

Memo on international law and the rules governing the expulsion of non-citizens

A. The international law background

1. The power to expel or to deport non-citizens is frequently taken for granted, and assumed to lie within the sovereign power of every independent State. What is often ignored, however, is that every act of deportation depends for its efficacy on the cooperation of another State or States and for that reason it is a matter of international law.
2. Already in the nineteenth century, it was accepted that while the function of expulsion is to protect the State and that every State is competent to decide for itself what conduct of the non-citizen will justify removal, yet certain limitations operate. Thus, in 1883, for example, the Law Officers of the Crown advised that,

where... the expulsion does not result from a judicial sentence, but from the act of the Executive, Her Majesty's Government is entitled to scrutinize the facts; and if the action of the Executive has been arbitrary and unfriendly, or the mode of its enforcement unnecessarily harsh or oppressive, may properly make the matter the subject of protest or representation.¹
3. The reference to what is arbitrary and unfriendly, or to what is unnecessarily harsh or oppressive, provide the basis for understanding the rules governing deportation, while judicial inquiry, based in formal investigation and proof of facts, is seen as a sounder guard against abuse than the free exercise of a power of expulsion based on vague and indefinite allegations.²
4. Controls over the movement of people between States became much more evident during the course of the First World War and have continued ever since.³ Migration is

¹ *Cases of Misses Charlesworth and Booth 1883*: 6 *British Digest of International Law*, 167, 169. These and other precedents are set out in Goodwin-Gill, G. S., 'The Limits of the Power of Expulsion in Public International Law', (1974–1975) 47 *British Yearbook of International Law* 55, 78–9; and in *International Law and the Movement of Persons between States*, Oxford: Clarendon Press, 1978, 201–208.

² *Expulsions from the Capitulations Countries. Turkey 1860–1893*: *ibid.*, 199, 202–3.

³ Controls over the entry of certain groups identified by reference to race, in particular, were common in the late nineteenth and early twentieth centuries; see Lester, E., *Making Migration Law: The Foreigner, Sovereignty and the Case of Australia*, Cambridge: Cambridge University Press, 2018.

now a major phenomenon on the international agenda, with States increasingly concerned by the seemingly uncontrollable migration of those without prior permission to enter and of those in search of refuge. The issues go beyond the obligation of the State to readmit its citizens, and the international legal framework nevertheless remains as it was described by the Australian Judge Read in the *Nottebohm* case in 1955:⁴

... by admitting the alien, the State, by its voluntary act, brings into being a series of legal relationships with the State of which he is a national... The receiving State becomes subject to a series of legal duties vis-à-vis the protecting State, particularly the duty of reasonable and fair treatment. It acquires rights vis-à-vis the protecting State, particularly the rights incident to local allegiance and the right of deportation to the protecting State. At the same time the protecting State acquires correlative rights and obligations, particularly... the obligation to receive the individual on deportation... The scope and content of the rights are... largely defined by positive international law.

5. However, it is with regard to the refugee and the stateless person that the legal relationship begins to reveal problematic issues – the refugee cannot be sent to any country where he or she has a well-founded fear of being persecuted (usually, but not necessarily, the State of which he or she is a national), because of the duty of protection included in the principle of *non-refoulement*; and the stateless person has in general no country to which he or she can be sent.⁵ In addition, no State is competent to insist that the receiving State abide by its international obligations, while the limited protection responsibility of UNHCR (the Office of the United Nations High Commissioner for Refugees) for refugees and stateless persons does not include providing either of them with a country to which they can be removed.
6. The international cooperation on which the efficient and effective implementation of the sanction of deportation depends is missing, although other applicable provisions of international law remain. Deportation, whether it be a civil or criminal proceeding, is a severe penalty which State practice confirms must be founded on serious reasons and related to its function and purpose. While detention pending removal may be permitted, provided it is necessary, reasonable, proportionate and non-discriminatory,⁶ the detention of a refugee or stateless person, who is by definition non-removable,

⁴ *Nottebohm Case*, [1955] ICJ Rep. 4, 47. This was said in a dissenting judgment but still holds good as an analysis of the applicable international law.

