LIMITATIONS ON THE FREEDOM OF MOVEMENT OF FOREIGNERS AND ASYLUM SEEKERS IN CROATIAN LAW AND PRACTICE

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ABSTRACT

In reality, numerous measures can be issued that limit the freedom of movement of foreigners, including third country nationals and asylum seekers. Detaining foreigners and asylum seekers is a form of deprivation of freedom of movement and can be compared to incarceration as they can be either arrested and detained for a short period of time or detained at the Centre for foreigners. The second form of detention is more important as it can last for a relatively long period. There are numerous reasons for which a foreigner can be detained at the Centre; moreover, the detainment can be prolonged repeatedly. This is why a scrutinous control of decisions to detain a foreigner must be established and every decision of detention must be controlled by an administrative court ex officio. This represents a quasi-administrative dispute instigated ex officio to ensure the conformity of such decisions with the law. This study analyzes the legal regulation of detention of foreigners. as well as the practice of the courts to show whether the Ministry of Interior acts in accordance with the law.

KEYWORDS

detention
foreigners
Centre for foreigners
quasi administrative dispute
control

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1. Introduction

The detention of foreigners and asylum seekers is regulated by two acts: the Foreigners Act[2] and the International and Temporary Protection Act[3] (there are several bylaws that regulate this issue). The restrictions on freedom of movement prescribed by the Foreigners Act (Arts. 211–222) are two-fold. First, foreigners can be arrested and detained for a maximum of 48 hours (possible prolongation for an additional 24 hours) for specific reasons (three in total). Second, it is possible to restrict the freedom of movement of foreigners by placing them at the centre for foreigners[4]; if the same purpose cannot be achieved by milder measures when the expected goal is the forcible removal and return of foreigners, it is their country of nationality or origin. The situations in which foreigners can be arrested are not controversial. Therefore, they will be briefly analysed. However, detention at the centre for foreigners is another issue. First, detention can last for a rather long time, and there are numerous reasons for this decision. Second, legal protection against decisions on detention by the Ministry of Interior is rather peculiar and unique in the Croatian legal system. The restriction of the movement of foreigners prescribed by the International and Temporary Protection Act is mentioned in Art. 54 which enables the Ministry of Interior to restrict the movement of asylum seekers for various reasons. Restriction of the movement of asylum seekers can be achieved by using several measures, including prohibition of movement outside shelters for asylum seekers or detention at centres for foreigners. Usually, the goal is to determine one's identity or ensure one's participation in an administrative procedure (to hinder escape possibilities). However, it is worth noting that legal protection against decisions allowing for the detention of asylum seekers differs from that as prescribed by the Foreigners' Act. There is no mandatory control over every decision as control is implemented only if the detained person files a lawsuit against such a decision in front of a competent administrative court. Therefore, this study aims to analyse the legal regulations of the detention of foreigners and asylum seekers. However, an analysis of the legal regulation would not suffice, as the question of the adequacy of the legal regulation would still remain unanswered. Therefore, we also analyse the practice of the administrative courts with regard to both acts to show what controls decisions on detention. The study seeks whether the courts show that the actions of the Ministry of Interior conform with the law and to what extent. Earlier researchers examined[5] whether legal protection against decisions on the detention of foreigners, which was introduced in 2013, would force the Ministry of Interior to adopt procedures, to protect individual rights at a higher level. Research from 2020[6] showed that this is probably not the

2 | OG nos. 133/20, 114/22, 151/22.
3 | OG nos. 70/15, 127/17, 33/23.
4 | Admission centre for foreigners (Ježevo), Transit admission centre for foreigners Trilj and Transit admission centre for foreigners Tovarnik.
5 | Lalić Novak, 2013, p. 151.
6 | Staničić and Horvat, 2020, p. 12.

case. Therefore, it would be interesting to see whether the situation changed as Croatia faced a sharp increase in illegal migration from 2020 onwards. It is important to mention that there is a strong link between the detention of foreigners and asylum seekers, and the need for successful border control and protection which is also analysed (in short) in this study.

2. Relationship between border protection and control and the detention of foreigners and asylum seekers

Border control is considered an exclusive prerogative of every state, as states have the exclusive right to prescribe who, when, and in what manner they are entitled to cross borders. However, international human rights standards limit this right. In other words, states have the right to decide who, and under what conditions, is one entitled to enter or stay in their territory, but are restricted to this right by their obligation to consider the protection of human rights.[7] International law dictates that states allow a migrant to enter or stay in their territory when they meet the conditions for international protection or when their entry is necessary for family reunification.[8] Larger numbers of migrants and asylum seekers indicate a greater need to restrict the movement of illegal migrants and/or asylum seekers. In other words, border control means an effective control on border crossings and protection of the state border (the outer border of the European Union). This means that all activities are implemented at the border in accordance with the needs of the Schengen Code in response to an attempted crossing or the act of crossing the border.[9] All member states are obliged to implement integrated border management. By adopting Regulation (EU) 2016/1624 of the European Parliament and the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and the Council and repealing Regulation (EC) no. 863/2007 of the European Parliament and the Council, Council Regulation (EC) no. 2007/2004 and Council Decision 2005/267/EC[10], the default elements of the new European concept of integrated border management were made on the basis that all member states are obliged to adopt their national strategies of integrated border management. On 13 November 2019 the new Regulation (EU) no. 2019/1896 of the European Parliament and the Council on the European Border and Coast Guard was adopted, along with Regulation (EU) no. 1052/2013 and Regulation (EU) no. 2016/1624.[11] In Art. 3 of the new Regulation, four elements of integrated border management were incorporated (fundamental

