



REPORT

from the project

Who gets detained?
Increasing the transparency
and accountability of Bulgaria's
detention practices of
asylum seekers and migrants



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I. INTRODUCTION

Freedom of the person and the right to free movement are among the basic human rights recognized in a number of foundational acts at the international, regional and national levels. The limitation of these rights is permissible only in exceptional cases determined by law. There are two basic regimes for the limitation of these rights, which are essentially different in character: punitive and administrative. Punitive detention is imposed as a result of an investigated or committed crime, its goal is to punish and to reform, and it has strictly regulated substantive and procedural guarantees and regime. Unlike punitive detention, administrative detention, or the so-called detention without process, is imposed with a one-time decision of an executive body, and has preventative character, mainly regarding acts related to security and migration policy, as well as ensuring the execution of future acts of return and deportation.



Photo: Jose Antonio Sanchez Manzano

Administrative detention is not a new phenomenon. It dates back to antiquity and has been widely used in both totalitarian and democratic societies. Some of the first attempts to limit the practice of arbitrary detention exercised by the classes in power are made in the Magna Carta Libertatum in the beginning of

the 13th century as part of defending the rights and the interests of the feudal aristocracy in England from the actions of the representatives of the king's authorities.² With the advent of codification and the practice of administrative detention in modern times, and especially after the era of human rights and the revolutionary developments in international public law after the two World Wars, constant effort has been made to abolish the unlawful, defined as "arbitrary", forms of this practice. History shows that such arbitrary practices proliferate in moments of unforeseen circumstances and crises, when the executive and administrative authorities must be vested with additional powers in view of guaranteeing national security and public order. The seeking of the proper balance between the rights of the individual, on one hand, and the security of the community, on the other, is a long-standing debate, which, in view of the critical developments in contemporary history, has become even heated and more difficult to resolve.

2. See Art. 20 of the Magna Carta (1215), original text in English available at: <http://www.bsswebsite.me.uk/History/MagnaCarta/magnacarta-1225.htm>.

The increased migration flows into Europe over the last several years and the related challenges have led to an increased focus on security in European politics. Since 2013, Bulgaria, as an external border of the EU, has experienced an unprecedented for its history number of migrants passing through its territory, primarily asylum seekers and refugees. The majority of the arriving migrants are subjected to administrative detention, where the decisions made by the administrative bodies appear to be dictated by policy rather than by individual and objective assessment. The current project “Who gets detained? Increasing the transparency and accountability of Bulgaria’s detention practices of asylum seekers and migrants” examines this proposition, while aiming to contribute to increasing the transparency in the decision-making process for the administrative detention of migrants in Bulgaria and to the adopting of transparent and just detention practices that are in line with the principles of proportionality and individual assessment defined in international and European law.



Photo: Jose Antonio Sanchez Manzano

II. LEGAL FRAMEWORK

1. International Law

The administrative detention of migrants concerns a basic human right: the right to liberty and security. It is enshrined in international covenants with binding powers over our country.³ The International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) have developed extensive jurisprudence regarding the conditions under which a limitation of this basic human right is permissible. This jurisprudence allows for certain basic positions to be established: a limitation of the right to liberty and security is permissible only in the presence of two conditions: (1) it is prescribed by law; (2) it is not arbitrary. For the limitation of the right to liberty and security not to be arbitrary, it must be: (2.1) proportional to the legitimate purpose pursued; (2.2) necessary; and (2.3) reasonable.

The deprivation of liberty of the person must be prescribed by law

The ICCPR provides that deprivation of liberty must be “on such grounds and in accordance with such procedure as are established by law”.⁴ Similarly, under the ECHR any kind of detention must be “in accordance with a procedure prescribed by law”.⁵ According to EU law, the member states must bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2008/11/EC (the Return Directive)⁶ – the main legal tool at the EU level regulating the detention of migrants who do not have asylum-seeker status. Any deprivation of liberty, which does not comply with national legislation, would be unlawful under both national and international law.

The provision of a norm in national law, however, does not in itself automatically render the detention justified under international legal standards. In the case of *Amuur v. France*, the ECtHR ruled that the standard for “lawfulness” under the ECHR does not just “refer essentially to national law” but must be understood as closely related to the “quality of law”.⁷ “Quality” in this sense means that in its provisions allowing the deprivation – especially concerning a foreigner – national law must be sufficiently “accessible” and “precise” in order to avoid any risk of arbitrariness.⁸ Its consequences must be predictable for the affected individuals. The authorities have an obligation to guarantee that the detained persons are informed in a language they understand about the nature of the detention, the reasons therein, and the process for review or appeal of the detention decision.⁹ The ECtHR has ruled that “the absence of elaborate reasoning for an applicant’s deprivation of liberty renders that measure incompatible with the requirement of lawfulness inherent in Article 5 of the Convention”.¹⁰

3. See Art. 3 of the Universal Declaration of Human Rights (UDHR); see also Art. 9 of the International Covenant on Civil and Political Rights (ICCPR); see also Art. 5 of the European Convention on Human Rights (ECHR); see also Art. 6 of the Charter of Fundamental Rights of the EU.

4. See Art. 9, para 1 of the ICCPR.

5. See Art. 5, para 1 of the ECHR.

6. See Art. 20 of Directive 2008/115/EC (the Return Directive).

7. See case *Amuur v. France*, decision of the ECtHR from 25.06.1996, application № 19776/92, para 50.

8. *Ibid.*

9. See case *Abdolkhani and Karimnia v. Turkey*, decision of the ECtHR from 22.09.2009 on Application № 30471/08, para 136.

10. See case *Lokpo and Toure v. Hungary*, decision of the ECtHR from 20.09.2011 on Application № 10816/10, para 24

The deprivation of liberty of the person must not be arbitrary

At the same time, according to the practice of the ECtHR, lawfulness under domestic law is “not always the decisive element in assessing the justification of deprivation of liberty”.¹¹ The purpose of Art. 5 of the ECHR is, inter alia, to “prevent persons from being deprived of their liberty in an arbitrary fashion”.¹² Similarly, Art. 9 of the ICCPR stipulates that “No one shall be subjected to arbitrary arrest or detention”.¹³ In the case of *Hugo van Alphen v. the Netherlands*, the HRC has ruled that “arbitrariness is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability”.¹⁴



In the jurisprudence of the HRC, for detention not to be arbitrary and thus in violation of Art. 9 of the ICCPR, it must be necessary in the particular case, proportional to the pursued legitimate purpose and reasonable in the particular individual circumstances.¹⁵ The latter requires an assessment of any possible special needs and considerations related to the detained person. The proportionality principle prevents the authorities from undertaking any actions exceeding the minimally required for achieving the pursued legitimate purpose. In a similar manner, the constant jurisprudence of the ECtHR requires the state authorities to achieve a balance between the importance of respecting the right to liberty and security of the person and their right to free movement, on one hand, and the public interest of limiting these rights to pursue the legitimate purpose, on the other.¹⁶ It is precisely the proportionality test that obliges the state authorities to examine the possibility of applying alternatives to detention, which are less coercive on the individual, but would also achieve the pursued legitimate purpose. In the case of *C. v. Australia* the HRC finds a violation of Art. 9 of the ICCPR on the basis that the state had not demonstrated that it had not been

possible to impose less invasive measures than detention, such as parole.¹⁷ The jurisprudence of the HRC is consistent in such rulings. Thus, in the case of *Saed Shams and Others v. Australia*, the HRC points out that “the State party has not demonstrated that, in the light of each authors’ particular circumstances, there were no less invasive means of achieving the same ends.”¹⁸

11. Ibid., para 21.

12. Ibid.

13. See Art. 9, para 1 of the ICCPR.

14. See case *Hugo van Alphen v. the Netherlands*, decision of the HRC from 23.06.1990 on Communication № 305/1988, para 5.8.

15. See case *A v. Australia*, decision of the HRC from 30.04.1997 on Communication № 560/1993, para 9.2-9.4.

16. See case *Vasileva v. Denmark*, decision of the ECtHR from 25.09.2003 on Application № 52792/99, para 37; see also *Nowicka v. Poland*, decision of the ECtHR from 03.12.2002 on Application № 52792/99, para 61.

17. See case *C. v. Australia*, decision of the HRC from 13.11.2002 on Communication № 900/1999.

18. See case *Saed Shams and Others v. Australia*, decision of the HRC from 11.09.2007 on Communications № 1255,1256,1259,1260,166,1268,1270,1288/2004, para 7.2; see also case *F.K.A.G et al. v. Australia*, decision of the HRC from 26.07.2013 on Communication № 2094/2011, para 9.3.