⁵ In 1960, the United Kingdom government said that no other State can be required to accept a stateless deportee and that the power of deportation was therefore not available in the case of Klaus Fuchs, whose naturalisation had been revoked following conviction for espionage: 606 HC Deb., col. 1176.

⁶ In *A and Others v Secretary of State for the Home Department* [2004] UKHL 56, for example, the House of Lords held that legislation permitting the imprisonment of non-deportable non-citizens amounted to indefinite detention; it incompatible with the European Convention on Human Rights as it discriminated against foreign nationals and was also disproportionate, as it did not rationally address the threat posed by international terrorism.

would appear arbitrary and inconsistent with prevailing standards, whether imposed mandatorily or in the exercise of discretion.

B. The rule of international law that detention for the purpose of effecting deportation shall not be arbitrary

7. In general, detention in the context of removal will be arbitrary unless it is necessary, reasonable and proportionate in the individual case. The fact that it is characterised as ‘administrative detention’, or as not punitive in nature, or as not detention for an offence, is irrelevant to the fact that it constitutes a major limitation on the individual’s fundamental right to liberty and freedom of movement and that it will necessarily become punitive at a certain point.

8. The fundamental right is recognised in all major international and regional human rights instruments, including Article 9 of the Universal Declaration of Human Rights, Article 9 of the International Covenant on Civil and Political Rights,⁷ Article 6 of the African Charter of Human and Peoples’ Rights, Article 7 of the American Convention on Human Rights, Article 14 of the Arab Charter on Human Rights, and Article 5 of the European Convention on Human Rights. One hundred and seventy-three States are currently party to the ICCPR, and the Working Group on Arbitrary Detention noted in 2012 that ‘the prohibition on arbitrary deprivation of liberty is widely enshrined in national constitutions and legislation and follows closely the international norms and standards on the subject.’⁸ In its view,

the prohibition of arbitrary deprivation of liberty and the right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the legality of the detention... are non-derogable under both treaty law and customary international law.⁹

9. Moreover, in the *Diallo* case, the International Court of Justice held that Article 9(1) and (2) ICCPR and Article 6 of the African Charter apply in principle to *any* form of

⁷ Article 9(1) states that ‘Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’ Article 9(2) declares that ‘Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.’ Article 9(4) provides that, ‘Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.’

⁸ United Nations, Human Rights Council, ‘Report of the Working Group on Arbitrary Detention’: UN doc. A/HRC/22/44, 24 Dec. 2012 (Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, para. 43).

⁹ *Ibid.*, para. 47. The Working Group added: ‘Consequently, the prohibition of arbitrary deprivation of liberty is part of treaty law, customary international law and constitutes a *jus cogens* norm’: *ibid.*, para. 51.

detention, 'whatever its legal basis and the objective being pursued'.¹⁰ The Court added:

The scope of these provisions is not, therefore, confined to criminal proceedings; they also apply, in principle, to measures which deprive individuals of their liberty that are taken in the context of an administrative procedure, such as those which may be necessary in order to effect the forcible removal of an alien from the national territory.

10. 'Administrative detention', including that in the context of migration, can be a particular source of problems, for 'the administrative rather than judicial basis... poses particular risks that such detention will be unjust, unreasonable, unnecessary or disproportionate with no possibility of judicial review.'¹¹
11. The Working Group on Arbitrary Detention has also set out its views on the length of detention in migration proceedings. A maximum period must be set by legislation, such detention should be for the shortest period, and excessive detention is arbitrary: 'Indefinite detention... in the course of migration proceedings cannot be justified and is arbitrary.'¹² Where the reasons for non-removal cannot be attributed to the individual, for example, in the case of *non-refoulement* or statelessness, then 'the detainee must be released to avoid potentially indefinite detention... which would be arbitrary.'¹³
12. In 1986 the UNHCR Executive Committee recommended that the detention of refugees and asylum seekers should normally be avoided. If it is necessary, it should only occur on grounds prescribed by law in order to determine the identity of the individual, to obtain the basic facts of an application for protection, where an individual has purposely destroyed documentation, or where there are national security or public order concerns.¹⁴ In addition, Executive Committee Conclusion 106 (LVI) of 2006 expressly calls on States, 'not to detain stateless persons on the sole basis of their

¹⁰ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep. 639, 668, para. 77.

