

# Crimmigration and Othering in the Finnish Law and Practice of Immigration Detention

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## 1. Introduction

In *Minority Report*, a science fiction short story written by Philip K. Dick, the system of crime prevention and management called 'Precrime' depends on the work of three mutants – precogs. Precogs can predict the future and 'precognise' crime not yet committed, which leads to the imprisonment of the future perpetrator. According to the protagonist of the story, John Anderton, '[p]recrime has cut down felonies by ninety-nine and decimal point eight percent' (Dick 1956).

Acting in a similar fashion, in a decision of 5 February 2013, the Helsinki District Court, with little deliberation, accepted the motion of the Finnish police to detain a Romanian citizen for preparation of a decision on his expulsion. The decision of the court was based on section 121(1) point 3 of the *Aliens Act (Ulkomaalaislaki 2004/301)* then in force, according to which 'an alien may be ordered to be held in detention if [...] 3) taking account of the alien's personal and other circumstances, there are reasonable grounds to believe that he or she will commit an offence in Finland' (District Court of Helsinki [DCH] PK 13/1231)<sup>1</sup>. The court agreed with the police that mere suspicion of a

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<sup>1</sup> Throughout the text of the article the court cases will be referred to with the case numbers. The full reference will be provided in bibliography.

crime, coupled with an identifiable *modus operandi*, indicate that a person is likely to commit a crime in the future. Consequently, his administrative detention was considered justified.

This case is a telling example of the control-oriented approach towards foreigners in Finland, where the future criminality of a foreigner, based on mere suspicion of a crime, justifies administrative detention. Even though the legal provision giving a basis for the quoted court decision has recently been amended and the Minority Report-like approach has been abandoned in the case of common crimes, the new law has lowered the standard of proof for application of crime-based administrative detention of foreigners. In turn, this may arguably result in making its application more automatic. These developments reflect a strong relationship between crime and migration in the Finnish law on detention of foreigners, which has not been widely discussed thus far (Kmak 2015; Seilonen & Kmak 2015). This situation calls for analysis of the development, nature and purpose of this relationship and, most importantly, its implications for foreigners in Finland.

The main methodological point of departure for my analysis is the concept of crimmigration, first conceptualised, among others, by Juliet Stumpf in the US context (2006), and developed further by American and European scholars. I will in particular refer in this article to an understanding of crimmigration as a multifaceted relationship between 'the bordered' (immigration) and 'the ordered' (punishment) elements of contemporary measures of societal control (Franko Aas 2013). According to Katja Franko Aas, tensions between 'the bordered' and 'the ordered' embedded in contemporary crimmigration practices exert an influence on both the criminal justice domain, which acquires the role of border control, and the domain of immigration control, which is increasingly becoming used for the purpose of crime prevention (Franko Aas 2013).

The purpose of this article is to answer to the need, expressed by van der Woude, Barker and van der Leun (2017), to examine the applicability of the concept of crimmigration in the European context by looking at Finnish law and practice. The article will show, in particular, how the strong relationship between 'the bordered' and 'the ordered' in Finnish law and practice, which can be defined as crimmigration, results in the othering of foreigners, contributing to the call for mapping out the implications of law in othering practices (Gozdecka & Kmak 2018). As the article shows, in the Finnish case, othering happens through, on the one hand, differing state response to crime and crime prevention depending on a person's immigration status and, on the other, through directly linking migration with crime (see also Guia 2013, 19–20).

In what follows, I will first focus on the concept of crimmigration and its othering role. The aim of this section is to provide a background for

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further analysis of the law and practice of control-based administrative detention in Finland, by referring to the most contemporary scientific discussions on crimmigration in Europe. Drawing on the work of other crimmigration scholars, my approach towards the understanding of crimmigration is to treat it as a 'sensitising concept' (van der Woude et al. 2014), encompassing a broad category of intertwinement of crime control and migration control (Franko Aas 2013) that leads, on the one hand, to immigrationalisation of criminal law (Pakes & Holt 2017, 69) and, on the other, criminalisation of immigration law (van der Woude et al. 2014, 507; see also Miller 2005; Stumpf 2006). Next, the article turns to current law and practice of detention in Finland. By presenting the result of monitoring decisions of the Helsinki District Court concerning approval and prolongation of detention of foreigners (Seilonen & Kmak 2015) and analysing current law on detention, this section shows how migration is linked with control measures in contemporary migration law and practice. Finally, in the last part of the article I will describe the practices of crimmigration in Finland, in the form of both immigrationalisation of criminal law and criminalisation of migration law and point to their othering role. This in turn warrants a different approach to crime and prevention depending on the legal status of the person in question.

