



10 November 2020

OMBUDSMAN'S FINDINGS AND POSITIONS REGARDING THE IMPLEMENTATION OF DETENTION AT THE CENTRE FOR FOREIGNERS

I.

The Human Rights Ombudsman of the Republic of Slovenia (hereinafter: the Ombudsman) was informed from various sources about the inadequate placement of detainees at the Centre for Foreigners. The Ombudsman also found media publications on the subject (e.g. placement in containers¹). To check the detention conditions, the Ombudsman visited the Centre for Foreigners twice (on 31 July and 3 September 2020) and contacted the Ministry of the Interior for explanations. On these grounds, the Ombudsman established:

a) Detention conditions in a closed building with containers at the Centre for Foreigners

Detainees in containers are placed inside a roofed concrete building with little daylight. The openings (secured with metal bars) are not at eye height and individuals can only look outside if they climb a container or look through the barred door to the yard, where there are police officers guarding the building. The detainees are not allowed any daily exits from the building and may only move around inside it. There is no space for recreation or leisure activities inside the building. The Ombudsman believes that the **building with the containers should be classed as a closed space, so movement inside it is not to be considered access to open-air spaces**. By limiting movement to this building, the purpose of the right to access open-air spaces cannot be achieved; this right is, inter alia, important for the mental health of persons whose liberty has been restricted – by exercising this right, they can break the monotony that stems from being trapped in the same place all the time.

In accordance with Article 10 of the Reception Directive,² Member States must ensure that, so far as is possible, detained applicants for international protection are kept separately from other third-country nationals who have not lodged an application for international protection. When applicants cannot be detained separately, the Member State must ensure that the detention conditions provided for in this Directive are applied – inter alia that the detained applicants have access to open-air spaces. The Ombudsman found that both applicants and persons who had declared an intention to apply for international protection and persons awaiting deportation are placed in the containers, neither group having access to open-air spaces. The Ombudsman's position, therefore, is that **the detention conditions of applicants for international protection in containers are inconsistent with the Reception Directive requirements**.

According to the explanation received from the Ministry of the Interior and the Centre's management, people were supposedly placed inside the containers for a maximum of 10 to 14 days; however, **some detainees were kept inside the containers for more than a month, as the Ombudsman discovered during its visit**. As **no records are being kept of the duration of container accommodation and no other checks relating to how long individuals have been kept inside the containers are undertaken, there seem to be no safeguard mechanisms to prevent individuals staying in the containers for a longer period of time**. It seems in fact that **the duration of stay in a container is decided arbitrarily, as there are no clear criteria according to which decisions are made regarding placement in containers or supervision thereof**. Such long-term confinement can have a negative impact on mental health, especially if the detainee cannot even predict how long they will be in the container.

¹ For example: <https://www.mladina.si/200338/z-azilanti-po-novem-brez-milosti/>.

² Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

The Ombudsman believes that detention conditions in the containers are on the verge of acceptable. Even **the potential shortage of space for the placement of detainees in the main building of the Centre (due to renovation works) cannot justify the long-term placement of persons in areas that are not intended for long-term detention and where they do not enjoy the rights and benefits in accordance with the *Rules on residing in the Centre for Foreigners, depositing own financial resources and on the form and content of the card stating permission to remain in the Republic of Slovenia.***

b) The reasons for implementing detention in containers

Based on the interview with the Centre's management, the Ombudsman found that the container accommodation regime of new detainees had been (partly) chosen for health reasons, as it supposedly prevents the spread of COVID-19 among detainees and employees. This decision was not based on the position of medical experts specifically prepared for such circumstances, the Ombudsman notes, but was a product of the Centre's own judgment. A newcomer is supposed to spend 10 to 14 days in a container, as infected persons should display symptoms of the disease in this period; the detainees in the building with containers are allowed to be in contact and new detainees arrive in the containers on a daily basis. According to the explanations by the Centre's management, ventilation is supposedly ensured in the building, which is supposedly crucial for preventing the spread of the COVID-19 (the openings of the building are only covered by metal bars). However, we found that there was no additional ventilation inside the containers (each housing max. 6 persons). During the Ombudsman's visits, the detainees in the containers were not wearing protective masks. There was also no specific ventilation in sanitary containers.³

The Ombudsman is not convinced by the medical justification for implementing detention in containers, as it clearly does not comply with the published recommendations of the National Institute of Public Health for the prevention of COVID-19 or with current general knowledge about this new infectious disease. It is not ensured that the detainees in the building with the containers or in the containers themselves would not come into close contact through which they could contract the disease, even with newly detained persons.

