IMMIGRATION, PERSONAL LIBERTY, FUNDAMENTAL RIGHTS

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with the assistance of
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THE RIGHT OF 'HELD' MIGRANTS TO BE INFORMED ABOUT THE GROUNDS FOR DETENTION: A QUESTIONABLE APPROACH IN STRASBOURG?

Lorenzo Bernardini

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1. An outline of the problem.

The European legal systems, as already explained, [1] have set up para-criminal detention systems, to be applied to those foreigners who, finding themselves in certain situations, can be 'held'—this is the semantic sweetener used by the Italian legislator—in special facilities, distinct from prisons, according to the procedural steps provided for by *ad hoc* domestic provisions. In this way, national legal systems have welcomed the imperatives stemming from European Union ('EU') law and from the European Convention on Human Rights ('ECHR'), as interpreted by the Strasbourg Court.

In particular, as Cathryn Costello has sharply pointed out, EU law has progressively established a legal framework in which the applicant for international protection is considered as a "detainable subject", i.e. as a vulnerable individual who is perceived *in primis* as an ideal target for (formally) administrative and custodial measures. [2] This definition, tailored-to the applicant, may well be extended both *ratione personae* to 'irregular' foreigners, and *ratione materiae*, also in the light of recent developments of the ECHR legal system. Accordingly, the category of 'detainable subject' appears to be applicable to any

[1] See *supra* Part III, L. Bernardini, *Detained, criminalised and then (perhaps) returned: the future of administrative detention in European Union law.*

[2] C. Costello, *EU Law and the Detainability of Asylum-Seekers*, in *Refugee Quarterly Review*, 2016(35/1), p. 47 ff.

foreigner arriving on the territory of an EU Member State (or, similarly, of a State Party to the Council of Europe). Indeed, detention in centres, transit zones or *hotspots* is now a widespread administrative practice. However, migrants have not been left without any means of challenging the detention order issued by the authorities.

For instance, the Italian Constitutional Court has clearly acknowledged that the migrant 'enjoys all the fundamental rights of the human person, including the right to defence'.[3] The Court of Justice of the EU (CJEU) has repeatedly confirmed this assumption: the rights of the defence are fundamental rights which constitute an integral part of the legal order of the Union, as enshrined in the Charter;[4] the obligation to ensure their observance rests with 'the authorities of the Member States' which 'are, as a rule, subject to the obligation to observe the rights of the defence of addressees of decisions which significantly affect their interests',[5] such as administrative detention.

This has important consequences, especially those who are subject to 'holding': the effective exercise of the right of defence, in the words of the Italian Constitutional Court, implies that the addressee of a measure, which in any way restricts his or her personal freedom, must be able to understand its content and meaning.[6] The effectiveness of the linguistic assistance that must be provided to foreigners thus acquires particular importance, becoming prodromic to the exercise of all other procedural rights,[7] especially in relation to the very first moment in which the migrant may come into contact with the authorities of the country where he/she is, i.e. when—as soon as he/she is deprived of liberty for migratory reasons (whether irregular or asylum seeker)—he/she needs to know the reasons for such 'holding'. And this need can only be fully satisfied should the foreigner be informed in a language he/she understands.

At the supranational level, both the 1966 International Covenant on Civil and Political Rights (ICCPR) and the ECHR contain a specific provision on the right to linguistic assistance for the accused, i.e., that individual against whom criminal charges have

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[3] In this regard, Const. Court, 16th June 2000, no. 198.

[4] See, among others, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and Others v. Kadi*, ECLI:EU:C:2013:518, paras. 98–99 and case-law cited therein.

[5] Case C-383/13 PPU, *G. and R.*, ECLI:EU:C:2013:533, para. 35.

[6] Const. Court, 16th June 2000, no. 198.