As far as EU law is concerned, the Return Directive also requires detention to be necessary and proportional. The states may only resort to detention if less coercive measures could not be effectively applied in the particular case.¹⁹ In the case of *El Dridi*, the Court of Justice of the European Union (CJEU) ruled that the coercive measures must be applied “in a proportionate manner and with due respect for, inter alia, fundamental rights.”²⁰ According to the CJEU, “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 [...] to measures which restrict that liberty the most, namely detention in a specialised facility; the principle of proportionality must be observed throughout those stages.”²¹

In regards to the legitimate purpose, which must be pursued in imposing detention, the Return Directive envisions a narrow interpretation of its provisions concerning administrative detention.²² The only permissible goal of the detention is to organize the return or its execution, and specifically, only when (1) there is a risk of absconding, or (2) the person escapes or obstructs the return procedure. The detention is in compliance with the Return Directive and justified only as far as there is a “reasonable prospect of return”.²³ In the *Kadzoev* case, the CJEU ruled that “a reasonable prospect of removal does not exist where it appears unlikely that the person concerned will be admitted to a third country [...]”²⁴ Therefore, detention would be arbitrary in such case. In any case, after the maximum period for detention of 18 months under the Return Directive has elapsed, “the question whether there is no longer a ‘reasonable prospect of removal’ within the meaning of Article 15(4) does not arise. In such a case the person concerned must in any event be released immediately.”²⁵

2. National Law

Legal grounds for the administrative detention of foreigners

Bulgarian law regulates the administrative detention of foreign citizens with the Law of the Foreigners in the Republic of Bulgaria (LFRB) (in force from 27.12.1998). The LFRB contains provisions regulating the access, stay and removal from the country of citizens of third countries (outside the EU), and does not apply to asylum seekers. This law does not use any of the internationally recognized terms for detention – such as administrative or immigration detention – but uses, instead, the term “accommodation”. The places, where the foreigners are detained, are designated as “special homes for the temporary accommodation of foreigners” (SHTAF). In essence, however, they are closed facilities, which have all the essential characteristics of a prison. According to the LFRB, these “special homes” are created as part of the Migration Directorate of the Ministry of Interior (Mol). At this moment, there are two SHTAFs in the country: in the Busmantsi neighbourhood of Sofia (SHTAF – Sofia) with a capacity of 400 people, and in the town of Lyubimets (SHTAF – Lyubimets) with a capacity of 300 people.

According to Art. 44, para 7 of the LFRB, in the Migration Directorate’s “special homes” are accommodated foreigners who have been issued a Coercive Administrative Measure (CAM) “convoying to the border of the Republic of Bulgaria” or “expulsion”. These two CAMs are proscribed in the LFRB. Both represent in essence deportations. Generally, the measure “convoying to the border” is imposed on a foreigner who is present on the territory on the country without the respective legal grounds, and “expulsion” – to somebody whose presence in the country, while not in violation of the legal regime for the residence

19. See Art. 15, para 1 of the Return Directive.

20. See case *El Dridi*, decision of the CJEU from 28.04.2011 on prejudicial inquiry submitted on 10.02.2011, para 38.

21. *Ibid.*, para 41.

22. See Art. 15 of the Return Directive.

23. See case *Kadzoev*, decision of the CJEU from 30.11.2009 on prejudicial inquiry submitted on 07.09.2009, paras. 63-67.

24. *Ibid.*, para 66.

25. *Ibid.*, para 60.

of foreigners, creates a serious threat to national security and public order, as well as when the foreigner has an expulsion order from another EU member country. A consequence of the issuing of either CAM is a bar on entry and residing on the territories of the EU member states. In the case of “expulsion” this is an imperative requirement of the LFRB,²⁶ while with “convoying to the border” the decision is left to the discretion of the deciding body, but, in practice, it is applied in almost all cases.²⁷ The CAM “expulsion” also necessarily leads to stripping of the right of the foreigner to reside on the territory of the Republic of Bulgaria.²⁸ Therefore, the administrative detention under the LFRB may only serve the purpose of carrying out the deportation of foreign citizens, who did not have the right to reside in the country whether prior to the order imposing the CAM or as a result of it.

The imposing of any one of these two types of CAM, however, is not a sufficient and sole condition for detaining the foreigner in a “special home”. For the detention to be lawful under Bulgaria law, one of the following three alternative conditions must apply to the foreigner: (1) his or her identity is not established; (2) he or she obstructs the execution of the removal order; or (3) there is a risk of absconding.²⁹ Of the three grounds only “risk of absconding” is defined in the LFRB. The LFRB requires that for such risk to be present, there needs to be “justified supposition” that the foreigner “will attempt to avoid the execution of the imposed measures.”³⁰ The LFRB also provides a non-exhaustive list of the indicators that may give rise to a supposition of a risk of absconding, for example, the person “cannot be found at the declared address of residence, existence of prior violations of public order, [...] and other”³¹ (emphasis added).

The LFRB provides only one measure alternative to detention in a SHTAF – weekly appearance in the respective local office of the Mol (a type of parole). The imposing this measure is mandated by the law when there are obstacles for the foreigner’s “immediate leaving of the country”.³² In this sense, the LFRB does not provide any proportionality guarantees, since it does not require the deciding authorities to always impose the lightest measure with which the purpose prescribed by law can be achieved. The deciding officials have full power to impose the harshest measure – detention in a SHTAF – in every single case. The LFRB contains almost no requirements of necessity or reasonableness in view of the individual characteristics of the foreigner – it only prohibits the detention of unaccompanied minors and limits the duration of detention of accompanied minors.

This does not mean, however, that the Bulgarian authorities are not bound by these principles. They are obliged to apply international law, which takes precedence of conflicting national law. In addition, the Bulgarian Administrative Procedure Code (APC) provides a proportionality guarantee for administrative acts of general nature on the part of the authorities, such as a CAM or a detention order.³³

Procedural questions related to the administrative detention of foreigners

The assessment regarding the need for detention in a SHTAF and, respectively, the issuing of an order for this, is done by the same body which has issued a CAM “convoying to the border of the Republic of Bulgaria” or “expulsion”: (1) the Chairman of the Bulgarian State Agency for National Security (SANS); (2) the Directors of the General Directorates National Police, Border Police and Combating Organized Crime of the Mol; (3) the Directors of the capital and regional police directorates; (4) the Director of the Migration Directorate of the Mol; (5) the Directors of the regional Directorates of Border Police; or persons duly authorized by the above.³⁴

26. See Art 42, para. 2 of the LFRB.

27. See Art. 42b, “h”, para 4 of the LFRB.

28. See Art. 42, para 2 of the LFRB.

29. See Art. 44, para 6 of the LFRB.

30. See para 4c of the Additional Provisions of the LFRB.

31. Ibid.

32. See Art. 44, para 5 of the LFRB.

33. See Art. 6 of the APC.

34. See Art. 44, para 6 of the LFRB in connection with Art. 44, para 1 of the LFRB.

The LFRB does not provide for automatic ex officio judicial review of the issuing of the deportation order. Such guarantee exists in the national law (Art. 64 of the Criminal Procedure Code (CPC) for anyone charged with a crime under the Criminal Code – every restrictive measure of arrest under Art. 64 of the CPC is issued by the respective court at the request of the prosecutor. Such initial ex officio judicial control is not provided to the detained foreigners. This is of particular importance, given that the appeal of the imposed CAMs, which lead to a detention in a SHTAF, does not stay their execution: (1) for expulsion, Art. 44, para 4, s. 3 of the LFRB allows ex lege the preliminary execution of the order, and Art. 46, para 4 of the LFRB specifically states that the appeal does not stay the execution of the order; (2) regarding the CAM “convoying to the border”, the LFRB does not require preliminary execution, but in fact it is allowed with the issuing of the CAM order under the general provisions of Art. 60 of the APC.³⁵ Therefore, regardless of the appeal before the court of the order for imposing a CAM, at the moment of issuing the order the issuing body may, at its own discretion, forcibly place the foreigner in a special home immediately. The foreigner has 14 days to appeal the detention in a SHTAF itself.³⁶ According to the LFRB, however, this appeal also does not stay the execution of the order.³⁷ The judicial control on the appeal of a CAM “expulsion” is before one instance – the Supreme Administrative Court (SAC), whose decision is final. The appeal of the CAMs “convoying to the border” and detention in a SHTAF is at two instances, where the first instance is before the city administrative court.

The detention in a SHTAF “continues as long as the circumstances [which led to the detention] are still present, but no longer than 6 months.”³⁸ The Director of the Migration Directorate is required to conduct monthly checks regarding the continuing existence of the circumstances, which have led to the detention of the foreigner, and to discontinue the latter, if they are no longer present.³⁹ The LFRB states clearly that when there is no longer a “reasonable possibility, for legal or technical reasons, to forcibly remove the foreigner”, he or she must be freed.⁴⁰ At the same time, the law provides that the 6-month period may be extended by another 12 months (for a maximum duration of 18 months), if: (1) the person refuses to cooperate with the competent authorities; (2) there is a delay in obtaining the documents necessary for the forcible removal or expulsion.⁴¹

35. Preliminary execution is by nature a deviation from the administrative process principle that the administrative act may not be executed before the elapsing of the term for its contestation, and, in case of an appeal or protest – until the dispute with the respective administrative body has been resolved.

36. See Art. 46a, para 1 of the LFRB.

37. Ibid.

38. See Art. 44, para 8 of the LFRB.

39. Ibid.

40. Ibid.

41. Ibid.

III. METHODOLOGY

1. Introduction

In August 2015, the Center for Legal Aid – Voice in Bulgaria (CLA) launched the project “Who gets detained? Increasing the transparency and accountability of Bulgaria’s detention practices of asylum seekers and migrants”, funded by the European Programme for Integration and Migration (EPIM) of the Network of European Foundations (NEF). The main goal of the project was to increase the accountability and transparency of the process of decision-making in the administrative detention of migrants. The project also aimed at contributing to the establishment of practices for making decisions which are just and transparent, in accordance with the principles of proportionality, necessity and individual assessment, required by international and European law.

