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# Liberty's Application: the European Union's Struggles with Detaining Asylum Applicants

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# Liberty’s Application: the European Union’s Struggles with Detaining Asylum Applicants

*Will Patrick*<sup>†</sup>

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## I. Introduction

For the past few years, the European Union (“EU”) has been grappling with an influx of immigrants, particularly Syrian refugees.<sup>1</sup> From the United Kingdom<sup>2</sup> to Sweden to the Czech

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<sup>1</sup> See Reuters, *Immigrant population hits new high in Germany*, REUTERS (Aug. 1, 2017), <https://www.reuters.com/article/us-germany-immigration/immigrant-population-hits-new-high-in-germany-idUSKBN1AH3EP> [<https://perma.cc/Y5D5-9RUS>].

<sup>2</sup> For the purposes of this Note, assume the United Kingdom is still within the EU. As of this writing, Brexit has not yet occurred. See Alex Hunt & Brian Wheeler, *Brexit: All you need to know about the UK leaving the EU*, BBC NEWS (July 31, 2018),

Republic, the influx has become an increasingly prevalent political issue.<sup>3</sup> However, this is not a new issue for the EU.<sup>4</sup> Since 1999, the EU has attempted to establish a set of uniform asylum rules for its member states with the establishment of the Common European Asylum System (“CEAS”).<sup>5</sup> In furtherance of this objective, the EU proclaimed the Charter of Fundamental Rights of the European Union (“the Charter”), which would establish the overall framework of the legislation.<sup>6</sup>

This Note will examine a recent European Court of Justice case, *K. v. Staatssecretaris van Veiligheid en Justitie*,<sup>7</sup> and its interpretation of the Charter’s relation to EU law and policy. First, it will delve into a brief background of the CEAS and the facts of the case. Second, it will explore the applicable European laws and their current applications. Third, it will analyze how the European Court of Justice has imposed another limitation on the exercise of a third-party national’s right to liberty under the Charter, while striking a proper balance between state and applicant interests. Finally, this Note will look to the likely future consequences of the ruling, and the potential fallout had the European Court of Justice

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<https://www.bbc.com/news/uk-politics-32810887> [<https://perma.cc/8YG2-AYXR>].

<sup>3</sup> See Johan Ahlander & Mansoor Yosufzai, *Sweden intensifies crackdown on illegal immigrants*, REUTERS (July 13, 2017), <https://www.reuters.com/article/us-sweden-immigration-crackdown/sweden-intensifies-crackdown-on-illegal-immigrants-idUSKBN19Y0G8> [<https://perma.cc/M44U-HY7D>]; REUTERS, *Britons want to see immigration controlled: PM May*, REUTERS (Sept. 6, 2017), <https://www.reuters.com/article/us-britain-eu-immigration-may/britons-want-to-see-immigration-controlled-pm-may-idUSKCN1BH1K7> [<https://perma.cc/4BLF-4F5C>]; Nikodem Chinowski, *Beyond Borders: Immigration Within the EU*, EMERGING EUROPE (Oct. 8, 2017), <http://emerging-europe.com/interviews/beyond-borders-immigration-within-eu/> [<https://perma.cc/LNN4-EVBL>].

<sup>4</sup> Anthony Faiola, *A global surge in refugees leaves Europe struggling to cope*, WASH. POST (Apr. 21, 2015), [https://www.washingtonpost.com/world/europe/new-migration-crisis-overwhelms-european-refugee-system/2015/04/21/3ab83470-e45c-11e4-ae0f-f8c46aa8c3a4\\_story.html?noredirect=on&utm\\_term=.75406ad30907](https://www.washingtonpost.com/world/europe/new-migration-crisis-overwhelms-european-refugee-system/2015/04/21/3ab83470-e45c-11e4-ae0f-f8c46aa8c3a4_story.html?noredirect=on&utm_term=.75406ad30907) [<https://perma.cc/4J3V-GMGN>].

<sup>5</sup> CÉLINE BAULOZ, MELTEM INELI-CIGER, & SARAH SINGER, SEEKING ASYLUM IN THE EUROPEAN UNION: SELECTED PROTECTION ISSUES RAISED BY THE SECOND PHASE OF THE COMMON EUROPEAN ASYLUM SYSTEM 34 (2015).

