. As such, it does not concern situations on the basis of which the CJEU ruled while criminal proceedings were ongoing, either at the investigation or judgment stage, by setting strict requirements and which presumed that the offence had already been committed.[33] The second issue with applying this criterion is that the existence of the 'risk' of committing a criminal offence, or repeating it, requires a subjective assessment, and is based on material facts, unlike, for example, the risk of absconding or hampering the removal process. Following the same logic of interpretation, it would be possible to justify detention on other recurring grounds as well—for example, a risk of suicide or any other foreseeable serious health risk that could lead to the person concerned being hospitalised, thus automatically delaying that person's removal.[34] Therefore, such an assessment of the likelihood that the person concerned will commit a criminal offence cannot be considered to be consistent with the requirement of legal certainty. Moreover, for the assessment of the likelihood that the person concerned will commit a criminal offence to be effective, it will need to be based on clear criteria as well as solid and reliable evidence.[35] Third, adequate vigilance needs to be exercised to avoid circumventing the exclusion of a justification based on reasons of public order, especially where that assessment is made as part of the decision to grant a period for voluntary departure.[36] As the European Commission noted,

33 | In *Z. Zh. V. Staatssecretaris van Veiligheid en Justitie and Staatssecretaris van Veiligheid en Justitie v. I. O.*, for example, the CJEU held that the concept of 'risk to public policy' presupposes 'in addition to the perturbation of the social order which any infringement of the law involves, a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'. The CJEU stated in this case that 'with regard to the assessment of that threat, in the case of a third-country national who is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law, the nature and the seriousness of that act and the time which has elapsed since it was committed may be relevant matters'. *Z. Zh. V. Staatssecretaris van Veiligheid en Justitie and Staatssecretaris van Veiligheid en Justitie v. I. O.*, Case C-554/13, Court of Justice of the European Union, Judgment of the Court (Third Chamber) of 11 June 2015, ECLI:EU:C:2015:377, paras. 50–52, 60, 62. As for the existence of such a threat to justify detention for the purpose of removal being carried out in prison accommodation, see *WM v. Stadt Frankfurt am Main*, 2020, ECLI:EU:C:2020:511, paras. 45–46.

34 | *I. L. v. Politsei- ja Piirivalveamet*, 2022, ECLI:EU:C:2022:432, para. 56 and a corresponding footnote.

35 | *I. L. v. Politsei- ja Piirivalveamet*, 2022, ECLI:EU:C:2022:432, para. 57.

36 | *I. L. v. Politsei- ja Piirivalveamet*, 2022, ECLI:EU:C:2022:432, para. 59.

> It is not the purpose of Article 15 of the Return Directive to] protect society from persons which constitute a threat to public policy or security. The legitimate aim to protect the society should be addressed by other pieces of legislation, in particular criminal law, criminal administrative law and legislation covering the ending of legal stay for public order reasons. … If the past behaviour/conduct of the person concerned allows drawing the conclusion that the person will probably not act in compliance with the law and avoid return, this may justify the decision that there is a risk of absconding.[37]

Overall, this judgment also seems to confirm a laudable trend towards greater jurisprudential convergence in matters of migrants' detention between Luxembourg and Strasbourg Courts. The CJEU appears to rely more explicitly on the relevant Strasbourg jurisprudence not only as a toolbox but also as a benchmark (i.e., as mandatory minimum protection level), thereby protecting domestic judges in EU Member States from falling below that level when applying EU law.[38] This 'benchmark function' of the ECHR is less frequently mentioned in CJEU jurisprudence and refers to the fact that pursuant to Article 52(3) of the EU Charter of Fundamental Rights, the ECHR protection level also applies under EU law. However, EU law may provide more extensive protection of migrants' fundamental rights, including the right to liberty. In interpreting Article 6 of the EU Charter of Fundamental Rights, Article 5 ECHR serves as the minimum threshold of protection of migrants' right to liberty. In other words, the CJEU must interpret the human rights aspects of EU asylum and immigration law, notably issues of migrants' detention, in conformity with the ECtHR case law, which acts as the lowest common denominator. In doing so, the CJEU itself draws the relevant conclusions on the content of Strasbourg jurisprudence.[39]

This preliminary ruling seeks to strengthen the protection of irregular migrants against arbitrary detention by requiring EU Member States to define clear, foreseeable, and accessible grounds for detention in return procedures in line with international human rights law and EU law. However, it can also be criticized for overlooking the aim of promoting voluntary return that the Return Directive pursues. Specifically, the non-exhaustive nature of the grounds for detention stemming from Article 15(1) of the Return Directive seems to be in contrast with that aim, thus hindering further harmonisation in this particular area. Furthermore, this decision has important implications for the further development of EU asylum and immigration *acquis*, notably in light of the current proposed recast Return Directive, which shortens the term for voluntary departure, on the one hand, and extends the grounds for detention of irregular migrants for the purposes of transfer, on the other.[40]

37 | European Commission, 2017, p. 140.
38 | *I. L. v. Politsei- ja Piirivalveamet*, 2022, ECLI:EU:C:2022:753, paras. 47 et seq.
39 | Tsourdi, 2020, pp. 185–186.
40 | European Commission, 2020.

3. Restriction of the freedom of migrants unable to meet their own needs in transit zone: FMS and Others

3.1. Facts of the case

Another recent decision relevant for the interpretation of the concept of 'arbitrariness' with respect to detention of both irregular migrants and asylum seekers under EU law was rendered by the CJEU in joined cases *FMS and Others*.[41] In this judgment, delivered in the context of the urgent preliminary ruling procedure, the CJEU ruled on a number of questions relating to the interpretation of the right to asylum and return of illegally staying third-country nationals under Directives 2008/115 (Return Directive), 2013/32 (Procedures Directive), and 2013/33 (Reception Directive).