In the execution of the project the team aimed at helping to bring about the following changes: (1) full consideration of the requirement for individual assessment in each decision for detention, on the basis of objective criteria, which would lead to decreased incidence of arbitrary detention on a mass principle; (2) decrease of the average duration of migrant detention; (3) increased use of alternatives to detention as provided by Bulgarian law and EU directives; (4) placing a special emphasis on the negative effects of detention on women, children and members of other vulnerable groups.

The project methodology was created by the CLA team with the help of an expert from the Centre for European Refugees, Migration and Ethnic Studies (CERMES) at New Bulgarian University – prof. Anna Krasteva.

2. Overview of the project activities

The execution of the project included the following activities: (1) conducting a preliminary study of the legislation, statistics and current practices related to the administrative detention of migrants, with the aim of becoming informed as much as possible prior to the start of the field work and generating a sufficient volume of comparable data; (2) completing a study of the jurisprudence of the administrative courts – the Haskovo Administrative Court (HAC) and the Administrative Court – Sofia City (ACSC) – with the goal of examining the process of making decisions to detain on the part of the MoI officials, with a particular focus on the criteria and factual circumstances for the issuing of a detention order; (3) conducting field research, including: (3.1) visits to the detention centres (SHTAFs) by a project team consisting of an interviewer, interpreter, and a lawyer from Bulgarian Lawyers for Human Rights (BLHR); the team with this composition conducted 40 interviews with foreigners detained at the moment of the visit; (3.2) conducting 31 interviews outside of the detention centres with foreigners who have been detained in a SHTAF at an earlier point; (4) legal aid was provided to about 30 people who were in detention at the moment of the team’s visits of the SHTAFs; (5) conducting key informant interviews with MoI officials who participate in the process of making decisions on the detention of migrants and with persons who have witnessed or are in other ways involved in detention decisions; (6) the activities mentioned above were accompanied by an ongoing communication campaign aimed at increasing public awareness about the migrant detention practices in the country, including through a dedicated web platform on the topic, www.detainedinbg.com; (7) the results of the study are synthesised in the present report, which was presented and discussed at a special seminar with representatives of the implicated institutions and other stakeholders.

IV. DESCRIPTION OF THE FINDINGS

1. Statistical review

The project included collecting statistics related to the detention of foreigners in SHTAFs for two different reasons. In the first place, up-to-date information on the number and the basic demographic characteristics was needed for the effective planning of the field study (especially regarding the most common languages spoken in the detention centres at a given point and the need to recruit interpreters from those languages), and for conducting interviews with a maximally representative sample. On the other hand, the goal of the project was not only to contribute to increasing the transparency of the decision-making process for placing foreigners in detention from the point of view of the institutions, but also to inform the broader public on the topic. For this reason, during the later stage of the project information was collected and published on the project's website regarding the trends in detention in the SHTAFs and regarding irregular migration into Bulgaria and the characteristics of the foreigners in detention or who are potentially subject to detention.

The methods for collecting statistical information included: informal verbal and written requests to the Mol; requests to the Mol under the Law for Access to Public Information (LAPI); information, published on the Mol website (from October 2015 onward); secondary sources, such as reports by Bulgarian and international organizations; and information obtained by partner organizations also working on detention-related projects funded by EPIM.

Summarized below are the key statistical findings based on the information collected within the framework of the project. As is the case with the other project study components, the timeframe is from 2012 to the present, with the goal of gaining a perspective on the trends immediately before the increase of migration flows in 2013 and afterward, up until the end of 2015 and the first several months of 2016.

Persons apprehended at entry and exit at the borders and on the interior of the country⁴²

According to Art. 41, para 1 and para 2 of the LFRB, third-country nationals who cannot demonstrate that they have entered the country in a lawful manner are necessarily subject to a CAM "convoying to the border". This applies to persons apprehended while attempting to cross the border into Bulgaria or shortly after they have managed to enter, and those arrested on the interior of the country during a special police action or while trying to exit the country without possessing the requisite documents for being present legally on the territory. The orders for placement in a SHTAF are issued under Art. 44, para 6 of the LFRB by the same body having issued the order for convoying to the border, and are issued upon assessment and discretion; however, practically all CAMs for convoying to the border are accompanied by a CAM for placing in a SHTAF. For this reason, the statistics on the number of persons apprehended at the borders or on the interior of the country give quite an accurate idea of the size of the group of persons who are subject(ed) to detention.

42. Source of the data in this section: Ministry of Interior, Migration Statistics, weekly and monthly bulletins, published at: https://www.mvr.bg/Planirane_otchetnost/Migracionna_statistika/default.htm.

NUMBER OF APPREHENDED PERSONS BY MONTH – 2015

	Apprehended at entry	Apprehended at exit	Apprehended on the interior	Total apprehended
January 2015	705	203	160	1,068
February 2015	742	224	279	1,245
March 2015	634	281	226	1,141
April 2015	896	607	610	2,113
May 2015	764	683	541	1,988
June 2015	736	697	743	2,176
July 2015	686	921	1,115	2,722
August 2015	1,417	1,341	1,657	4,415
September 2015	1,742	1,275	1,958	4,975
October 2015	1,179	1,017	2,320	4,516
November 2015	709	776	998	2,483
December 2015	690	483	533	1,706
TOTAL	10,900	8,508	11,140	30,548



Photo: Jose Antonio Sanchez Manzano

NUMBER OF APPREHENDED PERSONS BY MONTH – JANUARY – MAY 2016

	Apprehended at entry	Apprehended at exit	Apprehended on the interior	Total apprehended
January 2015	712	227	302	1,241
February 2015	444	181	355	980
March 2015	180	231	355	766
April 2015	385	371	638	1,394
May 2015	399	412	431	1,242
TOTAL	2,120	1,422	2,081	5,623

NATIONALITIES OF THE APPREHENDED PERSONS (%) – TOP 3 COUNTRIES

	Syria	Afghanistan	Iraq
01.01.2015 – 31.12.2015	39%	33%	24%
01.01.2016 – 31.05.2016	14%	49%	27%

NATIONALITIES OF THE APPREHENDED PERSONS (NUMBER) – TOP 3 COUNTRIES

	Syria	Afghanistan	Iraq
01.01.2015 – 31.12.2015	12,199	10,322	7,507
01.01.2016 – 31.05.2016	787	2,755	1,518

Persons detained in a SHTAF – number, demographic characteristics and length of detention⁴³

The table below shows the number of people who have been detained at a given point during the period in either one of the two SHTAFs; it does not describe the population of the centres. It is possible for the same person to be placed in a detention centre more than once during a given year, and each such instance of detention is counted separately. In regards to the length of stay, a significant shortening has been observed since the transposing of Directives 2013/33/EU and 2013/32/EU, in October and December 2015, respectively, which impose a timeline of 3-6 days for the registration of refugee status applications. In spite of this, the field research conducted as part of the project, found that some of the people placed in a SHATF remained in detention for extended periods of time after filing an application for refugee status, without an explanation of the reasons.

43. Source of the data in this section: information from the MoI received through a request under the Law for Access to Public Information (LAPI).

PERSONS DETAINED IN A SHTAF BY GENDER, 2012 – 2016 (YEARLY)

	SHTAF – Sofia			SHTAF – Lyubimets			Total		
	Man	Women	Total	Man	Women	Общо	Man	Women	Total
2012	873	94	967	1,340	170	1,510	2,213	264	2,477
2013	2,370	367	2,737	4,095	631	4,726	6,465	998	7,463
2014	2,559	208	2,767	1,929	114	2,043	4,488	322	4,810
2015	5,558	490	6,048	5,149	705	5,854	10,707	1,195	11,902
01.01.2016 – 28.04.2016	988	152	1,140	976	270	1,246	1,964	422	2,386

MINORS PLACED IN SHTAF, 2012 – 2016 (YEARLY)

	SHTAF – Sofia		SHTAF – Lyubimets		Total
2012	11		121		132
2013	225		849		1,074
2014	233		201		434
2015	1,073		1,450		2,523
01.01.2016 – 28.04.2016	85		410		495

AVERAGE LENGTH OF DETENTION IF SHTAF (DAYS)

	SHTAF – Sofia	SHTAF – Lyubimets
2012	61.00	31.00
2013	61.20	33.00
2014	39.59	42.00
2015	21.26	18.00
01.01.2016 – 28.04.2016	19.00	9.00

NATIONALITIES OF THE PERSONS DETAINED IN SHTAF – SOFIA – TOP 5 COUNTRIES, BY YEAR

	2012	2013	2014	2015	01.01.2016 – 28.04.2016
Algeria	161	500			
Syria	105	755	1,027	1,350	163
Iraq	94		238	1,084	143
Afghanistan	91	308	939	3,140	702
Pakistan	50		84	169	59