[7] See, by analogy, M. GIALUZ, *L'assistenza linguistica nel procedimento penale*, Wolters Kluwer-Cedam, 2018, p. 30: the purpose of language assistance is to 'give ears and a voice' to the accused and victims who do not know the language of the proceedings at stake, thus ensuring the effectiveness of the defence guarantees.

been brought.[8] Moving away from the strictly criminal *focus*, Article 5(2) ECHR guarantees anyone individual deprived of their liberty the right to be informed 'promptly, in a language he understands' of the reasons for his/her arrest.

While the safeguards set out in Article 5(2) ECHR largely concern individuals detained for various reasons in the context of criminal proceedings—and thus, for example, suspects in pre-trial detention or those who have been definitively sentenced—, the analysis in this chapter will focus on the right to linguistic assistance to be ensured to those migrants deprived of their liberty by administrative means (thus held in *ad hoc* centres).

Firstly, the prerogatives contained in the ECHR (§ 2), which apply to all individuals subject to detention measures *lato sensu*, will be considered. Secondly, a specific analysis of the Strasbourg Court's (ECtHR) case-law on language assistance for detainees (§ 3), will be taken into account. Lastly, some critical reflections on the approach proposed by the ECtHR case-law will conclude the analysis (§ 4).

2. The ECHR legal framework: a general picture...

The right to be informed about the grounds for detention is an 'elementary safeguard',[9] which constitutes 'an integral part of the scheme of protection afforded by Article 5 [ECHR]',[10] designed to prevent anyone from being arbitrarily deprived of his or her personal liberty. This prerogative embodies a 'legitimate confidence in the relations between the individual and the public powers'.[11]

Moreover, the ECtHR has long established a specific link between the guarantees under analysis and the right to *habeas corpus*, enshrined in Article 5(4) ECHR – a person who wishes to challenge the lawfulness of the deprivation of liberty suffered could not make effective use of this right without adequate and timely information on the grounds for the detention.[12]

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[8] The reference is to Article 14(3)(a) and (f) ICCPR and Article 6(3)(a) and (e) ECHR. In this regard, see at N. PASCUCCI, *La persona alloglotta sottoposta alle indagini e la traduzione degli atti*, Giappichelli, 2022, p. 6 ff.

[9] *Fox, Campbell and Hartley v. the United Kingdom*, App. nos. 12244/86 *et al.* (ECtHR, 30th August 1980), para. 40.

[10] *Shamayev and Others v. Georgia and Russia*, App. no. 36378/02 (ECtHR, 12th April 2005), para. 413.

[11] *X. v. United Kingdom*, App. no. 7215/75 (ECtHR, 5th November 1981), dissenting opinion of Justice Evrigenis.

[12] *Van Der Leer v. the Netherlands*, App. no. 11509/85 (ECtHR, 21st February 1990), para. 28.

According to Article 5(2) ECHR, anyone who is 'arrested' must be informed 'promptly', in a 'language he understands', of the 'reasons for his arrest' and of any 'charges' against him/her. This provision has three pillars.

Firstly, the information provided to the person concerned—or, where appropriate, to his lawyer or, if the detainee is a minor, to his or her legal tutor [13]—must be communicated to him/her as soon as possible, [14] i.e. immediately [15] or, at least, within an extremely short period of time. [16]

Secondly, the person concerned must be given a general picture that represents, in an 'essential' manner, the factual and legal circumstances underlying the custodial measure taken against him or her, [17] so that the individual can understand 'why he has been deprived of his liberty'. [18]

Thirdly and finally, communication with the prisoner must be carried out in a language that is 'a-technical', and 'simple', and that can be easily understood by the prisoner. [19] With regard to this last requirement, the problem of the effectiveness—but also the quality—of the linguistic assistance provided to the person concerned.

3. ... and its specific application vis-à-vis *detained migrants*.

There is no doubt as to the applicability of Article 5(2) ECHR to persons who are arrested, in various capacities, in the context of criminal proceedings. Indeed, the aforementioned provision explicitly regulates the situation of anyone who is 'arrested'. Therefore, the situation of migrants who are 'held'—not properly arrested—could fall outside the scope of the above-mentioned norm.