The two cases concern the situation following the arrival in Hungary of a married couple of Afghan nationals and of an Iranian national with his infant child. They applied for asylum in the Röszke transit zone, but their applications were rejected as inadmissible because they had arrived to Hungary via a country where they would not be exposed to any risk of ill-treatment. Following the rejection of their applications, they were ordered to continue their forced stay in the transit zone, which is reserved for those whose asylum claims have been rejected. In both cases, the Hungarian authorities issued return orders to Serbia and contacted the Serbian authorities to organise the return. Serbia, however, decided that it would not readmit the applicants as they had lawfully entered Hungary and were thus excluded from the readmission agreement between the two countries. Subsequently, the Hungarian Migration Police Authority amended the return decisions, changing the destination country from Serbia to Afghanistan and Iran, respectively. In both cases, the applicants brought an action before the referring court seeking to annul the return orders, as they were return decisions and should be open to judicial review. In addition, they also submitted an administrative appeal requesting that the referring court recognise Hungary's failure to comply with its obligation to accommodate them outside the Röszke transit zone.

The domestic court (the Administrative and Labour Court in Szeged) ordered a stay of proceedings and referred to the CJEU for its preliminary ruling, focusing on the inadmissibility ground of a safe transit country and the nature of the Röszke transit zone, as well as possible *de facto* detention and its compatibility with EU law. With regard to the transit zone as a place of detention in the context of an asylum procedure, the referring court wondered, in the first place, whether Article 2(h) of the Reception Directive, applicable pursuant to Article 26 of the Procedures Directive, read in the light of Article 6 and Article 52(3) of the EU Charter of Fundamental Rights, is to be interpreted as meaning that accommodation in a transit zone (a zone which an applicant for international protection cannot lawfully leave on a voluntary basis regardless of destination) for a period exceeding the four-week

41 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367.

period referred to in Article 43 of the Procedures Directive constitutes detention and, thus, deprivation of liberty for the purposes of recitals 17 and 24 and Article 16 of the Return Directive. In connection with this, the referring court was also interested in whether Article 43 of the Procedures Directive is to be interpreted as precluding legislation of a Member State under which the applicant for international protection may be detained in a transit zone for more than four weeks.

The Hungarian court also asked the CJEU about the compatibility with recital 16 and Article 15(1) of the Return Directive, as well as with Article 8 of the Reception Directive, applicable pursuant to Article 26 of the Procedures Directive, read in the light of Articles 6 and 52(3) of the EU Charter of Fundamental Rights, of the fact that the detention of a third-country national (the applicant for international protection) takes place solely because they are subject to a return order and cannot meet their needs (accommodation and food) owing to a lack of material resources to cover those needs. Furthermore, the referring court requested the CJEU to pronounce itself on the questions of whether the following facts are compatible with recital 16 and Article 15(2) of the Return Directive, read in the light of Articles 6 and 47 and Article 52(3) of the EU Charter of Fundamental Rights, as well as with Articles 8 and 9 of the Reception Directive, applicable pursuant to Article 26 of the Procedures Directive: (i) accommodation, which constitutes *de facto* detention for a period exceeding the four-week period referred to in Article 43 of the Procedures Directive, has not been ordered by a detention order; (ii) no guarantee has been provided that the lawfulness of the detention and its continuation may be challenged before the courts; (iii) the *de facto* detention takes place without any examination of the necessity or proportionality of that measure, or whether there are any alternative measures; and (iv) the exact duration of the *de facto* detention is not fixed, including the date on which it ends. The last question referred to the CJEU addressing the issue of whether Article 47 of the EU Charter of Fundamental Rights could be interpreted as meaning that, when a manifestly unlawful detention is brought for consideration before a court of a Member State, that court may, as an interim measure until the administrative proceedings are concluded, require the authority to designate for the benefit of the third-country national a place of stay outside the transit zone that is not a place of detention.

3.2. Court's decision and reasoning

In response to a request (preliminary reference) from the Hungarian court, the CJEU delivered its high-profile judgment, ruling that the automatic and indefinite placement of asylum seekers in the transit zones at the Hungarian–Serbian border qualifies as unlawful detention. As for the detention of the persons concerned, the CJEU first examined their situation in the Röszke transit zone, in the light of the rules governing both the detention of applicants for international protection (Procedures and Reception Directives) and that of illegally staying third-country nationals (Return Directive). The CJEU held that detaining the persons concerned in that transit zone must be regarded as a detention measure. In reaching that conclusion, the Court stated that the concept of 'detention', which has the same meaning in the context of the various directives mentioned above, refers to a coercive measure that presupposes the deprivation of liberty and freedom of movement

(and not a mere restriction of the freedom of movement of the person concerned) and isolates that person from the rest of the population, by requiring him or her to remain at all times within a limited and closed area.[42] According to the CJEU, the conditions prevailing in the Röszke transit zone amounted to a deprivation of liberty, *inter alia*, because the persons concerned could not lawfully leave that zone of their own free will in any direction whatsoever. The Hungarian Government argued that the applicants could leave freely in the direction of Serbia and, therefore, their stay in the transit zone could not be classified as unlawful detention. However, the CJEU did not find this argument compelling for two reasons: first, the persons concerned could not leave that zone for Serbia, since such an attempt would be considered unlawful by the Serbian authorities and would therefore expose them to penalties; and second, leaving that zone might result in their losing any chance of obtaining refugee status in Hungary.

