Administrative detention in the asylum sector

Summary of the report by the Parliamentary Control of the Administration for the attention of the National Council Control Committee

of 1st November 2017

Summary

Administrative detention largely achieves its goal of ensuring the execution of return decisions concerning asylum seekers who have their application for asylum rejected. Detention is generally used appropriately, but there are considerable cantonal differences, which also raise questions of legality. The Confederation has so far been cautious, but there are signs of a trend towards stricter supervision.

The Confederation's costs for the administrative detention of rejected asylum seekers, which currently amount to around CHF 20 million per year, are likely to increase significantly in the future with the subsidies to be paid for the construction of detention centres. However, it is unclear how detention is being used. For these reasons, in January 2016 the Federal Assembly's control committees (CCs) commissioned the Parliamentary Control of the Administration (PCA) to evaluate administrative detention in the asylum sector.

At its meeting on 23 June 2016, the FDJP/FCh sub-committee of the National Council CC decided that the evaluation should examine in particular the effectiveness of administrative detention, the expediency of its use and the role of the Confederation. Aspects of legality and the situation of minors in administrative detention should be taken into account as far as possible. The sub-committee also requested a comparison with the rest of Europe.

The PCA subsequently awarded an expert mandate to BASS for a longitudinal statistical analysis of rejected asylum seekers who were concerned by a return decision from Switzerland by 2014 – i.e. before the amendments to the EU's Dublin III Regulation came into force. The PCA also carried out interviews with around 50 people, mainly from cantonal migration authorities and the State Secretariat for Migration (SEM), and conducted an extensive document analysis. For the European comparison, it examined statistical data and existing evaluations.

Administrative detention is effective, but requires international cooperation

In the case of 12,227 of the 61,677 negative asylum decisions taken between 2011 and 2014, the rejected asylum seeker was placed in administrative detention. Administrative detention achieves its goal of ensuring the execution of the return decisions in almost every Dublin case and in two thirds of the cases of returns to the country of origin. Administrative detention is thus effective. However, it may only be ordered if departure is reasonably foreseeable. Whether this is the case depends primarily on the country of destination, which must be prepared to issue the person with documents and accept them. Good international migration cooperation is a prerequisite for this, but the cantonal migration authorities have complained that this is not given enough weight in Swiss foreign policy.

Cantonal differences raise questions about legality

The evaluation revealed considerable differences between the cantons, in terms of the frequency and timing of ordering administrative detention, its duration, the detention of minors and the achievement of its objective. The different characteristics of the rejected asylum seekers in terms of sex, age, family situation or country of origin explains only one third of these differences at most. The cantonal differences are above all an expression of differing understandings of the proportionality of detention, which is shaped by both cantonal politics and the courts. The question then arises of the extent to which these differences are justified given the principles of equality before the law on the one hand and of cantonal implementation of federal law on the other hand.

Increased federal supervision offers opportunities and entails risks

In its supervisory function, the SEM has so far relied on the dialogue with the cantons, which they value. However, the cantonal differences make it clear that harmonisation has only been achieved to a limited extent. The Confederation is now using subsidies for detention facilities as a financial incentive to improve conditions of detention. Since the autumn of 2016, the SEM has also had the statutory task of supervising the execution of return decisions. If the cantons fail to fulfil their obligations, the SEM can also cancel financial compensation. On the one hand, this is an opportunity for greater harmonisation of practices in executing return decisions; on the other, the new rules entail the risk that, in view of possible sanctions, administrative detention will increasingly be used in cases in which the legal requirements are not clearly fulfilled.

SEM data management is inefficient and error-prone

There are numerous duplications between the existing data management systems in the area of the execution of return decisions, which creates extra work. The electronic systems are insufficiently linked to one another, which is why the same data must be entered several times, which can lead to errors. The correct entry of the data on administrative detention has not been seen as a priority by many cantons and by the SEM. The data in relation to some cantons proved insufficient for statistical analysis in the present evaluation. The benefits that can be currently derived from the data managed by SEM for the execution of return decisions are limited.

The full report is available in German and French; the Italian version should be ready around September 2018 (www.parliament.ch).