The Ombudsman also finds that for prisons, which are also places of deprivation of liberty, the National Institute of Public Health recommends measures that are significantly different (avoiding close contact, maintaining distance, adapting activities so that as few people as possible are on the premises at a time, etc.).⁴ In the container building of the Centre for Foreigners, on the other hand, persons are detained together and new persons are placed in the building on a daily basis. Furthermore, the National Institute of Public Health recommends that migrants, who only have access to emergency services, are ensured full accessibility to healthcare under the present circumstances rendered by COVID-19,⁵ but **it appears that this recommendation by the National Institute of Public Health, which specifically addresses the situation of certain migrant groups, is not being followed.**

The Ombudsman finds that in deciding on the container accommodation at the Centre for Foreigners, **the publically available recommendations by the National Institute of Public Health were followed very selectively.** In addition, **the principle of good governance requires that authorities' decisions that are essentially professional decisions are based on findings, assessments and recommendation by the relevant experts, taking into account the specific characteristics of the situation governed in this way.** Establishing an accommodation regime in a detention area that deviates from the standard one, allegedly for medical reasons, without this being based on the position of the medical experts prepared for such circumstances, would therefore constitute a breach of the principle of good governance.

c) Duration from declaring the intention to apply for international protection until the application is received

³ According to the recommendations by the National Institute of Public Health, the ventilation of toilet facilities is of utmost importance for preventing spread via the faecal-oral route. Opening the windows in toilet facilities with mechanical or passive ventilation is to be avoided, as it can cause the air from the toilet facilities to pass into other areas (<https://www.niiz.si/sl/navodila-za-prezracevanje-prostorov-izven-zdravstvenih-ustanov-v-casusirienia-okuzbe-covid-19>).

⁴ <https://www.niiz.si/sl/priporocila-za-preprecevanje-prenosa-okuzbe-z-novim-koronavirusom-sars-cov-2-covid-19-v-zavodih-za>

⁵ "Osnovni napotki in priporočila za delo z ranljivimi skupinami v času epidemije virusne bolezni covid-19" (Basic guidelines and recommendations for working with vulnerable groups during the COVID-19 epidemic), page 25 (available at website of National Institute of Public Health: https://www.niiz.si/sites/www.niiz.si/files/publikacije-datoteke/napotki_in_priporocila_covid-19_ranljive_skupine_final.pdf)

The Ombudsman has established that the period from when a person at the Centre for Foreigners declares their intention to apply for international protection in Slovenia to when a personal interview to apply for international protection is conducted with that person is too long (lasting up to several weeks), for which the responsibility lies with the authority responsible for conducting international protection procedures, i.e. the Ministry of the Interior. In Article 6(1), the Asylum Procedures Directive⁶ provides that if the application for international protection is made to authorities which are likely to receive such applications but not competent for the registration under national law (for example the Centre for Foreigners as a police service), Member States shall ensure that the registration shall take place **no later than six working days after the application is made.**

As highlighted by the Court of Justice of the European Union in the case *C-36/20* (judgement of 25 June 2020), a third-country national **acquires the status of applicant for international protection within the meaning of Article 2(c) of the Asylum Procedure Directive by "making" such an application, whereby the act of "making" an application for international protection does not require any administrative formalities.** The Ombudsman adds **that declaring an intention, as defined in the International Protection Act (ZMZ-1), is to be considered as making an application within the meaning of EU law.**