Mali	120			
Palestine	89			
Iran		67	51	20

NATIONALITIES OF THE PERSONS DETAINED IN SHTAF – LYUBIMETS – TOP 5 COUNTRIES, BY YEAR

	2012	2013	2014	2015	01.01.2016 – 28.04.2016
Syria	468	1,055	181	1,425	127
Iraq	211		31	1,348	284
Algeria	179	367			
Palestine	128	155			
Afghanistan	36	259	363	2,476	691
Mali		182			
Pakistan			36	115	81
Iran			32	54	
Sri Lanka					22

PERCENTAGE OF CAPACITY USE OF SHTAFs, AS OF SELECTED DATES

	SHTAF – Sofia (capacity: 400)	SHTAF - Lyubimets (capacity: 300)
31.08.2015	103%	134%
30.11.2015	168%	142%
28.02.2016	36.5%	22%
28.04.2016	42%	54%

Deportation orders and effected deportations⁴⁴

According to the Bulgarian legislation currently in force, the sole purpose of placing foreigners in SHTAFs is the organizing of their removal from the country. In addition, the jurisprudence on the national and European levels requires both reasonable efforts on the part of the state authorities for the organization of the removal, and a realistic prospect that that it can be realized. Accordingly, data on the number of orders for removal from the country (conveying to the border or expulsion) and the number of removals actually completed, are relevant to the necessity and the lawfulness of the detention in a SHTAF. A small percentage of executed removals on the whole puts doubt on the purposefulness (and from it, the lawfulness) of the detention, and persisting discrepancies between the countries of origin of the detainees and the countries to which deportations have been effected would be an indicator that persons are being detained despite the knowledge on the part of the authorities that there is no reasonable prospect to execute a transfer to their countries of origin.

44. Source of the data in this section: information from the Mol received through an request under the Law for Access to Public Information (LAPI).

DEPORTATION ORDERS AND COMPLETED REMOVALS, 2012 – 2016 (YEARLY)

	Deportation orders *	Completed removals	Top 5 countries to which removals have been made, total for the period 2012 - 2016
2012	2,000	888	Turkey, Greece, Iraq, Algeria, Afghanistan
2013	5,296	1,025	
2014	12,874	1,062	
2015	20,819	755	
01.01.2016 – 28.04.2016	4,140	154	

* Includes both expulsion orders and orders for conveying to the border of Bulgaria

2. Review of the jurisprudence

An important component of the project research was a review of the jurisprudence. The goal of the review was to gain a perspective on the circumstances surrounding the issuing of the orders for placement in a SHTAF: which of the three grounds prescribed in the law was applied and what were the factual circumstances representing factors in the assessment that such placement was necessary. To a lesser extent, the same questions were examined in regards to the continuation of detention, as the project was focused above all on the issuing of initial detention orders. The quality of the court ruling as such was not a subject of study. Since elements, such as the country of origin, the authority issuing the



Photo: Victoria Nikolova

detention order, the outcome of the court case and others, were taken into account, the review of the jurisprudence draws a holistic picture of the trends in the migration flows and the detention practices, especially in regards to the foreigners who were kept in detention for longer periods of time.

Reviewed were the rulings on the cases related to detention in SHTAF rendered in the period 01.01.2012 – 31.12.2015 by the Administrative Court – Sofia City (ACSC) and the Haskovo Administrative Court (HAC), as the ACSC hears the cases for detention in SHTAF – Sofia, and HAC – for SHTAF – Lyubimets. For the ACSC, the search was conducted using key words on the court's website, on which all rulings are published, where the keywords used in the names of the parties were "border", "migration", "security" and "police" (according to the authorities who issue detention orders). For the HAC, which does not have a similar search engine on its website, the full lists of rulings by month were reviewed and all rulings on cases related to detention were selected. The number of rulings found through this method was 55 for the ACSC and 440 for the HAC. This big difference can be explained by the discussed below mass and lengthy detention in SHTAF – Lyubimets in 2013-2014 of foreigners, primarily from North African countries, which produced over 300 rulings on the continuation of the detention issued by the HAC in 2014.

Each of the selected decisions was read in its entirety, after which the following information was extracted and tabulated: number and year of the case; date of the issuing of the court ruling; country of origin of the detainee; whether the case was an appeal of initial detention order or the obligatory 6- or 12- month point judicial review on the proposed continuation of the detention; the authority issuing the initial detention order; the legal grounds for the order (as far as this becomes clear); the factual circumstances of the case and the factual justification for issuing the initial detention order; the legal grounds for the request to prolong the detention; the factual circumstances and the evidence presented for the request; the decision of the court (in favour of the detainee – release, or in favour of the state – continuation), as well as any other important or notable details, which were captured in a "Notes" section.

Some important limitations and flaws of this study of the jurisprudence include: first, due to the fact that very few of the detention orders are appealed, the majority of the reviewed cases represent judicial reviews of the continuation of detention beyond 6 or 12 months; thus, the review gives information, above all, on the cases of long-term detention; second, in many cases, the details on the factual circumstances and the justification of the initial detention order were scant or lacking, which was compensated to a certain degree with reviewing a greater number of cases (close to the full set of detention-related rulings for the period); in the third place, the review of the jurisprudence does not provide information on instances where the making of decisions on detention or release is based on factors outside of the judicial realm, such as corruption.

Description of the findings

Yearly distribution

Yearly (based on the date of the case) the reviewed cases are distributed as follows: ACSC: 2012 – 9; 2013 – 10; 2014 – 23; 2015 – 13; HAC: 2012 – 9; 2013 – 8; 2014 – 353; 2015 – 70.

Countries of origin

The judicial rulings most often state the country of origin of the detained person in full, although in some cases only an initial, or no information at all, is provided; in such cases, unless the country of origin becomes apparent in the description of the facts (for example, a place name is mentioned, or the initials given are revealing, such as C. d'I. for Côte d'Ivoire), it is marked as "unknown" or the initial is recorded. Recording two countries of origin,

for example, “Syria and Algeria” indicates that the detained person initially stated one nationality, and subsequently declared another. In almost all of these cases of “combined” nationality, it becomes clear from the ruling that the actual country of origin is the North African one (Algeria, Morocco or Tunisia).

The distribution by country of origin is as follows:

ACSC: Algeria – 10; I. – 9; Unknown – 4; P. – 3; Côte d'Ivoire – 3; Afghanistan – 3; S. – 2; Cameroon – 2; A. – 2 and one from each: Ukraine, Georgia, Armenia, Bosnia and Herzegovina; Turkey, Mali, Cuba, DR Congo, Iraq, Serbia, Iran, Tunisia, Morocco, Pakistan, Palestine (stateless), G., M.

HAC: (the most common countries of origin) Algeria – 226; Morocco – 60; combined Algeria/Tunisia/Morocco/other – 52, Tunisia – 12; Syria – 12; M. – 12; Mali – 9; Côte d'Ivoire – 8; A. – 6; Iran – 5; Iraq – 5; Afghanistan – 3.

It is evident that the most significant region in terms of countries of origin of the detained persons whose



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rulings were reviewed was North Africa, and, more specifically, Algeria, Morocco and Tunisia. Taken together, the cases of persons originating from these three countries represent 80% of the reviewed cases. Given the considerable similarities in the circumstances around their initial detention and the stated reasons for its continuation, these cases should be considered in their totality as a distinct phenomenon in Bulgaria's practice of administrative detention of migrants for the period.

Case type

About half (28) of the ACSC cases reviewed were an appeal of the initial detention order, while of the 440 HAC cases reviewed, only 11 were appeals of initial detention orders and 9 of those were from 2012 (representing all of the reviewed HAC case law for that year). This is indicative of obstructed access to legal aid in SHTAF – Lyubimets during the appeal period and a lack of information in a language that the detained person understands – deficiencies confirmed in the interviews conducted with detainees in both centres. Four of the HAC cases from 2014 and one – from 2014, were requests (unsuccessful) by the detainee to be released on the basis that the reasons for the initial detention were no longer present.

Authority issuing the detention order

Whether the order for placement in a SHTAF was issued by Border Police, the Migration Directorate, the SANS of regular police (the Sofia or another regional directorate) is important, since this is indicative of the facts, the place, the time and the reasons for issuing the CAM. In the rulings of the ACSC, 20 of the orders were issued by Border Police; 18 – by the Migration Directorate; 8 – by the SANS; in 7 of the cases it was not clear from the ruling, and 5 were issued by regular police. In the cases from the HAC, in about 350 instances (80% of all) the detention orders were issued by Border Police; about 10 detention orders were issued by the Migration Directorate; around 35 – by regular police from the Sofia or other regional police directorates; 23 – by the SANS. There are combinations in the cases when the person has been detained more than once, unless the second detention is after serving a prison sentence for a repeated offence for trying to cross the border illegally (a significant number of cases), when the detention is again ordered by Border Police.

The detention orders issued by the SANS on the basis on a CAM for expulsion for reasons of a threat to national securities were, in the HAC cases (persons detained in SHTAF – Lyubimets), issued primarily to Syrian nationals, relatively soon after their entry into the country, while their asylum procedure is still under way. This trend differs from the phenomenon observed in a series of cases from late 2015 in the jurisprudence of the ACSC: persons who had resided in Bulgaria for a long time, with connections in the community and, in many cases, with families, most often of Iraqi origin, were issued expulsion orders on national security grounds by the SANS and detained in SHTAF – Sofia. The legal justification for the detention was risk of absconding and the factual one was a vague allegation of maintaining communication with persons of Arab origin who are connected to human smuggling. This practice on the part of the state authorities is very worrisome, as it uses administrative detention as a means for deprivation of liberty for reasons of suspicion of participation in a criminal activity (and not in order to organize the removal as prescribed by law), instead of applying the Criminal Code, where the threshold of proof is much higher and the procedural guarantees for the accused are much more robust.

