European Network on Statelessness

PROTECTING STATELESS PERSONS FROM ARBITRARY DETENTION

IN BULGARIA

Фондация за достъп до права
Foundation for Access to Rights

SUMMARY OF FINDINGS

The increasing use of immigration detention and the criminalisation of irregular migration by a growing number of states, is a concerning global and European trend. This results in increasing numbers of persons being detained for longer than they should, or for reasons that are unlawful. While arbitrary detention is a significant area of concern in general, the unique characteristics associated with stateless persons and those at risk of statelessness make them more likely to be detained arbitrarily, for unduly lengthy periods of time.

In Bulgaria the detention of stateless persons and those at risk of statelessness takes place within the general immigration detention regime. There is no specific legal regulation that provides for specific guarantees for the protection of stateless persons from removal and/or detention. Since 2009 the maximum time limit of immigration detention in Bulgaria is 18 months, broken down into six month blocks.

LAW AND POLICY CONTEXT

The right to a nationality and/or protection of stateless persons is reinforced by a range of international and regional instruments, to which the Republic of Bulgaria is party, including the International Covenant on Civil and Political Rights (ICCPR), Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women, the 1954 Convention Relating to the Status of Stateless Persons, 1961 Convention on the Reduction of Statelessness and the European Convention on Nationality. The practice of (administrative) detention is also regulated by a variety of instruments, including the ICCPR, the European Convention on Human Rights (ECHR) and the EU Returns Directive, all of which protect against arbitrary detention.

In 2012 Bulgaria acceded to the 1954 and 1961 Statelessness Conventions. However, the wide range of reservations to the 1954 Convention could undermine its very purpose. On 15 June 2016 the Bulgarian Parliament adopted at first reading a draft Law Amending and Supplementing the Law on Foreign Nationals in the Republic of Bulgaria (LFRB), which for the first time introduces a statelessness determination procedure. However, as drafted currently, the status of 'stateless person' would be accessible only to persons who were born in or entered legally into Bulgarian territory *and* who at the same time hold a permanent or long-term residence permit. As such, the scope of the draft law would exclude the vast majority of stateless persons in the country.

DATA ON STATELESSNESS AND DETENTION

The total number of immigration detainees in Bulgaria in 2012 was 2,477. In 2015 this rose to 11,902. Furthermore, in 2015, there were 15,760 persons detained at the so-called 'Redistribution Centre' at Elhovo near the Bulgarian-Turkish border. In 2015 only 755 of 11,902 detainees in the Bousmantsi and Lyubimets detention centres were removed from Bulgarian territory. Therefore, the efficiency of detention for the purpose of removal is an issue that deserves to be raised.

According to statistics from the Ministry of Interior, the number of stateless persons in detention varies from one person to 38 persons annually in the period from 2007 until 2016. However, there are significant concerns about the accuracy of official statistical data. According to the official statistics, the average length of detention of stateless persons has been 118.5 days in the Bousmantsi (Sofia) detention centre, 28 days in the Lyubimets detention centre and seven days in the Elhovo detention centre. In comparison, the average length of detention for all detained migrants in the Bousmantsi (Sofia) detention centre in the period from 2012 until April 2016 has been 40 days.

KEY ISSUES OF CONCERN

Based on desk research, legal analysis and stakeholder interviews, the following key areas of concern were identified with regard to the detention of stateless persons in Bulgaria:

a) Identification and determination procedures

States have a human rights obligation to identify statelessness *before* subjecting people to immigration detention. Identification of statelessness is necessary when determining the destination country to which someone is to be removed. In Bulgaria, however, the destination country of removal is determined in the process of enforcing the removal order, *after* detaining the person. In fact, the need to establish one's identity is a formal ground for detention under Bulgarian national law. According to Article 44, paragraph 6 of the LFRB, detention is imposed when the foreigner "is unidentified, hampers enforcement of the order or there is a risk of absconding".

Another issue of concern in Bulgaria is that, upon issuance of removal and detention orders, stateless immigration detainees are usually 'assigned' a 'citizenship'. In other words, in their detention and removal orders they are not identified as stateless. Thus, for example, in the case of Mr. A., who was detained in Bulgaria from 2005 until 2012, the authorities continued to refer to him as a citizen of Russia, regardless of the fact that in a Ruling of June 2009 the Court had noted that at an unspecified date the Migration Directorate had received answers by the Ukrainian and the Russian embassies in Bulgaria stating that Mr. A. was not a citizen of either of the two countries. In the case of Mr. H., who has lived in Bulgaria for the last 24 years, the Bulgarian authorities refer to him as a citizen of Bosnia and Herzegovina, although he left his country of origin during the Bosnian war and had never had an identity document.