As a third-country national who has expressed their wish to apply for international protection to "other authorities" already has the status of applicant for international protection within the meaning of second subparagraph of Article 6(1) of the Asylum Procedures Directive, their position at this stage cannot (i.e. can no longer) fall within the scope of the Return Directive.⁷ This means, inter alia, that it is not permissible to detain them for reasons other than those set out in Article 8(3) of the Reception Directive. Yet in the circumstances here described, **the Ombudsman is, at least in some cases, faced with situations where persons were detained in accordance with the Foreigners Act (ZTuj-2) as illegally staying foreigners (after an issued return decision) even after they declared their intention to apply for international protection at the Centre for Foreigners.** According to the explanations by the Centre's management and as stated in the procedural documents of some detainees, this situation **can last several weeks, despite the Asylum Procedures Directive requiring that the applicant be granted access to the asylum procedure within six working days.** During this time, persons who have declared their intention and should thus be considered applicants for international protection within the meaning of EU law continue to be detained as illegal foreigners, even though they should be entitled to the reception conditions guaranteed to applicants for international protection. **According to the Ombudsman, the described situation is inconsistent with EU law.**

d) Individual treatment in decision-making about detention

The Ombudsman obtained the document No. 225-2/2020/34 (213-01) – "Piloting of procedures regarding foreigners who declare an intention to apply for international protection at police stations" (the signatory of which is the then Acting Director-General of the Police), which shows that persons who, after being apprehended for illegally crossing the border, declare an intention to apply for international protection should be detained after the police procedures have been carried out until a decision rejecting the application for international protection is final and enforceable.

This is supposed to enable migrants' return and prevent them from travelling to their preferred country of destination or abusing the international protection procedure, thus making illegal travel through Slovenia less appealing.

This document applies to the Koper Police Directorate and to a month-long trial period; it is unclear how many persons were actually processed in the described way. It is unknown to the Ombudsman whether a similar instruction was also addressed to other Police Directorates and whether it applies for a longer period. The Ombudsman therefore cannot assess whether the

⁶ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

⁷ 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.

increased number of detained applicants at the Centre for Foreigners, as follows from the explanations by the Ministry of the Interior, is a result of such instructions. However, the number of detained applicants in June and July 2020 deviates significantly from the numbers in previous months. According to certain information, the Administrative Court of the Republic of Slovenia upheld around 60% of actions that were brought against such detentions.⁸ This raises concerns that the principle of individual treatment is not sufficiently taken into account when ordering the detention of applicants for international protection.

The Ombudsman believes that the appropriateness and relevance of the above-mentioned instruction are also questionable. At a time when society is facing the challenges of preventing the spread of COVID-19, a reduction in the number of detentions and an increased use of alternatives would be expected, rather than actions that contribute towards overcrowding of closed (carceral) institutions and make it harder to maintain safe distance between detainees. This situation represents a greater risk for detainees who might develop a severe course of the disease in the event of infection (elderly, persons with autoimmune and chronic diseases, etc.).

Detention of an applicant for international protection is an interference with personal liberty which may be ordered only when, after an individual treatment of all relevant circumstances of the individual case, at least one of the statutory reasons for the interference has been established. A person may not be detained solely because they seek international protection. Applicants may only be detained in exceptional circumstances, regulated by law, in accordance with EU law and subject to the principles of necessity and of proportionality with regard to both the manner and the purpose of such detention.⁹ According to the Ombudsman, the content of the mentioned instruction is therefore a cause for concern, as **it completely disregards the fact that the detention may only be ordered in exceptional circumstances and only due to the individual circumstances of the applicant. Ordering detention to achieve systemic effects and deter migrants cannot be justified.**

e) Alarming use of a service dog in the detention area

Other police units also provide staff to help at the Centre for Foreigners, among them dog handlers. Several detainees mentioned that police officers with dogs enter the building with containers every evening and reportedly let the dogs to bark at the barred front door, while at night, police patrols with dogs reportedly take place among the containers.