## 2. The bordered and the ordered

The debate concerning the relationship between crime and migration emerged in the USA in the 2000s. The concept of crimmigration was used for the first time by Juliet Stumpf in 2006 as encompassing three scopes of interrelation between criminal and immigration law:

- (1) the substance of immigration law and criminal law increasingly overlaps, (2) immigration enforcement has come to resemble criminal law enforcement, and (3) the procedural aspects of prosecuting immigration violations have taken on many of the earmarks of criminal procedure (Stumpf 2006, 381).

Since then, crimmigration and its characteristics have been widely discussed, primarily in the context of US law and practice of detention of foreigners (see for instance Legomsky 2007). Recently, however, the crimmigration approach has become increasingly visible in other countries and regions, including the European Union, even though the scientific discussion continues to remain primarily USA-centred (van der Leun & van der Woude 2013, 42). The European manifestation of crimmigration has been different from the American one due to differing theoretical approaches to the phenomena of migration and crime, analysed primarily against a theoretical framework of broadly

understood securitisation (van der Leun & van der Woude 2013, 42). However, a number of attempts have been made by European scholars to conceptualise crimmigration practices in a broader European context. An important contribution was recently made in a special issue of *The European Journal of Criminology* titled 'Crimmigration in Europe' (edited by van der Woude, Barker & van der Leun) in which the authors focused on crimmigration law and practices in the EU internal border areas (van der Woude & van der Leun 2017), in Spain (Wonders 2017), Italy (Fabini 2017), England & Wales and Norway (Pakes & Holt 2017), Greece (Cheliotis 2017), the Netherlands (Brouwer et al. 2017) and Sweden (Baker 2017).

Taking the most recent development in the scholarship of crimmigration in Europe, I refer in this article to crimmigration in its broad understanding, as a tool or lens through which one can look at historical and contemporary developments and application of law on detention in Finland, in particular, its othering qualities. This approach is inspired by van der Woude et al., who treat crimmigration not as defined but rather as a 'sensitizing concept' (2014, 561), in other words, a lens through which the law and practice of detention can be looked at and analysed. This approach allows crimmigration to be broadly defined as a multifaceted relationship between 'the bordered' and 'the ordered'. Whereas 'the ordered' in this understanding refers to the role that criminal law and policing carries with the aim of preserving security and establishing and maintaining an ordered and disciplined society, the bordered refers to the role of immigration and security laws in maintaining a clear distinction between the inside and the outside of society (Franko Aas 2013, 23). According to Franko Aas, in the contemporary globalising world, growing mobility creates novel configurations between these two aspects, which sometimes attain such a level of hybridity that can be called 'crimmigration control' (Franko Aas 2013, 25).

Crimmigration control in this understanding encompasses two phenomena dealt with in this article: immigration of criminal law (Pakes & Holt 2017, 69) and criminalisation of immigration law (van der Woude et al. 2014, 507). The former concerns situations where criminal justice acquires the role of immigration or border control (for instance, when a common crime constitutes a basis for immigration detention), immigration detention constitutes part of criminal procedure, the one procedure precedes the other, or both procedures are applied simultaneously (Stumpf 2013b, 66–68). On the other hand, criminalisation of immigration law concerns the situation when administrative law on immigration acquires a preventive role, which happens, for instance, when migration offences, such as irregular stay or work, are considered as crimes and dealt with through criminal law, when criminal law procedure is applied to immigration offences or when the role of immigration enforcement is to prevent future crimes (Stumpf

2013b, 66–68). Franko Aas underlines the complexity of this phenomenon, indicating that the two elements, ‘the bordered’ and ‘the ordered’ are put together in varying ways that ‘demands concrete empirical investigation [...] an examination of their constitution in different institutional, national, and historical configurations’ (Franko Aas 2013, 24), which constitutes the focus of this article.

