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Is the Australian Offshore Processing System a Model for Europe?

Camilla Ioli

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European migration and refugee policies have undergone rapid changes over the last decade, a change which has been accelerated by the so-called “refugee” or “migration” crisis.

According to UNCHR, over one million people arrived in Europe by sea in 2015, followed by over 360.000 people in 2016.¹ One of the measures developed by the European Commission to face the “crisis” is the “hotspot approach”. It represents the EU’s central measure for facilitating the registration and identification of asylum-seekers arriving in the frontline member states.

The hotspot approach involves the development of processing centres in the frontline member states, and has enabled hundreds of thousands of irregular migrants to be processed through its constituent centres in Italy and Greece. However, recently some EU leaders have expressed interest in the adoption of a system in which these procedures happen outside Europe. Various leaders have referred to the Australian model as a suitable system to face the “crisis.”²

¹ UNHCR, December 2016, http://reliefweb.int/sites/reliefweb.int/files/resources/Monthly_Arrivals_to_Greece_Italy_Spain_Jan_Dec_2016.pdf (last access 4/02/2017).

² “The elimination of the prospect of reaching the European coast could convince migrants to avoid embarking on the life-threatening and costly journey in the first place” (Loewenstein, A., “A Punitive Approach to Refugees Will Lead Europe to Unrest and Corruption”, *The Guardian*, 4 May 2015, <https://www.theguardian.com/commentisfree/2015/may/04/a-punitive-approach-to-refugees-will-lead-europe-to-unrest-and-corruption>.(last accessed 21/1/ 2016). See also Eder, F., “Austrian Proposal for an Australian Migration Solution,” *Politico*, 14 December 2016, <http://www.politico.eu/article/austrian-proposal-for-an-australian-migration-solution/> (last accessed 17/01/ 2016).

Moreover, the European Parliament has presented briefings in which the Australian offshore processing system was explored.³ Despite a clear political interest by Europe, the possible application of a European offshore processing system would meet the legal boundaries embodied in the European Convention of Human Rights (ECHR), a regional treaty that constitutes a structural feature in the European Union framework. A similar legal instrument is lacking in Australia.

This paper focuses on the analysis of the right to liberty listed in the ECHR in order to evaluate the compliance of a possible offshore system with it. The analysis will be partly based on two judgments presented by the Supreme Courts of Nauru and Papua New Guinea (PNG), the two states that host processing centres detaining those who try to arrive in Australia by boat. Both Courts explored the ECHR jurisprudence in order to assert the existence of a situation of detention and to consider its compliance with the domestic system. Since neither Nauru nor PNG are parties to the ECHR, the adoption by these two courts of a reasoning similar to the one adopted by the European Court of Human Rights (ECtHR) is an important sign for the EU. Indeed, if the ECtHR – which acts as the final court of appeal for matters relating to the Convention – is asked to rule on the implementation of a possible European offshore processing system, the principles explored by the Nauru and PNG Courts will be key to its judgement.

Australia's offshore processing system

A central feature of Australia's migration system is that non-citizens must hold a valid visa to enter and remain in Australia.⁴ Unlawful non-citizens must be detained in immigration detention unless and until they are subsequently granted a visa to remain lawfully in the country.⁵ The policy of mandatory detention of unlawful non-citizens was introduced as a deterrence strategy in 1992, following a high number of boat arrivals from South-East Asia. Under current provisions of the *Migration Act*, boat arrivals who do not hold a valid visa

³ European Parliamentary Research Service, *Briefing – Refugee and Asylum Policy in Australia*, November 2016, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593517/EPRS_BRI\(2016\)593517_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593517/EPRS_BRI(2016)593517_EN.pdf) (last accessed 4/02/2017).

⁴ Parliamentary Research Service, *Immigration Detention in Australia*, 20 March 2013, http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1311498/upload_binary/1311498.pdf (last accessed 5/12/2016).

⁵ Section 189 Migration Act: “An unlawful non-citizen may be able to apply for and be granted a substantive visa or a bridging visa. The bridging visa allows them to stay lawfully in Australia while they apply for another visa or they make arrangements to leave the country.”

(termed “unlawful maritime arrivals”) are unable to apply for any visa to enter or remain in Australia, and are subject to mandatory detention.⁶ Pursuant to agreements that Australia has concluded with countries in the Asia-Pacific region, unlawful maritime arrivals, most of whom are asylum-seekers, are transferred to third countries where they are detained while their claims for asylum are processed. Currently, Australia has such agreements with the Republic of Nauru and Papua New Guinea (Manus Island).⁷

The “offshore processing” arrangements adopted by Australia have several features that have attracted the interest of political leaders in Europe. Firstly, the system is premised on what Australia calls the “no advantage policy,” according to which asylum-seekers are afforded no greater benefits than those who have remained in refugee camps around the world waiting to access UNHCR resettlement programs. Secondly, asylum-seekers are held in large “processing” centres outside of the destination country, often in areas that are isolated and sparsely populated. Lastly, third countries are essential to offshore processing, with some housing asylum-seekers in detention centres and processing their asylum claims, and others resettling those who are recognised as refugees. At no stage are asylum-seekers permitted to enter the destination country and thus no refugee may be resettled in Australia through offshore processing.

