

Feilazoo v. Malta: Immigration detention in the context of the Covid-19 pandemic and beyond and the right of individual petition

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Introduction

On 11 March 2021, the First Section of the European Court of Human Rights (hereinafter the ‘Court’) delivered a highly anticipated judgment which concerned issues related to the Covid-19 pandemic. More precisely, in Feilazoo v. Malta, the Court was called upon to decide on the applicant’s immigration detention next to new arrivals in Covid-19 quarantine, as well as on the conditions and the lawfulness of his immigration detention and on issues related to the right of petition before the Court.

Although we can praise the Court for its balanced approach to the question of access to medical treatment, other aspects of its decision on the conditions of detention are disappointing. First, the Court did not seize the opportunity to develop clear and adequate standards in the context of the deprivation of liberty during the Covid-19 pandemic and thus clearly failed to live up to expectations that it would play an active role in safeguarding the rights of those most affected by the pandemic such as detainees and prisoners. Second, the Court failed to consider all available evidence which would enable it to hold the respondent State accountable for overcrowding in detention.

Principal facts

The applicant, Mr. Joseph Feilazoo, is a Nigerian national who lives in Malta. Upon serving his prison sentence for drug related offences, the applicant was informed that he could not return to Spain, as wished, as he no longer had a right to reside in Spain. He was informed that he would be sent back to Nigeria and that, until deportation, he would be kept in detention. He was declared a prohibited immigrant at risk of absconding.

It was later alleged that during that meeting, the applicant had become aggressive and had violently resisted detention, causing bodily harm to police officers. In response, the officers had used force and pepper spray, eventually managing to handcuff the applicant. Following medical examinations, it was confirmed that the applicant had suffered a number of injuries and abrasions and that, following the beating, the applicant’s already existing lower back pain became more severe. The officers had suffered only minor injuries.

On 5 February 2019, the applicant was found guilty of, *inter alia*, assaulting correctional officers and disobeying lawful orders. On 14 September 2019, the applicant was released from prison. However, he was immediately placed in immigration detention until his deportation could be executed. After spending around fourteen months in immigration detention, the applicant was released as his deportation became unlikely due to the Nigerian authorities' refusal to issue the applicant with travel documents and to cooperate with the Maltese authorities in order to facilitate the applicant's deportation.

Complaints

On 19 August 2019, the applicant lodged his application with the Court claiming multiple violations of the European Convention on Human Rights (hereinafter the 'ECHR'), some of which were declared inadmissible by the Court due to the non-exhaustion of domestic remedies.

Admissible complaints

Before the Court, the applicant claimed that his conditions of immigration detention amounted to a violation of Article 3 of the ECHR (the prohibition of inhuman and degrading treatment) and that some periods of his immigration detention had been unlawful and thus violated Article 5(1) of the ECHR (the right to liberty and security). The applicant further claimed that the respondent State had hindered his right of individual petition before the Court in violation of Article 34 of the ECHR, firstly, because it had interfered with his communication with the Court and, secondly, because of the ineffective legal aid representation granted to him for bringing his case to Strasbourg. All complaints were declared admissible by the Court and were thus examined on their merits.

Judgment

Conditions of immigration detention – Article 3 ECHR

The Court first reiterated some important principles established in its earlier jurisprudence, highlighting, in particular, that under Article 3,

the State must ensure that a person is detained in conditions which are compatible with respect for human dignity and that the manner and method of the execution of the measure do not subject the individual to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention (para 81)

The Court also reiterated a number of factors which should be considered in determining whether the conditions of detention amount to treatment contrary to Article 3. These include the length of time during which a person is detained in specific conditions, the personal space allocated to the detainee, access to outdoor exercise, open air and natural light and the hygiene and sanitary conditions in detention.

The Court proceeded to examine the applicant's conditions of immigration detention, paying particular attention to his complaints about inadequate medical treatment, overcrowding, lengthy placement in a container with excessive isolation and without access to natural light, air and outdoor exercise, and his subsequent placement with new arrivals in Covid-19 quarantine.

In respect of the applicant's complaints about inadequate medical treatment and overcrowding, the Court did not find violations of Article 3. The Court found that the applicant had been treated like any other citizen at liberty who is treated in public hospitals, as he had been examined by doctors in connection with his ailments at an appropriate time and had been prescribed medication. On the issue of overcrowding, the Court concluded that it was unable to find a violation of Article 3 because both the applicant and the respondent Government had failed to provide precise information which would enable it to determine the actual space allocated to the applicant while in detention.