One of the results of the crimmigration practices that this article is particularly interested in, is *othering*, understood as a process of turning one who is merely different into the other that later becomes devalued and marginalised (Young 1990; Jensen 2011). Othering has often been considered as a result of crimmigration laws and practices producing what scholars have been calling, a ‘crimmigrant Other’ (Bosworth & Guild 2008; van der Woude & van der Leun 2017). Othering as part of crimmigration means in particular differing or discriminatory state responses to crime and crime prevention depending on a perpetrator’s immigration status, or situations when migration and migrants are, in the law or practice of national authorities and courts, directly linked with crime and criminal behaviour. As pointed out by Stumpf, this may concern cases of the ‘use of crimmigration law to exert social control over groups marginalised by ethnic bias, class, or citizenship status’ (Stumpf 2013a, 7). In this context the ‘crimmigrant Other’ can be understood as an individual that is no longer punished for committing an offence but rather for being part of a group considered as different, other, or as an enemy (Guia et al. 2013, 20). As the editors of this volume underline, legal scholarship has been catching up with these processes, however there is a need for more research to address both theoretical and practical implications of othering in law and through law (Gozdecka & Kmak 2018).

In this article I contribute to these calls by looking at the legal provisions on administrative detention of foreigners as well as the implementation of these procedures in Finland and identify some of them as falling within the definition of crimmigration. I also show that some of these practices result in turning migrants into the ‘crimmigrant Other’. In the next section, I will look at the practices of the Helsinki District Court in applying section 121(1) point 3 of the Aliens Act as observed through monitoring and I will conclude by presenting the content and purpose of the current law on detention.

### 3. Detention of foreigners in Finnish law and practice before 2015

Up until the 1990s Finland was a country of emigration rather than immigration, lacking substantial discussion regarding policy towards non-citizens. The situation changed at the beginning of the 1990s, when the number of asylum seekers increased by 15 times. Such a dramatic change required not only logistical arrangements but also introduction of immigration policy programmes and comprehensive legislation

(Kmak & Seilonen 2015, 39). Despite these changes, the Finnish approach towards immigrants 'remained grounded in the perception that non-citizens constituted a potential threat to public order, national security and foreign relations' (Kmak & Seilonen 2015, 40). This attitude was also apparent in the comprehensive Aliens Act of 2004 and later amendments, including the most recent in 2015. In what follows, the article focuses on the Aliens Act of 2004 and its application by the Helsinki District Court. This gives a basis for further analysis of the Aliens Act currently in force, amended to transpose the Recast Reception Directive in 2015.

The comprehensive Aliens Act of 2004 allowed for detention of foreigners on three alternative bases: 1) there are reasonable grounds to believe that they will, by hiding or in other ways, prevent or considerably hinder issue of a decision concerning them, or enforcement of a removal decision; 2) detention is necessary for establishing their identity; and 3) when there are reasonable grounds to believe that they will commit an offence in Finland. The latter provision clearly required from the police and the courts' ability to determine the likely future criminality of a foreigner to be detained. The wording of section 121(1) point 3 and its application is so intriguing that it prompted me and my colleague Aleksi Seilonen to analyse how the police and the courts were applying it in concrete cases. Since the practice of detention in Finland has been raising concerns,<sup>2</sup> we decided to monitor the decisions of the Helsinki District Court, the role of which was to accept or reject decisions on detention made by the police (Seilonen & Kmak 2015).

Monitoring focused on three primary issues: 1) the practice of detention in Finland, including statistical information as well as the main grounds for detention and their interpretation by the police and the court, 2) the right to effective judicial proceedings and 3) conditions of detention, in particular, length of detention and placement of detainees in police prisons. Monitoring consisted of two types of activity – observation of court hearings by a group of volunteers and analysis of written judgments. In total, we monitored 167 cases obtained in two batches: first from 4 to 15 February 2013 (all cases dealt with by the court during this period, amounting to 57 cases, including observation and analysis of written decisions on both application and prolongation of detention) and the second from 15 February to 31 May 2013 (all first hearing cases regarding a decision on application of detention amounting to 110 written decisions).<sup>3</sup>

Among 167 decisions analysed, in 58 cases (nearly 30%) the decision on detention was based on section 121(1) point 3 of the comprehensive Aliens Act. In 10 cases, probability of future crime constituted the sole

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<sup>2</sup> For instance, in relation to detention of vulnerable people and the practice of holding immigration detainees, under certain circumstances, in police prisons.