Article 5 of the ECHR

The ECHR is the basis for the protection of human rights in Europe. Introduced in the aftermath of the Second World War, the Convention now has 52 contracting states comprising every state in Europe. The Convention is referenced in the Treaties of the European Union, though the EU is not itself a party to the Convention. European Court of Human Rights is the final court of appeal for matters relating to Convention rights. The ECtHR’s jurisprudence

⁶ “Factsheet. Immigration detention”, Andrew and Renata Kaldor Centre for International Refugee Law, 21 October 2015: 1, http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Immigration_detention.pdf (last accessed 12/01/2017).

⁷ Gleeson, M., “Offshore processing: refugee status determination for asylum-seekers on Nauru”, Andrew and Renata Kaldor Centre for International Refugee Law, January 2017, http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_offshore_processing_RSD_PNG.pdf (last accessed 21/02/2017); Gleeson, M., “Offshore processing: refugee status determination for asylum-seekers on Manus Island; Papua New Guinea”, Andrew and Renata Kaldor Centre for International Refugee Law, January 2017, http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_offshore_processing_RSD_PNG.pdf (last accessed 21/02/2017).

must be taken into account by contracting states' courts, and the Court has the right to award compensation and find domestic law incompatible with the Convention.

Article 5 recognises a general right to liberty and security of person which includes a guarantee against arbitrary arrest or detention. The deprivation of this right is allowed only in specific circumstances defined by Convention law, and in compliance with a procedure dictated by domestic law. If a contracting state cannot prove that the measure is among the exceptions indicated in Article 5(1)(a)-(f), a violation occurs. The following sections of the Article refer to the rights belonging to anyone who has been detained or arrested. Subjects of lawful detention must be informed of the reasons of the arrest in a language he or she can understand, and must be able to exercise the right to access a court. If a person has been the victim of arrest or detention in contravention of these provisions, he or she has a right to compensation.

Article 5 has a particular importance among the rights in the ECHR. Importantly, the deprivation of liberty exposes the person concerned to a situation of significant vulnerability, including the increased possibility of them being subjected to torture, inhuman and degrading treatment. The Court frequently notes the fundamental importance of Article 5 for protecting the right of individuals to be free from arbitrary detention at the hands of the authorities.⁸

Offshore Processing and Article 5

This section assumes it would be possible to attribute state responsibility under the ECHR to a contracting state operating a processing centre in a third country, likely not a party to the ECHR. This assumption is based on the jurisprudence of the ECtHR. In the controversial *Bankovic* case the Court held that the jurisdiction of a state is primarily territorial with a limited list of exceptions.⁹ However, this emphasis on strict territorial jurisdiction was largely undermined in the *Al-Skeini v. United Kingdom* decision. The Court, whilst reaffirming its largely territorial jurisdiction, elaborated on the exceptions to the rule and abandoned the controversial concept of "legal space" that had significantly limited the Court's jurisdiction to European territory.¹⁰ The exceptions fall into two categories: first, the exception of effective

⁸ ECHR 2006, Judgement of 27 July 2006, *Bazorkina v. Russia*, application no. 69481/01, [146].

⁹ ECHR 2001, Judgement of 12 December 2001, *Bankovic v. Belgium*, application no. 52207/99, [57].

¹⁰ ECHR 2011, Judgement of 7 July 2011, *Al-Skeini and Others v. United Kingdom*, application no. 55721/07.

control over a territory,¹¹ second, the concept of state authority and control that includes the exercise of public powers through consent, invitation, or acquiescence of the territorial government¹² and the use of force by the state's agent operating outside its territory.¹³ A possible development of an offshore processing system by a contracting state, if based on the Australian experience, would likely fall within these exceptions identified by the Court. It is arguable that there is effective control by Australia over a territory because the centres in the Pacific Islands are entirely controlled and financed by Australia. They operate solely to process asylum-seekers whose destination country is Australia. Alternatively, the agents operating in the camps are Australian agents.

Transfield, a private security company that has been contracted by Australia to manage the camp, is the company responsible for guaranteeing security infrastructures for the Regional Processing Centre (RCP) in Nauru. The Australian High Court recognised the effective control of the Commonwealth over the RPC in Nauru due “to the obligations it imposed on Transfield.”¹⁴ Moreover, the “Commonwealth appointed a Programme Coordinator to be responsible for managing all Australian officers and service contracts in relation to the RCP in Nauru.”¹⁵ The Programme Coordinators are employed by the Australian Department of Immigration and Border Protection, and are therefore agents of the Australian Government. Their presence and control has been consented or acquiesced to by the Nauruan and Papua New Guinean Governments through a series of Memoranda of Understanding (MOUs), and they are thus an expression of public power. Furthermore, detention and using force are the acts that can be authorised only by a government. The ECHR has made clear on several occasions that it will not allow states to artificially avoid their responsibilities under the Convention. In the *Issa* case, the Court wrote in obiter:

*[A]ccountability (...) stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.*¹⁶

¹¹ *Al-Skeini and Others v. United Kingdom*, [138].