<sup>6</sup> Lillian M. Langford, *The Other Euro Crisis: Rights Violations under the Common European Asylum System and the Unraveling of EU Solidarity*, 26 HARV. HUM. RTS. J. 217, 229–30 (2013).

<sup>7</sup> *K. v. Staatssecretaris van Veiligheid en Justitie*, Case C-18/16, [2017] E.C.J.1 (CELEX No. 616CJ0018) [hereinafter K Case].

ruled in the alternative.

## II. K. v. Staatssecretaris van Veiligheid en Justitie

### A. General Overview

*K. v. Staatssecretaris van Veiligheid en Justitie* arises from a detention action brought in a District Court of the Hague, Netherlands.<sup>8</sup> Mr. K and the Staatssecretaris van Veiligheid en Justitie (State Secretary for Security and Justice, Netherlands) referred the case to the Court of Justice of the European Union to determine whether Mr. K's detention under Directive 2013/33/EU was valid under Article 6 of the Charter of Fundamental Rights.<sup>9</sup> The European Court of Justice has jurisdiction over the issue, as it is a question of interpreting EU law and the potential annulment of a EU legal act.<sup>10</sup>

In late November 2015, Mr. K boarded a plane in Vienna, Austria, bound for Amsterdam, Netherlands.<sup>11</sup> However, Amsterdam was merely a connection point for Mr. K.<sup>12</sup> His eventual destination was Edinburgh, United Kingdom.<sup>13</sup> During boarding procedures for the Edinburgh flight, Mr. K was suspected of using a fake passport, then subsequently detained and charged in a Dutch criminal court.<sup>14</sup>

It was determined that Mr. K was not a Dutch citizen, nor was he a citizen of any European Union member state.<sup>15</sup> After the criminal action was dismissed and Mr. K released, he applied for asylum in the Netherlands.<sup>16</sup> The Dutch authorities then detained K once again, stating they needed to determine his actual identity and

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<sup>8</sup> *See id.*

<sup>9</sup> *Id.* ¶ 1–2, 23; *See* Council Directive 2013/33, 2013 O.J. (L 180) 96 (EU) [hereinafter Directive 2013/33/EU]; Charter of Fundamental Rights of the European Union, art. 6, Oct. 26, 2012 (C 326/391) [hereinafter Charter].

<sup>10</sup> *What does the CJEU do?*, European Union (last visited Nov. 17, 2017), [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en) [https://perma.cc/EPY4-A7A9].

<sup>11</sup> K Case, *supra* note 7, ¶ 17.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* ¶ 18–19.

<sup>15</sup> *See id.* ¶ 17.

<sup>16</sup> *Id.* ¶ 20.

that K was a flight risk.<sup>17</sup> Consequently, Mr. K challenged his detention, arguing it violated Article 6 of the Charter of Fundamental Rights.<sup>18</sup>

*B. Common European Asylum System*

It is necessary to explain the European Union asylum process, as this case hinges on the interpretation of its purpose and application.<sup>19</sup> In 1999, at a meeting in Tampere, Finland, the European Council decided to create a broad-sweeping uniform scheme on asylum in its member states.<sup>20</sup> The objective was to “reconcil[e] the universal interests of asylum seekers as stated in EU policy documents with the particular interest of the EU or its Member States.”<sup>21</sup>

To this end, the prevailing principle was to ensure “nobody is sent back to persecution,” otherwise known as the principle of non-refoulement.<sup>22</sup> The system was meant to provide clear determinations for which Member State was responsible for the application, the common procedures that would be followed, minimum conditions of retainer, and rules on refugee status.<sup>23</sup>

In addition, the Council took a stance that “third-party nationals,” like Mr. K, must be granted fair treatment, especially in the face of racism and xenophobia.<sup>24</sup> To this end, the Council called for “[a] more vigorous integration policy . . . granting [third-party nationals] rights and obligations comparable to those of EU citizens.”<sup>25</sup> For Member States, the Council instructed that any decisions made must factor in each State’s capacity for asylum seekers and the relationship of that State to the applicant’s country of origin.<sup>26</sup>

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<sup>17</sup> K Case, *supra* note 7, ¶ 20.

<sup>18</sup> *Id.* ¶ 23.

<sup>19</sup> *See id.* ¶ 32.