<sup>3</sup> For detailed information on the methodology and choice of monitored cases see Seilonen & Kmak 2015, 8–11.

basis for detention, and in the remaining 48 criminality was referred to in conjunction with one or two other grounds. In addition, nine monitored cases concerned criminality-based detention without referring to section 121(1) point 3 of the Aliens Act. Among 10 cases where section 121(1) point 3 was applied as the sole basis for detention, six of the persons concerned had previously been convicted of crimes and four cases concerned persons only suspected of crimes but without any criminal record. Crimes committed by detained foreigners included robbery, driving under the influence of alcohol, and drug smuggling: all carried a suspended prison sentence. In the remaining 48 cases where the criminality ground for detention was applied together with other grounds (risk of absconding and identity) the ratio of those suspected and convicted of crimes was reversed, that is, in only 10 cases out of 48 had the person been convicted. Suspicion of a crime was found in 32 cases. In six cases a foreigner was both suspected and convicted. Within this group, crimes encompassed the whole spectrum of behaviour, though mostly including theft and narcotics-related crimes. In three cases, the crimes were immigration-related but were referred to only in combination with theft. Finally, among those nine cases where crime was mentioned but a criminal offence was not treated as a basis for detention, six related to theft and three solely to immigration offences. Among these cases, only one person concerned had been convicted of an immigration offence (working in a restaurant without a permit) and the remaining detainees were suspected of crimes.

In monitoring, we considered two types of reasoning by the court as potentially relevant in establishing whether reasonable grounds exist to believe that a detainee will commit an offence: 1) the level of certainty that a crime will be committed in the future and 2) the type of criminal behaviour that could qualify as a basis for detention. However, analysis of monitored cases was complicated because in most judgments the court did not actually discuss the arguments put forward by the police, despite the obligation of the court to assess both the necessity and the proportionality of detention in accordance with sections 5 and 121 of the Aliens Act. Indeed, analysis of all monitored cases shows that the court engaged very infrequently in a proper balancing of the need to detain and the consequences of detention in each particular case. In what follows, I will focus on both aspects of reasoning by the court regarding application of section 121(1) point 3 and look in more detail at the balancing act as applied by the court (Seilonen & Kmak 2015, 44–47).

### 3.1. Level of certainty

To be sure, the wording of section 121(1) point 3 is a remnant of older regulations, where detention was a result of refusal of entry at the border. Such a measure could still have been relevant in cases where the sole purpose of a person's arrival in Finland was to commit an offence.

Indeed, in the monitored cases the police often used precisely that justification in decisions on detention in cases when a person was suspected or convicted of crimes (see for instance DCH PK13/3551, DCH PK 13/4285, DCH PK13/3955, DCH PK13/3811). The main difficulty in interpreting the level of certainty in this provision was the standard of proof required by law, which was set as 'reasonable grounds to believe' (*perusteltua aihetta olettaa*), located in between 'grounds to suspect' (*syytä epäillä*), applied in criminal law for initiation of a pre-trial investigation, and 'probable cause' (*todennäköisin syin*) required for arrest. Consequently, the ongoing pre-trial investigation in the case of a crime committed by a foreigner under consideration for administrative detention should not in itself justify detention. On the other hand, the law on detention did not require future criminality to be probable in order to justify placing a foreigner in a detention centre (Seilonen and Kmak 2015).