¹² *Al-Skeini and Others v. United Kingdom*, [135].

¹³ *Al-Skeini and Others v. United Kingdom*, [136].

¹⁴ Plaintiff M68/2015 v. Minister for Immigration and Border Protection [2016] HCA 1, [93].

¹⁵ Plaintiff M68/2015 v. Minister for Immigration and Border Protection [2016] HCA 1, [204].

¹⁶ ECHR 2004, Judgement of 16 November 2004, *Issa and Others v. Turkey*, application no. 31821/96, [71].

The use of offshore processing centres by the ECHR contracting states would, arguably, constitute an artificial construct designed to “perpetuate” acts, the prolonged detention of asylum-seekers that they would otherwise not be able to perform on their own territory.

Alternative tests have been proposed for assessing jurisdiction under the ECHR. In *Al-Skeimi*, Judge Bonello in his concurring opinion proposed a functional test for determining whether a state can uphold its Convention duties. He underpinned his theory of jurisdiction with the proposition that:

The duties assumed through ratifying the Convention go hand in hand with the duty to perform and observe them. Jurisdiction arises from the mere fact of having assumed those obligations and from having the capability to fulfil them (or not to fulfil them).

Such a functionalist test would likely mean that the signing of treaties or MOUs by a contracting state with third countries – necessary part of establishing offshore processing centres, may allow the Court jurisdiction over the contracting state as it has the capability to protect asylum-seekers through the operation of such agreements. Scholars have noted that recent developments in ECtHR case law suggest that it is more willing to allow extraterritorial jurisdiction for contracting state behaviours, and that future cases will likely expand and further define the concept of jurisdiction under the ECHR.¹⁷

Assuming the ECtHR’s willingness to give itself jurisdiction,¹⁸ the presence of a European human rights regime means that one of the key issues for Europe in seeking to introduce offshore processing is whether it would be compliant with Article 5 of the ECHR. As discussed above, the offshore processing system is characterised by several key elements. However, the key issue in assessing compliance with Article 5, is the detention of asylum-seekers in processing centres, while their asylum claims are being processed and until they are eventually resettled. Article 5 compliance requires, first, asking what the concept of detention means and, consequently, what constitutes unlawful detention. Two cases delivered by the PNG Supreme Court and the Nauru Supreme Court are relevant to this discussion. They concern the constitutionality of offshore processing and apply principles that are relevant in exploring the possible application of the system to Europe.

¹⁷ Rainey, B., E. Wicks and C. Ovey, *The European Convention of Human Rights*, Oxford, 2014: 92.

¹⁸ Article 32(2) of the ECHR provides that “In the event of dispute as to whether the Court has jurisdiction, the Court shall decide”.

Defining detention – PNG, Nauru and the ECHR

In seeking to understand the potential compliance of an offshore processing system in Europe with Article 5 of the ECHR, the ECtHR would first examine whether the system includes an element of detention. In conducting this analysis, the Court would rely on previous ECHR jurisprudence. The PNG and Nauru cases are useful in this context as they partly relied upon ECHR case law in reaching their decisions, and they grappled with the concept of detention and its legality in offshore processing.¹⁹ The case of *AG v. Secretary of Justice* was decided by the Supreme Court of Nauru in June 2013.²⁰ The case dealt with the situation of the applicants in processing centres on Nauru, who claimed they had been unlawfully detained, contrary to the right to liberty. Both the Australian and the Nauruan Governments challenged this claim. In carrying out its analysis of offshore processing, the Court divided the test into two limbs: first whether detention occurred, then whether the detention was legal. This is also the ECtHR's approach, and it reflects the wording of Article 5 of the ECHR.

The *Namah v. Pato* case concerned whether the forced transfer and detention of asylum-seekers in PNG by the Australian Government complied with the right to liberty in the PNG Constitution.²¹ Importantly, the provisions in the Nauru constitution²² and the PNG constitution²³ are very similar to the Article 5 right to liberty in the ECHR.²⁴ Moreover, both the judgments refer to ECHR jurisprudence to define the concept of detention.²⁵ Both cases will be central in the following discussion and, combined with ECHR case law, will allow for a detailed and predictive analysis of the legality of an offshore processing system in Europe.

The Nauruan case *AG v. Secretary of Justice* applies the key ECtHR case of *Guzzardi v. Italy* (1980) to the Australian offshore processing system,²⁶ and its analysis provides a useful insight into how the ECtHR may approach a European offshore system, particularly whether there is detention for the purposes of Article 5 of the ECHR. Article 5 of the Nauru

¹⁹ *AG v. Secretary of Justice* [2013] NRSC 10 (18 June 2013) [44]; *Namah v. Pato* [2016] PJSC 13 (26 April 2016) [30].