The Ombudsman obtained the work order of Koper Police Directorate about the use of the service dog in the video that was released in the media.¹⁰ The order shows that the dog handler was supposedly guarding the police officers' procedures during the foreigners' dinner and police officers in procedures with foreigners in the containers; he had with him a police service dog, which was supposedly muzzled and on a lead attached to a harness. According to the explanations from Koper Police Directorate, the service dog did not, with either its body or bite, exercise direct control over persons accommodated at the Centre for Foreigners, and it was thus not used as an instrument of restraint in police officers' procedures in accordance with Article 85 of the Police Tasks and Powers Act (ZNPPol). The Ombudsman cannot accept such an explanation. The purpose for which police power is exercised is also important in the exercising of police power – if the power is exercised for a purpose the use of which has not been provided by law, this may constitute an abuse of such power. Under Article 85 of the ZNPPol, police officers may only use a muzzled service dog on a lead if they cannot otherwise bring active resistance under control or avert an assault. However, in the present case it was clearly used in the detention area during a situation (dinner) in which no attack was likely to be expected (at least there is no indication that one was in the explanations from Koper Police Directorate). The dog was supposedly guarding the police officers, who are expected to be qualified to use instruments of restraint themselves. In such circumstances, where the balance of power between police officers

⁸ "Until 28 July, 116 restrictions of movement were imposed (one in January, two in February, two in April, one in May, 69 in June and 41 in July). A total of 99 actions were brought; in six cases, the time limit for bringing an action has not yet expired. The Administrative Court upheld the action in cases, they stated." (<https://www.dnevnik.si/1042935426>).

⁹ Cf. Articles 8, 9 and 10 of the Reception Directive.

¹⁰ <https://www.mladina.si/200747/ustrahovanje-s-psi/>

<https://www.dnevnik.si/1042937150/slovenija/migranti-ki-ih-policiisti-hranijo-skozi-resetke-in-ustrahujejo-s-psi-odklanjajo-hranilo>

and detainees is clearly disproportionately in favour of the former, there is doubt about the need to protect police officers with a service dog during the detainees' dinner.

It should also be noted that talks with the detainees revealed that the use of the service dog documented in the video was not an isolated case, as the detainees complained of discomfort due to the frequent presence of dogs both inside and outside the building. The Ombudsman's position is that it is only possible to justify the need to use a service dog in an individual case in closed (carceral) institutions such as the Centre for Foreigners in exceptional circumstances. It is by no means appropriate for it to be routine practice.¹¹

The Ombudsman's proposals:

The Ombudsman proposed to the Ministry of the Interior to examine the aforementioned findings and adopt necessary measures to remedy the established irregularities. The Ombudsman specifically proposed that the practice of placing applicants for international protection, persons who have declared their intention to apply for international protection and persons awaiting deportation in the containers at the Centre for Foreigners be immediately stopped if such placement is still going on.

At the same time, the Ombudsman proposed that consideration be given to regulating by way of a set of rules (or other relevant legal act) the conditions for the use of containers for the placement of detainees at the Centre for Foreigners so that this possibility would be provided for short-term-only accommodation in exceptional circumstances and that safeguards preventing arbitrary action be provided for as well.

Furthermore, the Ombudsman proposed that the competent authorities and epidemiological experts prepare appropriate expert bases for the most suitable organisation of the placement of detainees at the Centre for Foreigners, these to be medically appropriate and take into account the rights of persons detained there.

The Ombudsman also proposed that appropriate staffing, organisational and other necessary measures be adopted immediately to ensure that no more than six working days elapse from the time an individual declares their intention to apply for international protection to an authority not competent to receive such an application to a personal interview in which they apply for international protection.

The Ombudsman also proposed that the use of service dogs for Centre for Foreigners activities (e.g. during mealtimes) involving contact with the detainees be halted.

II.

The Ministry of the Interior (letter of 22 October 2020) responded to the Ombudsman's findings, recommendations and proposals with the following positions.

a) Detention conditions in a closed building with containers at the Centre for Foreigners

The Ministry of the Interior confirmed that the police use temporary accommodation facilities or so-called container homes located in a partially open roofed building of the Centre for Foreigners. **The Ministry also confirmed that in individual cases the duration of the accommodation in the container homes was longer than prescribed** but insisted there were reasons explaining each of the cases. The Police also gave their assurance that persons stay in the containers for a maximum of 10 to 14 days. Persons placed in the containers were supposedly informed about the reasons for and conditions of their stay both orally and in writing.