Another significant trend is the repeated placement in detention of persons of Algerian origin in the period November – December 2013, which is observed in 10-15 rulings of the HAC jurisprudence from 2014. The detention orders were issued by the Sofia regional police directorate, where the persons were apprehended during special police actions and the legal bases for the detention are unclear, but some of the rulings (see case 750/2014 of the HAC) mention a connection with a serious criminal offence committed by an Algerian national.⁴⁵ This is an example of arbitrary and unjustified deprivation of liberty – in the reviewed cases, continuing at least 6 months – and using administrative detention not as a measure to ensure removal from the country, but as a crime prevention tool based on discrimination on country of origin.

Legal and factual bases for issuing detention orders

The review of the jurisprudence did not include access to the case paper files and, accordingly, the actual detention orders in which the article of the law under which the order is issued is listed (also, in Art. 46, para 6 of the LFRB, the three conditions are listed together, which, on one hand, hinders the analysis, and, on the other, allows the official issuing the detention order to avoid the obligation for an actual individualized assessment and a solid factual justification). For this reason, in many of the reviewed cases the conclusion regarding the legal reason for the detention was drawn on the basis of the description of the factual circumstances; thus, quantitative information is not presented here.

45. This refers to a robbery and attempted murder (stabbing) incident, which took place in Sofia on November 1 2013, with which the Algerian national Salahedin bin Aladin was charged.

In the reviewed jurisprudence from both the ACSC and the HAC the most frequent legal reason for issuing orders for placement in a SHTAF is non-established identity, sometimes in combination with risk of absconding. In the nearly 350 HAC cases from 2014 of persons of North African origin detained in the summer and fall of 2013 for reasons of non-established identity, the facts are identical or nearly identical. The person is apprehended most often at entry on the green border with Turkey and does not possess identity documents, as they have been lost or thrown away during the crossing through Turkey. As far as the lack of documents is a condition accepted as sufficient ground to draw the legal conclusion of non-established identity, the placement of these people in detention centres happens on a mass, routine principle, and the need for individualized assessment by the Border Police official issuing the order does not arise.



Photo: Victoria Nikolova

Regarding the risk of absconding, the second most commonly used legal ground for issuing a detention order, in the reviewed cases from the ACSC a frequent factual justification is a criminal offence committed by the detainee and a prison sentence served, in all cases for repeated attempt to cross the border illegally (while trying to leave Bulgaria). Even though this is one of the indicators for assessing the risk of absconding listed in the additional provisions of the LFRB, the officials issuing the detention orders do not appear to mention those explicitly in the justification. In the cases of detention in SHTAF – Lyubimets (the jurisprudence of the HAC), on the other hand, the most commonly considered factors for risk of absconding are the lack of identity documents; the lack of a declared address at which the person resides and of means of support, as well as, in several cases, the commission of a criminal offence. Often the detainee's expression of intent to continue their journey towards another country in Europe, or even the mentioning of family living there, is taken as an indicator of risk of absconding. It must also be noted that, as evident in the reviewed HAC cases, in the second half of 2015, Border Police officials issuing detention orders started to give more specific and detailed reason-

ing on the factors for risk of absconding by citing, for example, illegal entry into the country, lack of identity documents, lack of family and social milieu, which “increases the mobility of the person” and potentially obstructs locating him or her; lack of declaration of residential address and means of support.

The third legal ground for detention, obstruction of the execution of the removal order, is rarely used, if ever. As long as a removal could not be organized within the 24-hour police arrest, which is the time period to issue the removal and detention CAMs, this ground appears superfluous, especially since it repeats to a large extent one of the grounds for continuing the detention – lack of cooperation for organizing the removal.

3. Interviews conducted inside the detention centres (SHTAFs)

During the period between 25.01.2016 and 30.04.2016, the project team conducted interviews with a total of 40 third-country nationals detained in the closed centres (SHTAFs) run the Migration Directorate of the Ministry of Interior, of which 29 interviewees were in detention in SHTAF – Sofia, and 11 – in SHTAF – Lyubimets.

The collecting of information from and about the subjects was done through personal interviews, conducted with the help of interpreters from the respective languages. The questionnaire, prepared in advance, included questions on the personal details of the interviewed person (country of origin, gender, education, profession); the circumstances around the placement in detention, including the perception of the detainee regarding the reason and content of the imposed administrative measures, as well as the conditions the detention centre.

Demographic characteristics of the detainees

Of the persons interviewed inside the detention centres, 32 were male and 8 – female, where all female interviewees were detained in SHTAF – Lyubimets and were from Iraq. More than half of the interviewed persons (21) were from Afghanistan, all of whom detained in SHTAF – Sofia. The second largest group by nationality among the interviewees was Iraq – 12 persons, 10 of whom detained in SHTAF – Lyubimets and two – in SHTAF – Sofia. Eleven of the Iraqi interviewees were Yazidi – a Kurdish minority, persecuted by the Iraqi authorities. In the third place, significantly fewer, were the interviewees from Pakistan – 3, all of them detained in SHTAF – Sofia, with the detention orders of two of them erroneously (according to the interviewees) stating Afghanistan as country of origin. In addition, one person from each Ghana, Mali and Albania were interviewed, all of whom detained in SHTAF – Sofia, as well as one foreign national from Tunisia, detained in SHTAF – Lyubimets.

As to the age bracket of the interviewed detainees, the predominant group were between 18 and 36 years of age, the majority of whom were unmarried men. An interesting subgroup is that of the 8 women interviewed in SHTAF – Lyubimets, 6 of whom were at an age between 19 and 25 years and unmarried, where one among them was a minor, one had university education and one, 57 years old, was married. All female interviewees had close relatives in Germany or elsewhere in Western Europe, with whom they aimed to reunite. The number of unaccompanied minors among the interviewed detainees was relatively high:⁴⁶ 12 in total, of which 10 in SHTAF – Sofia and 2 – in SHTAF – Lyubimets. A total of 5 of the detained interviewees were married. Only 3 had started or completed university, and the rest did not have any schooling or had elementary education. In the course of conducting the interviews at total of 13 detainees belonging to a vulnerable group were identified, namely, 12 de facto unaccompanied minors (with an assigned accompanying adult – a person from the same group with which the minor has travelling, who was not related to the minor) and two persons with physical disabilities, one of whom an unaccompanied minor. Four of the interviewed persons were in detention for a second time.

Place and manner of detention

Of the 29 people interviewed in SHTAF – Sofia, 18 were apprehended in the city of Sofia, during police checks on houses, hotels or cars on the intercity roads, with most of the people spending 24 hours in custody in the respective police directorate. Four of the interviewees were apprehended on the interior of the country outside of Sofia. Five were arrested while trying to leave Bulgaria – 2 at the airport with an expired visa or forged identity documents, and 3 at the border with Serbia. Apprehended upon being returned to Bulgaria under the Dublin Regulation were 2 of the foreign nationals – one being returned from Germany and

46. The described minors had been appointed formal accompanying persons, who were randomly selected adults, without a relation to the minor, where, in some of the cases, one adult was listed as accompanying several minors. For this reason, for the purposes of this report, the minors are considered de facto unaccompanied.

one – from Austria. The competent authorities issuing the detention orders in the described cases were regular police in Sofia and other regional centres, as well as Border Police officials.

Of the detainees interviewed in SHTAF – Lyubimets, 5 of the women were apprehended in a village near the Serbian border, after entering Bulgaria from Turkey, crossing onto Serbian territory from where they were returned “informally” back to Bulgaria by the Serbian police. The interviewees in question were sent from the Kalotina Border Police directorate to SHTAF – Lyubimets. The remaining six people interviewed in SHTAF – Lyubimets were apprehended in immediate proximity to the border with Turkey and their detention orders were issued by the Svilengrad Border Police directorate.

In the majority of the cases, the detention orders were served to the detainees for signature (32 of the cases). With the de facto unaccompanied minors, the orders were served to the person selected as “accompanying” adult – the generally randomly selected adult from the group with which the minor was arrested. In five of the cases in SHTAF – Lyubimets the foreign nationals signed the order, but did not receive a copy. In none of the cases of the interviewed persons, in spite of the formal presence of an interpreter, was the content of the order, the opportunity to appeal, or the consequences from it explained. Two of the interviewees even mention having been given misleading information by a police officer or an interpreter that they would be taken to an “open refugee camp”. In none of the 40 examined cases was there a lawyer present at the time of detention, although in 5 of the case in SHTAF – Lyubimets the detainees were informed of this possibility. There wasn’t a lawyer or a social worker present in any of the cases with the detained unaccompanied minors. Only two of the interviewees report having appealed the detention order.