²⁰ *AG v. Secretary of Justice* [2013] NRSC 10 (18 June 2013).

²¹ *Namah v. Pato* [2016] PJSC 13 (26 April 2016).

²² Art 5 of Nauru Constitution.

²³ Art 42 of PNG Constitution.

²⁴ Art 5 of the ECHR.

²⁵ *Namah v. Pato* [30]; *AG v. Secretary of Justice* [40].

²⁶ ECHR 1980, Judgement of 6 November 1980, *Guzzardi v. Italy*, application no. 7367/76.

Constitution states that no one shall be deprived of his/her right to liberty. Interestingly, despite considering the jurisprudence of the ECtHR, the Nauru Court interpreted this provision narrowly, limiting the right to liberty to freedom from “detention”.²⁷ They thus excluded restrictions on liberty, and set a high threshold for proving a breach of the right to liberty.²⁸ To distinguish between deprivation and restriction, it is necessary to evaluate the actual or “concrete” situation of an individual who is assessed against multiple criteria. The difference between the two “is a matter of degree and not a matter of substance.”²⁹ This focus on “degree” and the “concrete situation” follows the *Guzzardi* decision, which pioneered this approach for assessing borderline detention cases. In this case, Mr Guzzardi, a suspected Mafia member, was ordered to remain on a small island for sixteen years. Despite no physical fences, he was not allowed to leave a village of 2.5 square kilometres, populated only by people subject to the same order. Although his son and wife were allowed to live with him, the provided accommodation was unsuitable for a family. He was not prevented from looking for jobs, but there were few employers on the island and this made it impossible to find employment. Moreover, he was constantly controlled by the police and had to ask for permission to make or receive phone calls, or see any outside visitors. The Court found a violation of Article 5, stating that a deprivation of the right to liberty must be assessed on the base of the “concrete situation” which is composed of different criteria such as “the type, duration, effects and manner of implementation of the measure in question”.³⁰

Despite Mr Guzzardi not being detained in a prison, the analysis of his individual situation found that a deprivation of liberty have occurred. Importantly, the Court noted that the different measures adopted against him would not have constituted a violation of Article 5 in isolation. Instead, they constituted a breach of Article 5 when taken “cumulatively and in combination.”³¹ This is a relevant test to assess whether the presence of asylum-seekers in offshore processing centres amounts to detention.

In applying this test, the Nauruan Court found that the Australian offshore processing system amounted to detention. In its submissions, the Government of Nauru argued that the asylum-seekers in the processing centre on Nauru were not detained since they could do many

²⁷ *AG v. Secretary of Justice* [40].

²⁸ *AG v. Secretary of Justice* [41].

²⁹ *AG v. Secretary of Justice* [41].

³⁰ *Guzzardi v. Italy* [92].

³¹ *Guzzardi v. Italy* [95].

different types of activities “outside the confines of the camp” and could have contact with the outside world through phone and internet access.³² In making this case, the Government sought to argue that the restrictions on liberty did not amount to detention, which under Nauruan law was a higher threshold than that of the ECHR. Despite this higher threshold, the Court, relying on an analysis of the concrete situation of the asylum-seekers, found that those in the processing centre were detained. The judges reasoned this on the basis that the asylum-seekers:

*[A]re required to live in a location that effectively confines them in a limited and finite area that is isolated from the residential and urban areas of Nauru, and their lives are closely regulated and monitored 24 hours of each day. At all times they are effectively being guarded and watched to prevent their escape. Whilst the restrictions fall short of those to be found in the close confinement of a prison, they are very extensive in their impact on the daily lives and movement of the applicants.*³³

Thus, the cumulative effect of the factors in the case, as in *Guzzardi*, amounted to detention. Other facts that led to the Court’s decision included that the centre, at that time,³⁴ was surrounded by a 2-metre-high fence which was constantly controlled, though not electrified. Furthermore, the centre was enclosed by dangerous, difficult, and barren landscape,³⁵ and thus the centre was geographically isolated from the rest of the community.³⁶ Its only entrance was through a constantly monitored gate.³⁷ The Nauruan Court’s application of *Guzzardi* to the Australian offshore processing system offers a useful insight into how the ECtHR would examine a potential European offshore system.

The PNG case of *Namah v. Pato* also dealt briefly with whether the situation of asylum-seekers in offshore processing centres constituted detention.³⁸ The Supreme Court adopted an approach that seemed to make it easier to establish that the detention is lawful. In its

³² *AG v. Secretary of Justice* [53].

³³ *AG v. Secretary of Justice* [54].

³⁴ The RPC was declared an opened centre by the Nauruan Government in February 2015. Asylum-seekers are now free to leave and enter the centre during agreed hours on certain days. See <http://www.minister.border.gov.au/peterdutton/2015/Pages/australia-welcomes-nauru-open-centre.aspx> (last accessed 12/04/2017).

