

Analysis of migratory situation



Line of research: Migrations in the Third Millennium

ASYLUM SEEKERS AND THE RIGHT TO LIBERTY AND SECURITY: THE PORTUGUESE CASE¹

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INTRODUCTION

In May 2020, in the case known as VL, the CJEU ruled that an illegally staying third-country national who has expressed his/her intention to seek international protection before an "other authority" may not be detained for reasons other than those set out in Article 8(3) of the Reception Conditions Directive. In July 2020, a group of 21 people arrived on the southern coast of Portugal (Algarve) in a boat from Morocco. Despite having requested asylum, the group was detained in a prison facility (in Linhó, Portugal), as the temporary detention facility had already reached its maximum capacity. Although the Portuguese Asylum Law foresees limits to the detention of asylum seekers, in the same terms provided by the Reception Conditions Directive, in practice asylum requests presented at external borders imply systematic detention. Even with the changes in the practices that were implemented at the Lisbon Airport since March 2020, the Portuguese Asylum Law was not amended, which justifies the detention of asylum seekers both in Porto and Algarve, for instance. In this line, this analysis focus on the systematic use of detention of migrants in Portugal, arguing that the use of detention, particularly in the case of forced mobility, could constitute an obstacle to the achievement of the Sustainable Development Goal 16 (SDG 16), which aims at promoting the rule of law, nationally and internationally, and ensuring equal access to justice for all.

1. THE DETENTION OF ASYLUM SEEKERS IN PORTUGAL

Portugal has always been a country of immigration and emigration, with one accentuating over the other at different times in its history. Despite this, ANA RITA GIL refers that for some time, foreigners were ignored by constitutional texts, and the 1911 Portuguese Constitution was the first to enshrine a norm that recognised foreigners' rights as similar the Portuguese ones.² The same author highlights that, in the current Constitution, there are several principles that guarantee the recognition of fundamental rights for foreigners, acting in complementarity with each other".³

It is important to bear in mind that Article 27 of the 1976 Portuguese Constitution provides the right to liberty and security and its No. 2 establishes that no-one may be wholly or partially deprived of their freedom, except as a result of a judicial sentence

² - Gil, *Imigração e Direitos Humanos*, 245.

³ - Gil, 246.

imposed for an act punishable by law with a prison sentence or the judicial application of a security measure. However, the No. 3 of the same article imposes an exception to this principle, referring to the arrest, detention or other coercive measure subject to judicial control of a person who has entered or is staying illegally on national territory or against whom extradition or deportation proceedings are in progress.

Thus, the Portuguese Constitution follows the spirit and the limits of the right to freedom, especially regarding the balance between the fundamental rights of migrants and the State sovereign right on regulating the entry and stay of foreign citizens in its territory.

Regarding the regulation of migration, since the promulgation of the 1976 Portuguese Constitution, ALEXANDRINO⁴ considers two periods: before and after the accession to the current European Union (EU). This is because Portugal, after joining, had to adjust its national legislation to the policy and legislation developed at the European level. The referred author also considers that, from 1986 – the year of Portugal's accession to the EU -, the Portuguese migration legislation went through three phases, which he calls timid adjustment (referring to the transitory period that lasted until 1992), transition (from 1993 to 1998, with two levels of application: one for EU citizens and another to third-country nationals) and the effort to consolidate a comprehensive regulatory framework (from 1998, with the transposition of EU directives to the Portuguese legal system).⁵

It is important to bring to the analysis that since 2001 the need to regulate in a more muscular way the migratory flows were already present, especially to fight irregular immigration. Such need corresponded to the European political agenda which, during the Spanish Presidency of the EU Council, was marked by more restrictive proposals for migrations and even proposals for sanctions to the migrants' countries of origin that did not cooperate with the control of their own nationals.⁶

In this line, Law no. 27/2008, of 30 June, in its current wording (hereinafter only referred to as "Asylum Law" or "AL"),⁷ defines in Article 2(1)(h) "detention" as a

⁴ - Alexandrino, O Discurso Dos Direitos, 91.

⁵ - Alexandrino, 91–92.

⁶ - João Carvalho, A Política de Imigração Do Estado Português Entre 1991 e 2004, Alto Comissariado para as Migrações (Lisboa: Observatório das Migrações, 2009), 94–95.