7 | Staničić, 2022, p. 109.
8 | Lalić Novak, 2020, p. 6.
9 | Staničić, 2022, p. 117.
10 | Official Journal of the European Union, L 251/1 from 16.9.2016.
11 | Official Journal of the European Union, L 295, from 14.11.2019.

rights; education and training; research and innovation; and cooperation with relevant institutions and bodies, offices, and agencies of the Union). It is well known that there are different rules on entry into the Schengen Area depending on the status of the person attempting to cross the border (whether they have the right to free movement in accordance with the European Union law). Border control is implemented at border crossings to enable persons, their means of transportation and items in their possession to enter (or exit) the territory of member states. Border protection is the control of the borderline between border crossings to prevent people from evading border control and is the responsibility of the border police.[12] Therefore, state borders are protected mainly to prevent unauthorised border crossings, suppress cross-border crimes and take measures against persons who have illegally crossed the border. Border control, as well as the supervision and protection of state borders, is therefore an important instrument against illegal migration, criminality related to people smuggling and related crimes, and border crossings. In recent years, the Republic of Croatia has experienced an unprecedented increase in illegal border crossings. The period until 2017 was characterised by moderate illegal border crossings that did not exceed 5000 annually. However, in 2019, a sharp increase accounting to 20278 illegal crossings were detected, which was more than 147 % over that of the previous year. In 2020, the situation worsened as 29904 illegal border crossings were noted. In 2021, the problem was relatively mitigated as 17404 illegal crossings were noted[13]. However, by 2022, more than 50000 illegal crossings were noted. [14] Furthermore, the Republic of Croatia became a full member of the Schengen area on 1 January 2023; however, under its Treaty of Ascension to the European Union (EU) in 2013 the Schengen rules were implemented. This means that the Croatian border police have exercised the Schengen Code for many years. Considering this, it is obvious that the increase in illegal migration also implies an increase in migrants who are to be returned to their country of origin or nationality. This also indicates an increase in the number of asylum seekers in the Republic of Croatia who apply for asylum. Their numbers have increased remarkably during the last few years, from approximately 1900 in 2019 and 2020, to 3039 in 2021, and lastly 12832 in 2022.[15]

12 | Staničić, 2015, p. 130.
13 | Staničić, 2022, p. 111.
14 | Official statistic of the Ministry of Interior [Online]. Available at: https://mup.gov.hr/pristup-informacijama-16/statistika-228/statistika-trazitelji-medjunarodne-zastite/283234 (Accessed: 23 September 2023).
15 | Official statistic of the Ministry of Interior [Online]. Available at: https://mup.gov.hr/pristup-informacijama-16/statistika-228/statistika-trazitelji-medjunarodne-zastite/283234 (Accessed: 23 September 2023).

3. Restriction on the movement of foreigners according to the Foreigners Act

3.1. Arrest of a foreigner

As one of the measures for achieving restriction on movement (with the aim of returning foreigners to their country of origin, or to prevent escape), it is possible to arrest and detain foreigners. This is possible according to the Foreigners' Act and is prescribed by Art. 211. It is permissible to arrest and detain a third country national for at least 48 hours if there is a need to determine their identity (because of lack of documents or suspicion of a forgery), the circumstances of illegal border crossing or stay, the need to execute forcible return and the risk of escape of the third country national. The prescribed deadline for detainment can be prolonged for an additional 24 hours, but only if it is reasonable to assume that the circumstances regarding their arrest can be determined within that additional time and their detention at the centre for foreigners is not feasible because of the distance from the centre. The deadline starts at the time of the arrest. If the deadline expires, the third country national will be released immediately, even if the circumstances that necessitated the arrest have not yet been determined. Of course, if these circumstances were to be determined prior to the expiration of the deadline, the third country national would be released, despite the deadline having not expired.

It is obligatory to inform[16] the third country national about the reasons behind the arrest, following the possibility of determining a legal representative[17] and

16 | According to the Regulation on treatment of third state nationals (*Pravilnik o postupanju prema državljanima trećih zemalja*), OG no. 136/2021, the notice on the arrest contains (Art. 20):
1. name and surname of the third country national;
2. parent's names;
3. date, place, and state of birth;
4. gender;
5. nationality;
6. address, place, and state of residence;
7. type, number, date, place of issue, and validity period of the document for border crossing or other identity document;
8. place and date of arrest and name of the police department, that is, the police station whose police officers arrested the third country national;
9. reason for arrest (legal Art. and name of misdemeanour or criminal offense);
10. current location of the arrested person;
11. communication sent by a third country national;
12. information that the minor was found accompanied by a representative, as well as the name, surname, and nationality of the accompanying person;
13. information that the minor was found unaccompanied and the name, surname, and citizenship of the representative.

17 | In this case, they are entitled to one free phone call and the procedure is suspended until such a representative arrives (on the basis that this does not endanger the possibility to end the procedure within the set deadline). See Art. 54 of the Regulation on treatment of third state nationals.

informing their family members or someone else that they have been arrested, and, informing the embassy or a consular office of the state of their nationality.

If a third country national is a minor without an escort, the competent body for social welfare must be informed, as they are obliged to appoint a special guardian for all minors without escort, to safeguard their rights. Additionally, the embassy or consular office of the state of minors' nationality will be informed of their arrest.