³⁵ *AG v. Secretary of Justice* [28].

³⁶ *AG v. Secretary of Justice* [29].

³⁷ *AG v. Secretary of Justice* [30].

³⁸ *Namah v. Pato* [2016] PJSC 13 (26 April 2016).

judgement, the Court assumed that asylum-seekers were indeed detained, and then went on to consider the legality of their detention. This approach of assuming detention and then considering its legality is an interesting one, and made proving detention in offshore centres substantially easier than in the Nauruan case discussed above. In contrast, the Nauruan Court's focus was equally concentrated on both limbs of the right to liberty test. Regardless, both cases found the existence of detention, each with differing juridical approaches, suggesting that proving detention would be readily achieved in any potential European processing centre.

Apart from these two analogous cases and their use of ECtHR case law, other European cases support an argument in favour of processing centres constituting detention centres. In *Khalifia*,³⁹ the ECtHR confirmed the Court's broad approach to defining detention, emphasising that the circumstances of the alleged detainee are most important. The Court confirmed it will ignore the names by which detention centres are designated, and instead will focus on the facts and the factors of the alleged detention. This is relevant for offshore processing systems as such centres are often designated as "temporary transition centres" or the like, and it is argued that they are not therefore detention centres. *Khalifia* underlines the Court's emphasis on substance over form for recognising the existence of detention. In *Amuur*,⁴⁰ the ECtHR found that the ability of asylum-seekers to return to their home country or another third country has no bearing on whether they are being detained. The Nauruan Supreme Court followed this principle in *AG v. Secretary of Justice* finding that the processing centres on the island constituted detention centres despite detainees' ability to return home.⁴¹ This is relevant because the Australian offshore system includes the concept of voluntary return. The Australian Government has emphasised this element, assuring the community that all asylum-seekers on Nauru are not prevented from returning to their country of origin, facilitated through a simple procedure agreed with UNHCR and IOM. Since the global approach to refugees is premised on the concept of voluntary return, a possible European application of the offshore process will likely include a similar element. Lastly, detention must be used as a measure of last resort, that is, only when other less coercive measures are insufficient to protect the private or public interest concerned.⁴² European

³⁹ ECHR 2016, Judgement of 15 December 2016, *Khalifia And Others v. Italy*, application no. 16483/12.

⁴⁰ ECHR 1996, Judgement of 25 June 1996, *Amuur v. France*, application no. 19776/92.

⁴¹ *AG v. Secretary of Justice* [30].

⁴² ECHR 2008, Judgement of 29 January 2008, *Saadi v. United Kingdom*, application No. 13229/03, [70].

governments seeking to establish processing centres in third countries will need to demonstrate that such detention is necessary and justifiable.

The above analysis shows that it is probable that an offshore processing system based on the Australian model, with small and controlled centres, would satisfy the first limb of the ECHR's right to liberty test and thereby constitute detention. However, if a European offshore processing system were implemented with different characteristics, the strict approach of the ECtHR may be avoided. Such different characteristics may include larger processing centres, or even open ones, where asylum-seekers have access to job opportunities and safe environments. Indeed, it seems probable that a European offshore processing centre would seek to avoid the more controversial elements of the Australian model, and include stronger safeguards for human rights. Such an attempt may reflect form over substance, but it will nonetheless potentially be significantly better than the Australian system. However, even with such changes, the above cases indicate that the ECtHR's case law has focused on the "concrete situation" of those whose liberty has been limited. The consequence of this is that even with significant changes to processing centres, making them more open, hospitable, and formally more human-rights compliant, it will be difficult to avoid designating the centres as places of detention. Overall, on similar facts, or with facts that cumulatively suggest a concrete situation of restriction or deprivation amounting to detention, it is probable that the ECtHR would find offshore processing in Europe to include detention. Having considered and likely satisfied the first limb of the Article 5 right to liberty test, the ECtHR would then be required to proceed to the second limb: the lawfulness of detention.

Lawfulness of detention

Article 5 includes derogations that make detention lawful. The relevant one for the potential application of offshore processing in Europe is Article 5(f):

[T]he lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

This derogation contemplates two circumstances in which detention would be lawful. First, where migrants are detained for the purpose of avoiding an illegal entry into the contracting

party state. Secondly, the detention is allowed for those who are to be deported or extradited out of the contracting states. This section deals, first, with the illegal entry exception, and then with the deportation exception.