⁷ - Law no. 27/2008, published at Diário da República n.º 124/2008, Serie I of 2008-06-30, establishes the conditions and procedures for granting asylum or subsidiary protection and the statuses of asylum seeker, refugee and subsidiary protection, transposing Council Directives 2004/83/EC of 29 April and 2005/85/EC of 1 December into national law. This Law was amended by the Law no. 26/2014, published at Diário da República no. 85/2014, Serie I of 2014-05-05.

measure of confinement of an applicant for international protection in a special area. The same Law provides that applicants for international protection may not be held in detention for the reason that they have applied for such protection [Article 35-A(1) of the AL], except when there are grounds of national security, public order, public health or when there is a risk of absconding, on the basis of an individual assessment, and if other less onerous alternative measures cannot be applied effectively [Article 35-A(2) of the AL], namely [Article 35-A(3) of the AL]:

a) when applications for international protection were submitted at external borders.

(b) in cases of applications submitted following a decision to leave national territory.

(c) in the course of the special procedure for determining the Member State responsible for examining the application for international protection, provided for in Article 28 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013.

Under Article 35-A(5) of the Asylum Law, placement or maintenance in a temporary facility, as well as alternative measures to detention, are determined by either the criminal court or the district court, depending on the jurisdiction. In the specific case of requests received at external borders, such as airports, the stay in a temporary facility or equivalent space is communicated within 48 hours to the criminal court judge [Article 35-A(6) of the AL] to confirm the detention, which cannot extend longer than necessary establishes the conditions and procedures for granting asylum or subsidiary protection and the statuses of asylum seeker, refugee and subsidiary protection, transposing Council Directives 2004/83/EC of 29 April and 2005/85/EC of 1 December into national law. This Law was amended by the Law no. 26/2014, published at *Diário da República* no. 85/2014, Serie I of 2014-05-05. and cannot exceed 60 days [Article 35-B(1) of the AL]. The same is established by Law No. 34/94, of 14 September,⁸ which determines the regime for the reception of foreigners or stateless persons in temporary facilities.

Although Article 35-A(4) of the Asylum Law states that periodic reporting to SEF and the obligation to remain at home with the use of electronic surveillance are

⁸ - Law no. 34/94, of 14 September, published in the *Diário da República* (Official Journal) no. 213/1994, Series I-A of 1994-09-14.

considered less onerous alternative measures to detention, these measures have not been used preferentially.⁹

This occurs because the transposition of the EU Reception Conditions Directive (RCD) into the Portuguese legal system was not the most adequate, broadening the grounds for detention and therefore infringing the mentioned Directive.¹⁰ Due to this there will be cases of detention of asylum seekers which, despite being justified by the Portuguese Asylum Law, will be in breach of supra-legal norms, namely EU Law itself.

2. THE CASE OF THE MOROCCO-PORTUGAL "NEW ROUTE": IRREGULAR IMMIGRANTS OR ASYLUM SEEKERS?

Since December 2019, several small boats have risked crossing the boundary between the Mediterranean Sea and the Atlantic Ocean from Morocco towards Portugal.¹¹ Some of the foreigners, upon disembarking in the Algarve (southern Portugal), requested international protection, with, in most cases, their request being deemed inadmissible or unfounded.

Among the various arrivals, one drew particular attention from the media: a group of 21 people coming from the Kingdom of Morocco who arrived on the Island of Farol (Algarve) on 21 July 2020. This group faced the lack of accommodation in the temporary migrant reception centres in Faro, and such a situation had already been criticized in Lisbon.¹² Due to the exhaustion of the placement capacity at the temporary reception centre, the Faro (Algarve) Court decided that these migrants should be installed at the Linhó Prison (Lisbon District), where they should wait for an eventual removal process.¹³

This decision, however, raises some questions.

If, on the one hand, until the date they were brought before a judge (23 July 2020), none of these people had applied for international protection, the placement of these foreigners in a prison establishment equates, in a way, the administrative detention due to the absence of documents and/or illegal entry to a detention within the framework of criminal proceedings, which reinforces the idea of criminalisation of migration.

⁹ - Oliveira, "Anotação Do Artigo 35.º-A. o ,", 258.

¹⁰ - Oliveira, 259.

¹¹ - See Baptista, "The Migration Route Morocco-Algarve: Chronology."