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[13] See, e.g., *Rahimi v. Greece*, App. no. 8687/08 (ECtHR, 5th April 2011), paras. 108–110.

[14] In the French translation of the ECHR we find the more effective expression '*dans le plus court délai*'.

[15] Yet, the ECtHR made it clear in *Bordovskiy v. Russia*, App. no. 49491/99 (ECtHR, 8th February 2005), para. 56, that the information foreseen in Article 5(2) ECHR 'does not necessarily have to be reported in its entirety by the police officer at the time of arrest'.

[16] *Fox, Campbell and Hartley* (note 9), paras. 37–43.

[17] For a comprehensive analysis on the scope of the information to be communicated to the detainee, see S. TRECHSEL, *Human Rights in Criminal Proceedings,* Oxford University Press, 2005, p. 457 ff.

[18] *Ladent v. Poland*, App. no. 11036/03 (ECtHR, 18th March 2008), para. 63.

[19] On this point, see *Abdolkhani and Karimnia v. Turkey*, App. no. 30471/08 (ECtHR, 22nd September 2009), para. 136, and *Z.H. and Others v. Hungary*, App. no. 28973/11, (ECtHR, 8th November 2012), para. 41.

However, such an approach would unduly distinguish the position of one who is deprived of his/her personal freedom—protected by Article 5(1) ECHR—by *arrest* from that of another person who is similarly deprived of his/her liberty by a measure of detention. Rejecting this artificial diversification, the ECtHR has emphatically ruled that the right to be informed of the reasons for detention also applies to migrants subject to administrative deprivation of liberty.[20] This equalisation, in particular, was justified by the fact that Article 5(4) ECHR makes no distinction between persons deprived of their liberty 'by arrest' or 'by detention'.[21]

Thus, even "held" migrants are entitled to a right to know the reasons for their stay in 'administrative prisons'[22] where they are confined, in the terms set out above. Nevertheless, the ECtHR's approach to the latter situation discloses several shortcomings.

The first of these concerns the content of the information provided. Although the ECtHR has repeatedly emphasised that the relevant information does not necessarily have to take the form of a written document,[23] it must nevertheless contain the essential information on the factual and legal grounds for the detention at stake. The surprise for the interpreter comes in the analysis of ECtHR's judgments relating to detained migrants where the Court's approach on the matter bizarrely reveals a weakening of ECHR standards. While it is certain that Article 5(2) ECHR also applies to administrative detention (as allowed as per Article 5(1)(f) ECHR), it is also clear from the ECtHR's standpoint that—unlike the cases covered by Article 5(1)(c) ECHR (i.e. the various types of 'criminal' detention)—the information provided to foreigners may be 'less complete'[24] or 'less detailed'.[25] However, the rationale which may explain this differentiated approach is not clear. Such a situation may risk to seriously undermine the effectiveness of the protection

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[20] *Abdolkhani* (note 19), para. 136.

[21] See *Shamayev* (note 10), paras. 413–414.

[22] The expression is due to by A. PUGIOTTO, *La "galera amministrativa" degli stranieri e le sue incostituzionali metamorfosi*, in *Quad. cost.*, 2014(3), p. 573.

[23] See, *inter alia, Nowak v. Ukraine*, App. no. 60846/10 (ECtHR, 31st March 2011), para. 63.

[24] *Kane v. Cyprus*, App. no. 33655/06 (ECtHR 13th September 2009) [dec.].

[25] *Suso Musa v. Malta*, App. no. 42337/12 (ECtHR, 23rd July 2013), para. 113. Still, the Court is careful to specify, in a kind of *excusatio non petita*, that this must be done without prejudice to the effective right to bring an action before a court to challenge the lawfulness of the detention, in accordance with Article 5(4) ECHR. However, it is difficult to see how it would be possible in practice to reconcile the approximate (or incomplete) information given to an alien with the effectiveness of the right of *habeas corpus* to which he or she is also entitled.

stemming from Article 5(2) ECHR to a specific category of aliens—those placed in administrative detention—who, on the contrary, need protection appropriate to their situation as vulnerable individuals. [26]

This excessively lenient attitude is all the more dangerous in view of the widespread practice of informing foreigners of the reasons for their detention by means of *dépliants*, usually consisting of standardised or stereotyped phrases, often in a 'vehicular' language. [27] These situations, which are not uncommon, have been the subject of several judgments of the ECtHR, sometimes condemning the States, sometimes ruling in their favour, thus confirming the difficulty of finding a coherent approach to the matter.