<sup>20</sup> Presidency Conclusions, Tampere European Council (Oct. 15-16, 1999) [hereinafter Presidency Conclusions] [<https://perma.cc/DH32-98AX>]; *see* BAULOZ, *supra* note 5, at 35.

<sup>21</sup> BAULOZ, *supra* note 5, at 35.

<sup>22</sup> Presidency Conclusions, *supra* note 20.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

However, in the past 18 years, CEAS has never truly come to fruition.<sup>27</sup> Instead, a series of directives and regulations have established the general framework that governs asylum applicant rights.<sup>28</sup>

### III. European Asylum Law

#### *A. European Convention for the Protection of Human Rights and Fundamental Freedoms*

The European Convention for the Protection of Human Rights and Fundamental Freedoms, or the European Convention on Human Rights (“ECHR” or “the Convention”), is the overarching agreement in the European Union for the protection of human rights, including the rights of asylum seekers.<sup>29</sup> All Member States of the EU are required to accede to the Convention, and the EU itself, as an entity, was required to become a party under the 2009 Treaty of Lisbon.<sup>30</sup> In addition to enumerating the rights and freedoms under the EU, the Convention also establishes the European Court of Human Rights.<sup>31</sup> Under Article 34 of the ECHR, access to the Court of Human Rights extends to “any person . . . claiming to be the victim of a [human rights] violation by one of the High Contracting Parties of the rights set forth in the Convention.”<sup>32</sup> Furthermore, any ruling by the Court of Human Rights will be binding on the parties, thus ensuring these rights are properly respected.<sup>33</sup>

Of those rights, perhaps one of the most important is the Right to Liberty and Security, as enumerated in Article 5.<sup>34</sup> Under this Article, every *person* not only has a right to be informed of the

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<sup>27</sup> See Ulrich Becker & Julia Hagn, *Reform of the European Asylum System: Why Common Social Standards are Imperative*, 14 J. FOR INSTITUTIONAL COMPARISONS, at 21–26 (2016).

<sup>28</sup> *Id.*

<sup>29</sup> Thus, the name. See Langford, *supra* note 6, at 227.

<sup>30</sup> *Id.* at 227.

<sup>31</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, § II, June 1, 2010, C.E.T.S. 194 [hereinafter ECHR]; see Langford, *supra* note 6, at 22.

<sup>32</sup> ECHR, *supra* note 31, § II, art. 34.

<sup>33</sup> *Court in Brief*, EUR. CT. FOR HUM. RTS., [www.echr.coe.int/Pages/home.aspx?p=court&c=](http://www.echr.coe.int/Pages/home.aspx?p=court&c=) (last visited Nov. 17, 2017) [<https://perma.cc/CYW2-8NH4>].

<sup>34</sup> ECHR, *supra* note 31, § I, art. 5.

reasons for his or her detention, but also has the right to be free from any detention.<sup>35</sup> However, there are six exceptions to this right.<sup>36</sup> These exceptions are for lawful detentions: (1) after conviction, (2) for non-compliance with a court order, (3) to be brought before a court on reasonable suspicion, (4) of a minor for educational supervision, (5) for quarantine, and (6) those in deportation or extradition actions.<sup>37</sup> Thus, it is only when exercising proper law enforcement functions that a Member State may detain one of its own citizens, a citizen of another Member State, or a third-party national.<sup>38</sup>

### *B. Charter of Fundamental Rights of the European Union*

A year after the ECHR, the Charter of Fundamental Rights of the European Union (“the Charter”) was announced in Nice, France.<sup>39</sup> However, the Charter lacked binding legal authority at the time.<sup>40</sup> This changed in 2009 at the Treaty of Lisbon, when the Charter was changed to become the binding embodiment of the ECHR.<sup>41</sup> It is now part of EU primary-law and is enforceable in every court and at all levels of the judicial system in the EU.<sup>42</sup>

The Charter is split into seven chapters: Dignity, Freedoms, Equality, Solidarity, Citizens’ Rights, Justice, and General Provisions.<sup>43</sup> Notably, the Charter explicitly provides the right to asylum and the right to liberty for all, including non-European Union citizens and persons.<sup>44</sup> Within the Freedoms Chapter, Article 18 provides, “[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 . . . and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.”<sup>45</sup> Whereas,

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<sup>35</sup> *Id.* § I, art. 5.