The CJEU stated that in view of the context of Article 2(h) of the Reception Directive, detention must be understood as referring to a coercive measure of last resort that is not met with restricting the movement of an applicant for international protection.[43] The Court also observed that no provision in the Return Directive contains a definition of that concept. In the absence of such a definition, the same meaning of the notion of 'detention' as in the context of the Reception Directive is to be applied, for there is nothing to suggest that the EU legislature's intention was to give the concept a different meaning. According to the Court's interpretation, the concept of 'detention', within the meaning of these two directives, covers one and the same reality. Therefore, the detention of a third-country national who is illegally staying on the territory of a Member State, within the meaning of the Return Directive, constitutes a coercive measure of the same nature as that defined in Article 2(h) of the Reception Directive.[44]

The CJEU also examined whether this kind of detention complies with the requirements imposed by EU law. As regards the requirements related to detention, the Court first noted that Article 8(3) of the Reception Directive provides an exhaustive list of grounds for detention and does not include any ground relating to the applicants' inability to support themselves.[45] Even if other grounds of detention may be applicable (e.g., under domestic criminal law), the objective of the

42 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, para. 223.

43 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, para. 221.

44 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 224–225.

45 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 250–251.

Reception Directive must always be respected.[46] Under the Reception Directive, Member States are required to provide material reception conditions to applicants who cannot ensure an adequate standard of living for themselves; detaining them for this reason would undermine the very essence of that Directive.[47] Regarding the imposition of a detention measure, Articles 8(2) and (3) and Article 9(2) of the Reception Directive preclude detention without any reasoning or any assessment of the measure's proportionality and necessity, including in the form of a written judicial or administrative decision.[48] A possibility for judicial review should always be provided under Articles 9(3) and (5) of the Reception Directive.[49]

Similar to its assessment of detention under the Reception Directive, the CJEU held that a detention measure under the Return Directive is permissible only if the removal process risks being jeopardized. No detention can be imposed solely because the applicant is not able to support themselves.[50] The detention measure may be imposed only following an individualized assessment of such measure's proportionality and necessity and in the form of a written decision stating the reasons for the detention.[51] A judicial review of the detention measure should always be available.[52] Thus, the Court held that under Article 8 of the Reception Directive and Article 15 of the Return Directive, respectively, neither an applicant for international protection nor a third-country national who is the subject of a return decision may be detained solely on the ground that they cannot meet their own needs.[53] It added that EU law precludes an applicant for international protection (Articles 8 and 9 of the Reception Directive) or a third-country national who is the subject of a return decision (Article 15 of the Return Directive) from being detained without the prior adoption of a reasoned decision ordering that detention

46 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, para. 252.

47 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 253–256.

48 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 257–259.

49 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 257–259, 260–261.

50 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 269–270.

51 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 274–275.

52 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 276–277.

53 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 256, 266, 272, 281.

and without the need for and proportionality of such a measure having previously been examined.

The CJEU also clarified the requirements related to the continuation and, more specifically, duration of detention. It noted the lack of any provision in the Reception Directive laying down a maximum duration limit, with the applicants' right to liberty being only respected if effective procedural guarantees under Article 6 of the EU Charter of Fundamental Rights are in place.[54] In the absence of a time limit, the detention should be terminated as soon as it is no longer necessary or proportionate, with the authorities acting with all due diligence. Consequently, the absence of a time limit that, if exceeded, would render detention automatically unlawful is not contrary to Article 9 of the Reception Directive, so long as the aforementioned conditions are respected.[55] Moreover, Articles 15(1) and (4) of the Return Directive imply that detention may last only for as long as the removal process is taking place but Articles 15(5) and (6) of the same directive additionally require Member States to set a maximum period of detention and a possible extension for up to a further 12 months under specific circumstances (lack of documents). National legislation that does not set a time limit that, if exceeded, automatically renders the detention unlawful, and ensures that detention is maintained only for the procedure of removal is not in compliance with the Return Directive.[56] As regards applicants for international protection, the Court held that Article 9 of the Reception Directive does not require Member States to lay down a maximum period for continuing to detain such applicants, provided that their national law ensures that the detention lasts only for as long as the grounds for detention remain applicable and that the administrative procedures associated with such grounds are executed diligently. The lawfulness of the detention should be reviewed at regular intervals by a domestic judge. In the case of non-EU nationals who are the subject of a return decision, the CJEU interpreted Article 15 of the Return Directive as meaning that detention, even where it is extended, may not exceed 18 months and may be maintained only as long as there is a reasonable prospect of removal or removal arrangements are ongoing and executed with due diligence by the competent authorities.

As regards the detention of applicants for international protection in the particular context of a transit zone, the CJEU pointed out the need to take account of Article 43 of the Procedures Directive. Pursuant to that provision, Member States may require applicants for international protection to stay at their borders or in one of their transit zones, *inter alia*, to examine whether their applications are admissible, before taking a decision on the rights of entry of those applicants into their

54 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, para. 264.

55 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, para. 265.

56 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 279–280.

territory. However, such a decision must be adopted within four weeks, failing which the Member State concerned must grant the applicant for international protection the right to enter its territory and process their application in accordance with the ordinary procedure of civil law. Therefore, although the Member States may, in the context of a procedure referred to in Article 43 of the Procedures Directive, detain applicants for international protection who present themselves at their borders, such detention may not, under any circumstances, exceed the maximum period of four weeks from the date of application for international protection. Any extension is only possible under Article 43(2) of the Procedures Directive if there is a massive influx of applicants for asylum and the latter are accommodated in accordance with Articles 17 and 18 of the Reception Directive.[57] The Court concluded that asylum applicants cannot be detained in transit zones for more than four weeks, even in the event of arrivals involving a large number of third-country nationals or stateless persons.