However, some firm points can be drawn. As a rule, standardised formulas constitute a violation of Article 5(2) ECHR, as they do not allow the migrant to identify the reasons for detention. Yet—bearing in mind that 'held' aliens can also be provided with information that is 'less detailed' in relation to other categories of prisoners foreseen in Article 5(1) ECHR—the ECtHR questionably found that the conduct of the Maltese authorities in informing the foreigner of the reasons for detention, without mentioning the violated legal provisions from which the lawfulness of the deprivation of liberty suffered could be deduced was lawful under Article 5(2) ECHR. [28]

Similarly, should a foreigner be held on the basis of a statement of intent, which contains impersonal declarations, and does not refer to the material situation, Article 5(2) ECHR is effectively breached. [29] Finally, in the case of a migrant held for the purpose of return, the ECtHR reiterated that the mere communication of information relating to the migration status—or on the possible measures of removal from the territory that could be taken against that individual—cannot suffice to ensure that the migrant concerned is

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[26] C. O'CINNEIDE, *The Human Rights of Migrants with Irregular Status: Giving Substance to Aspirations of Universalism*, in S. SPENCER-A. TRIANDAFYLLIDOU (Eds.), *Migrants with Irregular Status in Europe*, Springer-IMISCOE Research Series, 2020, p. 53.

[27] For a critical analysis on the use of so-called 'vehicular languages' and the translation of acts in the Italian procedural-legal context, which can be shared *mutatis mutandis* here, see the analysis of N. PASCUCCI, *supra* note 8, p. 133 ff.

[28] *Suso Musa* (note 25), para. 116 and, similarly, *Rusu v. Austria*, App. no. 34082/02 (ECtHR, 2nd October 2008), paras. 37–42. Accordingly, the prerogative stemming from Article 5(2) ECHR is breached should the foreigner be merely informed that he is deemed to be an 'international thief', as pointed out in *Nowak* (note 23), para. 64.

[29] *Saadi v. the United Kingdom*, App. no. 13229/03 (ECtHR, 29th January 2008), para. 82.

aware of the grounds on which a deprivation of liberty has been ordered in the material case. [30]

Yet, in another judgment, the conduct of the national authorities in informing the detained migrant without providing 'details as to the method of instituting proceedings challenging the lawfulness of the detention' was held to be in keeping with the Convention, since Article 5(2) ECHR 'does not require the State to give such elaborate details, especially where it is not alleged that the applicant requested more information on the procedure [...] and that this request was refused'. [31] Thus, it appears that the content of the right to be informed as per Article 5(2) ECHR—which, if my reading is correct, should also include an explanation of the modalities by which the lawfulness of the detention suffered can be challenged [32]—is being "transformed" to the extent that it would impose an undue burden on the 'held' migrant to request 'more information on the procedure' concerning the detention measure.

A similar stance has been taken by the ECtHR with regard to the language assistance of the 'held' foreigner. He must have 'sufficient knowledge' of the language in which the reasons for the deprivation of liberty imposed on him/her are communicated. [33] Nevertheless, the migrant's allegedly negligent conduct could have an impact on the effectiveness of the prerogative under analysis. With the words of the ECtHR in *Suso Musa*—which rejected as manifestly inadmissible the applicant's complaints about the alleged violation of Article 5(2) ECHR—`[a]s to the language in which the information was given, the applicant did not specifically claim that he did not understand English or was unable to understand the information given on the bus or to communicate with the officers nor did he claim that he was unable to understand any other language in which the booklet was provided. Likewise, he did not submit that he had

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[30] *Khlaifia and Others v. Italy*, App. no. 16483/12 (ECtHR, 15th December 2016), para. 118.