<sup>36</sup> *Id.* § I, art. 5.

<sup>37</sup> *Id.* § I, art. 5. (1)(a)-(f).

<sup>38</sup> *See id.* § I, art. 5.

<sup>39</sup> Sionaidh Douglas-Scott, *The European Union and Human Rights after the Treaty of Lisbon*, 11 HUM. RTS. L. REV. 645, 645–82 (2011).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Langford, *supra* note 6, at 229.

<sup>43</sup> *See* Charter, *supra* note 9, O.J. (L 180) 96.

<sup>44</sup> *See id.* at art. 5, 18; *see* Langford, *supra* note 6, at 230.

<sup>45</sup> Charter, *supra* note 9, O.J. (L 180) 96, at art. 18.

Article 6 provides “[e]veryone has the right to liberty and security of person.”<sup>46</sup>

Article 52 of the Charter defines the scope of these rights.<sup>47</sup> Article 52(1) provides:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.<sup>48</sup>

Thus, each Member State, and the EU as an entity, must acknowledge the rights within the Charter and only limit them in a direct, legislative manner. Additionally, Article 52(3) explicitly encompasses the ECHR:

Insofar as this Charter contains rights which correspond to rights Guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.<sup>49</sup>

Given these three Articles, Articles 18, 6, and 52, European law creates very broad rights for those that seek asylum within the Union’s borders.<sup>50</sup> Seekers have an express right to liberty, and that right cannot be limited unless made by a very narrowly tailored law.<sup>51</sup> Furthermore, the EU has enacted certain directives and regulations to provide guidance for Member States and asylum seekers at each step of the way, as discussed below.<sup>52</sup>

### *C. The Four Pillars of Asylum*<sup>53</sup>

EU asylum law—the Charter and the ECHR—sits on four

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<sup>46</sup> *Id.*, at art. 6 (emphasis added).

<sup>47</sup> *See id.* at art. 52.

<sup>48</sup> *Id.* at art. 52(1).

<sup>49</sup> *Id.* at art. 52(3).

<sup>50</sup> *See id.* at arts. 6, 18, 52.

<sup>51</sup> *See* Charter, *supra* note 9, O.J. (L 180) 96, at art. 6, 18, 52.

<sup>52</sup> *See* Becker, *supra* note 27, at 21.

<sup>53</sup> *See id.*

pillars, which have been modified and reformed over the years.<sup>54</sup> These four pillars are the Qualification Directive, Asylum Protections Directive, Reception Directive, and the Dublin III Regulation.<sup>55</sup>

### *1. Qualification Directive*

The Qualification Directive, Directive 2011/95/EU, was enacted in 2011.<sup>56</sup> Its objectives were “to establish standards for the granting of international protection to third-country nationals and stateless person[s], for a uniform status for refugees . . . and for the content of the protection granted.”<sup>57</sup> Consisting of 42 articles, Directive 2011/95/EU notably enumerates the assessment criteria for asylum applications.<sup>58</sup> Article 4 states:

(1) [It is] the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection . . .

(2) The elements . . . consist of the applicant’s statements and all the documentation at the applicant’s disposal regarding the applicant’s age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.<sup>59</sup>

Thus, Directive 2011/95/EU gives Member States a broad outline of what is required in each asylum application. Additionally, it places the onus on the applicant to provide this information to the Member State, ensuring a cooperative process. This is only the first step.<sup>60</sup>

### *2. Asylum Procedures Directive*

The Asylum Procedures Directive, Directive 2013/32/EU,

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<sup>54</sup> *See id.*

<sup>55</sup> *See id.* at 21–22.

<sup>56</sup> *See id.*

<sup>57</sup> Directive 2011/95/EU of The European Parliament and of The Council, 2011 O.J. (L 337) 9, ¶ 49 (EU) [hereinafter Directive 2011/95/EU].

<sup>58</sup> *Id.* at art. 4.