5(f) Illegal entry exception

The PNG Supreme Court, in the *Namah* case delivered on 26 April 2016, grappled with the application of exceptions to the right to liberty in offshore processing. The PNG Constitution contains a similar right to liberty,⁴³ and a list of exceptions similar to those listed in the ECHR in which the deprivation of liberty is permitted. Among the exceptions is one analogous to Article 5(f), with the two alternative bases for lawful detention. The Court questioned the application of the “prevention of unauthorised entry” derogation. The PNG Government had argued that the exception applied as asylum-seekers were illegal arrivals that needed to be detained to prevent their unlawful entry into the country. However, the Supreme Court held that the first exception in the Article cannot apply for two reasons. First, the asylum-seekers have no choice as to the location of the processing centre to which they are relocated. The Court noted that the asylum-seekers’ intention was always to reach Australia, but they were transported and detained on Manus Island against their will.⁴⁴ More importantly though, the Court also noted that the Minister for Foreign Affairs had issued permits (visas) that made the entry of the asylum-seekers lawful, to ensure the functioning of the system. The Court appeared to recognise that had these permits not been issued, the system would have been contrary to domestic law as the asylum-seekers would have not been lawfully present within the country. However, as permits had been issued, the Court found the detention was unlawful because the permits authorised the asylum-seekers’ entry to PNG, and thus the detention fell outside the scope of the illegal entry derogation. The PNG Court thus concluded that the first derogation did not apply to the offshore processing system, either because people were forced to go to the third country or because they were granted visas that made their entry lawful. The Nauruan Supreme Court in *AG v. Secretary of Justice* also found that this exception did not apply on the basis that visas were provided to the asylum-seekers. Both Courts adopted an

⁴³ Art 42 of PNG Constitution.

⁴⁴ *Namah v. Pato* [37].

approach that emphasised substance over form in assessing the lawfulness of detention, and thereby sought to uphold the human rights of asylum-seekers.⁴⁵

Such an interpretation has important consequences for a European offshore processing system legally justified on the basis of the first exception in Article 5(f) of the ECHR. Similar issues to those that arose in the PNG and Nauru systems would be replicated in any European system, and the ECtHR would have to consider whether these would render inapplicable the illegal arrival exception. An offshore processing system in Europe would require a forced transfer of asylum-seekers to third countries, either by diverting them at sea or by transferring those who had arrived on the European mainland. The ECtHR would likely adopt a similar view to that of the PNG Court in finding that asylum-seekers had not chosen to go to a third country, and that their arrival there could not therefore be illegal. Alternatively, asylum-seekers are not illegal if they have been granted a visa. The granting of such visas or permits seems to be a necessary requirement to make the system function in the domestic law of third countries, as the situation in Nauru and PNG demonstrates. If the states that were to operate the processing centres in a European offshore processing system followed the Australian model, they too would have to issue visas to the transferred asylum-seekers, thereby precluding the application of illegal arrival exception. Regardless, it is difficult to foresee a situation in which the ECtHR would allow the application of the illegal arrival exception to offshore processing detention. This is because it is clear that the asylum-seekers' destination was Europe. The ECtHR, as discussed above, emphasises substance over form in the protection of human rights, and the reliance on technical legal arguments to designate as "illegal" an asylum-seeker transferred to a third country processing centre would likely not be recognised by the Court. As is clear from Article 5 and the ECHR generally, it is not sufficient that domestic law assesses an arrival as illegal.⁴⁶ The Court will make its own assessment of whether the arrival was substantively illegal, and the forced transfer of asylum-seekers to the third country would likely be a key consideration in the making of this decision. Recognising the lack of autonomy on the asylum-seekers' part, the Court would likely find the illegal arrival exception inapplicable to third country offshore processing detention centres.

⁴⁵*Namah v. Pato* [56].

Deportation or extradition

Both the second limb of Article 5(1)(h) of the Nauruan constitution and the second limb of Article 5(f) of the ECHR contain a provision that allows detention for reasons of removal from a country. Under both provisions, legality hinges upon asylum-seekers being removed from the country that has control over the detention centre. Thus, were an ECHR contracting state to introduce an offshore processing system in a third country, the contracting state would be precluded from accepting refugees from that detention centre. This was illustrated by the Nauruan case, *AG v. Secretary of Justice*, in which the Supreme Court found that the detention of asylum-seekers in Nauru fell within second limb of Article 5(1)(h). This was because, under the agreement signed by Australia and Nauru in 2012, the asylum-seekers detained in Nauru could not be resettled in Nauru. This satisfied the Nauruan Constitution in that the asylum-seekers would be “removed” from Nauru regardless of whether their asylum claims were successful. They would either be returned to their home country if unsuccessful, or relocated to another country if successful.⁴⁷ Were the ECtHR to adopt similar reasoning, the introduction of offshore processing by an ECHR contracting state would be lawful under Article 5(1)(f) of the ECHR only if asylum-seekers are detained in a third country for the sole purpose of facilitating their removal from the contracting party. This means that the asylum-seekers must be relocated outside of the contracting party state whether they are or are not recognised as refugees. Thus, the deportation exception in the ECHR would apply if it was clear they were being detained for the sole purpose of removal, and if the asylum-seeker would not be permitted to return to the contracting party as an accepted refugee, as this would suggest their detention was for assessing the validity of their asylum claims.