Grounds for detention

The specific grounds for detention were not made clear to the detainee in any of the cases, not at the time of the arrest, nor at serving the order or during the ensuing stays in the detention centre. In the cases when there was an interpreter present (usually at the time of apprehending), his or her role was merely formal and the content of the signed documents was not made known to the foreign nationals. There is no information that an interview was conducted with them during the arrest other than asking the standard questions for taking down basic personal data and checking documents. Only one of the detainees declared knowing how long the maximum period of detention in a SHTAF is, where the person in question was being detained for the second time. Only two of the interviewees had information about the judicial review every 6 months – again, those were people detained for a second time.

Duration and conditions of the detention

Of the interviewed persons, 15 had been in detention for about a month. Four of the detainees had been detained for 2 months as of the moment of the interview, and one of the foreign citizens interviewed in SHTAF – Lyubimets was in his 13th month of actual detention. The remaining 20 foreign nationals interviewed declared less than one month of detention at the point of the interview.

Twenty-eight of the interviewees had submitted an application for international protection to the SAR, in most cases through a representative of the Bulgarian Helsinki Committee (BHC) in the detention centre. Two of the foreign nationals had requested voluntary return to their country of origin. In the remaining 10 cases there was either no refugee status application filed because of a clearly stated lack of desire to remain in Bulgaria, or the person could not give enough information on having done so or not. Two of the interviewed persons (both applying for voluntary return) had met with representatives of their countries’

embassies. None of the interviewees had a lawyer or access to legal aid during their stay in the detention centre, except for an initial meeting with representatives of the BHC at which point they could receive assistance with filing an application for international protection.

Regarding the detention conditions, one of the main complaints by the interviewees was the lack of interpreters and a real possibility to communicate with the employees in the centre, with doctors, and to get familiar with their rights and the rules in the detention centre. There were also complaints of insufficient food and access to hot water. Detainees in SHTAF – Sofia complained of the inconvenience of having their rooms locked at 10 pm in the evening and unlocked early in the morning, during which time they were not able to use the toilettes. Several interviewees mentioned overcrowded rooms, housing 30-40 people each. It was reported that in SHTAF – Lyubimets men and women were being placed in the same room without being family members. Some of the interviewees signaled verbal and physical threats towards the detainees by employees of SHTAF – Sofia.

4. Interviews conducted outside the detention centres (SHTAFs)

The interviews with foreign nationals who had been detained in a SHTAF in the past but at the moment of the interview were free, were conducted in the period 12.11.2015 – 15.06.2016. The project team, consisting of an interviewer and an interpreter, conducted interviews with 31 foreigners in total who had been placed in a SHTAF for some period of time since 2012.



Photo: Jose Antonio Sanchez Manzano

The collecting of information from and about the subjects was done through personal interviews, conducted with the help of the questionnaire, prepared in advance, which was mentioned above in the methodology description. The questionnaire included questions on the personal details of the interviewed person (country of origin, gender, age, etc.); the circumstances around the placement in detention, including the perception of the detainee regarding the reason and content of the imposed administrative measures; the extent to which the person was informed about what was happening and about the rights he or she had in connection with the detention; the conditions and the place of detention.

Demographic characteristics of the detainees

Of the interviewed foreign nationals, 28 were male and 3 – female. This means that women represented about 12% of the interviewees, which corresponds to their share of the persons detained in SHTAFs in the period from 2012 to 28.04.2016, when of 29, 038 detained foreigners, 3,201, or 11% were women. Among the among the former detainees interviewed, Syrian nationals were the most numerous – 14, followed by Iran – 4; Iraq – 3; Lebanon – 3; Morocco – 2; Cameroon – 2; Guinea – 1; Afghanistan – 1; Côte d'Ivoire – 1; and Algeria – 1.

In terms of the age distribution of the interviewees, the majority, 25 of the 31 people, were between 18 and 36 years of age. The interviewing team met two unaccompanied minors, who had been detained in a SHTAF for 15 days and 1 month, respectively, in violation of Bulgarian law (Art. 44, para 9 of the LFRB stipulates that unaccompanied minors may not be forcibly placed in a closed centre).

Place and manner of detention

Of the 31 foreign nationals interviewed outside of the detention centres, over half had been apprehended immediately after crossing the border into Bulgaria or near the border. The next largest groups is those apprehended on the interior of the country, followed by those who were captured by police while attempting to exit Bulgaria through the border with Serbia.

Duration and conditions of the detention

Of all interviewees, only one had at some point been accorded an alternative measure – the only one existing in Bulgarian law, regular check-in with police. The duration of detention varied from 8 days to the maximum of 18 months. Two of the interviewees had been detained for the maximum period; both are from Syria, where one is stateless Palestinian national. The average length of detention was slightly over 3 months – 102 days. Regarding the conditions, almost all of the interviewees complained of a total lack of information and the uncertainty in which they lived. The complaints concern unpredictability primarily around the length of their stay in the detention centre. Of all the 31 interviewed foreign nationals, only 3 declared that they had known the maximum period of time for which they could be kept in detention. One person found out from another detainee who was entering into the last, 18th month of detention. Only 7 had been aware that their detention is reviewed by a court every 6 months. The majority complained of very short times for walks in the open air – according to most – twice a day for 1 hour. The project team also received numerous testimonies that the rooms in the detention centres get locked in the evening and unlocked in the morning so the detainees cannot access the toilettes. This situation continued, for some detainees, for months, and was especially difficult to handle in conditions of overcrowding.

Review of special cases

One of the interesting cases is that of a Syrian citizen who was detained for the maximum period – 9 months in SHTAF – Sofia, and after being released for several months, another

9 months in SHTAF – Lyubimets. When asked whether he knew why he was detained and whether the reasons were explained to him by the state officials, the foreign national responded that he was told he was being detained for “crossing the border illegally”. Even though the LFRB allows detention on the ground of non-established identity, detaining a foreign national only for this reason is in violation of the Return Directive. The Directive requires a narrow interpretation of the detention provisions and stipulates that the only permissible goal of the detention is to prepare or carry the return, and, more specifically, when (1) there is a risk of absconding, or (2) the person escapes or obstructs the return procedure. The case described above does not fall under any of these hypotheses. In is, furthermore, in violation with the requirement for a “reasonable prospect of return”. In the absence of such prospect, which appears to be the case with the Syrian national, the detention should have been discontinued immediately, as the CJEU ruled in the Kadzoev.

The case with the 21-year-old Syrian interviewee who had been detained for 18 months is similar. The explanation he was given was related to not having identity documents.

With the exception of these two cases, all 29 remaining interviewees declared that the reasons for being detained were not explained to them. In this respect, it should be pointed out that the ECtHR has ruled that the state authorities are obliged to take steps in order to ensure that the detained persons are informed, in a language they understand, of the nature of their detention, the reasons for it, and the process of review or appeal.⁴⁷ Failure to do so would constitute a violation of the principle of lawfulness of the detention and would render it unacceptable.

5. Key informant interviews

The project's field study included the conducting of 10-15 interviews with key officials from the Ministry of Interior (Moi) who are directly involved in or responsible for the issuing of detention orders to foreign nationals. The purpose of these interviews was, on one hand, to gain a direct impression of the process of assessment and the motivation of the officials in making these decisions, and about any operational needs for issuing such orders. On the other hand, the goal was to reflect the point of view of the institutions as well, and avoid the risk of a one-sided presentation only from the point of view of the detainees. The interviews with the key informants were conducted in the period October 2015 – May 2016, where officials from the following units of the Moi were interviewed: Migration Directorate – one employee in a senior position (SHTAF – Sofia); Sofia regional police directorate – two operational employees; (Sofia); General Directorate Border Police – one employee in a senior position (Sofia); local unit of Border Police – Malko Turnovo – three operational employees; Regional Directorate of Border Police – Elhovo – three operational employees; local unit of Border police – Svilengrad – two operational employees. In addition, an interview was conducted with one employee in a hostel in Sofia, primarily regarding the employee's observations of the special police actions for capturing undocumented migrants, which were being conducted in the area. The selection of key informants was based on the established in the review of the jurisprudence preponderance of Border Police officials as the detention order issuing authority for the period 2012 – 2015.

The questions posed to the key officials interviewed included: does the official participate directly in the issuing of the order for placement in a SHTAF; what is the process and the typical situations in which such orders are issued; what factual circumstances are taken into account; are there any written guidelines; what is the common profile of the foreign nationals subject to placement in a SHTAF; and other. The responses are summarized below, grouped according to the main topics raised in the interviews.