It is obligatory to keep the arrested third country national in a lit and aerated room; it must be adequately heated, furnished with basic furniture (table, chairs, bed with linen) and have a lavatory. If the accommodation is single, the room must be at least 7 m square, and if it is a group, it must be at least 5 m square per person.[18]

3.2. Detention of a foreigner at the Centre for foreigners

Detention of a third country national at the centre is possible only if the same purpose of forcible return and repatriation cannot be ensured by lighter measures. The law stipulates that available lighter measures can include depositing travelling documents and tickets, depositing financial funds, banning leaving a certain address and reporting to the police station at a given time (Art. 213, para. 1). If this can be achieved by implementing lighter measures, then detention cannot be ordered. Instead, a decision to implement one or more lighter measures was issued by the Ministry and delivered to third country nationals. In most cases, there is no possibility of an appeal against such a decision; however, an administrative dispute is an available remedy. If the purpose cannot be achieved by lighter measures, then detention in the centre will be ordered by the Ministry.[19] In this instance, detention must be determined for the shortest possible time and is required to execute forcible return and repatriation. It must be highlighted that the Ministry has discretionary powers in determine whether the purpose can be achieved through lighter measures or detention is really needed.

There are situations in which a third country national is detected during an illegal stay for various reasons[20]. In this case, they are obliged to leave the country immediately (Art. 183). If there is reason to believe that such a third

18 | Regulation on treatment of third state nationals, Art. 46/2.

19 | The rules of stay are regulated by the Regulation on the stay in the reception centre for foreigners and the method of calculating the costs of forced removal, OG no. 145/2021. It is translated into English and French and can be translated into other languages (Art. 3).

20 | (1) A third country national shall be deemed to be staying illegally if:
1. he is not on short-term stay;
2. he does not have a valid temporary stay, long-term residence or permanent stay permit;
3. he is not entitled to legally stay in line with the legislation governing international protection;
4. he is not the third country national referred to in Art. 58, para. 4; Art. 62, para. 2; Art. 129, para. 2; and Art. 156, para. 1 of this Act;
5. he moves outside an area to which his movement has been restricted pursuant to a bilateral international treaty; 6. he is not covered by the mobility programme referred to in Art. 73, para. 5 or Art. 74, paras. 3 and 12 of this Act.

country national is going to evade their obligation to leave the country (and the European Economic Area), they can be detained at the centre for up to six months. There are two sets of cases based on the existence of such risks. The first set leaves discretional power with the Ministry, that is, the Ministry is entitled, but not obliged, to issue a detention decision: they lack an identity card or travelling document, have no registered stay, have declared that they will not execute or disrupt the execution of measures for their return, they do not execute or have not executed the return decision, they do not fulfil or have not fulfilled the obligation to go to another member state, they entered the EEA illegally, that is, the Republic of Croatia; their previous behaviour indicates that they could avoid fulfilling the obligation to leave the EEA or the Republic of Croatia (Art. 214, para. 2).

The other set of cases prompts the Ministry to obligatorily issue a detention decision because their existence is considered a risk of avoiding the obligation to leave the EEA, that is, the Republic of Croatia. Those cases include they refused to provide personal or other information and documents or provided false information, they used or forged someone else's document, they rejected or destroyed the identity document, they refused to give fingerprints, they prevented by force or fraud the payment for the purpose of forcible removal to the country to which he is being forcibly removed, they did not comply with the lighter measures issued by the Ministry (instead of detention), they entered the EEA or the Republic of Croatia before the ban on entry and residence expired and they resided in another EEA member state from which they illegally entered the Republic of Croatia directly or by transit through a third country (illegal secondary movement) (Art. 214, para. 3).

The prescribed time for detention was up to six months. However, this time can be extended to 12 months if a third country national refuses to disclose personal or other data and documents needed for forcible return or has given false data, in some other manner prevented or delayed forcible return, or the Ministry justifiably expects the delivery of travel and other documents needed for forcible return that were requested from the competent bodies of another country.

If there are reasons for detention, whether those that dictate detention in all cases or those for which the Ministry finds that, because of their existence, it is appropriate to detain a third country national, a decision is issued by the Ministry through a competent police station or police department in the form of an administrative act. The decision on the extension of detention was brought about directly by the Ministry.

Another decision can be made during detention when stricter police supervision is ordered. It encompasses the restriction of the movement of a third country's nationals at the centre. This decision is specific as it is prescribed that it can be brought about without enabling the party (third country national) to be heard.[21]

21 | Staničić and Horvat, 2020, p. 11.

Strict police supervision may be ordered for a maximum period of seven days.[22] This measure could be issued multiple times (Art. 219, para. 7).

Therefore, during the detention process, there are three types of decisions: detention, the extension of detention and decisions on stricter police supervision.