<sup>59</sup> *Id.*

<sup>60</sup> *See* Becker, *supra* note 27, at 22.

enumerates the process for granting or removing asylum.<sup>61</sup> Notably, it gives explicit definitions for “applicant,” “refugee,” and “remain in member state.”<sup>62</sup> Furthermore, in Article 9, the Directive explicitly grants: “[a]pplicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision.”<sup>63</sup> Thus, an applicant knows they at least have temporary protection within the Member State. Member States also know their duty to the applicant while they determine the final decision on the asylum application.<sup>64</sup> Again, this emphasizes a cooperative process actively involving the applicant in each step along the way.<sup>65</sup>

### 3. Reception Directive

The Reception Directive, Directive 2013/33/EU, provides the exact standards for the reception of asylum applicants.<sup>66</sup> It allows for the detention of applicants, but only for a set of specified reasons.<sup>67</sup> Principally, an applicant cannot be held simply because he or she is an applicant.<sup>68</sup> A State can only detain an applicant when: (a) determining an applicant’s identity, (b) determining application elements that could not be obtained outside of detention, especially if there is a risk of flight, (c) determining an applicant’s right to enter the territory of the State, (d) in the event of extradition or intentional delay of the extradition process, (e) when national security requires it, or (f) as another Member State requires for their own application process.<sup>69</sup> Thus, the Member State knows the proper and adequate process it can use.<sup>70</sup> This both adequately protects the rights and interests of the applicant, while simultaneously insuring the State’s own interest in the proper processing of a valid application.<sup>71</sup>

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<sup>61</sup> *See id.* at 22.

<sup>62</sup> Directive 2013/32, EU, *supra* note 9, at art. 2.

<sup>63</sup> *Id.* at art. 9(1).

<sup>64</sup> *Id.* at art. 10.

<sup>65</sup> *Id.* at art. 13.

<sup>66</sup> *See* Becker, *supra* note 27, at 22.

<sup>67</sup> Directive 2013/33/EU, *supra* note 9, at art. 8(3).

<sup>68</sup> *Id.* at art. 8(1).

<sup>69</sup> *Id.* at art. 8(3)(a)-(f).

<sup>70</sup> *Id.* at art. 8(1)-(3).

<sup>71</sup> *Id.* at art. 8(1)-(3).

#### 4. *Dublin III Regulation*<sup>72</sup>

Regulation (EU) No 604/2013, otherwise known as the Dublin III Regulation, establishes which Member State is responsible for processing an asylum application.<sup>73</sup> The regulation both requires the Member State to review any application made in their territory—including the border or transit areas—and also to inform the applicant of the criteria and provide a personal interview.<sup>74</sup>

From these four pillars, the Qualification Directive, the Asylum Procedures Directive, the Reception Directive, and the Dublin III Regulation, EU law clearly establishes a well detailed process for asylum applications.<sup>75</sup> Member States are informed of their duties and the proper ways of processing the applications.<sup>76</sup> Applicants are informed of the necessary steps and information.<sup>77</sup> While each Member State may have some slight variance on the exact steps and required information, the generalities are clearly enumerated.<sup>78</sup> This gives courts a solid foundation to build upon when determining the proper outcome when an issue like Mr. K's arises.<sup>79</sup>

#### IV. Striking the Balance

In the case at hand, *K. v. Staatssecretaris van Veiligheid en Justitie*, Mr. K challenged the legality of Directive 2013/33/EU Article 8(3) in the light of the Charter's Article 6.<sup>80</sup> Simply put, Mr. K is challenging the Reception Directive's detention provision, especially when no extradition proceedings are underway.<sup>81</sup> He argued that Article 6 of the Charter— “[e]veryone has the right to

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<sup>72</sup> The Dublin Regulation is contentious and thoroughly written about. However, as it has no bearing on the case at hand, I will not be elaborating on it. For further information on the Dublin Regulation, see SAMANTHA VELLUTI, REFORMING THE COMMON EUROPEAN ASYLUM SYSTEM — LEGISLATIVE DEVELOPMENTS AND JUDICIAL ACTIVISM OF THE EUROPEAN COURTS (2013); Langford, *supra* note 6, at 264.

<sup>73</sup> See Becker, *supra* note 27, at 22.

<sup>74</sup> Commission Regulation 604/2013, 2013 O.J. (L 180) 31, arts. 3–4 [hereinafter Regulation 604/2013/EU].

<sup>75</sup> See Becker, *supra* note 27, at 21–22.

<sup>76</sup> See Regulation 604/2013/EU, *supra* note 74, at art. 3.

<sup>77</sup> See *id.* at art. 4.