The CJEU also considered whether a detention that is unlawful under EU law may require, under Article 47 of the EU Charter of Fundamental Rights, that domestic courts oblige the national authorities to provide the applicant with appropriate accommodation. It first noted that the absence of judicial review in national legislation is not only contrary to the provisions of the Reception and Return Directives but also contravenes Article 47 of the EU Charter of Fundamental Rights, and domestic courts are required to disapply any such legislation that hinders judicial review.[58] Second, where detention is unlawful, the national court must be able to issue its own decision ordering the release of the person, or an alternative measure if the detention ground is valid but the measure is disproportionate. In the present case, the CJEU held that the Hungarian courts can order the immediate release of the applicants for international protection if their placement in the transit zone is found to be unlawful.[59] Regarding the possibility for courts to order the applicants' placement in accommodation, the Court noted that the applicants remain asylum applicants after their release from detention and, as such, still benefit from Article 17 of the Reception Directive.[60] An appeal is provided under Article 26 of the Reception Directive against decisions affecting reception conditions provision. Courts are generally required to grant interim measures in cases covered by EU law, to fully ensure individuals' rights.[61] An applicant for international protection

57 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 244–245.

58 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 290–291.

59 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 293–294.

60 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, para. 295.

61 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, paras. 296–298.

whose detention, which has been found to be unlawful, has ended must be able to rely on the material reception conditions to which they are entitled during the examination of their application. According to the Court, Article 17 of the Reception Directive implies that if the applicant has no means of subsistence, they are entitled to either a financial allowance enabling them to find accommodation or to housing in kind. Thus, Article 26 of the Reception Directive requires that such an applicant be able to bring an action before a court aimed at guaranteeing that right to accommodation. The primacy of EU law and right to effective judicial protection require domestic courts to declare themselves competent to hear and decide on any action relating to the granting of interim accommodation measures if no other court has jurisdiction under national law.[62]

Lastly, the CJEU explained that the lawfulness of a detention measure, such as the detention of a person in a transit zone, must always be amenable to judicial review under Article 9 of the Reception Directive and Article 15 of the Return Directive. Therefore, in the absence of national rules providing for such a review, the principle of the primacy of EU law and right to effective judicial protection require the national court hearing the case to declare its jurisdiction to rule on the matter. If, following its review, the national court considers that the detention measure at issue is contrary to EU law, then the court must be able to substitute its decision for that of the administrative authority that adopted the unlawful detention measure and order the immediate release of the persons concerned, or possibly an alternative measure to detention.

3.3. On the Court's decision

The joined cases raise important questions regarding the conformity with EU law of the asylum and return procedures that the Hungarian authorities conducted at the border transit zone between Hungary and Serbia, at Röszke. This judgment of the CJEU is of particular significance as it explains some of the legal intricacies surrounding border procedures in transit zones under EU law, dealing also with the way in which these procedures relate to migrants' fundamental right to personal liberty. The Court's decision firmly and boldly concludes that the practice of placing applicants in the transit zone constitutes detention under the EU directives at issue. The obligation imposed on a third-country national to remain permanently in the Röszke transit zone, which they could not legally leave voluntarily, amounted to a deprivation of liberty, characterised by 'arbitrary detention' within the meaning set forth in the relevant EU directives. The Court denounced the expansion of the European migratory detention policies, making clear that 'accommodation' in the form of holding asylum seekers in a camp located in the transit zone, which is guarded and surrounded by barbed wire and without any realistic possibility (neither practical nor legal) for them to voluntarily leave, amounts to unlawful deprivation of their liberty in the EU legal order, unless it is

62 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367, para. 299.

justified by a valid legal ground, necessary, and proportionate, and unless no other coercive measures are sufficient in an individual case.

In addressing this preliminary question, the CJEU largely followed the opinion of Advocate General Pikamäe,[63] who, despite the recent ruling of the ECtHR in *Ilias and Ahmed v. Hungary*,[64] which held that the accommodation of applicants of international protection in the Röszke transit zone did not amount to a deprivation of liberty, observed that because of the autonomy of EU law, the CJEU has a power to interpret provisions of the EU Charter of Fundamental Rights independently of the ECtHR when EU law provides for a higher level of individual rights' protection. The Advocate General noted, *inter alia*, that the applicants' situation of isolation, along with the severely restricted possibility to voluntarily leave the transit zone, constituted detention within the meaning of Article 2 of the Reception Directive. Pikamäe further opined that the detention of the applicants in the Röszke transit zone, which was not based on a formally adopted detention decision outlining its factual and legal grounds, and was not preceded by an individual examination as to the possible implementation of alternative solutions, must be classified as unlawful.[65]

The CJEU's reasoning and finding with regard to this salient question, clarifying that the accommodation in this transit zone amounts to a *de facto* detention of asylum seekers, differ from those of the ECtHR in its much criticized judgment previously issued in *Ilias and Ahmed v. Hungary*.[66] The ECtHR ruled in the latter case that the restrictions imposed upon the applicants as asylum seekers in the Röszke transit zone did not qualify as a deprivation of liberty that would deserve the protection of Article 5 of the ECHR, with the consequence that this provision was declared inapplicable. Applying a 'practical and realistic' interpretative approach, the ECtHR reasoned that in this particular case, despite the same living conditions experienced by the applicants in the same transit zone as in *FMS and Others*, there was not a *de facto* deprivation of liberty because the applicants could have easily and realistically returned to Serbia from the transit zone.[67]

Although the CJEU legally qualified the situation of the applicants in the transit zones at the Hungarian–Serbian border as *de facto* detention within the meaning

63 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:367.
64 | *Ilias and Ahmed v. Hungary*, Application No. 47287/15, European Court of Human Rights (Grand Chamber), Judgment, 21 November 2019.
65 | *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 2020, ECLI:EU:C:2020:294, para. 186.
66 | *Ilias and Ahmed v. Hungary*, 2019.
67 | The ECtHR Grand Chamber stated that 'its approach should be practical and realistic, having regard to the present-day conditions and challenges', implying that States were entitled not only to control their borders but also 'to take measures against foreigners circumventing restrictions on immigration'. *Ilias and Ahmed v. Hungary*, 2019, para. 213. These findings and reasoning of the ECtHR received harsh criticism for narrowing and weakening the protection of Article 5 of the ECHR to the point that restrictions imposed upon asylum seekers might not even be qualified as deprivation of liberty worthy of the protection of this provision. See Stoyanova, 2019.