¹¹ United Nations, Human Rights Council, 'Report of the Working Group on Arbitrary Detention', UN doc. A/HRC/22/44, 24 Dec. 2012 (Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, para. 70). The European Court of Human Rights has likewise found that the requirement that detention have a legal basis does not merely refer back to domestic law, but relates to the *quality* of the law, 'requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention': *Khlaifia & Ors v Italy*, App. No. 16483/12, 15 Dec. 2016, para. 91.

¹² United Nations, Human Rights Council, 'Report of the Working Group on Arbitrary Detention': UN doc. A/HRC/39/45, 2 Jul. 2018 (Revised deliberation No. 5 on deprivation of liberty of migrants, paras. 25–26).

¹³ *Ibid.*, para. 27.

¹⁴ UNHCR Executive Committee Conclusion 44 (XXXVII) of 1986 on detention of refugees and asylum-seekers: <http://www.refworld.org/docid/3ae68c43c0.html>. See also, UNHCR, 'Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention', 2012, Guideline 4, 'Detention must not be arbitrary, and any decision to detain must be based on an assessment of the individual's particular circumstances': <http://www.unhcr.org/505b10ee9.html>.

being stateless and to treat them in accordance with international human rights law...'.¹⁵

13. In 2014, the International Law Commission completed the drafting of a complete set of articles which, it was hoped, would be used by States as the basis for a convention governing the expulsion of aliens.¹⁶ Article 19 provides that detention for the purpose of expulsion 'shall not be arbitrary nor punitive in nature'; that detention shall be limited to such period as is reasonably necessary for expulsion to be carried out; that any excessive duration is prohibited; and that detention 'shall end when the expulsion cannot be carried out', except where the reasons are attributable to the person concerned. While some States expressed concerns regarding aspects of this article, none was raised with respect to the provisions just cited.¹⁷
14. As the Australian Human Rights Commission made clear in its intervention in *M47/2018* (paras. 31–37), detention includes measures taken under the *Migration Act*, and as the Human Rights Committee has emphasised time and again, detention may become arbitrary when it becomes unjust, unreasonable or disproportionate to a lawful aim. For arbitrariness has long been equated beyond conduct that is simply against the law, and must be understood to include 'elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.'¹⁸

The rule reflected in regional and national law

15. Many States have domestic and/or regional human rights frameworks in place enshrining the right to be free from arbitrary detention. As noted in paragraph 8 above, this right is rooted in constitutional law and doctrine and therefore pre-dates treaties and legislation, meaning it has broader relevance even for States without localised human rights frameworks. The Supreme Court of Canada, which shares its understanding of common law rights such as liberty of the person with courts in Australia and the United Kingdom, has noted that Section 9 of the Canadian Charter of Rights and Freedoms 'guarantees freedom from arbitrary detention. This guarantee expresses one of the most fundamental norms of the rule of law. The state may not

¹⁵ UNHCR Executive Committee Conclusion 106 (LV1) of 2006 on identification, prevention and reduction of statelessness and protection of stateless persons: <http://www.unhcr.org/453497302.html>. For a general account of the detention of refugees, asylum seekers and stateless persons, see Goodwin-Gill, G. S. & McAdam, J., *The Refugee in International Law*, Oxford: Oxford University Press, 4th edn., 2021, 466–475.

¹⁶ International Law Commission, 'Expulsion of aliens – Text of the draft articles and commentaries thereto', *Report*, Sixty-sixth session, GAOR, 69th Session, UN doc. A/69/10 (2014). The text continues to be before the General Assembly; see UNGA res. 75/137, 15 Dec. 2020.

¹⁷ See 'Report of the International Law Commission on the work of its sixty sixth session. Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-ninth session, prepared by the Secretariat': UN doc. A/CN.4/678, 21 Jan. 2015, para. 97.