The decisions analysed show that the probability of committing a crime in the future was assessed based on past criminality of the foreigner. This concerned either conviction – or even mere suspicion – of crimes, and the latter prevailed as a justification for detention based on section 121(1) point 3. For instance, detention justified by the criminal intent of a foreigner's arrival in Finland was often based on a foreigner's arrest on suspicion of a crime (for instance DCH PK 13/4654). The level of certainty in these cases also varied. In most cases based on suspicion of crime as the sole reason for detention, detainees were either caught red-handed or admitted committing the crime. However, detention was also applied instead of criminal procedure or when criminality was disputable, as in the case mentioned in the introduction to this article. With regard to the former, in the case of two foreigners detained on suspicion of a crime, removal from the country was planned before the date set for the court decision in the criminal case (DCH PK13/1826, DCH PK13/1829). As regards the latter, this case concerned a foreigner who was suspected of robbery but was not recognised as a perpetrator either by the victim or by the witness. In addition, the stolen goods were not found on him. Despite these facts, the court accepted the police argument that detention in this case was justified because the person in question was suspected of robbery (DCH PK 13/1231). The court did not discuss the police considerations in that respect and in a very brief decision it only confirmed that the person was likely to commit an offence in Finland and for that reason should be detained.

This approach by the court – considering conviction or mere suspicion of crime as justification of probable future criminality – is deeply problematic. Even in cases of crimes already committed, the risk of further offending should also have been assessed. That risk would, for instance, be higher in cases of repeat offenders, but 'reasonable grounds to believe' would be much more difficult to justify in cases when a

foreigner committed – or was suspected of – only one petty crime. This rarely-questioned use of past criminality as a basis for administrative detention points to a strong interrelation between ‘the bordered’ and ‘the ordered’ elements of crimmigration in Finnish detention practice. Additionally, the findings from monitoring show an interrelatedness between criminal and administrative procedures, for instance when, as in the case described of detention of a Romanian citizen, administrative detention takes the place of criminal punishment when sufficient evidence for criminal conviction does not seem to exist or when the date of expulsion is set before the judgment in the criminal case is delivered.

### 3.2. Types of criminal behaviour

Unlike the standard of proof, the meaning of ‘an offence’ in the context of detention is not specified in the Aliens Act. The preliminary work on the Act only refers to the concept of ‘an offence’ in relation to grounds for expulsion of foreigners (which should be distinguished from grounds for detention). The cases analysed point to a mixed pattern of detention based on criminality. Here we identified that usually more serious crimes and multiple offences gave a basis for detention, which points towards the severity of a committed crime as an important factor in court decisions. The court also seemed to assess whether a certain crime or other circumstances of the case suggest potential future criminality. However, exceptions to all these generalisations appear in the monitored cases. Unfortunately, because of the limited reasoning offered and lack of data the court’s view on the matter remains largely unverifiable.

In terms of the severity of crimes, most of the crimes in the monitored cases were of a more serious nature or involved multiple offences. Consequently, in those cases, when the court has rejected the criminality ground, suspected threat and petty theft or violent resistance to a public official were not considered as a basis for the criminality ground. However, this assumption is contradicted in other cases where relatively petty crime such as criminal damage and impersonating a public official were sufficient for detention in the context of theft. Similarly, petty theft together with a registration offence and false identity information or even suspicion of a single theft or theft together with immigration forgery was accepted by the court as a basis for detention on the grounds of future criminality by a foreigner (Seilonen & Kmak 2015, 36).

In these cases, too, the relationship between ‘the bordered’ and ‘the ordered’ is visible in the interrelatedness of criminal and administrative procedures, when even the pettiest crimes can constitute a reason for detention or, as will be shown below, administrative detention may constitute an add-on to a suspended prison sentence imposed by a criminal court.

### 3.3. Balancing act

The Aliens Act requires assessment of both the necessity and proportionality of detention of non-citizens. However, it does not provide clear guidance regarding this balancing act. Indeed, the court has engaged only infrequently in proper balancing between the need to detain and the consequences of detention. In most of the cases the court only referred to scarce justification from the detention decision issued by the police, without conducting any assessment of its own as to the necessity and proportionality of detention. For instance, one of the monitored cases involved an Estonian citizen punished for robbery by a suspended prison sentence of 11 months. Before the court decision was issued, the person spent two months in pre-trial detention. Despite that, immediately after release, he was detained by the police based on the need to prepare a decision on expulsion. The court ordered administrative detention without discussing the arguments raised by the defendant's lawyer indicating that prolongation of detention on a different legal basis was in this context unjust (DCH PK 13/3695).