<sup>78</sup> See *id.* at art. 3–4.

<sup>79</sup> See *id.* at art. 3–4.

<sup>80</sup> K, *supra* note 7, ¶ 23.

<sup>81</sup> *Id.* ¶ 33.

liberty and security of person”<sup>82</sup> —prohibits his detention in the Netherlands. The Court of Justice held Article 8(3) fits within the Charter, as it only allows detention in scenarios where the State interest rests in the requirements of processing the application.<sup>83</sup> The court explicitly states, “[the] EU legislature struck a fair balance between . . . the applicant’s right to liberty and . . . the requirements relating to the identification of that applicant or of his nationality, or to the determination of the elements on which his application is based.”<sup>84</sup>

#### *A. Applicant vs. State Interests*

At its core, the case is determined by a balancing of interests. Indeed, the Court of Justice explicitly recognizes “limitations on the exercise of the right [to liberty enshrined in Article 6 of the Charter] must apply only in so far as is strictly necessary.”<sup>85</sup> Here, the Court of Justice has imposed a limitation on an asylum seeker’s exercise of the right to liberty, while striking a balance between the liberty interest and the State’s interest in ensuring proper application procedure.<sup>86</sup>

The most obvious liberty interest is Mr. K’s interest to be free from detention. The court notes there is precedent for this.<sup>87</sup> In *Nabil and Others v. Hungary*, the European Court of Human Rights held that “any deprivation of liberty [under the second limb of Article 5(1)(f) of the ECHR] will be justified only for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5(1)(f) [of the ECHR].”<sup>88</sup> As noted above, this article of the European Convention on Human Rights is encompassed in the Charter of Fundamental Rights.<sup>89</sup> However, the noted difference is that while Article 5 of the Convention creates the *specifics* of the right to liberty and security,

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<sup>82</sup> Charter, *supra* note 9, at art. 6.

<sup>83</sup> See K Case, *supra* note 7, ¶ 49.

<sup>84</sup> See *id.* ¶ 49.

<sup>85</sup> See *id.* ¶ 40.

<sup>86</sup> See *id.*

<sup>87</sup> See *id.* ¶ 27.

<sup>88</sup> See K Case, *supra* note 7, ¶ 27; *Nabil and Others v. Hungary*, 29 Eur. Ct. H.R. (2015).

<sup>89</sup> See Douglas-Scott, *supra* note 39.

including in extradition or deportation scenarios,<sup>90</sup> Article 6 of the Charter merely states, “everyone has the right to liberty and security of person.”<sup>91</sup>

However, Article 52 of the Charter, provides that all rights in the ECHR are within the scope of the Charter’s enumerated rights.<sup>92</sup> Yet, the Court of Justice rejects expanding the Charter to include 5(1)(f), stating “The fundamental right to liberty guaranteed in Article 6 of the Charter has the same meaning as in Article 5 of the ECHR, although the latter does not form part of the EU *acquis*” and “[t]he ‘ . . . limitations which may legitimately be imposed on the exercise of the rights laid down in Article 6 of the Charter may not exceed those permitted by the ECHR.”<sup>93</sup> In doing so, they decline to follow *Nabil*, and instead venture on their own balancing test of the involved interests.<sup>94</sup>

For their analysis, the Court of Justice adheres to the view that a person’s right to liberty should rarely be infringed upon.<sup>95</sup> Accordingly, one may think the Court would hold that K’s detention, absent a legal proceeding against him, would be a violation of the Charter. However, while admitting there were no extradition proceedings against K, the Court of Justice found the Member State’s interest to be compelling enough to hold the detention was lawful.<sup>96</sup>

To find such, the Court looked to the principle of proportionality.<sup>97</sup> This principle requires that State measures do not “exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued.”<sup>98</sup> Applying this principle to Directive 2013/33/EU Article 8(3), the Court of Justice held the

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<sup>90</sup> ECHR, *supra* note 31, at §1, art. 5(f).

<sup>91</sup> Charter, *supra* note 9, at art. 6.

<sup>92</sup> *See id.* at art. 52.

<sup>93</sup> *See K Case, supra* note 7, ¶ 49.

<sup>94</sup> *See id.* ¶ 49–81.

<sup>95</sup> *See id.* ¶ 57.

<sup>96</sup> *See id.* ¶ 64, 91.