¹⁸ United Nations, Human Rights Committee, 'General Comment No. 35. Article 9 (Liberty and Security of Person)': UN doc. CCPR/C/GC/35, 16 Dec. 2014, para. 12; Human Rights Committee, Views, *Mukong v Cameroon*, Communication No. 458/1991: UN doc. CCPR/C/51/D/458/1991, 10 Aug. 1994, para. 9.8; Views, *van Alphen v The Netherlands*, Communication No. 305/1988: UN doc. CCPR/C/39/D/305/1988, 23 Jul. 1990, para. 5.8 (both referring to the drafting history of the ICCPR),

detain arbitrarily, but only in accordance with the law.¹⁹ In *Chhina*'s case in 2019, the Court noted that 'lawful detention for the purpose of removal may become arbitrary and in violation of s. 9 of the Charter when it becomes unhinged from its immigration-related purpose. Where removal appears unlikely and the future duration of detention cannot be ascertained, this is a factor that weighs in favour of release.'²⁰

16. In the United Kingdom – some fifteen years before the adoption of the Human Rights Act – it was held in *Hardial Singh* that the power of detention was limited to the express purpose provided by statute and was further limited to a period that was reasonably necessary to enable deportation to be carried out, there being a duty of all reasonable expedition on the Secretary of State. Thus, the power to detain will cease to exist where removal is not a practical possibility for whatever reason, such as lack of travel documents, refusal to admit, or the risk of persecution or other treatment contrary to Article 3 of the European Convention on Human Rights (ECHR).²¹
17. Article 5(1) the ECHR provides that 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.' Paragraph (f) in turn deals with one such case, namely, 'the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.'
18. The European Court of Human Rights has interpreted these provisions on several occasions. In *Saadi v United Kingdom*, the Court recalled that 'no detention which is arbitrary can be compatible' with Article 5(1), and set out four requirements to avoid arbitrariness.²² It has also held that detention will be justified under Article 5(1)(f), 'only

¹⁹ *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350, para. 88.

²⁰ *Minister of Public Safety and Emergency Preparedness and Attorney General of Canada v Chhina* [2019] 2 SCR 467, para. 135; see also *Ali v Minister of Public Safety and Emergency Preparedness* 2017 ONSC 2660: 'The purpose under the [Act] is not the punishment of the uncooperative detainee. For the continued detention of the individual to be proper, it must be necessary to further a legitimate immigration purpose': para. 26. But see *Brown v Canada (Minister for Immigration and Citizenship)* 2020 FCA 130, [2021] 1 FCR 53, in which the possibility of prolonged detention was admitted, and the decision-maker has discretion to order detention as long as it is 'reasonably necessary' and removal remains 'a possibility'. 'Reasonable foreseeability' is not an appropriate criterion, but the 'possibility test' is, with its focus on 'the existence of objective, credible facts': paras. 94, 95. The availability of judicial review not only tests the legality of a detention decision against the Charter and common law principles, including proportionality, but also 'the reasoning process, its transparency, and its integrity': para. 161.

²¹ *R v Governor of Durham Prison ex parte Hardial Singh* [1984] 1 WLR 704, paras. 7, 8; *R(I) v Secretary of State for the Home Department* [2003] INLR 196, para. 46. In *R(MH) v Secretary of State for the Home Department* [2010] EWCA Civ 1112, para. 64, it was said that the Secretary of State does not need to show certainty of removal within a specific time-frame, but there must be 'sufficient prospect of removal to warrant continued detention when account is taken of all other relevant factors'.