It should be noted that unless detention serves a lawful purpose, it is arbitrary. According to Article 5, paragraph 1(f) of the ECHR, immigration detention should solely be for the administrative purposes of preventing unlawful entry or to enforce removal. The imposition of detention solely for the purpose of administrative convenience is not lawful under international law. The cases of Mr. A. and Mr. H. are examples of how detention did not serve the purpose for which it was imposed as no removal was possible.

b) Decision to detain and procedural guarantees

By law and in practice, in issuing a detention order the Bulgarian authorities do not consider the existence of reasonable prospects to implement the removal order. In Bulgaria removal and detention orders are issued simultaneously, even in cases of persons who have spent their entire lives in Bulgaria, simply because these persons were identified as residing irregularly in the country.

Although the law formally stipulates that detention is a measure of last resort that can be imposed only if less coercive measures could not be applied effectively, that provision may have no practical effect if the stateless persons' right to be heard before imposing detention is not respected in practice. Furthermore, in spite of the increasing use of immigration detention, the number of cases that reach the courts for review remains insignificant. This is due to a number of factors: according to Bulgarian law, the term to appeal detention orders runs from the date of the factual detention of the person and not from the date of properly notifying ('serving') the detention order. Migrants sign detention orders without knowing the reasons for being detained and the remedies against that. The detention orders are in the Bulgarian language and are rarely translated. Judicial control of detention orders is not automatic, but the detainee has to submit a written appeal (in Bulgarian) to the court within 14 days from the start of detention. Moreover, detainees have to find and engage a lawyer by themselves. Although in 2013 the Bulgarian Law on Legal Aid was amended to introduce a right to legal aid for immigration detainees, access has remained an issue and the new legal provisions have not been applied in practice. Even if an appeal against a detention order reaches the court, the Bulgarian law provides that participation of the detainee "is not obligatory".

c) The relationship between actions for removal and the length of detention

Removal is one of the two legitimate objectives which can justify detention (the other one is preventing unlawful entry). In the case of *Auad v Bulgaria*, for example, the European Court of Human Rights (ECtHR) concluded that detention was unlawful because the Bulgarian authorities could "hardly be regarded as having taken active and diligent steps" with a view to deporting the detainee.

In Bulgaria the authorities frequently refer to the refusal of the detainee to sign a declaration for voluntary return as an impediment to obtaining travel documents necessary for enforcement of removal. This is often interpreted as lack of collaboration by the person and a delay in obtaining the necessary documentation by third countries, both grounds for extension of the period of detention under Article 15.6 of the EU Return Directive. In this relation, it is important to note the *Mahdi* case before the Sofia City Administrative Court and the Court of Justice of the European Union (CJEU). Following the judgment of the CJEU of 5 June 2014, the Bulgarian court replaced Mr. Mahdi's detention with the less coercive measure of weekly reporting. The judge based her decision on the lack of a reasonable prospect of removal. Unfortunately, the ruling of the national court in that case is the exception and not the rule in Bulgaria. In the majority of cases the burden of proof is shifted to the detainee to prove that there is no reasonable prospect of removal.

d) Alternatives to detention

For detention to not be arbitrary, it must be necessary and it must be a proportionate means of achieving the legitimate objective. This proportionality obligation compels the state to always explore alternatives and to impose detention only as a measure of last resort. The practice in Bulgaria, however, reveals that alternatives are sought, only after removal has not been possible within a reasonable period of time and/or only upon a subsequent application by the person who has already been placed in detention.

Currently the Bulgarian law envisages one alternative to detention, weekly regular reporting (until March 2013, it was a daily reporting requirement). In order for this to be imposed, there must be obstacles to enforcing the removal order and a 'guarantor' shall provide a

declaration and evidence that he/she will provide for the subsistence and accommodation of the migrant.

However, Mr. A., a stateless person from the former Soviet Union who was detained from 2005 until to 2012, began his detention one day after his arrival in Bulgaria. He therefore had no social connections in the country. Once the maximum detention time limit passed, he continued to be kept in detention, because he could not provide an address at which he would live.

e) Vulnerable groups

Despite the recognition of different types of vulnerability under the law, in the official statistics of the Ministry of Interior, there are only the following five categories of vulnerable groups of detainees: minors under 14 years old, minors over 14 years old, elderly persons, ill persons and pregnant women. A conclusion can be drawn that no identification of the other types of vulnerability is conducted upon or during detention.