[31] *Suso Musa* (note 25), para. 116.

[32] Other possible 'details on how to initiate the proceedings', might include the indication of the procedural deadlines for lodging the appeal, or of the manner in which the appeal is to be lodged (e.g. by electronic means or on paper). It is difficult to argue that these are 'such elaborate details' and that the States should not be burdened with the task of communicating them to the detained person should not be burdened on the States. *Quid iuris,* indeed, in the event of the expiry of the time-limits for filing a *habeas corpus* petition under Article 5(4) ECHR, in the face of the failure to communicate them? Can it be said that the right provided for in Article 5(2) ECHR is effectively guaranteed in such a case?

[33] *Nowak* (note 23), para. 64.

requested an interpreter and had his request refused'.[34] According to the literal wording of Article 5(2) ECHR, the burden of providing information in a language which the person at stake understands rests *entirely* with the national authorities and it does not seem acceptable that it should be the alien who has to 'take action' (e.g. by requesting an interpreter) in order to obtain respect for a prerogative which is already acknowledged *ipso iure* by the very wording of the ECHR.[35]

4. Ad hoc *lack of guarantees for 'held' migrants?*

At the end of these brief considerations on the right to be informed as per Article 5(2) ECHR, set in the peculiar context of "held" foreigners, one cannot help but notice a worrying trend underway in Strasbourg.

Similar to the determination of the existence of a 'deprivation' of liberty under Article 5(1)(f) ECHR[36], the ECtHR seems to have developed, over time, a lower level of protection for migrants placed in administrative detention with respect to the guarantee under examination. Why, one might ask, can information on deprivation of liberty be less comprehensive than for other categories (e.g., suspects in pre-trial detention)? And why should the migrant have to bear the burden of representing his or her status as an alien, in a context where he or she may not understand anything that is communicated to him/her or her by the authorities in a different language?

It is thus clear that the issue of linguistic assistance, for "held" foreigners, intersects with the question of the scope of the information provided on the grounds for detention. In this regard, the critical aspects of the case-law of the ECtHR on the right to be informed revolve around two conceptual lines: (a) the failure to acknowledge a right to receive detailed information that renders

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[34] *Suso Musa* (note 25), para. 117. The Court makes a reference, *mutatis mutandis,* to *Galliani v. Romania*, App. no. 69273/01 (ECtHR, 10th June 2008), para. 54.

[35] N. PASCUCCI, *supra* note 8, p. 16, rightly observes, contesting the position of the ECtHR on this point, that 'paradoxically, it is precisely the person who is most in need of linguistic assistance—i.e. the person who is totally ignorant of the language of the proceedings and of the criminal procedure of the country in which he is—who is in fact excluded from it, as he or she is neither aware of nor able to signal his *alloglossia*'.

[36] On this point, see L. BERNARDINI, *La detenzione dei migranti tra "restrizione" e "privazione" di libertà: la CEDU alla ricerca di* Godot, in *Dir. imm. citt.*, 2022(1), p. 90 ff.

effective the right of *habeas corpus* enshrined in Article 5(4) ECHR; (b) the requirement that a foreigner must engage in 'active' conduct, assisting the national authorities, in order to secure for him or her the protection of Article 5(2) ECHR, in full contrast with the purpose of the Convention, which is to 'ensure the effectiveness of the rights enshrined therein'. [37]

The final question can be summarised as follows: why is such a paradigm adopted only with regard to the held foreigner, a 'special approach' [38] that undermines the universalism with which the Convention was drafted?

[37] N. PASCUCCI, *supra* note 8, p. 16.

[38] The expression is taken, by analogy, by C. PITEA, *La Corte EDU compie un piccolo passo in avanti sui Paesi terzi "sicuri" e un preoccupante salto all'indietro sulla detenzione dei migranti al confine*, *Dir. imm. citt.*, 2020(3), p. 203.