<sup>97</sup> *See id.* ¶ 57.

<sup>98</sup> *Id.* ¶ 57. A close American companion to this principle would perhaps be the Supreme Court’s doctrine of strict scrutiny. Note the goal must be legitimate, and the means must not exceed what is necessary to accomplish that goal, thus a narrow approach. *See Strict Scrutiny*, BLACK’S LAW DICTIONARY (10th ed. 2014).

legitimate State objective was the proper functioning of the CEAS.<sup>99</sup> The measure to achieve this objective—the detention—is grave, however Article 9(1) of the Directive limits the adverse effects on Mr. K.<sup>100</sup> The Article states “[a]n applicant shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds set out in Article 8(3) are applicable.”<sup>101</sup> Thus, Mr. K could only be held by the Netherlands for as long as it took ensure its asylum process was proceeding properly.<sup>102</sup> Once it was determined that Mr. K was who he said he was, he would have to be released or extradited.<sup>103</sup>

Here, where Mr. K was held only as long as necessary to ascertain his identity for the asylum process, the State’s detention powers have been properly checked.<sup>104</sup> While his right to liberty has been severely diminished, it was both for a legitimate reason—the asylum he requested—and for a limited time—the time needed to ascertain his true identity, rather than the fake one he provided at the airport. Thus, the Court of Justice struck the proper balance between the two interests.<sup>105</sup> It is true that Mr. K could be held longer, but not without good cause (such as a lawful detention for extradition). Furthermore, the Netherlands has been checked, but without being limited in function. Mr. K may be unhappy, but it appears that justice was properly administrated.

### *B. Likely Consequences*

While the Court of Justice struck a reasonable balance between the two conflicting interests, there are still some potential far-reaching consequences.<sup>106</sup> The most notable consequence is the disregard of the ECHR’s specifics and Article 52 of the Charter.<sup>107</sup>

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<sup>99</sup> See K, *supra* note 7, ¶ 54–59.

<sup>100</sup> See *id.* ¶ 57.

<sup>101</sup> Directive 2013/33/EU, *supra* note 9, at art. 9(1).

<sup>102</sup> See *id.* at art. 9(1).

<sup>103</sup> See K Case, *supra* note 7, ¶ 73.

<sup>104</sup> See *id.* ¶ 72–73.

<sup>105</sup> See *id.* ¶ 87.

<sup>106</sup> See Bernard Andonian, *The difficulty of refusing protection to an EU national*, Gulbenkin Andonian (Apr. 8, 2018), <https://www.gulbenkian.co.uk/the-difficulty-of-refusing-protection-to-an-eu-national/> [<https://perma.cc/BL4J-75SN>].

<sup>107</sup> See *Rights of Residence*, The UK Law Societies’ Joint Brussels Office, (May 31, 2018), <http://www.lawsocieties.eu/news/may-case-law-digest/5065128.fullarticle>. [<https://perma.cc/3K7H-JL5U>].

Article 52(3) explicitly states,

Insofar as this Charter contains rights which *correspond* to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, *the meaning and scope of those rights shall be the same* as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection. (emphasis added)<sup>108</sup>

This creates two issues. First, this sets a precedent of ignoring the ECHR. While the Court of Justice is correct in noting the ECHR is not a legally binding document for the EU,<sup>109</sup> it still provides the basic framework for the protections of human rights in the European Union. The ECHR is essentially a “Bill of Rights” for the EU.<sup>110</sup> To disregard the protections mentioned within—particularly those related to extradition and deportation—is to disregard basic rights that are demanded for citizens and third-party nationals. There is a potential for hypocrisy, with the courts saying the rights must be protected, and simultaneously ignoring the enumerated specifics of those rights.

In this case, where there were no extradition proceedings in the works,<sup>111</sup> the protections of ECHR’s Article 5, as encompassed in the Charter’s Article 6, would grant Mr. K a solid, valid claim. Why should he be detained if the detention is not for one of the specified purposes? Based on European asylum law, he should not.<sup>112</sup>

Admittedly, Mr. K. is in this predicament because of his own actions (fake passport and applying for asylum),<sup>113</sup> but the denial of his right to liberty sets a dangerous precedent for other asylum seekers. This precedent could even be viewed as catastrophic as Europe struggles to answer its refugee crisis, particularly in less forgiving nations, or those where public opinion has swung against immigrants.<sup>114</sup> Asylum seekers could potentially be detained for a “limited time as necessary,” but with no guarantees that said limited time is indeed *limited*. Nor is there a guarantee that those seeking asylum will regain their freedom in a territory in which they wish to

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<sup>108</sup> Charter, *supra* note 9, at art. 43, ¶ 3.