²² *Saadi v United Kingdom*, App. No. 13229/03, 29 Jan. 2008, para. 67. To avoid being arbitrary, the detention must be carried out in good faith; be closely connected to the purpose of preventing unauthorised entry or effecting removal; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued: see *ibid.*, para. 74.

for as long as deportation proceedings are in progress', which will not be the case in the event of a 'total failure' on the part of the authorities to take any steps to pursue removal; if such steps are not taken with 'due diligence', the detention will cease to be permissible.²³

19. Within the regulatory scope of the European Union, particular emphasis is placed on respect for the principles of international law,²⁴ including human rights in particular.²⁵ In addition, Directives adopted for the purposes of harmonising practice contain multiple references to international law and human rights.²⁶
20. Removal from the European Union is generally governed by the 2008 Returns Directive, which provides with regard to detention that 'Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process... Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.'²⁷
21. Article 15 goes on to provide as follows:

2. Detention shall be ordered by administrative or judicial authorities.

Detention shall be ordered in writing with reasons being given in fact and in law.

When detention has been ordered by administrative authorities, Member States shall:

- (a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention;

- (b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy

²³ *Aden Ahmed v Malta*, App. No. 55352/12, 23 Jul. 2013, paras. 144–145; *A & Ors v United Kingdom*, App. No. 3455/05, 19 Feb. 2009, para. 164.

²⁴ See Articles 3(5), 21(1) and 21(2), Treaty of European Union,

²⁵ See Articles 2, 3(5), 6(3), 21(1), Treaty of European Union. In addition, the Charter of Fundamental Rights of the European Union 'confirms the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States.'

²⁶ Among many, see the 2011 Qualification Directive (recast), the 2013 Procedures Directive (recast), and the 2008 Returns Directive.

²⁷ Directive 2008/ 115/ EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals, OJ L.348, 12.24.2008, 188–197, art. 15(1).

judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings.

The third-country national concerned shall be released immediately if the detention is not lawful.

3. In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or *ex officio*. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) a lack of cooperation by the third-country national concerned, or

(b) delays in obtaining the necessary documentation from third countries.

22. Significantly, the Returns Directive also contains explicit references to the obligation of the EU and Member States to abide by international law. Thus, Recital (17) declares that third-country nationals in detention ‘should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international... law’; Recital (24) adds that the Directive ‘respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union’, to which Article 1 adds a specific reference to refugee protection and human rights obligations. Article 9(1) in turn provides that Member States ‘shall postpone removal’ when it would violate the principle of *non-refoulement*, and that they ‘may postpone removal’ when taking account of the specific circumstances of the individual, including his or her physical and mental capacity, or ‘technical reasons, such as lack of transport capacity, or failure of the removal due to lack of identification.’

23. The Court of Justice of the European Union has had occasion to rule on these provisions, finding, for example, that under Article 15(4), '), 'detention ceases to be justified and the person concerned must be released immediately when it appears that, for legal or other considerations, a reasonable prospect of removal no longer exists';²⁸ that the Directive precludes national legislation which imposes imprisonment on the sole ground that the third-country national remains on State territory despite having been ordered to leave;²⁹ or that the six month period of detention can be extended solely because the individual concerned has no identity documents.³⁰

C. The rule of international law that detention for the purpose of effecting deportation must be subject to review by a court empowered to determine its lawfulness

24. It is one thing to have a rule of international law that prohibits arbitrary detention or detention that is, actually or potentially, indefinite, but quite another to determine who or which authority in the State should be able to decide such matters. The International Law Commission proposed that any *extension* of detention 'be decided upon only by a court or, subject to judicial review, by another competent authority', and that detention 'be reviewed at regular intervals on the basis of specific criteria established by law'.³¹ Although some concern was expressed at this requirement, it is supported by a broad range of practice and by the general principle that detention must be authorised by law and be necessary, reasonable and proportionate in each individual case.

25. Article 9(2) ICCPR thus requires that the individual be informed of the reasons for his or her detention, while Article 9(4) declares that 'Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'.³²

26. The Working Group on Arbitrary Detention considers that the right to challenge the legality of detention, for example, by habeas corpus, is 'non-derogable under both treaty law and customary international law'.³³ Emphasising the 'exceptionality' of detention in the migration context, it has also stressed that any form of detention must be 'ordered and approved by a judge or other judicial authority', and that there should

²⁸ *Said Shamilovich Kadzoev (Huchbarov)*, C-357/09 PPU, ECLI:EU:C:2009:741, 30 Nov. 2009, para. 63.