3.2.1. Legal protection against decisions on detention

As decisions on detention are administrative acts, they are brought under the General Administrative Procedure Act (GAPA)[23]. This Act prescribes legal protection against administrative acts (decisions, *rješenja*) in Art. 12[24], according to which an appeal is the usual legal remedy against decisions that parties find unlawful or irregular[25]. However, it can be prescribed differently according to the law. As the Foreigners Act prescribes that detention decisions are brought about by the

22 | Strict police supervision may be ordered if a third country national:
1. leaves the centre without authorisation or if there are justified reasons to suspect that they will try to leave the centre;
2. physically assaults other third country nationals, authorised officers, or other employees;
3. tries to inflict self-injury;
4. behaves inappropriately, grossly insults and degrades other third country nationals, authorised officers or other employees on any grounds;
5. prepares or makes items for assault, self-injury, or escape from the centre;
6. engages in the preparation of narcotic substances and precursors at the centre;
7. deliberately damages clothing or other items and objects they received to use at the centre;
8. deliberately damages technical and other equipment at the centre;
9. deliberately interferes with the operation of technical equipment (audio-visual and lighting) which is installed at the premises for the purpose of providing physical and technical protection;
10. persistently refuses to obey the orders of police officers and does not comply with the valid legislation;
11. otherwise seriously breaches the provisions of the house rules of the centre (Art. 219, para. 2).

23 | OG nos. 47/2009, and 110/2021. It is important to note that the GAPA is a general procedural act and that its application is mandatory in all administrative matters. This is prescribed by Art. 3/1 of the GAPA, according to which: 'This Act shall apply in deciding all administrative matters. Only individual questions of administrative procedure may be regulated otherwise by law, where it is necessary for deciding in particular administrative areas and where this is not contrary to the fundamental provisions and the purpose of this Act'.
From these two separate principles emerges the following: first, it is clear that deviations from the GAPA are permitted only in special cases and that even then the principles and fundamental provisions of the GAPA apply; second, only particular questions can be regulated otherwise by law, which results in the conclusion that the administrative procedure as a whole cannot be regulated by the provisions of any other act. Therefore, the importance of the GAPA in the Croatian legal order is paramount. Britvić Vetma and Staničić, 2021, p. 17.

24 | (1) A party has the right to an objection against a first-instance decision, as well as when an administrative body has not adjudicated an administrative matter within a specific term, unless provided otherwise by law.
(2) An administrative dispute can be initiated against a second-instance decision or against a first-instance decision against which an appeal is not allowed.

25 | Irregular decision is usually linked with the use of discretionary powers.

Ministry (although through first-instance bodies– competent police stations or police departments) which is a body above which there is no second-instance body and appeal is not permitted.[26] Therefore, according to Art. 12, para. 2 of the GAPA, the only available legal remedy, is administrative dispute. The Foreigners Act does prescribe that administrative dispute is available (Art. 216, para. 3), but also enacts a very peculiar mean of control of legality of the aforementioned decisions through a 'quasi' administrative dispute.[27]

Judicial protection against an individual decision of a public law body is ensured in all other cases in the form of an administrative dispute before the competent administrative court in accordance with the Administrative Disputes Act (ADA)[28], according to which administrative court proceedings are initiated by a lawsuit. The only exception to this is when an assessment of the legality of a general act is required. The provision that an administrative dispute is initiated by a lawsuit is an expression of the principle of disposition–the court does not initiate an administrative dispute *ex officio*. Therefore, the administrative court does not act *ex officio* but in accordance with the expressed will of the party, that is, the plaintiff.[29]

26 | It should be noted that the fact that the Ministry of interior decides on the limitation of freedom of movement, and not a court was challenged in front of the Constitutional Court of the Republic of Croatia in 2012. However, the Court decided on the matter in 2020 rejecting the claim that such regulation is unconstitutional. The Court cited the practice of the ECJ with regard to the requirements of the Directive 2008/115 on issuing a written act with real and legal reasons for detention (judgement Bashir Mohamad Ali Mahdi, C-146/14 from 5 June 2014. The Constitutional Court also reiterated that there is ample judicial control of detention decisions which makes the regulation in accordance with the Constitution. See decision U-I-5695/2014 from 24 June 2020.

27 | Accordingly, one could question how to formulate an instruction on the legal remedy as an integral part of each decision (Art. 98 of the GAPA). Namely, it is stipulated that the instruction on legal remedy informs the party whether he can file an appeal against the decision or initiate an administrative dispute, to which body, within what time frame and in what way. There is no doubt that a third country national is a party to an administrative proceeding that resulted in the adoption of a decision on detention/extension of detention/stricter police supervision. An appeal is not allowed against all the aforementioned decisions; therefore, the instruction on legal remedy should state that a lawsuit is allowed to the competent administrative court. However, according to the Foreigners Act, the party—a third country national—does not have the right to file a lawsuit against the aforementioned decisions, but is only informed that the Ministry will submit the case file to the administrative court, which will evaluate the legality of the decision. Therefore, basically, the party does not have any legal remedy against the aforementioned decisions. However, can a remedy instruction be like that? Or should it be stated in the instruction on legal remedy that no appeal or lawsuit can be filed against the decision, but that the Ministry will initiate the initiation of an 'administrative dispute' against the decision ex officio? The instruction on the legal remedy is an instruction for the party, therefore the decision from the Foreigners Act is problematic from the aspect of the GAPA and the mandatory content of the decision. Staničić and Horvat, 2020, p. 12.

28 | OG nos. 20/2010, 143/2012, 152/2014, and 94/2016 – decision of the Constitutional Court of the Republic of Croatia, 29/2017.

29 | Staničić, Britvić Vetma and Horvat, 2017, p. 87.