47. See case *Abdolkhani and Karimnia v. Turkey*, Decision of the ECtHR 22.09.2009 on application № 30471/08, para 136.

Process for issuing a CAM for placement in a SHTAF

The responses of the interviewed officials inform that the order for placement in a SHTAF is issued on the basis of a report containing a description of the factual circumstances around the arrest of the person during a special police action or in proximity to the border, and on a recommendation for detention, both prepared by an operational employee within the 24-hour police custody. The documents typically state that after a check was conducted, nothing could be established regarding the person in question (i.e., his or her identity). On the whole, there are no written guidelines regarding the assessment of whether detention should be recommended in the particular cases; instead, the interviewed officials refer directly to the LFRB. The detention order is signed by the head of the unit or by the director or deputy director of the respective directorate. It is important to note in connection with the

process of issuing the order, the very short time available to Mol officials to assess whether the circumstances require placement in a SHTAF, as well as the fact that the orders are not signed (approved) by the same official who participates directly in the arrest and in the establishing of the facts – the responsibility for the decision and the assessment are thus separated. It was also stated that, in practice, all recommendations for placement in a SHTAF are signed (approved) by the head of the unit; therefore, the approval is only formal. Regrets were voiced that, once the person is handed over to Migration Directorate (responsible for the detention centres), the unit which has issued the initial detention order receives no further information and loses connection with the foreign national. This means that, in actuality, the officials making the recommendation to detain do not have the opportunity to follow the case and do not receive any feedback as to the appropriateness of their assessment. The fragmentation of the process of detention recommendation, approval, and eventual release, with different officials, units and directorates of the Mol responsible for the different stages, makes it difficult to exercise monitoring and control over conducting the assessment, except



through the judicial system in the appealing the order. In connection with this, the opinion was shared that the responsibility for the mass detention of all persons who have crossed the border without documents cannot be placed on Border Police, since they only lay out the facts (even though, formally, that directorate issues many of the detention orders).

Reasons for the need to place in detention

The lack of an identity document is, according to the interviewed officials, the leading

reason for which the placement of the foreign national in a SHTAF is necessary. The lack of such document is perceived, on one hand, as a sufficient ground for detention in itself: the officials expressed alarm at the idea of letting the migrants “roam around freely” (i.e., not to be detained in a closed centre), given that have entered the country in an illegal way and do not have the right to be on the territory, and because “we know nothing about these people” so they must be “placed somewhere”.

These explanations lead to the conclusion that while non-established identity is, indeed, one of the grounds prescribed by the law for issuing a detention order (but for the purpose of ensuring the removal from the country by having the required documents issued), the officials see the placement in closed centres rather as immigration detention – a measure, imposed because the person is undocumented and without a residence right, and the need to exercise control over the movement of that person. On the other hand, some of the interviewed officials view the lack of an identity document as just one of several complex and interconnected grounds for detention. The connection was explained in the following way: if somebody has entered the country in an illegal manner and without an identity document, this generates the remaining reasons for which the person should be placed in a closed centre: he or she cannot rent an apartment, thus, there arises a risk of absconding; also: without an identity document the foreigner cannot leave the country within the granted period for voluntary return, thus, he or she will be obstructing the execution of the return order.⁴⁸

Avoidance of the deportation was also stated as a stand-alone reason by some the interviewed officials, where for indicators of that were taken circumstances that the person does not want to leave voluntarily, as many embassies refuse to issue temporary passports without the explicit consent of their national to return to the country of origin, or if the person has been arrested in the past. The impossibility to carry out the deportation immediately (within 24 hrs, due to a lack of documents, or at all, when the country of origin refuses in principle to take back its nationals, an example of the latter being Afghanistan) was also among the mentioned grounds for issuing an order for placement in a SHTAF, even though it is not among the grounds prescribed by the law.

Regarding the risk of absconding as a legal ground for placing a foreign national in a closed centre, none of the interviewed officials mentioned specifically the additional provisions in the LFRB where indicators of such risk are listed. Rather, mentioned as indicators of risk of absconding were illegal crossing of borders; absence of application for international protection, lack of identity documents (see also above), and intention to use the country as transit territory where entering without documents is considered indicative of such intent. One of the interviewed officials expressed the opinion that the risk of absconding is assumed to be always present, as a matter of principle.

Individual Assessment

The interviews with the key officials included questions aiming to determine whether in each case of apprehending a foreign national and issuing a removal order, an individualized assessment is conducted regarding the need to also issue an order for placement in a closed centre. Without exception, the responses of the interviewees lead to the conclusion that detention is applied on a mass principle, without individualized assessment, and the reason is to a large extent the impossibility to conduct such assessment in the short period of police custody, as well as the fact that in the majority of the cases the circumstances are similar and such that there is a presumption that in these circumstances the placement in a SHTAF is imperative and is understood.

48. It must be pointed out that in its jurisprudence from 2014 in exercising judicial control over detention for more than 6 months, the Haskovo Administrative Court repeatedly and specifically states that not presenting I.D. documents when the migrant does not possess such, cannot be considered an obstruction of the execution of the removal order or lack of cooperation. See the section Review of the Jurisprudence above.

In regards to the persons apprehended shortly after their crossing of the border in an illegal manner (entering through the green border and not possessing identity documents and visa or passport), an unwritten procedure has been adopted in which everyone is issued an order for conveying to the border as well as a detention order, and only subsequently (in the distribution centre in Elhovo) it is determined who will actually be placed in a SHTAF and who will be sent to one of the open centres operated by the SAR instead.

Concerning the persons apprehended on the interior of the country, usually in the course of specialized police actions, the criterion for deciding whether a detention order will be issued is the presence or absence of an asylum seeker registration card issued by the SAR – i.e., the persons who are in procedure do not get detained, and the rest are subject to detention. According to some of the interviewed officials, who have extensive experience in applying coercive measures on illegally residing foreigners, in the past there were greater opportunities to apply alternative measures (such as regular check-in with police) than at the present moment with the current type of migration flows where the migrants, on the whole, do not have an address to reside nor secured means of support.

Specialized police actions (SPA)

Not in the last place, the project interviewer also asked the officials questions about the conducting of specialized police actions (SPA), during which foreigners residing on the territory on Bulgaria without the required documents to do so are stopped and arrested, and, in some cases sent into detention.⁴⁹ These actions, according to the interviewed officials, are planned based on internal Mol intelligence, and sometimes on signals by citizens, in neighbourhoods and areas known for concentration of foreigners. During SPAs, which are conducted most often in and around hostels, fast-food restaurants, Internet clubs and so on, Mol officials request the stopped foreigners to present identity documents. The decisive criterion on whether they will be taken into custody for 24 hours and possibly detained in a SHTAF afterwards is whether they can present an asylum seeker registration card issued by the SAR. According to an employee in a hostel located in an area where police actions for arresting undocumented foreigners are frequent, the said actions are only “for show”, and often the owners of the businesses where the migrants congregate or reside are warned in advance of the planned actions, and it is known that the purpose is to extract money from the migrants. According to the same source, Mol employees conduct checks on people who have the appearance of foreigners and carry backpacks, demanding payment in exchange for not arresting them for not having documents. Similarly, according to the hostel employee, taxis on the way to the Serbian border, visibly transporting foreigners, get stopped by police officers, who then demand sums of money (50 euro per person as of end of December 2015) in exchange for not arresting and sending into detention the trying to leave the country illegally foreigners.⁵⁰

49. This does not include the specialized police actions which Border Police has been conducting since 2013, which, according to information provided by the interviewed officials, have been a regularity over the last three years, and consist of patrols along the green border for the purpose of detecting and pushing back migrants who attempt to enter illegally.

50. Unproven allegations of corrupt practices by Mol employees (police) were also made by foreigners whom the project team met in the Women's Market area in October 2015, who did not wish to be identified or to be formally interviewed for the project.

V. ANALYSIS

The above description of the findings of the conducted studies described and analyzed a number of trends in the practices of making decisions for initial and continued detention, which will be summarized and complemented in the current section.

The main goals of the project were to find out what is the process of making decisions for the administrative detention of migrants in Bulgaria and whether this process contains the required degree of accountability and transparency, and to therefore contribute to the establishing of practices that are in line with the principles of proportionality, necessity and individualized assessment required by international and European law. The research conducted by means of interviews and reviews of the jurisprudence and of statistical data, confirms some of the preliminary hypotheses regarding the existence of routine detention practices, in most cases based rather on policies for “dealing” with the increased migration flows than on individual assessment in the particular case and a necessity to impose this type of measure only in view of attaining the final goal of removal of these persons from the country.

As discussed above, the national legislation, which has to a large extent incorporated the requirements of international and European law, specifies three alternative conditions for imposing administrative detention after a CAM for expulsion or conveying to the border has been issued: non-established identity, obstruction of the removal order, or risk of absconding. The LFRB in para 4c of its Additional Provisions defines (non-exclusively) only one of these conditions, risk of absconding. The conducted study found that in the issuing of the initial detention order the legal ground used is almost entirely the first one, non-established identity. A key factor for establishing this ground is the detained persons’ lacking of identity document. It is even pointed out, in the interviews with state officials, that the lack of identity documents is a sufficient fact to establish all the remaining legal grounds for detention. A large share of the people crossing the border over the last three years come from zones characterized by armed conflict and instability, such as Syria and Iraq, and are asylum seekers who are not in possession of identity document and are not deportable to their native countries.

At the same time, the lack of identity documents is an obvious obstacle to the effective and timely organization of the foreign national’s deportation – the purpose for detaining the latter. It is not by chance that the inclusion of “non-established identity” ground is unique to our national legislation, as it is not among the requisite grounds under the Return Directive, but was added by the Bulgarian legislator. The mass use of this ground leads to a patent purposelessness of the effected detention, which indicates that the practice is routine and that an individual approach is lacking. This conclusion is confirmed also by the information obtained through the interviews with detained foreign nationals, who did not go through an in-depth and holistic personal interview at the initial apprehension by Border Police or regional police officers, but were asked primarily about the availability of documents.