Recent developments in the Australian offshore processing system have given support to this argument. In particular, under a 2013 MOU between Australia and Nauru, asylum-seekers are now relocated in Nauru after the recognition of their asylum status. Azadeh Dastyari has argued that this change renders the detention of asylum-seekers unlawful.⁴⁸ The MOU contemplates a temporary relocation into the Nauruan community of those detained in the processing centre. Recognised refugees are relocated in Nauru for a period that can last up to ten years before being transferred to Cambodia. Dastyari argues that the relocation of

⁴⁷ *AG v. Secretary of Justice* [72].

⁴⁸ Dastyari, A., “Detention of Australia’s asylum-seekers in Nauru: Is Detention by Any Other Name Just As Unlawful?”, *University of New South Wales Law Journal* Vol. 39, No. 2 (2016): 683.

refugees into the Nauruan community makes their detention unconstitutional under Article 5(1)(h) because the detention is no longer solely for the purpose of removal. This change came about because of practical constraints, mainly the difficulty of finding third countries willing to take refugees recognised in Nauru. Furthermore, refugees are not always willing to go to the third countries that have been selected for the resettlement of refugees. For example, Cambodia has taken just six refugees since the 2013 agreement, four of whom have returned to their home country citing the lack of employment opportunities and poor conditions. This situation also led to many complaints from national and international communities.⁴⁹ This situation demonstrates another difficulty regarding offshore processing in Europe. ECHR contracting states will not only have to find a third country willing to detain asylum-seekers for a temporary period, but also must find countries that are willing to accept recognised refugees, who are likely to be significant in number. The effective failure of the Cambodia agreement is a warning of how difficult it is to find another country where refugees will be willing to settle. Under the Australian system, refugees retain the right to decide whether to be resettled in a proposed country, and they can select to either return home, stay in the local community or remain in detention in the offshore processing centre. This will be a particular problem if, as would likely be the case, third countries in a European offshore processing system include poorer nations such as Turkey or Egypt.

Based on the above analysis, it is possible that the ECtHR will find Article 5(1)(f)'s "deportation and removal" exception to apply. However, offshore processing must be carried out in a specific way that results in deportation for all asylum-seekers and precludes their ability to be resettled in the contracting state. Though this is the most likely reasoning that the ECtHR's would follow, the Court may also adopt more innovative or unusual approaches in reading the "removal" exclusion. Perhaps the simplest of these would be the argument that asylum-seekers had already been deported from the ECHR contracting state once they were in a third country housing a processing centre. Thus, their detention in that third country would be unlawful, as deportation had already occurred. This argument would have a strong basis in the Court's previous interpretations of "deportation", which have held it to be a physical act

⁴⁹ Gleeson, M., "Agreement between Australia and Cambodia for the relocation of refugees from Nauru to Cambodia", Andrew & Renata Kaldor Centre for International Refugee Law, January 2017: 12, http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Cambodia-agreement_0117.pdf (last accessed 17/01/2017).

that encompasses the removal of a person.⁵⁰ Such an argument could render offshore processing, operating on the basis of the removal exception, unlawful.

Prolonged detention

Even were the ECtHR to find that detention in processing centres was lawful based on one of the two exceptions in Article 5(1)(f), the detention of an asylum-seeker may become later illegal. On this issue, the ECtHR has focused on the duration of detention, which is also an issue in the Australian offshore processing system. Excessive detention occurs where a person is detained longer than is necessary for the execution of the purposes of their detention. This issue arose in *AG v. Secretary of Justice*, which explored the concept of excessive detention. The applicant in that case argued that a “long and unreasonable delay” in processing asylum claims of those detained in the Nauru Centre amounted to an arbitrary detention because it makes the detention “not authorised by law.”⁵¹ The Court did not accept this claim because, at that time, the period in detention had not reached the level of an excessive detention. However, this issue may arise if time spent in detention by asylum-seekers is recognised by a court to be excessive. In assessing whether a period in detention is excessive, the Nauru Court observed it would examine the duration of detention and the status of the asylum-seeker.⁵² Scholars have argued recently that the period spent in detention in Nauru, being around two and a half years for some asylum-seekers, amounts to prolonged detention. Dastyari points to unreasonable delays and the lack of a clear date for removal as evidence of this.⁵³ Thus, it is now probable that at least some asylum-seekers have been subjected to unlawful prolonged detention.

Excessive length of detention is therefore relevant for the adoption of an offshore process in Europe, particularly because of ECtHR case law that emphasises the need for reasonable detention times. There are two bases upon which the Court may find a detention has become unlawful: it is no longer for the purpose originally intended or the purpose has not been carried out with “due diligence” by the authorities.⁵⁴ Lawful detention for reasons of removal

⁵⁰ Rainey, B., E. Wicks and C. Ovey, *The European Convention of Human Rights*, Oxford, 2014: 238.

⁵¹ *AG v. Secretary of Justice* [79].

⁵² *AG v. Secretary of Justice* [79].