In some of the monitored cases the court did engage in a balancing act. However, instead of assessing the necessity and proportionality of detention the court rather referred to its reasonableness. It is unclear whether that assessment corresponded to the requirement of a proportionality test under section 5 of the Aliens Act. In one of the monitored cases the court distinguished between the two, asserting that detention is 'neither unnecessary nor unreasonable' (DCH PK 13/3002). Interestingly, a reasonability test can be found in the Coercive Measures Act (CMA – *Pakkokeinolaki* 806/2011), which requires the court to consider such elements of cases as the nature of the crime, the age of the suspect and their other personal circumstances such as pregnancy, sickness or family circumstances. Even though it was difficult to assess, based on the collected cases, to what extent the court is resorting to the analogy from the CMA in immigration detention cases, this analogy seems to be at least possible if the same department of the court is responsible for both types of case (pre-trial detention and detention of foreigners). In a Court of Appeal decision (R11/1373 – collected as subsidiary material), the court approved a decision by the district court which clearly employed the analogy from the CMA and the CMA-based proportionality test, by adapting the provision from the CMA to correspond to the wording of the Aliens Act (for detailed analysis see Seilonen & Kmak 2015, 44–47).

Moreover, these aspects of court decisions point to the strong relationship between 'the bordered' and 'the ordered'. Here, monitoring exposed the decisive role of police and border guards in ordering detention of foreigners. Results of monitoring show that only in 14 analysed cases did the court provide its own justification for the decision on detention and only in 2 cases did not confirm the decision by the

police to detain the foreigner. Finally, the court seemed to readily apply terminology borrowed from criminal law, for instance in relation to the test of rationality of detention, which can be found in the Coercive Measures Act. Even though these standards surely overlap, such an analogy risks allocating too much weight to the need to detain in the context of criminal law considerations, which aim to protect public order (Seilonen & Kmak 2015, 45).

This article turns now to section 121(1) point 3 as amended in July 2015. In the next section, I will look at the wording of the new provision and present the government's justification for the amendment in more detail.

#### 4. Current Law on Detention after 2015 legislative reform

The aim of the new amendments to the Finnish Aliens Act of 2004 (Laki ulkomaalaislain muuttamisesta, 2015) and to the Detainee Treatment Act of 2002 (Laki säilöön otettujen ulkomaalaisten kohtelusta ja säilöönottoyksiköstä annetun lain muuttamisesta, 2015) was to transpose the Recast Reception Directive (2013/33/EU) into Finnish law. Except for some public action by NGOs regarding detention of children and conditions of detention (see for instance Helsinki Times 25 February 2015) the new law was not widely discussed in Finland nor was there much academic discussion on the topic either.

The amended section 121(1) point 3 of the Aliens Act allows for detention if a foreigner is convicted or suspected of a crime and detention is required for securing the preparation or enforcement of a decision on expulsion. The amendment was justified in the government proposal, first, by lack of clarity and vagueness of the previous provision, which according to international monitors had even led to racial profiling (*Hallituksen esitys* 2014, 13). Second, the aim of the amendment was to make the new provision correspond to the requirement of protection of public order as mentioned in article 8(3) point e of the Recast Reception Directive. According to the government's reasoning, section 121(1) point 3 as amended 'would correspond to the "public order" basis for detention from the recast reception directive but would be much more accurate and much more defined'. In other words, the new basis for detention 'on the one hand would secure removal from the country and on the other protect public order before removing a person from the country' (*Hallituksen esitys*, 2014, 28).

The new law deals with some problems and concerns that emerged in monitoring. It indeed clarifies the content of the provision and frees the police and the court from the difficult task of assessing the future criminality of a foreigner. However, as I show below, this shift in the wording of the provision from forward-looking to past-oriented is in reality misleading due to the reference to the threat to public order which is, by definition, future-oriented. However, the consequence of

this shift, whether intended or unintended, is to lower the standard of proof required for detention and in consequence expand the possibility to detain foreigners on the basis of their criminality. Indeed, under the previous law the fact that the police had an ongoing criminal investigation concerning a person whose detention was under consideration under the Aliens Act (based on existing grounds to suspect - *syytä epäillä*) would not in itself be enough to justify detention, which required reasonable grounds to believe (*perusteltua aihetta olettaa*). This limitation does not seem to apply in the new law, which requires mere suspicion of crime (*epäillään syyllistyneen*) in order to justify detention. Even though those provisions are not identical, it is clear that suspicion of a crime (*epäillään syyllistyneen*) potentially warrants detention and the threshold for starting a criminal investigation (*syytä epäillä*) is very low.