However, the Foreigners Act prescribes (parallelly, or instead of[30]) that immediately after delivering the decision to the third country national, the Ministry is obliged to submit to the competent administrative court the case files on detention at the centre, on extension of detention, or on stricter police supervision (this decision is referred to the court by the centre). On the basis of the submitted file, the competent administrative court examined the legality of this decision. Therefore, without the filing of a lawsuit, that is, without the activity of the plaintiff, the judicial supervision of the legality of the individual decision by which the public law body decided on the party's obligation is activated, that is, it is undoubtedly a 'dispute' whose subject is the one referred to in Art. 3, para. 1, point 1 ADA. The question is whether it is even possible to talk about an administrative dispute, as, basically, in this form of judicial control over the work of the administration, there is no plaintiff, defendant, or interested person, as Šikić believes.[31] Other authors state that this is a 'quasi-administrative dispute', that is, a drastic deviation from the usual regulation of administrative disputes according to the ADA.[32]

Furthermore, in contrast to the ADA, which does not prescribe deadlines in which the administrative court must make a decision in an administrative dispute, the Foreigners Act prescribes extremely short deadlines in which the administrative court must make a decision to repeal or confirm the contested decision within five days from the date of delivery of the case file to the court (Art. 216, para. 4). The deadline is even shorter for the evaluation of the legality of the decision on stricter police supervision, where the court must make a decision on the same day it receives the decision, or if the decision in question is brought on a court's non-working day, the first working day from the day it receives the decision from the centre. Additionally, when the court decides, in accordance with Art. 216, para. 5, or para. 8 of the same Art. of the Foreigners Act, whether a third country national who has been detained for a period longer than three months should be released from the centre after three months, the deadline is ten days from the date of delivery of the case files. The ratio of such short deadlines is clear as these are proceedings in which the personal freedom of an individual is limited to free movement[33]. However, as Šikić states, the ability of the administrative court to decide on cases so quickly is questionable.[34]

30 | One could assume that both legal remedies are available – the right of the third country national to file a lawsuit in front of the competent administrative court, and the obligation of the Ministry and the centre to submit the decision (and file) to the competent administrative court for review of legality. However, because all decisions are due for review according to the law, what would be the point in allowing the third county national to dispute a decision that will already be processed by the court *ex officio*? Therefore, the available legal remedy is substituted by a quasi administrative dispute instigated by the court upon delivery of the decisions with regard to detention. Accordingly, there are examples in which a lawsuit by the third country national was lodged in front of the competent administrative court (Usl-3563/18-7 from 21 January 2021).

31 | Šikić, 2019, p. 57.

32 | Staničić, Britvić Vetma and Horvat, 2017, p. 87.

33 | Staničić and Horvat, 2020, p. 11.

34 | Šikić, 2019, p. 57.

As an additional point of interest, it should be pointed out that, in an administrative dispute, if the illegality of an individual decision contested by a lawsuit is established, it should be annulled. However, according to the Foreigners Act, if the administrative court finds illegality(s) in a decision on detention, extension of detention or stricter police supervision, it can only repeal such decisions (Art. 216, paras. 4 and 5, Art. 219, para. 5). The practical as well as theoretical difference between the annulment and repeal of an administrative act!).[35]

Furthermore, there is the question of whether there is the right to appeal the decision of the administrative court regarding the legality of decisions brought about by the detention of a third country national. Namely, third country national is not a party in this 'administrative dispute', and only the party can file an appeal according to ADA; therefore they cannot file an appeal against the judgement confirming the decision of the Ministry. However, the Ministry is relatively a party in this 'administrative dispute'; therefore, in theory, it could file an appeal against the judgment repealing the decision. However, this would mean that only a public law body can file an appeal when it is dissatisfied with a court decision, and not the third country national on whose rights the decision refers to, which would be a direct violation of Art. 14, para. 2 of the Constitution of the Republic of Croatia[36], which reads: 'All are equal before the law'. In other words, there would be no equality of arms and the appeal would be the legal remedy for only one party in the 'administrative dispute'. Therefore, one should accept Šikić's point of view that in this form of judicial control over the work of the administration, there are no parties in the sense of ADA.[37] Consequently, no one can dispute the administrative court's decision to revoke or confirm the decision.[38] However, the newer case law of the Administrative court shows that the judgments contain the legal remedy notice which states that an appeal to the High Administrative Court is permitted.[39]

Therefore, there are the following differences in this form of judicial control over the work of the administration, which is why we cannot discuss an administrative dispute in the sense that it is regulated by the ADA: 1) it is initiated *ex officio*, without a lawsuit, that is, the addressee of the act cannot challenge the act independently. However, the body that adopted the act only initiates the procedure for assessing its legality; 2) there are no parties (plaintiff, defendant, and interested person); 3) as a rule, there is no hearing (except in the case of minors), contrary to the ADA's express provision; 4) a number of ADA rules do not apply (on the submission of a claim to an answer, the principle of a party's statement, the principle of helping an ignorant party, the party's right to representation, and so on); 5) it should be impossible to challenge the court decision.

35 | Staničić and Horvat, 2020, p. 12.
36 | OG, nos. 56/1990, 135/1997, 113/2000, 28/2001, 85/2010– consolidated text, 5/2014.
37 | Šikić, 2019, p. 57.
38 | Staničić and Horvat, 2020, p. 12.
39 | See, e.g., Usl-2680/2022-2 from 16 September 2022, Us I-37/2023-2 from 10 January 2023, Us I-114/2023-2 from 30 January 2023. This practice is not valid, as stated, there are no parties in this form of judicial control, and only parties can challenge a court's decision through appeal.