⁵³ Dastyari, A., “Detention of Australia’s asylum-seekers in Nauru: Is Detention by Any Other Name Just As Unlawful?”, *University of New South Wales Law Journal*, Vol. 39, No. 2 (2016): 685.

⁵⁴ ECHR 2009, Judgement of 19 February 2009, *A and Others v. United Kingdom*, application no. 3455/05. [164].

under the ECHR requires an actual and consistently present intention to remove a person. This can be contrasted to the Nauru Constitution, under which the simple expressed purpose of eventually removing a person from Nauru is sufficient. This allows the decision in *AG v. Secretary of Justice* to be distinguished because the ECHR requires a higher threshold to justify detention for removal. In *Saadi*, the Court commented that the detention must at all times be “closely connected” with the purpose for which it initially occurred.⁵⁵ Thus, the Court will, on application from an asylum-seeker, ask whether the detention is still for purpose of either preventing illegal entry or removing the person. If it is not, the detention will be unlawful.

The other possible basis for illegal detention is where it has been unnecessarily prolonged due to failures on the part of the authorities. This is also linked somewhat to purpose, though is a separate argument. This link was demonstrated in *Saadi*, where the Court commented that the length of detention should not exceed the period reasonably required for the purpose pursued.⁵⁶ It must be shown that the delays in detention are attributable to the authorities and that they were unreasonable. There is thus no specific time period after which a delay is unreasonable, and an analysis requires looking at an applicant’s specific circumstances. For example, in *Chalal v. United Kingdom*,⁵⁷ the Court accepted the prolonged detention of the applicant, which lasted six and a half years, because the authorities were always aiming to end procedures for removal with “due diligence throughout all the deportation proceedings.”⁵⁸ The delay was attributable to the necessity of ongoing appeals and administrative decisions that the ECtHR concluded were necessary in light of the seriousness of the case. In total, the British Home Office spent 13 months examining Chalal’s refugee application, but the Court found the authorities’ delays were justifiable due to the complexity of the case and the national security issues raised if he were a terrorist. However, scholars have noted that the applicant was detained this long despite never having been convicted of a crime, and that a particularly “high standard of speed and diligence” should have been adopted by the authorities, which the Court seemed not to have required.⁵⁹ Offshore processing in Europe

⁵⁵ ECHR 2008, Judgement of 29 January 2008, *Saadi v. United Kingdom*, application No. 13229/03 [74].

⁵⁶ *Saadi v. United Kingdom* [74].

⁵⁷ ECHR 1996, Judgement of 15 November 1996, *Chalal v. United Kingdom*, application no. 22414/93.

⁵⁸ *Chalal v. United Kingdom* [123].

⁵⁹ Rainey, B., E. Wicks and C. Ovey, *The European Convention of Human Rights*, Oxford, 2014: 239.

would have to ensure that the processing of asylum-seekers for deportation, under either exception in Article 5(1)(f), occurs expediently and is always about the removal of the person.

Conclusion

The discussed judgments are relevant for the European Union framework. Firstly, they enlighten the legal problems that a European offshore processing system could face regarding its compliance with Article 5 of the ECHR. Secondly, the two judgments highlight the main features of the Australian offshore processing system, including the practical complexities in applying such a system in Europe.

The EU would need to find a third country willing to host a processing centre for asylum-seekers trying to reach the EU borders by boat. Despite the Turkey Statement and recent national agreements that member states have already concluded with third countries, such as Libya, the type of organisation required for a processing centre is possible only in states with a strong central government which perceives a real advantage in taking asylum-seekers.

Moreover, those who are recognised as refugees at no stage can be resettled in Europe or in the same country where the processing centre is located, otherwise the exception listed in the second part of art 5(f) of the ECHR would not apply. Then, the compliance with Article 5(f) requires the EU to conclude an agreement with other countries in order to resettle refugees. The failure of the Cambodia Agreement, recently signed by Australia, is a warning sign of the difficulties such an agreement may face. Few countries, especially in the most likely resettlement region of North Africa, have the resources or interest in resettling the number of asylum-seekers that are flowing into Europe. Over one million people arrived in Europe by sea in 2015, while the number of people detained on Manus Island and Nauru amounts to 1241. It is clear that these numbers cannot be compared and a European offshore processing system needs to take it into consideration.

To conclude, among endless comments on the topic, a theoretical question needs to be answered first: how should we consider ECHR? Apart from its formal reference in the treaties and, consequently, its structural role in the EU system, is not the ECHR a normative document, beyond its legal significance? The ECHR could be important in shaping a common European identity which is currently missing. In this sense, it is critical to define which Human Rights standards we are ready to renounce and which ones should be leading us in

shaping EU policies. If we intend, rightly, that ECHR defines the values we need to follow in building EU policies in delicate issues, such as migration and asylum, then it should not be considered as the juridical boundary to political choices, but, oppositely, as the common standards for dealing with difficult issues. Consequently, a European offshore processing system needs to pass this test first.