¹² - See Henriques, "Pessoas Amontoadas Em Beliches: Fórum Refúgio Alertou Sobre 'Hostels' Há Nove Meses." And Fernandez, "Centenas de Refugiados Em Albergues Durante a Pandemia Deixam Portugal Em Alerta."

¹³ - See LUSA, "Migrantes Que Desembarcaram Em Faro Transferidos Para a Prisão Do Linhó."

"Crimmigration" or Criminalisation of Migration would be the approximation of Criminal Law to Administrative Law on issues related to borders, immigration and asylum,¹⁴ a term coined by JULIET STUMPF¹⁵ in 2006.

Thus, the decision to place all the group in a prison facility in order to guarantee detention, without considering any other measure less - as provided for in Article 142 of the Immigration Law¹⁶ - seems to associate an alleged risk of absconding to the simple fact of being a third-country national. As detention must be used as a measure of *ultima ratio*, the result of this decision approximates the illegal entry to a crime - and not to an administrative offence, as foreseen by the Portuguese legislation - which may criminalise, as PARKIN¹⁷ explains, not only the individual but also the migratory process itself.

It should also be noted that some of the migrants requested asylum when their detention was confirmed, others when they were already in detention, which made it impossible for them to leave the national territory until the assessment of the admissibility of the request (first phase of the asylum procedure in Portugal). However, what we have been able to ascertain is that in the majority of cases, the requests were considered unfounded¹⁸, which led to an accelerated procedure that may culminate in the foreigner's removal, if they do not judicially challenge the administrative decision.

Following this, the question is whether the VL case would not be applicable, i.e. that applicants for international protection be placed in specific places for asylum seekers - or at liberty - unless strictly one of the subparagraphs of Article 8 (3) of the RCD could be alleged to justify the continuity of detention? It seems to us that the answer is positive, especially with regard to the need to examine applications on an individual basis, as provided for in the Asylum Law.

Such a construction may seem confusing, as it may imply releasing a person to possibly detain him/her again, considering that the requests were considered unfounded and there is a practice where the use of detention is dominant. However, we maintain the positive response to the question raised, since the restriction of a person's freedom has

¹⁴ - Kubal, "Struggles against Subjection. Implications of Criminalization of Migration for Migrants' Everyday Lives in Europe."

¹⁵ - Stumpf, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power."

¹⁶ - Law no. 23/2007, which approves the legal regime for the entry, stay, exit and expulsion of foreigners from national territory, published in the Official Gazette no. 127/2007, Series I of 2007-07-04.

¹⁷ - Parkin, "The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research."

¹⁸ - Article 19 of the Asylum Law.

clear limits and cannot be used as a measure to facilitate a procedure that in itself is lengthy and complex. Moreover, it should be noted that such an argument would have greater impact on asylum applications that take place at border crossings - such as airports - where the use of detention is widespread.¹⁹

One cannot fail to mention that in March 2020 there was a change in the practice of detention in Lisbon, where asylum seekers were no longer detained, but the possibility of detaining irregular immigrants was maintained. As there was no change in the Asylum Law, but only in a localized practice, this additional protection to asylum seekers would allow the legal provision that a foreigner should not be detained for the mere fact of applying for asylum to become effective.²⁰

Thus, recalling the El Dridi case,²¹ the detention of irregular immigrants is limited and must be applied in a proportional and necessary manner, and provided that another less coercive measure does not prevail, in order to respect and guarantee the protection of the fundamental rights of foreigners under the jurisdiction of a given State. As MITSILEGAS analyses:

El Dridi is a landmark judgment on two levels: on the level of constitutional law, it reiterates—based on settled case-law in the field—that EU law places limits to the power of EU Member States to criminalise, limits which stem from the obligation of Member States to comply with the EU law principles of effectiveness and loyal cooperation; on the level of migration law, it confirms that EU law, and EU migration law specifically, places limits upon Member States’ power to criminalise migration.²²

And if detention of immigrants is conditional, the restriction of the freedom of asylum seekers should be (re)viewed with more caution, following the judgment of the VL case. Being necessary and proportional the application of a coercive measure, the Portuguese Asylum Law offers in Article 35-A(4) other possibilities that can be applied as an alternative to detention, such as periodic presentation to SEF and the obligation to stay in the house with the use of surveillance means.