The review of the jurisprudence and the conducted interviews show that “risk of absconding” is the second most frequently applied legal ground for detention. It is also connected, in many of the cases of arresting migrants immediately after their crossing of the border, with the lack of personal documents as well as with the lack of a residential address and financial support. In the cases when migrants are apprehended while they are attempting to leave the country or after a period of time of them residing in the country has elapsed,

this ground is used as a consequence of a committed crime (repeated attempt to cross the border illegally) or a served prison sentence. As has been mentioned, risk of absconding is the only legal ground for detention defined in the LFRB. In spite of this, it was established in the interviews with key officials that none of them base their assessment on the additional provisions of the LFRB, but uses instead factual justifications not mentioned in the law (illegal crossing of the border; absence of refugee status application; lack of identity documents; intention to use the country as transit territory, where entering without documents is considered an indication of such intention). This shows, once again, that the decision for administrative detention is made routinely rather than on the basis of individual assessment based on clearly defined legal parameters.

“Obstructing the execution of the order” is the ground which is rarely used to justify the initial detention orders, and is largely applied in the assessment of the necessity to prolong the detention. In these cases, very often it is considered that the lack of desire on the part of the foreigner to sign a declaration for voluntary return, a condition posed by many embassies in order to issue travel documents, is considered obstruction (non-cooperation). The refusal to return voluntarily to the country of origin is assumed for almost all detainees, having in mind that most of them are transiting through Bulgaria asylum seekers. This is another instance of an automatic application of a legal provision, in a routine manner and without an individualized study of the particular case. It is important to point out that, in a number of cases, the HAC states that since the measures “convoying to the border” and “expulsion” are by nature coercive, the lack of consent on the part of the person to return to their country of origin cannot be an element in the assessment of whether he or she obstructs or cooperates with the execution of the removal order.



Photo: Jose Antonio Sanchez Manzano

The analyzed application of the legal provisions on imposing detention shows clearly a trend of detention for a purpose not corresponding to the legal requirement for “immediate removal” but is, rather, an instrument for regulation the migration flows. This is to a large extent due to the lack of legal both short- and long-term alternatives to detention which could be applied to the current mixed migration flows, which are characterized by massiveness (most migrants are apprehended in groups), are composed of persons lacking identity documents, and are to some extent transitory. On one hand, the initial 24-hour police custody is too short to conduct an objective assessment for future purposeful actions, as was logically pointed out by the interviewed state officials. This is usually the time frame for preparing the motivated proposal for imposing detention, on the basis of which the decision is made, and which, due to the short time available, cannot be objectively motivated.⁵¹ Given the fragmented responsibility among different officials and the shortened period of time for the decision-making,

it would be especially important to have written guidelines for assessing the facts for each of the legal grounds for detention, which would contribute to more objective and transparent practices. The present study did not find any indication of the existence of such guidelines.



Photo: Victoria Nikolova

On the other hand, an important element of an individualized and objective approach to the assessment is the ability to conduct a personal interview with the foreign national at the earliest possible stage of the process of making a decision on their detention. None of the interviewed persons, whether inside or outside of the detention centres, testified to having gone through such interview, other than the routine taking down of basic personal data and the request to produce documents. In almost all cases an interpreter was present at the moment of detention, but his or her role was entirely formal and did not include explaining to the foreigner the procedure or the content of the documents to sign, including the detention order. In two of the cases the information provided was misleading.

The failure to involve the addressee of an administrative order in the process of making the decision for the order is in violation of both the requirements of the LFRB (Art. 44, para 2) and the general provisions of Art. 35 of the APC.

Such procedural deficiency could also be avoided through written guidelines for assessing the need for detention measures that would be available to the officials at the different stages of the decision-making process. Particularly helpful would be the participation of a

51. See Part IV, section 5 of the report – Key Informant Interviews.

lawyer and the availability of legal aid at this administrative stage of the process. Unfortunately, almost 100% of the interviewed foreign nationals stated that they had not received legal help at that point.

This deficiency of legal assistance, which is especially harmful at the moment of the issuing of the detention order given that the detained persons are not informed of the decision-making process, persists throughout the entire period of detention. This is evidenced both in the interviews with current and past detainees, and by the findings of the jurisprudence review, in which the majority of the courts' rulings are ex officio judicial reviews of detention continuation at the 6-month point, and only a small percentage are appeals of the initial orders. In addition, most of the appealed orders are of detainees originating in North African countries, which represent a relatively smaller share of the detained persons, as the majority, according to the statistical review, are from Afghanistan, Iraq and Syria. Thus, a very small number of people have effective access to the appeal process, and most of them are detained for a second time, or have been in the country for a longer period of time prior to the detention. In most cases this results from not having knowledge of the possibility to appeal and no access to legal advice through which this possibility would be explained and assistance within the deadline to appeal as well as court representation would be provided.

A very worrisome finding of the current study is that de facto unaccompanied minors are currently being detained, with randomly selected accompanying adults from the group with whom the minors were arrested, without a relation between them, and, in some cases, with several minors assigned to the same adult. There was no evidence of a social worker or lawyer present at the moment of detaining the minor. The detention orders are typically handed to the randomly selected "accompanying" adults and the minor is left without any information on what is happening and what follows next, and does not even have copies of the orders issued against him. Such practice is a grave violation of Art. 44, para 6 of the LFRB and its existence mandates urgent measures for putting in place viable alternatives for this category of vulnerable persons, as, on the other hand, not detaining unaccompanied minors without ensuring the required care and accommodation would expose them to great risks.

Not in the last place, worrisome are also the reports on corrupt practices both at the initial apprehending of the persons near the borders, at entry or exit, and on the interior of the country during the conducting of special police actions. Such practices are much easier to conceal when the authorities act in a routine manner, often not subject to judicial scrutiny, and without objective criteria or guarantees.

VI. RECOMMENDATIONS

On the basis of the findings and their analysis, the project's team puts forward the following recommendations:

- Adopting written guidelines for assessing the different legal bases for detention, which would help to establish an objective process for making detention decisions, in accordance with the requirements for proportionality, necessity and individualized approach, where as a model can be used guidelines already used in jurisdictions with similar legislative frames in regards to administrative detention.
- Separating in different paragraphs of the LFRB of the grounds for detention, in view of increasing transparency and accountability through requiring the detention order to state the specific ground and to avoid the merging of the legal grounds; and/or define clearly the requisite components of the CAM for placement in a SHTAF as a requirement for more detailed justification.
- Effective use of the existing possibilities, and creating new ones, in cooperation with existing organizations specialized in the area, for regular provision of legal aid both at the initial stage of detention of foreign national and along the entire period of their stay in the closed centre (i.e., initial and subsequent availability of legal consultation).
- In connection with the recommendation above, organizing of regular informational sessions in the closed centres regarding the rights and obligations of the foreign nationals during the time of their detention and after the potential release.
- Focus on the need to train interpreters on the specifics of their work as intermediaries between the foreign nationals and the state officials, and on the terminology and the legal consequences of the translated procedures and documents.
- Availability of interpreters in the closed centres and at the border, which would facilitate the communication between the detained persons and the employees.
- Adopting of short-term immigration detention measures (for instance, a maximum of 5-7 days) for foreign nationals without documents, who have entered the country in an irregular manner, in order to conduct an assessment of the need to detain them longer or to accord alternative measures, and to be able to inform them effectively of their situation, options and rights.
- Creation of alternative, open-type, centres to accommodate unaccompanied underage foreign nationals who are subject to deportation, and provision of legal aid and assistance of a social worker in the process of making decisions regarding their detention.
- Legislative change to create alternatives to detention that can help avoid its use for general regulation of the migration flows into the country.
- In the longer term, adopting of regularization measures for undocumented foreign nationals who meet set criteria and who cannot be removed from the country.

VII. CONCLUSION

The management of migration flows, especially in crisis situation, is an important responsibility of the national governments and the European community, especially for Bulgaria as an external border of the EU. National governments, including the Bulgarian government, tend to put an emphasis on national security and prevention, and to use coercive methods, including detention, to fight illegal migration. At the same time, an indication of a successful migration policy is rather the reaching of a balance between the national interest, on one hand, and the respect for individual human rights, on the other. The basic principles of European law and jurisprudence call for such balanced approach. The first interpretive decision of the CJEU on the Return Directive, *Kadzoev*, was the result of a prejudicial inquiry sent by a Bulgarian court. In this key ruling, the court reaffirms the basic principles of respect for the individual rights of third-country nationals, and proportionality of the coercive measures imposed on them. The practical application of these principles, in a situation of unprecedented not only for Bulgaria, but for the region, migration flows, is not an easy or a linear process, and requires focused effort on the part of the legislative and the executive powers. Every crisis, however, is also an opportunity to mobilize and recalibrate all paradigms and practices. We hope that the conclusions and recommendations resulting from the “Who Gets Detained?” project, as well as those from the other detention-related pilot projects funded by EPIM, will contribute to this. We also hope that the current initiatives for positive reform in the area of administrative detention in Bulgaria will not remain an isolated event, but that, in cooperation and dialogue of all interested parties from the governmental and non-governmental sectors at the national and European levels, this process of reform will be successfully continued and completed.

