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### **Detention of foreigners refused entry to the country**

At a meeting of Police and Border Guard Board (PBGB) officials, representatives of Tallinn Airport and the Chancellor's advisers (5 October 2021), an issue arose about the legal status of foreigners in the Tallinn Airport transit zone to whom the Estonian authorities have refused entry (a refusal of entry has been issued in respect of them). Another issue was how to organise the detention of these people, i.e. where they should stay while detained and in what cases it is necessary to take them to the detention centre.

The matter concerns third-country nationals at Tallinn Airport who have been refused entry to Estonia because they do not fulfil the necessary requirements for crossing the external Schengen border, and who have therefore been issued a refusal of entry laid down by Article 14 of the [Schengen Borders Code](#). Under Estonian laws and in line with the opinions of the EU Court of Justice and the European Court of Human Rights and several international organisations, these people are considered detainees. The PBGB must organise a person's detention so that it is the least burdensome for that person in view of the period and situation of their stay at the airport, as well as considering when that person can leave Estonia.

Placing a detained foreigner in the detention centre might not always be justified. If a person can leave Estonia on the date of their detention but more than six hours after being detained, they may be placed in the detention centre only if this is unavoidably necessary in view of the person's situation or if this is necessary for protecting public order and other people. Depending on the individual situation of a detained foreigner, a period of stay in the transit zone over 24 hours or overnight may also be acceptable: for instance, if the person themselves is able to pay for a hotel room within the closed airport area.

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## Legal status of a foreigner who has been refused entry

Foreigners staying in the non-Schengen area at Tallinn Airport who have not been granted entry and in respect of whom a refusal of entry has been issued are deemed to be detainees. They cannot leave the airport at will while waiting for their return flight. Therefore, safeguards concerning detention must be applied in respect of these foreigners. This concerns applying for court authorisation for detention if a person cannot leave Estonia within 48 hours (see § 28<sup>2</sup>(6) Obligation to Leave and Prohibition on Entry Act), as well as organisation of detention.

The Chancellor has previously explained the legal status of foreigners refused entry and waiting for a return flight at Tallinn Airport in the [summary of the inspection visit](#) to Tallinn Airport in 2020. This issue has been recently further refined in Estonian legislation as well as the case-law of the EU Court of Justice and the European Court of Human Rights.

Estonian legislation lays down unequivocally that people in the transit zone who have been refused entry to the country shall be detained. Section § 9<sup>1</sup>(1) of the [State Borders Act](#) lays down that persons who have not been permitted to cross the border and persons who have illegally crossed the external border shall be detained. Section 28<sup>2</sup>(5) of the [Obligation to Leave and Prohibition on Entry Act](#) states that, in order to comply with a decision on prohibition of entry, the PBGB shall detain a foreigner pursuant to the procedure provided for in §§ 19–19<sup>2</sup> of the Act. Under § 28<sup>2</sup>(6) of the Act, if enforcement of a decision on prohibition of entry is not possible within 48 hours, the PBGB shall apply to the administrative court for authorisation to place a foreigner in the detention centre and detain them for up to two months.

The EU Court of Justice has found that people held in a transit zone have been detained. The Court established in joined cases [C-924/19 PPU](#) and [C-925/19 PPU](#) that Directive [2008/115/EC](#), as well as Directive [2013/33/EU](#) of the European Parliament and of the Council laying down standards for the reception of applicants for international protection, must be interpreted as meaning that the obligation imposed on a third-country national to remain permanently in a transit zone the perimeter of which is restricted and closed (within which that national's movements are limited and monitored, and which he or she cannot legally leave voluntarily, in any direction whatsoever) appears to be a deprivation of liberty, characterised by 'detention' within the meaning of those directives (see the [operative part of the judgment](#)).

As noted in the Chancellor's [summary of the inspection visit](#) in 2020, the European Court of Human Rights has also found that people in the airport transit zone who have been refused entry to the country are within the jurisdiction of a particular country (ECtHR (Grand Chamber) judgment of 21 November 2019, *Z.A. and Others v. Russia* [61411/15](#), [61420/15](#), [61427/15](#) and [3028/16](#), paras 131–132). In a later judgment the Court partially reviewed its earlier case-law and found that [European Convention on Human Rights and Fundamental Freedoms](#) Article 5 also applies to people in other transit zones (ECtHR judgment of 2 March 2021, *R.R. and Others v. Hungary*, [36037/17](#), paras 74–84).