3.2.1.1. Role of discretionary power in detention cases

Another point that must be mentioned is the role of discretionary power in administrative procedures regarding detention. Discretionary powers are especially broad in the Administrative Law of the Interior; this is true in almost all detention cases. When discretionary powers are used, the court's ability to review decisions that contain discretionary powers is limited. The ADA prescribes that an administrative dispute cannot be conducted on the regularity of an individual decision made by applying discretionary powers, but can be conducted on the legality of such a decision, the limits of authority, and the purpose for which the authority was given (Art. 4, para. 2).

4. Restriction of movement of asylum seekers according to the International and Temporary Protection Act

4.1. On limiting freedom of movement of asylum seekers in general

International agreements, regional documents, and national regulations guarantee the right to asylum. According to the 1951 Convention on the Status of Refugees, all states are, in principle, obliged to give the right of choice of place of residence and freedom of movement within their territory to legally residing persons (Art. 26, para. 2). In general, the limitation of freedom of movement for asylum seekers should be avoided; however, this can be prescribed in certain cases[40]. However, it should be prescribed by law and justified, considering that the duration of such a measure should be as short as possible.[41] The asylum seeker must be informed of the decision and reasons for limiting his freedom of movement in the language he understands, and this limitation must not represent an obstacle for applying for asylum.[42] Prior to deciding on the limitation of movement, other measures must be considered, such as reporting to a competent body or similar measures.[43] If a limitation on freedom of movement is issued, it must meet (cumulatively) the criteria of necessity, proportionality, and justifiability.[44] The European Convention for the Protection of Human Rights and Fundamental Freedoms does not explicitly mention the right to asylum; however, the ECtHR has established a series of standards for the protection of asylum seekers through its case law.[45] It should be mentioned that the ECtHR highlighted the fact that limiting the freedom of movement of asylum seekers is a measure implemented not on persons who committed a felony but on foreigners who are often in fear of their

40 | Lalić Novak, 2013, p. 142; UNHCR, 1986, para. b.
41 | Lalić Novak, 2013, p. 142.
42 | Lalić Novak, 2013, p. 142.
43 | Lalić Novak, 2013, p. 143.
44 | Lalić Novak, Gojević-Zrnić and Radečić, 2015, p. 87.
45 | Lalić Novak, 2014, p. 940.

life, fled the country of their origin.[46] Therefore, asylum seekers are a vulnerable group that must always be considered when discussing such measures.

4.2. Decisions on limiting the right of free movement of asylum seekers

It is prescribed that asylum seekers have the right to move freely in the Republic of Croatia. This right is set in motion after the person who seeks asylum states their intention to seek asylum, usually while undertaking border control at the border crossing.[47] However, this right can be limited if a competent authority deems it necessary. There are multiple reasons[48]for which this decision can be made by the ministry, police department, or police station. Therefore, although asylum seekers have, in principle, the right to free movement, this right can be limited in several ways. The following measures were used to limit the right to free movement: prohibiting movement outside the shelter; prohibiting movement outside a certain area; personally entering the shelter at a certain time; depositing travel documents and tickets at the shelter; detention at a centre for foreigners.

It is worth noting that detention at the centre for foreigners is deemed the strictest measure that can be implemented only if all other measures cannot ensure the fulfilment of the purpose of limiting the right to free movement in accordance with the proportionality principle.[49] Therefore, in total, five types of decisions can be made to ensure the asylum seekers' participation in the procedure and that they do not abuse the right to asylum, as it has to be considered that

46 | Amuur vs. France, request no. 19776/92 from 25 June 1996, para. 41.

47 | This can be done, if the seeker is already in Croatia, at the police department, police station or at the centre for foreigners, and also, but in extraordinary circumstances, at the shelter for asylum seekers.

48 | 1. to determine the facts and circumstances on which the request for international protection is based, which cannot be determined without restrictions on movement, especially if it is assessed that there is a risk of flight (the risk of flight is assessed based on all the facts and circumstances of the specific case, especially with regard to previous attempts to leave the Republic of Croatia voluntarily, refusal to submit to verification and identification, concealment or provision of false information about identity and/or citizenship, violation of the House Rules of the shelter, results of the Eurodac system and opposition to the transfer).
2. to establish and verify identity or nationality.
3. for the protection of national security or public order of the Republic of Croatia.
4. to prevent the spread of infectious diseases in accordance with national regulations on necessary epidemiological measures.
5. to prevent endangering the lives of persons and property.
6. multiple consecutive attempts to leave the Republic of Croatia during the international protection procedure.
7. the implementation of the forced removal procedure, if on the basis of objective circumstances, considering that the applicant already had the opportunity to start the procedure for granting international protection, it is reasonably assumed that by applying for international protection he wants to delay or hinder the execution of the decision on expulsion and/or return made in accordance provisions of the Foreigners Act.

49 | This applies especially to members of vulnerable groups who can be detained in the centre only if, by individual assessment, is determined that such accommodation is fit to his personal circumstances and needs, especially health condition. Unaccompanied minors, if this measure is deemed, by individual assessment, necessary, must be detained apart from adults and in the shortest possible time.

almost 80% of asylum applicants left the country during the procedure[50]: decision prohibiting their movement outside the shelter, decision prohibiting their movement outside a certain area, decision ordering them to check themselves at the shelter at a certain time (every Tuesday at two), decision ordering them to deposit documents and tickets at the shelter (to make further travelling impossible) and the decision on detention at the centre for foreigners. All these decisions are administrative acts that must be explained and contain instructions on legal remedies.