of the EU directives concerned, this does not necessarily mean that EU law offers asylum seekers better protection from detention in transit zones compared with the ECHR. The qualification as detention of the accommodation in a transit zone is a pre-condition for the start of the four-week deadline set by Article 43(2) of the Procedures Directive as the maximum length of detention of asylum seekers in such a zone. This implies that a detention of up to four weeks from the beginning of the stay concerned is in principle acceptable under EU law, irrespective of individual circumstances.[68] Article 5 of the ECHR allows for a case-based assessment of the living conditions in transit zones; the ban on arbitrary detention is activated as soon as those conditions exceed what is strictly necessary for the processing of asylum applications in the individual circumstances.[69] These methodological differences between the two European legal systems have practical implications for domestic courts of EU Member States—they should always examine such situations under both systems since, depending on the particular circumstances, either of them can provide the higher protection against arbitrary detention of asylum seekers.[70] In such cases pursuant to Article 52(3) of the EU Charter of Fundamental Rights, domestic courts of EU Member States are thus required to apply the higher protection afforded by whichever of the two systems.

4. Detention of asylum seekers at the border in the event of a mass arrival of migrants: *M.A. v. Valstybės sienos apsaugos tarnyba*

4.1. Facts of the case and Court's ruling

The third case regarding detention of asylum seekers that was also recently decided by the CJEU is *M.A. v. Valstybės sienos apsaugos tarnyba*.[71] The Court ruled that a domestic regulation which, by reason of the state of emergency created by a mass influx of migrants, precludes a foreigner who unlawfully entered a Member State from lodging an application for international protection, is incompatible with the Procedures Directive. More relevant for our analysis is the Court's declaration that the domestic regulation allowing in the same circumstances asylum seekers to be placed in detention for the sole reason that they are staying illegally on the territory of that Member State is incompatible with provisions of the Reception Directive.

The case concerns a third-country national, M. A., who was arrested in Poland on 17 November 2021, together with a group of persons from Lithuania, for having neither the travel documents nor the necessary visa to stay in Lithuania and in

68 | Callewaert, 2020.
69 | Ibid.
70 | Ibid.
71 | *M.A. v. Valstybės sienos apsaugos tarnyba*, Case C-72/22 PPU, Court of Justice of the European Union, Judgment of the Court (First Chamber) of 30 June 2022, ECLI:EU:C:2022:505.

the EU. He was found to be irregularly residing in Lithuania. The incident occurred after the Republic of Lithuania declared an emergency throughout its territory on 2 July 2021 in response to a sudden mass influx of migrants at the Lithuanian–Belarusian border. This declaration was followed, on 10 November 2021, by a declaration of a state of emergency in parts of the territory owing to a mass influx of migrants from, *inter alia*, Belarus. After the 2021 amendment of Lithuania's Aliens Act, a non-EU national who entered the territory irregularly during declared situations of emergency because of a mass influx of migrants might be placed in detention solely on the grounds of their unlawful entry. M. A. entered Lithuania illegally from Belarus and was handed over to the Lithuanian authorities, which detained him on the grounds of irregular entry and stay, justified by the risk of absconding, pending the adoption of a decision on his legal status. In the days following that handover, he immediately made an application for international protection, which he made again in writing in January 2022. This written application was rejected as inadmissible on the ground that it had not been submitted in accordance with the requirements of the Lithuanian legislation on the submission of applications for international protection in an emergency caused by the mass influx of foreigners. Pursuant to that legislation, a foreigner who has entered Lithuania unlawfully is unable to make an application for international protection in that Member State. The same legislation also provides that, in such an emergency, a foreigner may be detained solely on account of having entered Lithuanian territory unlawfully.

The Lithuanian Supreme Administrative Court heard an appeal brought by M. A. against the decision ordering his detention and was thus called upon to determine the legality and validity of such a detention measure. It sought to ascertain whether the Procedures and Reception Directives preclude such national legislation. The CJEU, under the urgent preliminary ruling procedure, held that the Procedures Directive precludes legislation of a Member State under which, in the event of a declaration of a state of war or of emergency or in the event of a declaration of an emergency owing to a mass influx of foreigners, illegally staying third-country nationals are, *de facto*, denied access to the procedure for examining an application for international protection in the territory of that Member State. Moreover, the Court held that the Reception Directive precludes legislation of a Member State under which, in the event of such a declaration, an applicant for asylum may be detained on the sole ground that they are illegally staying in the territory of that Member State.

As regards the issue of detaining a third-country national for the sole reason that they entered the territory of a Member State unlawfully, the CJEU pointed out that, under the Reception Directive, an applicant for international protection may be detained only when, after an individual assessment of the case, this proves necessary and other less coercive alternative measures cannot be applied effectively. Moreover, the Reception Directive sets out an exhaustive list of the various grounds justifying detention. The fact that an applicant for international protection is illegally staying in the territory of a Member State is not one of those grounds. Accordingly, a non-EU national cannot be detained on that basis alone. As to whether such a circumstance may justify the detention of an applicant for asylum on the grounds of protecting national security or public order, in the exceptional

context represented by the mass influx of foreigners in question, the Court stated that the threat to national security or public order can justify the detention of an applicant for international protection only if the applicant's individual conduct represents a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society or the internal or external security of the Member State concerned. An example is when the person concerned is a dangerous criminal and their detention will protect the public from the threat that their conduct represents.[72] In this regard, the fact that an applicant for international protection is staying illegally cannot in itself be regarded as demonstrating the existence of such a threat. In principle, such an asylum seeker cannot constitute a threat to the national security or public order of that Member State on the sole ground that they are illegally staying in the territory of a Member State. In the present case, the CJEU found that such a threat did not arise from the circumstance that the asylum seeker entered and resided in Lithuania unlawfully. The Court's finding is without prejudice to the possibility that an illegally staying applicant for international protection may be regarded as such a threat because of specific circumstances that demonstrate the applicant's dangerousness, in addition to the fact that the applicant's stay is illegal.