Other international institutions have also drawn attention to the fact that people staying in a transit zone who have been refused entry to the country are considered detained persons. For instance, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or

Punishment (CPT) has found in its consistent practice in checking airports that foreigners forced to stay in an airport transit zone are detained persons.<sup>1</sup> The same opinion has been expressed by the EU Agency for Fundamental Rights (FRA)<sup>2</sup> which has emphasised that the minimum rights set out under Article 4(4) of the EU Return Directive ([2008/115/EC](#)) also apply to persons refused entry. Guidelines issued by the United Nations High Commissioner for Refugees (UNHCR) in [1999](#) and [2014](#) also state that foreigners forced to stay in an airport transit zone are *de facto* detainees.

### Organisation of detention

States have used different solutions in resolving detention of foreigners refused entry at the border and waiting for a return flight. In some countries, these foreigners may stay in the ordinary passenger waiting area or in a separate waiting area within the transit zone intended for foreigners who have been refused entry. Other countries have set up special detention facilities or accommodation centres (in the transit zone or within airport territory), but also accommodation centres included in the transit zone in the immediate vicinity of the airport.<sup>3</sup>

The CPT has emphasised that legislation must lay down a maximum period for how long people may be held in the transit zone (CPT's 2020 [recommendations](#) to Turkey, para. 76). According to the CPT [opinion](#), as a rule, a foreigner should also not be detained for more than 24 hours in a place which does not ensure proper sleeping conditions, sufficient natural light, access to at least one hour of outdoor exercise a day, and access to toilet and washing facilities, access to their mobile phone, luggage, and the like.<sup>4</sup>

Under § 28<sup>2</sup>(1) of the Obligation to Leave and Prohibition on Entry Act, a refusal of entry must be drawn up in the form of a decision. This requirement also applies if a person returns within a relatively short period after being detained. Otherwise, it is impossible to get an overview of and check how many people have been detained.

Section 28<sup>2</sup>(5) and (6) of the Obligation to Leave and Prohibition on Entry Act in combination with §§ 19–19<sup>2</sup> of the Act allow a foreigner to be detained for up to 48 hours in official police premises, a police detention centre or the detention centre. Thus, the Obligation to Leave and Prohibition on Entry Act does not stipulate that a foreigner should be detained for up to 48 hours only in the detention centre.

The PBGB operational guidelines for places of detention stipulate that a foreigner may stay in a transit zone, which is a temporary place of detention,<sup>5</sup> for a maximum of six hours (para. 55). A foreigner who is held in a transit zone for longer than six hours shall be transferred to the detention centre and shall be brought back to the airport from there if their return flight takes place later than

<sup>1</sup> See e.g. CPT's 2020 [recommendations](#) to France, CPT's 2020 [recommendation](#) to Turkey, CPT's 2018 [recommendations](#) to Italy, etc.

<sup>2</sup> See FRA 2011 [report](#) "Detention of third-country nationals in return procedures", FRA [2020 Handbook](#).

<sup>3</sup> See e.g. FRA, [Fundamental rights at airports: border checks at five international airports in the European Union](#), 2014; The Global Detention Project, [Harm Reduction in Immigration Detention: A Comparative Study of Detention Centres in France, Germany, Sweden, and Switzerland](#), 2018.

<sup>4</sup> See e.g. CPT, [Factsheet. Immigration detention](#), CPT/Inf(2017)3.

<sup>5</sup> According to para. 2.4. of the PBGB operational guidelines for places of detention, a temporary place of detention means a room chosen for detention either in the PBGB or other buildings.

six hours from the moment of their detention. If a decision on refusal of entry cannot be enforced within 48 hours, the PBGB shall apply to the administrative court for an authorisation to place the person in the detention centre and detain them there for up to two months (§ 28<sup>2</sup>(6) Obligation to Leave and Prohibition on Entry Act).

It is not clear why exactly six hours has been set as the temporal limit for stay in the transit zone by a foreigner refused entry. The PBGB operational guidelines are contradictory since elsewhere in the text it is noted that a person may also be detained for more than eight hours in a temporary place of detention (i.e. including in the transit zone) (para. 65). It may be that the six-hour limit relates to the duty to provide meals for a detained person. However, the need to provide meals may occur even before the expiry of six hours, for instance if a person needs to eat more frequently because of health reasons. A person's need for a first meal must be ascertained and assessed by PBGB officials.