The number of detained children in Bulgaria is striking. In spite of the national law prohibiting the detention of unaccompanied children, according to the official statistics of the Ministry of the Interior, in 2015 there were 971 children detained in the Bousmantsi detention centre, 1,451 children in the Lyubimets centre and 4,477 children in the Elhovo centre.

f) Conditions of detention

Conditions of detention are common to stateless and non-stateless persons alike. However, as stateless persons are more likely to be detained for longer periods, they often have to endure poor conditions of detention for longer as well. In her 2015 report, the national Ombudsman observed "significant deterioration in material living conditions" in the immigration detention centres in Bulgaria. She observed that the centres were overcrowded, bedrooms and bathrooms were dirty, there was insufficient personal space, there was a lack of hot water and no sanitary products.

A significant problem related to detention conditions in Bulgaria over the years has been the arbitrary use of solitary confinement as a form of punishment. For example, in the case of Mr. Kadzoev, he was forced to be in solitary confinement several times, for a total of at least nine months. Some reasons for his punishment were as trivial as being in possession of a lighter. He was also placed in solitary confinement for inquiring about his asylum claim and prolonged detention. In none of these instances was a document, which stated the punishment and the reasons for imposing it, served to him. In a landmark judgment of 7 January 2016 the Supreme Administrative Court repealed the regulation of solitary confinement in the Ordinance adopted by the Minister of the Interior because it was deemed unlawful.

g) Conditions of release and re-detention

Immigration detainees regularly question the use or purpose of their time spent in detention. If by law immigration detention is not a punishment, then what result does their detention produce in relation to their immigration status? When released back in Bulgaria, stateless persons, like undocumented migrants, receive no papers.

In the *Mahdi* case, the CJEU stated that Directive 2008/115 must be interpreted as meaning that a member state cannot be obliged to issue an autonomous residence permit, or other authorisation conferring a right to stay in such cases. However, that member state must provide the released person with written confirmation of their situation.

When persons are released from detention without any identity documents, there is a high risk of re-detention. For example, an expert of the National Commission on Combatting Trafficking in Human Beings (NCTHB) recalled the case of a stateless lady who was repeatedly detained in the Bousmantsi detention centre. She was a victim of trafficking and had suffered physical abuse. As a result, she suffered from dissociative psychosis. In September 2013, she was transferred from the Bousmantsi detention centre to a shelter of the NCTHB. In the meantime, the Migration Directorate continued to investigate her citizenship. She was not provided with identity documents. In 2014 the shelters of the NCTHB were temporarily closed and the stateless lady was again detained in the Bousmantsi detention centre.

CONCLUSIONS AND RECOMMENDATIONS

The issue of statelessness is gradually gaining attention following Bulgaria's February 2012 accession to the 1954 and 1961 Statelessness Conventions. Bulgaria does not yet have a statelessness determination procedure in its national legislation, but a draft law was tabled in Parliament in 2016. While these developments are welcome and should be encouraged, there are a range of issues – including in relation to the draft law - that expose stateless persons to a high risk of arbitrary detention in Bulgaria.

The report has revealed that prevention of arbitrary detention of stateless persons in Bulgaria requires a number of interrelated overhauls to the system and its implementation, regarding recognition of the status of a stateless person, issuance of return and removal decisions and immigration detention. Concrete recommendations for improvement are listed below:

1. The definition of a stateless person in the draft Law Amending and Supplementing the Law on Foreign Nationals in the Republic of Bulgaria should be revised in line with the 1954 Statelessness Convention, according to which, "a person who is not

considered as a national by any State under the operation of its law" is stateless.