The Court then examined the applicant's placement in a container and his conditions of detention during that time, which were found to amount to treatment contrary to Article 3. The Court reasoned that, although the applicant's confinement in a container did not in itself amount to treatment contrary to Article 3, the fact that it had been coupled with the lack of access to light, ventilation and outdoor exercise raised serious concerns. The Court also placed great emphasis on the applicant's isolation during that time. Although it noted that the applicant had been put in isolation upon his own request, the long duration and the stringency of the measure were still considered to be excessive by the Court.

The final issue considered by the Court concerned the applicant's claim that, following that period of isolation, he had been moved to other premises which had been used to accommodate asylum seekers under Covid-19 quarantine. Given the long period that the applicant had spent in isolation, the Court determined that quarantine had been unnecessary and that the authorities had put the applicant's health at risk in violation of Article 3.

Lawfulness of immigration detention – Article 5(1) ECHR

In respect of the applicant's complaint that his immigration detention had not remained lawful throughout the whole period of fourteen months, as, at some point, there had been no prospect of his deportation taking place, the Court found in favour of the applicant. The Court based its decision on the fact that the deportation of the applicant had become unlikely due to the failure of the domestic authorities to vigorously and diligently pursue the passport matter which would facilitate the applicant's deportation. The Court noted, in particular, that the only step taken by the domestic authorities had been to write once to the Nigerian authorities. In addition, the Court observed that it had been clear to the domestic authorities that the Nigerian authorities would not issue travel documents and that, therefore, the applicant's deportation would not be executed.

Exercise of the right of individual petition – Article 34 ECHR

(i) Communication with the Court

The Court found a violation of Article 34 for two reasons. Firstly, because the prison authorities had refused to provide the applicant with copies of documents which he had needed for his application to the Court. Secondly, because of the interception of the applicant's correspondence with the Court by the prison and immigration detention authorities. In this regard, the Court emphasised that correspondence with the Court must be confidential, since any form of control by prison and detention authorities may hinder individuals in bringing their complaints to Strasbourg.

(ii) Domestic legal aid representation

The Court held that the domestic legal aid representation granted to the applicant for bringing his case to Strasbourg had been ineffective for the purposes of Article 34. In reaching this decision, the Court took into consideration the failure of the lawyer to regularly contact the applicant, to make submissions on behalf of the applicant, to inform the applicant about her decision to abandon the case and the fact that the lawyer had abandoned the case without obtaining the revocation of her appointment by the domestic courts. In finding a breach of Article 34, the Court also took into consideration the inaction of the respondent Government, which had been informed about that situation but had failed to rectify it. Finally, the Court considered the actions of the applicant, who had a responsibility to diligently defend his rights. As the Court observed, the applicant had displayed the necessary diligence by persistently pursuing his case and by attempting to make and maintain contact with the lawyer.

Commentary

The Court's decision on Article 34 is uncontroversial. It is clear from the case that there had been interference with the correspondence between the applicant and the Court by the State authorities and that the domestic legal aid lawyer had failed to represent the applicant. The same can be said about the Court's decision on Article 5(1), as the respondent Government itself had admitted that the applicant's deportation would not take place due to the Nigerian authorities' refusal to cooperate. However, the question of access to medical treatment under Article 3 is more difficult to resolve due to the nature of the right involved. Although the Court's approach to this issue is to be applauded, other aspects of its decision on Article 3 are problematic. Due to the more complicated nature of some of the issues raised under Article 3 and due to the Court's inadequate approach to others, the following paragraphs will centre on the Article 3 aspect of the judgment only.

The Court has been instrumental in safeguarding the right to medical treatment for persons deprived of their liberty. Although the Court found no violation of Article 3 on this ground, it reiterated and applied the important principle of equivalent treatment which provides that

persons deprived of their liberty must be treated like citizens at liberty who are treated in public hospitals. By adopting this principle, the Court sent a clear message to the Contracting States that their socio-economic obligations are not to be reduced in the context of the deprivation of liberty. The Contracting States have an obligation to provide persons deprived of their liberty with access to medical treatment which is equivalent to that offered in public hospitals. Medical treatment in detention must, therefore, be timely, appropriate and attain a standard of quality which is comparable to that enjoyed by the population at large.