The Ministry of the Interior referenced the judgment of the Administrative Court of the Republic of Slovenia I U 1308/2020-20 (which became final on 18 September 2020), according to which

¹¹ Also highlighted in the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).⁵¹

persons temporarily placed in container homes are now ensured daily access to open-air spaces, i.e. outside the building with the container homes but still in the grounds of the Centre for Foreigners.

b) The reasons for implementing detention in containers

The Ministry of the Interior explained that the Police had had to ensure additional accommodation facilities due to the growing number of persons apprehended when illegally entering Slovenia and detained at the Centre for Foreigners and for reasons of preventing additional exposure of police officers, other public employees who come into contact with the foreigners as a result of the implementation of procedures and other detainees at the Centre. Due to the possibility of newly detained foreigners being infected with the coronavirus, the Centre for Foreigners follows the recommendations of the National Institute of Public Health by temporarily accommodating newcomers in separate container homes, thus preventing any further spread of infection at the Centre.

This is why, on 16 June 2020, the Centre for Foreigners started temporarily placing detainees in container homes. On that day, 98 persons were reportedly detained at the Centre. Because of ongoing renovation, not all of the accommodations departments were in use; the temporary reception was carried out in one of the accommodation departments. The Centre for Foreigners also supposedly followed the general recommendations regarding the implementation of measures during the spread of COVID-19 and all instructions, these supposedly prepared for the Ministry of the Interior and the Police by the Health and Safety at Work Service at the Ministry of the Interior. The Centre for Foreigners thus supposedly followed the key recommendations, and in particular ensured the conditions for safe distance, limiting the number of people in a particular area, maintaining hand hygiene, ventilation of areas, etc. The Ministry of the Interior gave its assurance that it also consulted the National Institute of Public Health on measures for preventing the spread of infection from a potentially infected foreigner to other detainees, as well as on measures in the event of infection at the Centre and on the division of placements. The Ministry of the Interior stressed that full treatment is ensured in the container homes, i.e. health monitoring and healthcare, meals, hygiene, and legal procedures.

c) Duration from declaring the intention to apply for international protection until the application is received

The Ministry of the Interior explained that the number of persons who wish to apply for international protection in the Republic of Slovenia has been rising since April 2020. In May, for example, 444 applications were lodged, 169 in June, 462 in July, 500 in August and 337 in September. This is a significant increase compared to the beginning of 2020, when, for example, 235 applications were lodged in January and 151 in February. Taking into account the spatial, staffing and other capacities (interpreters, legal representatives), this was addressed by redeploying employees within the internal organisational unit and assigning overtime in order to receive the largest possible number of applications in the given situation.

The Ministry of the Interior also pointed out that in this same period, the Republic of Slovenia introduced a 14-day mandatory quarantine for persons arriving from certain Balkan countries. As 99% of foreigners declaring intention pass through these countries, the objectives of the introduced government measure were also pursued, i.e. protecting the health of employees and other participants in the reception of the application for international protection and indeed society as a whole.

The reception areas of the Asylum Centre are supposedly full due to the very high number of persons declaring intention, which is why, in accordance with paragraph one of Article 81 of the ZMZ-1, persons who declared intention to apply for international protection were placed in the existing accommodation, i.e. the Centre for Foreigners, as it would not be possible to ensure minimum accommodation standards for them in the reception areas of the Asylum Centre.

d) Individual treatment in decision-making about detention

The Ministry of the Interior explained that the instruction from document No. 225-2/2020/34 (213-01) (see point d in Section I above) applied only for the area of Koper Police Directorate for one

month and referred to the immediate individual treatment of persons by the Police (due to illegal entry) and the International Protection Procedures Division (in cases of declaring intention to apply for international protection) in one place. During the trial period, only one person was reportedly treated and detained in this way. The Police did not extend the trial period, nor was the instruction applied in areas of other police directorates.

e) Alarming use of a service dog in the detention area

In June 2020, the Centre for Foreigners asked for additional staff, which they received on 16 June 2020. Because of the escalation of security issues and negative incidents in terms of safety (self-harm and suicide threats, escape attempts, escapes, etc.), the Centre asked for supplementary staff at the end of July, which they received at the beginning of August. The staff included a dog handler (with a dog), who was present at the Centre between 9 and 11 a.m. and 8 p.m. and midnight. Having the dog handler at the Centre was supposedly only a precautionary measure in terms of preventing disorderly conduct. The service dog supposedly wore a muzzle and was on a lead at all times; it also wore a harness with the inscription "Police".