These decisions can be made for a period during which the right to free movement persists for up to three months in total. However, an issued measure can be prolonged for an additional up to three months 'for justified reasons'. It is important to note that when the ministry, police department or police station issues a decision limiting the right to free movement, such a decision must contain (at the disposition) the measure of choice and duration of the measure. Both must be aligned to limit the free movement of asylum seekers.

4.3. Legal protection against decisions on the limitation of the freedom of movement

All decisions that limit the freedom of movement of asylum seekers are subject to legal control. However, as mentioned above, there is discretionary power in all of these decisions. This fact prevents the court from examining the regularity of the decision in the scope of its discretionary part, as it is competent only for examining the legality of such a decision, the limits of authority and the purpose for which the authority was given. As in decisions regarding the detention of a third country's nationals, there is no appeal against decisions limiting the right to free movement of asylum seekers. The only legal remedy was an administrative dispute before a competent court.

It is prescribed that the asylum seeker should be entitled to administrative disputes against all decisions, limiting their right to free movement. The deadline for such a lawsuit is rather short – only eight days after delivery. The competent court then asks the issuing authority for the case file to be sent to the court within eight days after the request of the court is received. Consequently, the court must deliver a judgement within 15 days after the oral hearing. It is worth noting that such deadlines differ significantly from the ones usually prescribed in administrative dispute by the ADA (the deadline for filing a lawsuit is 30 days from delivery, there is no deadline in which a judgement is to be delivered). This is justified because limiting freedom of movement requires quick redress if unlawfulness occurs.

If the court finds the decision unlawful, it will annul it, and the asylum seeker must be released immediately (Art. 54, para. 14). The law is not very complete on this issue, as it only prescribes that the Ministry is to 'release the asylum seeker' if the court finds that a decision on limiting the freedom of movement is illegal. However, as explained above, there are multiple decisions on limiting freedom of movement which do not always include detention. For example, decisions

50 | Lalić Novak and Giljević, 2022, p. 118.

prohibiting movement outside a certain area, ordering one to check themselves at the shelter at a certain time or ordering them to deposit documents and tickets at the shelter. Therefore, if such decisions are found illegal, then the asylum seeker is free to move outside a precisely set area, is not obliged to check themselves at the shelter, and is entitled to the return of documents deposited at the shelter.

There is a relatively peculiar obligation of the competent administrative court to examine, *ex officio*, or at the request of the asylum seeker, the decision to limit freedom of movement at reasonable intervals. This applies especially when the limiting freedom of movement exceeds one month in duration. However, the International and Temporary Protection Act lacks regulation in the sense of Art. 216, para. 4 of the Foreigners Act, which prescribes the obligation of the Ministry to send files to the competent Court. Therefore, the question on how the court will fulfil its duty if no one is obliged to send the file and decide on detention arises. The only solution is to apply the aforementioned regulations from the Foreigners Act and allow them to apply to all detentions of third country nationals.

5. Court's practice on detention of foreigners and asylum seekers

This Sec. analyses the practice of the administrative courts since 2012 regarding the detention of foreigners, based on the information obtained from the courts via the right to access information, as they control all detention decisions. Regarding the detention of asylum seekers, court practices available to the public were analysed, and data was requested from the courts.

The previous research done by Staničić and Horvat in 2020 showed that competent administrative courts made the following decisions during the period from 1 January 2012 to 1 January 2020.

a) Administrative Court in Zagreb

Total detentions	Total verified decisions	Total revoked decisions	Percentage of verified decisions
1154	995	121	86.22%

b) Administrative Court in Split

Total detentions	Total verified decisions	Total revoked decisions	Percentage of verified decisions
487	447	36	91.77%

c) Administrative court in Osijek

Total detentions	Total verified decisions	Total revoked decisions	Percentage of verified decisions
317	300	10	94.64%

d) Administrative Court in Rijeka

Total detentions	Total verified decisions	Total revoked decisions	Percentage of verified decisions
1	1	0	100%

From this data, it is clear that there were, in total, 1959 detention decisions, from which 1743, or 88.97% were verified. Only 167 or 8.52% detention decisions were revoked.[51] Furthermore, Staničić and Horvat point out that none of the first-instance administrative courts have received a case in which a decision would be made on stricter police supervision in accordance with Art. 138, para. 5 of the Foreigners Act, which means that this measure is not used at all, because the Ministry is obliged to refer such solutions to the court for evaluation of legality. Additionally, there were only cases before the Administrative Court in Zagreb under Art. 135, para. 5 of the Foreigners Act–an extension of accommodation after three months–and in 12 cases, it was decided that the citizen of a third country would not be dismissed from the centre.[52]

After collecting data for the period from 1 January 2020 to 25 June 2023 via the Access to Information Act,[53] we observed the following:

a) Administrative court in Zagreb

Total detentions	Total verified decisions	Total revoked decisions	Percentage of verified decisions
1615	1331	256	84.15%

b) Administrative court in Osijek

Total detentions	Total verified decisions	Total revoked decisions	Percentage of verified decisions
1879	1652	224	88.08%

51 | In some cases, the suspension of the dispute was recorded–7 before the Administrative Court in Osijek, 1 before the Administrative Court in Split, that is, the proposal of the Ministry for judicial review of the legality of the decision was rejected–3 such cases before the Administrative Court in Split, and in some cases the decision was partially cancelled–66 such cases before the Administrative Court in Zagreb. See in Staničić and Horvat, 2020, p. 12.