4.2. On the Court's judgment

As far as the right of asylum seekers to their liberty is concerned, the CJEU has ruled that provisions on detention in the new Lithuanian Aliens Act are not compatible with EU law. The referring court asked this preliminary question solely for the purpose of assessing the legality and merits of the detention measure imposed on M. A. by the court of first instance. As in the case of *I. L. v. Politsei- ja Piirivalveamet*, the CJEU again emphasized that, in principle, even in a state of emergency, the national authorities cannot impose detention measures on foreign nationals on the grounds other than those foreseen in the EU legal instruments. The possibility of such a detention would contravene the requirements of predictability and, in particular, protection against arbitrary use of detention measures. The Court's ruling also referred to the seriousness of the interference with the right of migrants to their liberty and thus limited detention within the meaning of EU law to strictly necessary situations where, after individual assessment, a serious threat posed by the asylum seeker concerned is soundly identified. According to the Court, an irregular stay of a third-country national who applied for international protection does not prove by itself such serious threat to society. In other words, an asylum applicant cannot be detained merely because they entered the territory of a Member State unlawfully. The CJEU concluded that EU law precludes Lithuanian legislation under which, in the event of a mass influx of foreigners, an applicant for asylum or any third-country national that entered and resided illegally in this Member State may be detained on the sole ground that they are staying illegally. In principle, the EU Member State to which an illegally staying applicant for asylum applies for international protection must demonstrate that,

72 | *M.A. v. Valstybės sienos apsaugos tarnyba*, 2022, ECLI:EU:C:2022:505, para. 89.

because of specific circumstances, the applicant constitutes a threat to national security or public order, to justify the applicant's detention.

The Procedures and Reception Directives regulate the possibility for the national authorities of EU Member States to detain an asylum applicant, but the grounds for and conditions of such a measure must be in accordance with Article 8 of the Reception Directive. Article 8(2) of the Reception Directive emphasises that the detention of asylum applicants should be the exception rather than the rule. Pursuant to this provision, an asylum applicant may be held in detention only where, following an assessment carried out on a case-by-case basis, detention is necessary and where other less coercive measures cannot be applied effectively. Moreover, Article 8(3) of the Reception Directive exhaustively lists the various grounds that may justify recourse to a detention measure. The CJEU rejected the Lithuanian Government's argument that the possibility of placing an applicant in detention when they have illegally crossed the national border meets the requirements of national security. The detention measure in question was one of those taken by the Republic of Lithuania to protect the border it shares with Belarus and, more specifically, to stem the illegal crossing of that border by migrants in the context of the 'mass influx' that the Republic of Lithuania was facing at the time and, accordingly, to ensure internal security in its territory and in the entire Schengen area.

According to the CJEU, the mere fact that a person is part of a flow of migrants that a Member State is seeking to stem to safeguard the internal security of its territory—understood in the broad sense of its 'migration policing'—cannot justify the detention of that person on the basis of the ground set out in Article 8(3)(e) of the Reception Directive. From the perspective of the Court's established jurisprudence, detention under this article implies an assessment of the dangerousness of the person concerned, taking into account factors other than the possible illegal crossing of the border, as such an offence does not, in itself, constitute a threat to national security or public order. In such a context, the presumption of national authorities that any person who has illegally entered the territory is dangerous is not sufficient to adopt a detention measure against an applicant for international protection. This implies that before adopting such a measure, national authorities must have consistent, objective and specific evidence establishing the dangerousness of an individual.

In addition to its noncompliance with EU Procedures and Reception Directives, such a national provision of a Member State that allows an asylum applicant to be detained on the sole ground of unlawfully crossing the national border is also incompatible with the fundamental rights enshrined in the EU Charter of Fundamental Rights and other relevant international legal instruments. For one, the ECHR establishes a minimum threshold of protection below which the EU cannot fall. Another is the 1951 Geneva Convention Relating to the Status of Refugees as supplemented by the 1967 Protocol Relating to the Status of Refugees.[73] This is

73 | Although the EU is not a contracting party to the Refugee Convention, Article 78(1) of the TFEU and Article 18 of the EU Charter of Fundamental Rights require it to observe the rules contained therein. Consequently, the CJEU must ensure that its interpretation of the relevant EU law is in line with the level of protection guaranteed by this convention itself. *M.A. v. Valstybės sienos apsaugos tarnyba*, Case C-72/22 PPU, Opinion of Advocate General Emiliou delivered on 2 June 2022, ECLI:EU:C:2022:431, para. 135.

true even in the event of a mass arrival of migrants at that Member State's border. Specifically, a national law of a Member State that provides for such a detention measure gives rise to a particularly serious interference with the migrants' right to liberty guaranteed by Article 6 of the EU Charter of Fundamental Rights. In light of such a serious interference with this extremely important fundamental right, limitations on the exercise of that right are allowed solely if they are applied only inasmuch as is strictly necessary.[74]

The CJEU did not accept the argument put forward by the Lithuanian Government that the provision in question in national law was necessary for the maintenance of law and order and internal security in the territory of Lithuania and that the precise purpose of a detention measure foreseen by this provision was to prevent illegal secondary movements within the Schengen area of those migrants who have succeeded in entering national territory illegally. While the fact that an applicant has entered the territory of a Member State illegally may, in certain cases, constitute an indication of a risk of their absconding—possibly to other Member States—from the latter, this must always be supported by other evidence for such a risk to validly make it necessary to detain the person concerned, for a given period of time, as also permitted by Article 8(3)(b) of the Reception Directive. From this perspective, such a detention measure goes beyond what is necessary to protect public order and internal security. Therefore, as Advocate General Emiliou pointed out, in the absence of sufficient evidence, a detention measure based on illegal entry alone can be considered arbitrary.[75]