However, the Court was careful not to impose a disproportionate burden on the Contracting States in the field of health-care which requires substantial commitment of resources (financial, technological, technical). In its judgment, the Court emphasised that there is no State obligation to guarantee each detainee ‘the same medical treatment that is available in the best health establishments outside such facilities’ (para. 86). The Court adopted a similar approach in other cases. For example, in the case of Pentiacova and Others v. Moldova, which concerned insufficient State funding for medical treatment outside the context of detention, the Court stated that:

“[w]hile it is clearly desirable that everyone should have access to a full range of medical treatment, including life-saving medical procedures and drugs, the lack of resources means that there are, unfortunately, in the Contracting States many individuals who do not enjoy them, especially in cases of permanent and expensive treatment”.

It seems, therefore, that there is a limit on what the Contracting States must do both within the context of the deprivation of liberty and outside this context. Whilst there is a State obligation to provide a certain level of medical treatment to the population, including persons deprived of their liberty, this obligation is not unlimited. It is commensurate with the level of resources which is generally available in the Contracting States. This is a reasonable approach which strikes the right balance between human rights protection, on the one hand, and practical considerations, on the other hand.

The Court’s decision on the applicant’s placement next to asylum seekers under quarantine is another positive aspect of the judgment. The Court found a violation of Article 3 on this ground. However, the Court’s reasoning is disappointing, to say the least. The Court’s examination of this important issue was restricted to a few sentences. The Court merely stated that it had not been necessary to put the applicant in quarantine and that the detention authorities had failed to consider the risk to the applicant’s health. Particularly striking is the Court’s failure to clearly establish that Article 3 entails an obligation for the Contracting States to separate detainees and prisoners under quarantine from the wider detention/prison population in order to stop the transmission of Covid-19. The Court also failed to highlight the special responsibilities of the Contracting States towards persons deprived of their liberty in

health crises such as the Covid-19 pandemic. Persons deprived of their liberty exclusively rely on the States for the protection of their health and are disproportionately affected because they are at greater risk of becoming infected.

The Court missed the opportunity to establish, clarify and elaborate on the States' obligations in the context of the deprivation of liberty during the Covid-19 pandemic. This is particularly regrettable especially when considering the wider context in which the Court operates and its general readiness to draw on relevant international sources and standards. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and United Nations anti-torture mechanisms have issued statements (see [here](#) and [here](#)) relating to the treatment of persons deprived of their liberty in the context of the Covid-19 pandemic. However, the Court failed to consider external sources and thus missed the opportunity to benefit from such sources when most needed, at a time when it was confronted with an unprecedented situation like the Covid-19 pandemic.

Another disappointing aspect of the judgment is the Court's decision on the issue of overcrowding. The Court held that, in the absence of sufficient and precise information, it was unable to find a breach of Article 3 on this ground. However, the Court could have found a breach of Article 3, despite the absence of the precise measurements of the space allocated to the applicant. As the Court itself emphasised, '[w]hat is important...is whether detainees had a possibility to move around within the cell normally' (para. 87). This can be determined in the absence of precise measurements. The Court could have made use of and could have given due weight to the photographic evidence submitted by the applicant. Past international reports and public statements, which had criticised the conditions of the detention centre at issue, supplemented this evidence. These factors, coupled with the general appalling conditions during the applicant's detention and the specific conditions of the applicant's detention which were found to amount to treatment contrary to Article 3 by the Court, were sufficient to enable it to find a breach of Article 3 on this ground as well.

Concluding remarks

With this judgment, the Court demonstrated, once again, that it strikes the right balance between the conflicting interests at stake, namely, the protection of the right to medical treatment and resource constraints. Another positive element of the judgment is that it resulted in a win as far as the applicant's placement next to asylum seekers in quarantine was concerned. Despite the positive outcome, however, the Court failed to establish adequate standards to protect the rights of detainees and prisoners during the pandemic and to help the Contracting States to fulfil their obligations under the ECHR during these unprecedented times. The Court also failed to give sufficient weight to available material and to the context of the applicant's detention which would enable it to find a breach of Article 3 on the issue of overcrowding and to thus impose on the State a legal obligation to remedy this long-lasting situation.