52 | Staničić and Horvat, 2020, p. 12.

53 | OG nos. 25/2013, 85/2015, and 69/2022.

c) Administrative Court in Rijeka[54]

Total detentions	Total verified decisions	Total revoked decisions	Percentage of verified decisions
0	0	0	0%

d) Administrative court in Split

Total detentions	Total verified decisions	Total revoked decisions	Percentage of verified decisions
1662	1645	7	98.97%

There were, in total, 5156 detention decisions in the specified period (1 January 2020 to 25 June 2023), out of which 487 or 9.45% were revoked. Therefore, 90.55 % of the detention decisions were verified as legal by the competent courts. Again, only five (four in front of the Administrative court in Zagreb and one in front of the Administrative court in Osijek) cases of accommodation extension appeared after three months, and all were verified as legal. It is also interesting to note that there have been no decisions regarding stricter police supervision from 2012 to date, which clearly shows that the institute was not in use. The data show that the vast majority of decisions on detention brought by the competent bodies (the Ministry, police departments, and police stations) are legal, as there have been 7115 detention decisions, out of which only 533 or 7.49% were revoked by the courts. It should also be noted that there are instances in which courts uphold the detention decision but shorten the detention period, saying that the decided decision is not in accordance with the principle of proportionality.[55]

By checking the available case law of the administrative courts on detention[56], it is clear that the courts usually rule within the set deadline[57] of five days; however, there are cases in which this was not adhered.[58] However, such delays are minimal, and one must highlight the fact that the courts bring such judgements in a very short time, notwithstanding the fact that it is, e.g., the holiday season (judgments from 29 December, 2 January etc.) which shows that the courts really try to meet the set (very short) deadline.

In conclusion, courts always check whether the conditions for ordering detention have been met, whether the same purpose could have been achieved by lighter

54 | Is not a competent court as there is no detention centre under its jurisdiction.

55 | See the series of judgements of the Administrative court in Osijek early 2023 in which the detention is upheld, but the duration shortened from the set maximum six months to maximum two months. See, Us I – 1534/2023-2 from 2 January 2023, Us I 67/2023-2 from 12 January 2023, and Us I 181/2023-2 from 8 February 2023.

56 | Through the dana base of the Supreme Court – *Supranova*, available at: https://sudskapraksa.csp.vsrh.hr/home (Accessed: 23 September 2023).

57 | See, Usl-2680/2022-2 from 16 September 2022, 5 Us I-35/2023-2 from 10 January 2023, and 1 Us I-153/2023-2 from 2 February 2023.

58 | See, Usl-2753/22-2 from 27 September 2022 (one day delay).

measures (which is uncommon), and whether the duration of the detention was set in accordance with the principle of proportionality.[59]

6. Conclusion

The system regulating the limitations of the freedom of movement of foreigners and asylum seekers in Croatian law is aligned with the acquis communautaire, and set up in a way that guarantees the rights and freedoms of the people to whom it is applied. The analysis showed that more than 90% of decisions on detention are validated by the administrative courts. However, the impact of discretionary powers, which limit the scrutiny of administrative courts must always be considered. It is worth noting that the Croatian system regulating the limitations of freedom of movement of foreigners and asylum seekers also adheres to the requests set by the UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention.[60]

Furthermore, the wording of the Foreigners' Act regarding legal protection against detention decisions is poor and open to interpretation. For example, as was stated above, what is the nature of court protection in form of *ex officio* scrutiny, do parties in reality exist in such a court procedure, and consequently, should there be a right to appeal against first instance judgements? By scrutinising the norms, one should determine that this is a highly unusual 'administrative dispute' without parties. This would mean that there is no right to appeal, but court practices show that administrative courts find this differently. Therefore, there is need for amendments to the Foreigners Act to clearly prescribe whether third country nationals and the Ministry are parties to such court procedures, and whether an appeal is allowed.

A special issue is the right to launch a 'real' administrative dispute against detention decisions (parallel with the procedure *ex officio*). This option should not exist as it is obsolete because of the obligation of the authorities to send every decision to the competent court for validation. However, the existence of this 'real' administrative dispute can, in theory, be justified as a manner in which the rights of the parties are protected, as they have the opportunity to challenge every decision limiting the right to movement by themselves. However, there are a small number of such cases which is to be expected because of the *ex officio* control and the fact that to instigate judicial proceedings, a person must, first, be aware of the possibility, and second, be in a position to do so.

One should also rethink the deadlines set by courts to deliver their judgements. Five days is an extremely short time to put a decision on detention under real scrutiny, and this could be why few such decisions were revoked. If courts have more time, they would find more illegalities in the procedure before making

59 | See, Us I-42/2023-2, Us I-47/2023-2, and Us I-37/2023-2, all from 10 January 2023.
60 | UNHCR, 2012.

a detention decision. These cases have limitations in terms of freedom and must be resolved swiftly. However, a time limit of 10 days would be more suitable.

The International and Temporary Protection Act should be amended to include the obligation of the Ministry to return deposited travelling documents and tickets in Art. 54 para. 14, and the fact that the asylum seeker is free to move outside a precisely set area or is not obliged to check themselves at the shelter if the decision on limitation of freedom of movement is found illegal. The Act only prescribes that the asylum seeker should be released if the detention decision is illegal; however, there are other forms of limiting freedom of movement available to the authorities.

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