However, the CJEU should, in my view, also expand on, or at least mention in its judgment, another important aspect highlighted by the Advocate General—that a detention measure such as the one provided for in Lithuanian legislation is contrary to Article 31(1) of the Geneva Refugee Convention. Pursuant to that provision, States that are parties to that convention must not impose penalties on refugees, including asylum applicants, on account of their illegal entry to or presence in their territory, under certain conditions. This specific provision is intended to prevent those persons from being penalised for their illegal entry or presence in the territory of a State. In view of this purpose that the provision pursues, the concept of 'penalty' must be understood, autonomously and broadly, as covering any measure that is not only preventive but also deterrent or punitive, regardless of its classification under national law. The Lithuanian Government stated that the detention measure in question does not constitute a penalty under Lithuanian law. However, the Advocate General opined that it amounts to a 'penalty' with a deterrent effect for the purposes of Article 31(1) of the Geneva Refugee Convention, for it is also meant, to some extent, to punish applicants for international protection who have illegally crossed the national border and, at the same time, deter other migrants who might be tempted to do the same.[76]

74 | *M.A. v. Valstybės sienos apsaugos tarnyba*, Case C-72/22 PPU, Opinion of Advocate General Emiliou delivered on 2 June 2022, ECLI:EU:C:2022:431, para. 145.
75 | *M.A. v. Valstybės sienos apsaugos tarnyba*, Case C-72/22 PPU, Opinion of Advocate General Emiliou delivered on 2 June 2022, ECLI:EU:C:2022:431, para. 148.
76 | *M.A. v. Valstybės sienos apsaugos tarnyba*, Case C-72/22 PPU, Opinion of Advocate General Emiliou delivered on 2 June 2022, ECLI:EU:C:2022:431, paras. 149–152.

This CJEU ruling moreover demonstrated that by not allowing asylum seekers to be placed in detention for the sole purpose of the processing of their application for international protection, EU law applies a higher protection standard than the ECHR.[77] Overall, the Court's judgment is an implied rebuff to those national authorities who would like to resort to the extensive detention of asylum seekers as a means to address emergency situations such as a mass influx of migrants.

5. Conclusion

This work is not about three isolated cases without a broader significance. All the three cases discussed here have been decided by the CJEU, the supreme judicial body of the EU. They are preliminary rulings under Article 267 of the TFEU, through which the CJEU, in a manner that binds all domestic courts throughout the EU, has decided the interpretation and application of relevant parts of the EU legislation. The detention of irregularly staying third-country nationals in return procedure and asylum seekers in asylum and transfer procedures has been a subject of the preliminary rulings of the CJEU. In many of those judgments, referring to the EU Charter of Fundamental Rights, the CJEU interpreted EU law to protect migrants, underlining that detention is a serious interference with their right to freedom and should be made with exceptionally strict and precise interpretation of its provisions. The CJEU has a primary role in the interpretation of EU law to ensure that such law is interpreted and applied in the same way in all EU Member States and to settle legal disputes between national governments and EU institutions. The role of the CJEU jurisprudence on immigration detention is decisive in interpreting and applying the relevant EU law and, consequently, amending arbitrary/unlawful detention practices in EU Member States. Some of the CJEU's rulings have considerably affected the practice of EU Member States that allowed for the broad usage of detention of asylum seekers waiting to be transferred to another Member State under the Dublin III Regulation. Those rulings of the CJEU have significantly increased the level of protection against arbitrary detention of asylum seekers by making such detentions more predictable.

Is EU asylum and immigration law the remedy for a widespread problem of the deprivation of liberty of migrants, or is it itself a problem in need of a remedy? First, it is not only the law on paper not being fully realised in practice but, more fundamentally, it is also the question of understanding of the underlying rationale of the relevant EU norms and their practical implications. A closer look into the regulation of border procedures (i.e., procedures ordinarily carried out at the border or a transit zone, when applicants for international protection are not granted entry to the national territory of a Member State) in EU asylum law reveals that the purpose of the EU legislator is, *inter alia*, to accept that these procedures, in most

77 | Compare with *Z.A. and Others v. Russia*, Applications nos. 61411/15, 61420/15, 61427/15 and 3028/16, European Court of Human Rights (Grand Chamber), Judgment, 21 November 2019, para. 162.

cases, involve a restriction or deprivation of freedom of persons concerned. This is evident from Article 43 of the Procedures Directive read in conjunction with the Reception Directive and Article 18 of the EU Charter of Fundamental Rights. In the same vein, forcibly retaining asylum seekers in a transit zone following the rejection of their applications for international protection without possibility to return or be removed in the sense of the Return Directive amounts to detention under the Return Directive. Acknowledging that these situations constitute deprivations of migrants' liberty does justice to the realities of migration control within the EU.[78] All three case studies discussed above demonstrate that the CJEU's restrictive approach to interpreting EU provisions on the detention of irregular migrants and asylum seekers (including its narrow interpretation of possible detention grounds) involves significant flashes of humane, dignified, and fair treatment of migrants when it comes to the deprivation of their liberty/freedom of movement.

Second, in the jurisprudence of the CJEU dealing with detention cases, the EU Charter of Fundamental Rights has started to play a more significant role as the EU primary law. In the vast majority of cases dealing with migration-related detention, the CJEU either directly referenced the Charter or referred to the need to observe fundamental and human rights without explicitly mentioning the Charter. The Court has shown a growing tendency to directly rely on the EU Charter of Fundamental Rights while adjudicating migration-related detention cases. This is reflected in the fact that almost all of the preliminary references concerning the detention of asylum seekers under the Dublin III Regulation and Reception Directive contain a direct reference and analysis of the Charter. In a number of its judgments, referring to the EU Charter of Fundamental Rights, the CJEU interpreted EU law to protect migrants from arbitrary deprivation of their liberty, underlining that detention is a serious interference with their right to freedom and should be made with exceptionally strict and precise interpretation of the relevant standards and provisions.