2. The provision in the draft Bulgarian law that the status of 'stateless person' should be accessible only to persons who were born in or entered legally onto the territory of Bulgaria and who hold a permanent or long-term residence permit, should be removed, as these criteria contradict Bulgaria's international treaty obligations.
3. In removal proceedings, Bulgaria should determine the destination country before enforcing a removal order and detaining the individual. In this regard, it should implement the measure set out by the European Court of Human Rights in the *Auad* case that "the destination country should always be indicated in a legally binding act and a change of destination should be amenable to legal challenge".
4. Identification of statelessness should take place before issuing a removal and detention order. Stateless persons should be identified as such and should not be arbitrarily 'assigned' a country of origin in their detention and removal orders.
5. The need to establish the identity of a person should not be a formal ground for detention. Article 44, paragraph 6 of the Law on Foreign Nationals in the Republic of Bulgaria, which provides that detention is imposed when the foreigner "is unidentified, hampers enforcement of the order or there is a risk of absconding" should be amended and brought in line with Article 15, paragraph 1 of the EU Return Directive and Article 5(1)(f) of the European Convention on Human Rights.
6. Both administrative and judicial authorities in Bulgaria should recognise every person's right to be heard when they are subject to removal and detention. In order to guarantee access to justice, Bulgarian law should envisage automatic judicial review of removal and detention orders and court hearings with the appropriate participation of the addressee of the orders.
7. Unless removal efforts are carried out with due diligence, detention is unlawful. In reviewing the length of detention, the authorities should follow the burden of proof test, stipulated by the Court of Justice of the European Union in the *Mahdi* case. For it to be possible to consider that there is a 'reasonable prospect of removal' within the meaning of Article 15, paragraph 4 of the Return Directive, there must be a real prospect that the removal can be carried out successfully within the allowed time limit of detention.
8. Before authorities consider whether the detainee has shown that he has failed to cooperate, the authority concerned should be able to demonstrate that the removal operation is lasting longer than anticipated, despite *all reasonable efforts of the removing authorities*.
9. 'Lack of cooperation' by the detainee should not be inferred solely from their refusal to sign a declaration for voluntary return.
10. Bulgarian authorities should take into consideration the fact that the one alternative to detention that currently exists in Bulgaria, weekly regular reporting, is not feasible in cases of persons who have entered the country shortly before their detention and have no social links in Bulgaria or residential address. Furthermore, this one alternative, with onerous weekly reporting requirements is not fit for purpose to meet the varying needs of different vulnerable persons. Bulgaria should therefore introduce new alternatives to detention that are in line with respect for human rights, and which are considered and exhausted first, before, in exceptional cases, detention is resorted to.
11. Vulnerable persons should not be detained and alternatives to detention should be explored instead. To that end, identification of vulnerability is crucial. The number of detained unaccompanied children in Bulgaria despite the legal ban on their detention speaks of the pressing need to take concrete measures for initial screening and identification of unaccompanied minors and other vulnerable persons at the earliest possible stage and on a continuous basis.
12. With regard to conditions of detention, the Bulgarian authorities should hear the repeated complaints of detainees over the years and take measures to ensure that detention does not amount to inhuman and degrading treatment in violation of Bulgaria's human rights obligations and does not threaten the health and life of detainees.
13. The application of solitary confinement to immigration detainees in Bulgaria has been arbitrary. Before imposing disciplinary punishments on detainees, there should be regulation of the conditions, procedure and remedies in this regard, which are stipulated in an act of law.
14. When persons are released from detention without any identity documents, they remain in a legal limbo without access to fundamental human rights and there is a high risk of re-detention. This not only violates the human dignity of these persons, but also poses a serious risk to social cohesion and national security. Therefore, all persons who are released from detention should be granted legal status and related rights including access to work and welfare.
15. Immigration detention shall always serve a meaningful purpose. Otherwise, it is an unjust punishment of the detained person. The Bulgarian authorities shall take actions to implement the above listed measures so that the arbitrary detention of stateless persons is avoided.

ABOUT THE PROJECT

The European Network on Statelessness (ENS), a civil society alliance with over 100 members in 39 European countries, is undertaking a project aimed at better understanding the extent and consequences of the detention of stateless persons in Europe, and advocating for protecting stateless persons from arbitrary detention through the application of regional and international standards.

The project will deliver a series of country reports (including this report) investigating the law, policy and practice related to the detention of stateless persons in selected European countries and its impact on stateless persons and those who are 'unreturnable' and therefore often at risk of statelessness. The methodology for all country reports follows a common research template – combining desk-based analysis alongside interviews with relevant stakeholders (civil society and government) as well as stateless persons.

In addition the project has developed a regional toolkit for practitioners on protecting stateless persons from arbitrary detention – which sets out regional and international standards that states must comply with. The toolkit, along with the full version of this and other country reports, are available on the ENS website at www.statelessness.eu

Please refer to the full version of this report for citation purposes and for more detailed acknowledgements. This report has been researched and written by Valeria Ilareva (Foundation for Access to Rights), a consultant researcher and ENS member.

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