²⁹ *El Dridi*, C 61/11, ECLI:EU:C:2011:205, 28 Apr. 2011, para. 62.

³⁰ *Mahdi*, C-146/14 PPU, ECLI:EU:C:2014:1320, 5 Jun. 2014, para. 74.

³¹ Article 2(b), 3(a), ILC Articles on Expulsion of Aliens, above note 16.

³² See also Human Rights Committee, 'General Comment No. 35', above note 18, paras. 38–48.

³³ United Nations, Human Rights Council, 'Report of the Working Group on Arbitrary Detention': UN doc. A/HRC/22/44, 24 Dec. 2012 (Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, paras. 47–51).

be 'automatic, regular periodic reviews of... detention to ensure that it remains necessary, proportional, lawful and non-arbitrary'.³⁴

Nature of the appeal or review

27. Both the treaties on refugees and stateless persons provide for the right of appeal against expulsion. Each provides in turn that expulsion (and presumably any incidental detention) 'shall be only in pursuance of a decision reached in accordance with due process of law', at which the individual shall be allowed to submit evidence to clear themselves and to appeal to and be represented before competent authority or person of persons specially designated.³⁵ Each convention likewise provides for 'the same treatment as a national in matters pertaining to access to the courts, including legal assistance'.³⁶ Little is said beyond that, but it could be argued that, irrespective of the fact that nationals are not liable to deportation, the refugee or stateless person should be entitled to challenge his or her detention as would a national – that is, by showing that it is not authorised by law or is otherwise arbitrary, unreasonable, disproportionate, or discriminatory.
28. This is a function for which the courts are particularly suited, in addition to guaranteeing the separation of executive and judicial functions and retaining control over the limitation of the fundamental human right to liberty. In *A v Australia* in 1997, the Human Rights Committee found that the control and power of the courts to order the release of an individual was 'limited to an assessment of whether this individual was a "designated person" within the meaning' of the Act. In the Committee's view, appropriate review of the lawfulness of detention is not limited to establishing compliance with domestic law, but must be real and not merely formal, and this entails looking at grounds particular to the individual that would justify, on the one hand, continued detention and, on the other hand, release.³⁷
29. Among the grounds personal to the detainee that are relevant to any review must be the effect of detention on the physical and mental well-being of the detainee. This was highlighted in the case of *Danyal Shafiq* in 2006, whose mental illness was found to be the consequence of his prolonged detention,³⁸ and it was recently emphasised in the call addressed to the UK by the UN Special Rapporteur on torture to review over 2,000 indefinite sentences imposed between 2005 and 2012 under the 'Imprisonment for Public Protection' system. Although not cases of immigration detention, the impact of indeterminate sentences can be similar, and the Special Rapporteur cited a UK

³⁴ United Nations, Human Rights Council, 'Report of the Working Group on Arbitrary Detention': UN doc. A/HRC/39/45, 2 Jul. 2018 (Revised deliberation No. 5 on deprivation of liberty of migrants, paras. 12–13).

³⁵ Article 32, 1951 Convention relating to the Status of Refugees; Article 31, 1954 Convention relating to the Status of Stateless Persons. In each case, an exception applies where there are 'compelling reasons of national security'.

³⁶ Article 16 of each Convention.

³⁷ Human Rights Committee, *A v Australia*, Views: UN doc. CCPR/C/59/D/560/1993, 30 Apr. 1997, paras. 9.4–9.5.

³⁸ Human Rights Committee, *Danyal Shafiq v Australia*, Views: UN doc. CCPR/C/88/D/1324/2004, 13 Nov. 2006, para. 7.3.