Although the CJEU frequently relies on the judgments or standards set by the ECtHR, it also proposes its own unique solutions based on the EU Charter of Fundamental Rights. Through its jurisprudence, the CJEU is seeking to find ways to reconcile the need to guarantee the fundamental rights of third-country nationals and effective deportation proceedings throughout the EU. Along with the ECtHR, the CJEU plays a major role in ensuring control of arbitrary detentions, with a view to affording a sufficient level of protection as regards asylum and immigration that, in social and human terms, are the most crucial issues facing the world in the years to come. The CJEU's strict approach to the limitation of the discretion of State authorities in imposing detention on asylum seekers and irregular migrants is understandable given the consequences the application of such an exceptional measure of last resort may have on the protection of fundamental rights, notably the right to liberty. Nevertheless, the Court's judgments regarding the validity of the grounds for immigration detention may also be seen as controversial. Specifically, the level of interference with the right to liberty, set out in the EU Charter of Fundamental Rights, in these judgments appear to be lower. This provides for the

78 | Cornelisse, 2020.

more extensive protection of migrants' rights compared with the guarantees by the ECHR, as is expressly permitted by Article 52(3) of the EU Charter. This, in turn, raises some doubts about the CJEU's correct application of Article 52(3) of the EU Charter.

A third point to be noted—and perhaps the most important one—is that there appears to be some decrease in convergence between the jurisprudence of the CJEU and the EU legislator's vision on the future of CEAS. Recently, the European Parliament and the Council of the European Union (consisting of EU Member States' ministers) reached a deal on five key pieces of a new EU asylum legislation, concerning asylum procedures, the Dublin system on responsibility for asylum applications, the Eurodac database supporting the Dublin system, screening of migrants and asylum seekers, and derogations in the event of crises. Looking at available texts, including the planned new Reception Directive (expected to be finally adopted in 2024 as part of a package of new or revised EU asylum laws), CJEU case law remains relevant to the new Reception Directive, unless the relevant text has been amended. According to this revised Reception Directive, asylum seekers cannot be detained solely for applying for asylum or based solely on their nationality, and their detention must be necessary based on an individual assessment. The new directive also introduces a provision that concerns detainees (or would-be detainees) who are special cases, who may be released from detention, or have their detention adjusted, in light of their personal circumstances. The new directive now specifies that the detention of applicants for international protection cannot be punitive.

The new Reception Directive also contains other amended provisions intended to reduce the risk of arbitrariness in applying detention measures in asylum cases (including the guarantees on detention for special cases, stronger language and new references regarding the detention of minors and those whose health would be put at serious risk, a new requirement to explain the disuse of coercive measures instead of detention, provisions on the judicial review of detention specifying a deadline with a useful remedy). However, some of its provisions seem to ignore CJEU case law. For example, there is a new possible ground for detention: it will be possible to detain an asylum seeker 'to ensure compliance with legal obligations imposed on the applicant through an individual decision requiring residence in a specific place in cases where the applicant has not complied with such obligations' and given 'a risk of absconding of the applicant'.[79] However, given that the list of grounds will remain exhaustive, it will still not be possible to detain asylum seekers purely because housing capacity has been exhausted, because of their inability to cover their needs, or because they entered a Member State illegally. Moreover, the new Reception Directive still has no time limits on the detention of asylum seekers in general, although CJEU case law on detention under the border procedure under the current asylum procedures law has set time limits. Failed applicants for international protection have time limits to their detention in the Returns Directive. The future will also show whether and to what extent revised rules on border procedure detention in the new Reception Directive might alter the

79 | Peers, 2024.

CJEU rulings against the Member State's transit zone detention under the current rules (*FMS and Others* judgment).

In the newly proposed Screening Regulation, the legal basis and modalities regarding cases in which the screening requires detention are left to EU Member States' national law. In legal doctrine, secondary EU law instruments on asylum confer too much discretionary power upon the Member States, as seen in lists of justification grounds for detention that are (too) extensive. This diminishes the protection of asylum seekers and other migrants in the EU by, *inter alia*, increasing the risk of arbitrary deprivation of liberty. Moreover, this screening will take place at the first point of entry, which means, for most asylum cases, those Member States that already have a reputation of unlawfully detaining asylum seekers by disregarding the requirements of necessity, proportionality, and maximum duration of the detention measures taken.[80] Thus, the proposed Screening Regulation will likely lead to *de facto* detention of migrants. Similarly, the revised proposal for the EU Asylum Procedures Regulation risks resulting in systematically applied (formal) migration-related detention as the European Commission failed to insert in its legislative proposal the principle of proportionality and assessment of less coercive measures. The proposed Asylum Procedures Regulation also envisages mandatory border procedure and mandatory border return procedure for non-EU nationals refused international protection in border asylum procedures, coupled with a mandatory application of the fiction of non-entry.[81] All these provisions raise legitimate concerns about the lowering level of protection of migrants against their arbitrary detention in such procedures in the EU.

Lastly, the EU is falling short of an asylum and immigration policy that is simultaneously fair, humane towards non-EU nationals, realistic, and coherent. The CJEU has, through its jurisprudential interpretations of EU law—including those contained in the three judgments examined in this research—taken some important steps aimed at improving this unsatisfactory situation. In light of further developments concerning the planned new legal framework for migration and asylum in the EU (New Pact on Migration and Asylum), it remains to be seen whether and to what extent this path paved by the CJEU will be followed by the EU's and Member States' legislative and other competent authorities, as well as by the Court itself.

80 | Bombay and Heynen, 2021, p. 255.
81 | Meikle, 2021, pp. 47–48.

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