¹⁹ - Article 35-A(3) of the Asylum Law

²⁰ - Article 35-A(1) of the Asylum Law.

²¹ - CJEU Judgment of the Court (First Chamber) of 28 April 2011, C-61/11 PPU Hassen El Dridi, alias Soufi Karim, ECLI:EU:C:2011:268.

²² - Mitsilegas, *The Criminalisation of Migration in Europe*, 65

3. SUSTAINABLE DEVELOPMENT GOALS AND THE PORTUGUESE CASE

In 2015, United Nations adopted the 2030 Agenda for Sustainable Development.²³ With 17 goals for the Sustainable Development, there is “an urgent call for action by all countries - developed and developing - in a global partnership”.²⁴

Although the 2030 Agenda directly refers to migration only in four goals²⁵, human mobility is related to other goals. More specifically, Sustainable Development Goal 16 (SDG 16) aims at promoting more peaceful and inclusive societies, so that access to justice is guaranteed to all, and institutions are effective, accountable and inclusive.

To achieve the SDG 16, it is urgent to foster and deepen mutual trust, especially the trust between (national or foreign) citizens and State institutions. In this line, one can argue that generalized detention of migrants may jeopardize trust in institutions.²⁶ This definitely constitutes, on the one hand, an obstacle to the achievement of SDG 16, but also, on the other hand, hinders the protection of people in need of international protection, since it does not provide the necessary environment for a foreigner to tell the facts that brought him/her to Portugal, for instance.

In the specific case of asylum seekers, sometimes the agent of persecution is the State itself, which already creates a complementary difficulty for those to trust state agents - such as the police - to narrate the facts that support their request for protection. It is also important to mention the basis of a request for international protection: “International Law understands that in cases of asylum, the State of origin has ceased to protect the person (because it does not wish to or it cannot do it), and so the State-citizen bond has been broken. The person has been left helpless and, therefore, International Law issues a special protection statute for him or her (refugee status)”.²⁷

In this line, the use of detention, especially in the case of asylum seekers, could be an obstacle to the achievement of SDG 16, but also of the entire 2030 Agenda, which proposes the principle of leaving no one behind. This idea corroborates the fact that the

²³ - United Nations, “Transforming Our World: The 2030 Agenda for Sustainable Development.”

²⁴ - United Nations, “THE 17 GOALS | Sustainable Development.”

²⁵ - Gortázar Rotaèche, “The Constant Link between Migration and Sustainable Development: The 2030 Agenda and the ‘Not Let Nobody behind’ Principle,” 34

²⁶ - Parkin, “The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research,” 11.

²⁷ - Gortázar Rotaèche, “The Constant Link between Migration and Sustainable Development: The 2030 Agenda and the ‘Not Let Nobody behind’ Principle,” 28.

use of detention shall be a last resort, and that alternatives to detention should be prioritized.

In the Portuguese case, the alternatives included in the Asylum Law, but also in the Immigration Law, are very limited and could aggregate other measures proposed by the Council of Europe, such as a case manager who accompanies the applicant from his/her application until his/her integration process, after having been granted refugee status or subsidiary protection. And such a measure not only facilitates the relationship with migrants but may also allow the non-exhaustion of the reception system, since, as we have seen, the reception (and detention) centres for migrants have outdated capacity and the option of using prisons may further increase the gap between the migrant - in the capacity of asylum seeker - and the host State and its institutions.

CONCLUSION

This analysis focused on the detention of migrants and the promotion and protection of the right to freedom and security of migrants in Portugal, pointing out the structural and practical changes in the detention facilities, especially the Lisbon one. Among the measures that are not foreseen nationally, but that could be part of the list of examples would be the appointment of a case manager, replacing the excessive use of detention.

It was also argued that the use of detention, particularly in the case of forced migration, could constitute an obstacle to the achievement of the goals set by Goal 16 for Sustainable Development (SDG 16) of the UN Agenda 2030, upholding greater detachment and weak bonds of trust between migrants with the host State and its institutions.

In this line, we conclude that the expansion of alternative measures to detention would be, for the time being, the most appropriate response to ensure, on the one hand, the protection of persons in need of international protection while their request is being examined, with special attention to asylum applications submitted at border crossings. Alternative measures would help to improve the trust in the (Portuguese) institutions and to achieve the general objectives of SDG 16, which are: to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.