The presence of a service dog in the dining hall of the Centre for Foreigners was, according to the explanations of the Ministry of the Interior, a singular event when the dog handler briefly stopped in the dining hall during a security patrol of the building. In the dining hall, the service dog was on a lead, wore a muzzle, was next to the police officer, and did not growl or bark. Due to the improved security situation and gradual reduction in the number of detainees, dog handlers have not carried out tasks at the Centre for Foreigners since the beginning of September 2020.

The Ministry of the Interior assured us that the Police have already begun preparing a proposal to amend the Rules so that conduct in unforeseeable situations and the possibility of short-term placement in accommodation units (for example containers) would be regulated.

The Ministry also assured us that the Centre for Foreigners will, in accordance with the Ombudsman's findings, strive to improve the supervision over the placement of detainees in containers and that the duration of the container accommodation will not exceed the COVID-19 incubation period. Efforts will also be made to carry out the procedures of persons declaring the intention to apply for international protection as soon as possible. To ensure a faster reception of applications, phase 3 of the Contingency Plan is to be activated and a vacancy notice is to be published.

According to the Ministry of the Interior, the Centre for Foreigners will also strive to place applicants for international protection and foreigners processed by the Police in accordance with the ZTuj-2 separately, in line with spatial capacities. An information form, which the detainees in temporary accommodation units receive in a language they understand, was also supposedly drawn up.

Furthermore, the Centre for Foreigners will continue to prioritise the greatest possible epidemiological safety of all those in the area of the Centre. A proposal for the Order amending the Order on the designation of endangered areas due to the infectious disease COVID-19 (Official Gazette of the Republic of Slovenia [*Uradni list RS*], Nos. 95/20 and 96/20) is supposedly in the process of inter-ministerial coordination in order to define centres for foreigners and asylum centres as endangered areas under Article 7 of the Communicable Diseases Act (ZNB) in addition to those already listed (homes for the elderly, special social care institutions, prisons and public healthcare institutions). The Ministry of Health supposedly assessed that there is also an increased risk of transmission and spread of SARS-CoV-2 in these places.

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In conclusion, the Ombudsman has established that the Ministry of the Interior did not substantially oppose its findings and assured the Ombudsman that the situation of detainees in the containers at the Centre for Foreigners would improve in terms of both actual living conditions and legal certainty. In this regard, the decision to now enable detainees in the containers daily access to open-air spaces outside the closed building is to be commended, as are efforts to speed up the reception of applications for international protection and assurances that the duration of an individual's detention in the container will no longer exceed 14 days. The Ombudsman expects that any amendment of the Rules will also include regulation for effective supervision over such placement of detainees at the Centre.

The Ombudsman understands that the current situation, which is significantly impacted by the efforts to prevent the spread of COVID-19, is exceptional and requires various adjustments. However, the Ombudsman highlights that this situation cannot justify long-term container accommodation. Here the Ombudsman adds that it was not informed about the positions of the Health and Safety at Work Service at the Ministry of the Interior and of the National Institute of Public Health that were, according to the Ministry of the Interior, followed when deciding to place new detainees in the containers.

The Ombudsman cannot agree with the Ministry of the Interior's response in the part stating that due to the occupied reception areas of the Asylum Centre and the large number of persons declaring intention, these persons are accommodated at the Centre for Foreigners in accordance with paragraph one of Article 81 of the ZMZ-1 (see point c of Section II above). Under paragraph one of Article 81 of the ZMZ-1, after being processed by the police, a person declaring the intention to file shall be accommodated in the reception area of the Asylum Centre or *another national accommodation facility*, where his or her needs for meals, essential toiletries and emergency medical care shall be met. According to the Ombudsman, *other accommodation facilities* intended for applicants for international protection do not include areas where detention is carried out. Even in the case of a large number of declared intentions to apply for international protection and consequently occupied reception areas of the Asylum Centre, reasons for detention must be determined individually for each detention of an applicant for international protection, as it is, in principle, not permissible to detain a person solely because they have declared an intention or because they are an applicant for international protection.