<sup>109</sup> K Case, *supra* note 7, ¶ 32.

<sup>110</sup> Douglas-Scott, *supra* note 37, at 655.

<sup>111</sup> K Case, *supra* note 7, ¶ 27.

<sup>112</sup> See ECHR, *supra* note 31, at § I, art. 5.

<sup>113</sup> K Case, *supra* note 7, ¶ 18-19.

<sup>114</sup> See Becker, *supra* note 27, at 21.

reside, travel, or be protected. Even worse, the “applicable grounds” could change. This is not to suggest the Member States of the European Union are a set of dystopic police states, focused on indefinitely detaining third-party nationals.<sup>115</sup> Yet, if the original grounds were for asylum verification, then changed to extradition purposes, and then changed to a criminal context, the one who was originally seeking protection could very well be detained for an unreasonable time period.<sup>116</sup>

On the other hand, the Member State does have the legitimate objective of ensuring those they grant asylum to are who they say they are.<sup>117</sup> This not only protects their citizens, but also ensures proper assessment of the application. Thus, the State is juggling the dual interests of their citizens’ protection and the speedy conclusion of the asylum process.<sup>118</sup> Without detention, these interests may never be truly satisfied. Detention grants the State a kind of insurance against any potential “dangerous activity”<sup>119</sup> of the asylum seeker, and the knowledge of the seeker’s location, allowing for quick verification of information during the asylum process.<sup>120</sup>

The second issue with disregarding the ECHR and Article 52 of the Charter arises from the last sentence of Article 52. This sentence grants Member States the ability to increase the level of protection for asylum seekers.<sup>121</sup> Thus, the Netherlands could always enact laws to give Mr. K further protections while applying for asylum. Perhaps, give him further legal rights or changes in the level of detention.

However, with the Court of Justice’s ruling, there is no incentive to even codify the ECHR’s provisions at the national level.<sup>122</sup> If Member States are aware that courts will not look to the ECHR or Article 52 of the Charter when making determinations on the scope

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<sup>115</sup> Besides the mild irony of an American writing in the current tense atmosphere involving police actions (or lack thereof) in the US, it obviously would be impractical to detain that many people indefinitely.

<sup>116</sup> See Directive 2013/33/EU, *supra* note 9, at art. 9(1).

<sup>117</sup> I believe Americans would call this a “national security concern.”

<sup>118</sup> See Becker, *supra* note 27, at 21.

<sup>119</sup> If unclear, the author is being intentionally skeptical.

<sup>120</sup> See Emily Papp, Comment, *Just Take My Word For It: Creating a Workable Test to Ensure Reliability in Overseas Document Verification Reports for Asylum Proceedings*, 101 IOWA L. REV. 2144, (2016).

<sup>121</sup> See Charter, *supra* note 9, at art. 52(7).

<sup>122</sup> See *id.*

of these rights, but will rather attempt to interpret or expand other Charter articles, it follows that they would push litigation to create a scope that favors state interests.<sup>123</sup> Yet, as structured as the EU is, this piecemeal litigation may prove to only muddle the rights.

## V. Conclusion

In conclusion, *K. v. Staatssecretaris van Veiligheid en Justitie* creates a reasonable balancing of liberty and State interests, but may have adverse consequences on the clarity of rights in the EU. The balancing of Mr. K's right to liberty with the necessity of properly assessing his application for asylum is objectively reasonable. Not only does the Court of Justice afford great deference to the right, it also ensures Member State power is checked. It realizes how important the right is, and makes sure the detention is both based in good cause and has a temporal limit.

However, by disregarding the scope of the right based on the European Convention for the Protection of Human Rights, the Court of Justice has opened a door that may allow the enumerated rights to be curtailed. It may become necessary for the Court of Justice to reaffirm that the Charter on Fundamental Rights encompasses the entire ECHR.

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<sup>123</sup> *See id.*