Parliamentary Report which referred to 'the significant psychological harm suffered', including high levels of self-harm, suicidal ideation, suicide attempts and actual suicides. The situation was made worse by the fact that, given insufficient and inappropriate resources, few had access to the rehabilitation programmes which they needed to show a reduction in their risk to the public.³⁹

30. The requirement of a judicial inquiry has received broad support in the practice of States. In the case of *Mahdi*, for example, the Court of Justice of the European Union applied Article 15 of the Returns Directive, read in light of Articles 6 and 47 of the Charter of Fundamental Rights. While an initial period of six months detention must be ordered by an administrative or judicial authority, review of prolonged detention is subject to a judicial authority, which,

'must be able to rule on all relevant matters of fact and of law in order to determine... whether an extension of detention is justified, which requires an in-depth examination of the matters of fact specific to each individual case... To that end, the judicial authority ruling on an application for extension of detention must be able to take into account both the facts stated and the evidence adduced by the administrative authority and any observations that may be submitted by the third-country national. Furthermore, that authority must be able to consider any other element that is relevant for its decision should it so deem necessary. Accordingly, the powers of the judicial authority in the context of an examination can under no circumstances be confined just to the matters adduced by the administrative authority concerned.'⁴⁰

31. Any other interpretation would render judicial supervision 'ineffective'.⁴¹ The Court concluded that the judicial authority must be able to decide 'on the merits' whether

³⁹ United Nations, 'UK: UN torture expert calls for urgent review of over 2,000 prison tariffs under discredited IPP sentencing scheme', Geneva, 30 Aug. 2023: <https://www.ohchr.org/en/press-releases/2023/08/uk-un-torture-expert-calls-urgent-review-over-2000-prison-tariffs-under>. See also, Gecsoyler, S., 'UN highlights 'psychological harm' to UK man jailed since 2012 for phone theft', 3 Sept. 2023: <https://www.theguardian.com/law/2023/sep/03/un-highlights-psychological-harm-to-uk-man-jailed-since-2012-for-phone-theft>; Monbiot, G., 'The law is gone but they are still in jail: who will free Britain's most wronged prisoners?' 18 May 2023: <https://www.theguardian.com/commentisfree/2023/may/18/jail-law-britain-prisoners-ipp-sentences>; Grierson, J., 'Indefinite sentences "the greatest single stain on justice system"', 3 Dec. 2020: <https://www.theguardian.com/law/2020/dec/03/indefinite-sentences-the-greatest-single-stain-on-justice-system>.

⁴⁰ *Mahdi*, C-146/14 PPU, ECLI:EU:C:2014:1320, 5 Jun. 2014, para. 62.

⁴¹ *Ibid.*, para. 63. See also, *FMS, FNZ, SA, SA Junior*, C-924/19 PPU, C-925/19 PPU, 14 May 2020, para. 281, holding, among others, that Article 15 precludes detention 'without a reasoned decision... having first been adopted and without the necessity and proportionality of such a measure having been examined.'

detention should be extended, whether it may be replaced with a less coercive measure, or whether the person concerned should be released.

32. In *Khlaifia*, the European Court of Human Rights noted, first, that while detention must be effected in accordance with law, this does not merely refer back to domestic law, but relates ‘to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention’. The principle of legal certainty requires that the conditions for deprivation of liberty be clearly defined, ‘and that the law itself be foreseeable in its application, so that it meets the standard of “lawfulness” set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.’ In the particular case, the deprivation of liberty did not satisfy the general principle of legal certainty and was not compatible with the aim of protecting the individual against arbitrariness; it therefore could not be regarded as ‘lawful’ within the meaning of Article 5(1) of the Convention.⁴²

D. Conclusion

33. In view of the development of the above-mentioned rules, a non-compellable discretion to order release from immigration detention, with or without conditions, or to do nothing, including ignoring requests for action, without the obligation either to admit evidence or to provide reasons for decisions, does not satisfy the requirements of international law; it does not ensure that detention is not arbitrary. This is the particular function of a court, which must be able to review all the circumstances of detention in order to determine whether it is necessary, as being essential to secure deportation; reasonable, as being credibly related in fact to steps actually being taken to effect removal; proportionate, given, among other matters relevant to the person concerned, the length of detention and its impact on the individual; and non-discriminatory.

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⁴² *Khlaifia & Ors v Italy*, App. No. 16483/12, 15 Dec. 2016, paras. 91–92, 107.