BIBLIOGRAPHIC REFERENCES

- Alexandrino, José Melo. *O Discurso Dos Direitos*. Coimbra: Coimbra Editora, 2011.
- Baptista, Mariana. “The Migration Route Morocco-Algarve: Chronology.” *NOVA Refugee Clinic Blog*, June 22, 2021. http://novarefugeelegalclinic.cedis.fd.unl.pt/?blog_post=the-migration-route-moroccoalgarve-chronology.
- Carvalho, João. *A Política de Imigração Do Estado Português Entre 1991 e 2004*. Alto Comis. Lisboa: Observatório das Migrações, 2009. https://www.om.acm.gov.pt/documents/58428/179891/tese_26.pdf/63d30119-651d-44b2-87d6-dfe2bb44a7b1.
- Fernandez, Paula. “Centenas de Refugiados Em Albergues Durante a Pandemia Deixam Portugal Em Alerta.” *Agencia EFE*. 2020. <https://www.efe.com/efe/portugal/portugal/centenas-de-refugiados-em-albergues-durante-a-pandemia-deixam-portugal-alerta/50000441-4229755>.
- Gil, Ana Rita. *Imigração e Direitos Humanos*. Lisboa: Petrony, 2017.
- Gortázar Rotaeché, Cristina. “The Constant Link between Migration and Sustainable Development: The 2030 Agenda and the ‘Not Let Nobody behind’ Principle.” In *The Relevance of Migration for the 2030 Agenda for Sustainable Development The Global Compact for Safe, Orderly and Regular Migration*, edited by Constança de Urbano Sousa. Lisbon: Universidade Autónoma de Lisboa, 2019.
- Henriques, Joana Gorjão. “Pessoas Amontoadas Em Beliches: Fórum Refúgio Alertou Sobre ‘Hostels’ Há Nove Meses.” *Público*. 2020. <https://www.publico.pt/2020/04/23/sociedade/noticia/dez-pessoas4m2-forum-refugio-alertou-hostels-ha-nove-meses-1913605>.
- Kubal, Agnieszka. “Struggles against Subjection. Implications of Criminalization of Migration for Migrants’ Everyday Lives in Europe.” *Crime, Law and Social Change* 2014 62:2 62, no. 2 (June 10, 2014): 91–111. <https://doi.org/10.1007/S10611-014-9527-5>.
- LUSA. “Migrantes Que Desembarcaram Em Faro Transferidos Para a Prisão Do Linho.” *Diário de Notícias*. 2020. <https://www.dn.pt/pais/migrantes-que-desembarcaram-em-faro-va-ser-transferidos-para-a-prisao-do-linho-12459621.html>.
- Mitsilegas, Valsamis. *The Criminalisation of Migration in Europe*. SpringerBriefs in Law. Cham: Springer International Publishing, 2015. <https://doi.org/10.1007/978-3-319-12658-6>.
- Oliveira, A. Sofia Pinto. “Anotação Do Artigo 1.º .” In *Lei Do Asilo - Anotada e Comentada*, edited by A. Sofia Pinto Oliveira and Anabela Russo, 9–13. Lisboa: Petrony, 2019.

- Parkin, Joanna. “The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research.” CEPS Paper in Liberty and Security in Europe. Brussels, 2013. <https://www.ceps.eu/ceps-publications/criminalisation-migration-europe-state-art-academicliterature-and-research/>.
- Stumpf, Juliet. “The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power.” *American University Law Review* 56, no. 2 (2006): 367–419. <http://digitalcommons.wcl.american.edu/aulr>.
- United Nations. “THE 17 GOALS | Sustainable Development.” Department of Economic and Social Affairs, 2015. <https://sdgs.un.org/goals>.
- . “Transforming Our World: The 2030 Agenda for Sustainable Development.” Department of Economic and Social Affairs, 2015. <https://sdgs.un.org/2030agenda>.
- Woude, Maartje A.H. van der, and Patrick van Berlo. “Crimmigration at the Internal Borders of Europe? Examining the Schengen Governance Package.” *Utrecht Law Review* 11, no. 1 (January 30, 2015): 61–79. <https://doi.org/10.18352/ULR.312>.