The six-hour limit imposed by the PBGB operational guidelines may be too rigid. For instance, according to the principles under [Resolution No 1707](#) of 28 January 2010 of the Council of Europe Parliamentary Assembly, placement of foreigners in a closed institution must be an exceptional measure used only where no effective alternative solution exists (para. 9.1.1). Placement in the detention centre after such a short period also fails to take into account a person's individual situation and might not be proportionate to the objective to be achieved (para. 9.1.7).

Consideration and use of solutions other than detention in respect of foreigners (so-called *non-custodial measures*) is also deemed important by the International Organisation for Migration (IOM),<sup>6</sup> the Steering Committee for Human Rights (CDDH) of the Committee of Ministers of the Council of Europe,<sup>7</sup> the UN High Commissioner for Human Rights,<sup>8</sup> as well as the CPT<sup>9</sup>. Seeking and using solutions which are less restrictive of foreigners' rights and freedoms has also been emphasised in Article 8(2) of the Reception Conditions Directive ([2013/33/EU](#)), Article 28(2) of the Dublin Regulation ([604/2013](#)), and Article 15(1) of the Return Directive ([2008/115/EC](#)).

These principles also indicate that, if alternatives between different places of stay exist in a situation where a foreigner is detained, preference should be given to a place where a person's freedom and rights would be least restricted in view of the circumstances.

As a rule, a foreigner refused entry at the border should be able to wait for their return flight in the ordinary passenger area in the transit zone. A person should not necessarily be placed in the PBGB holding cells in Tallinn Airport unless this is required due to the person's behaviour or for other compelling reasons. Nor might it always be justified to place a detained foreigner in the detention centre.

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<sup>6</sup> See e.g. IOM, [Information on International Standards on Immigration and Detention and Non-Custodial Measures](#), 2016; IOM, [Advocating for Alternatives to Migration Detention – Tools series N°2](#), 2021.

<sup>7</sup> See e.g. CDDH, [Legal and practical aspects of effective alternatives to detention in the context of migration](#), 7 December 2017.

<sup>8</sup> UNCHR, [Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention](#), 2014.

<sup>9</sup> See e.g. CPT, [Factsheet. Immigration detention](#), CPT/Inf(2017)3.

Although a person has the status of a detainee both while in the transit zone and also when placed in the holding cell or the detention centre, the latter two situations certainly have a more custodial nature in comparison to a stay in the transit zone. This is so both in terms of how the person perceives the situation as well as in terms of their rights. For instance, in the transit zone a person may move around relatively freely and use personal means of communication (a mobile phone, laptop, and the like) – including to organise their return flight and be in contact with next of kin. If they wish (and have available financial resources), a foreigner can also visit a café and make purchases in a shop or from vending machines in the transit zone. In that case, the foreigner is in a relatively similar situation to an ordinary passenger since it is not uncommon that an ordinary passenger may also wait for a return flight or a connecting flight for more than six hours.

It should be noted that the current conditions in Tallinn Airport might not be suitable for detention at the airport for more than 24 hours or overnight (see the Chancellor's recommendations in the [summary of the inspection visit](#) to Tallinn Airport in 2020). However, depending on everyone's individual situation, a period of stay in the transit zone over 24 hours or overnight may also be acceptable: for instance, if the person themselves is able to pay for a hotel room within the closed airport area. However, it is not reasonable to place a person in the detention centre if their flight departs in more than six hours after their detention but still on the same day. In that case, placement in the detention centre may be justified only exceptionally: for instance, if this is required by a person's health condition which needs more careful monitoring or if this is necessary for protection of public order and other people, or the like.

Placement of a foreigner in the detention centre in any case after the expiry of six hours might also not be expedient in terms of using PBGB resources (e.g. transport, officials' working time spent on receiving the person in the detention centre and dealing with them). A foreigner who has been refused entry but does not violate public order or impede their departure from the country while staying in the transit zone may also perceive placement in the detention centre as disproportionate and unnecessary. This, in turn, may lead to unnecessary misunderstandings and dissatisfaction and escalate the situation, which again may result in the need to use physical force or restraint on the foreigner.

I ask the PBGB to consider whether the current practice can be made more flexible and bring the activities of the PBGB into line with the standards and principles of international organisations concerning detention of foreigners.

I expect feedback to my recommendations by 25 March 2022.

Ülle Madise