This lowering of the standard of proof is particularly problematic in the context of the definition of 'public order' in the Recast Reception Directive. According to the recent judgment of the Court of Justice of the European Union [CJEU] in the *J. N.* case, this particular concept:

[...] entails, in any event, the existence — in addition to the disturbance of the social order which any infringement of the law involves — of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (*J. N. v. Staatssecretaris voor Veiligheid en Justitie*, 2016).

A past-oriented focus on suspicion or conviction of crime as a basis for detention, introduced for the purpose of protecting public order (as explained by the government) seems largely disproportionate when compared to that definition.

In essence, the scope of section 121(1) point 3 depends on the practice of the authorities and courts. According to Advocate General Sharpston in her opinion in *J.N.* (2016), placing the foreigner in detention on the basis of article 8(3) point e is justified only if their past conduct represents a genuine, present and sufficiently serious threat (para 67) which has to be determined on a case-by-case basis (para 69). However, the very narrow wording of the new Finnish law does not invite the court to analyse the existence of such a threat. In the amended provision, assessment of the need for detention of a foreigner who has committed or is suspected of crimes is based only on whether detention is necessary for securing preparation or enforcement of a detention decision. However, as pointed out by Advocate General Sharpston, it is important to remember that '[t]he fact that an applicant is suspected, or has already been convicted, of an act punishable as a criminal offence under national law cannot, in isolation, justify detaining him on the ground that the protection of national security or public order so requires' (para 68). In other words, past convictions cannot automatically contribute to

showing that a person constitutes a present threat to public order (para 68) and the preventive character of provision 8(3) point e cannot have the purpose of punishing past conduct. Any other conclusion would cause difficulties under the *ne bis in idem* principle, since it would allow a person who has been convicted of one or more offences and who has served the relevant sentences to be 'punished again for the same offences through detention under the provision at issue' (para 97). The practice of the Helsinki District Court as identified in the monitoring also cast doubt on whether the court will conduct such a case-by-case analysis under the new provision, even considering the proportionality requirement under section 5 of the Aliens Act. This situation may in extreme cases result in preventive action against all foreigners who have been associated with criminal activities, which according to Advocate General Sharpston is against the purpose of the Directive.<sup>4</sup>

The government proposal quoted above, as well as the wording of the new provision, therefore shows that the strong link between migration and criminality continues to orient Finnish law on detention. In particular, the new provision lowers the standard of proof for detention, which is now based on mere suspicion of crime. In other words, the new provision automatically considers criminal acts (of which a foreigner has been convicted or is merely suspected) as indicators of a threat posed by the foreigner, without inviting the authorities and the court to assess the existence of a genuine, present and sufficiently serious threat to society. In consequence, the new law of detention, despite its past orientation, acquires a distinctively preventive role based on the need to secure the expulsion of a foreigner on the basis of some unspecified future crime. Indeed, according to the authorities the new law will 'secure removal from the country and protect public order before removing the person from the country' (*Hallituksen esitys* 2014, 28). This preventive orientation, coupled with a lowered standard of proof, seems to go further than the previous wording of section 121(1) point 3 of the Aliens Act, contributing to the strong relationship between 'the bordered' and 'the ordered' elements of the crimmigration regime. More research is therefore needed, in particular detailed monitoring of court decisions issued after the entry into force of the new law, in order to see whether the court has changed its reasoning in detention cases based on criminality of foreigners.

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<sup>4</sup> See, however, the new section 121(1) point 6 of the Aliens Act according to which detention of a foreigner is allowed when, taking account of personal and other circumstances, reasonable grounds exist to believe that he or she will constitute a threat to national security. This provision has been introduced due to a change in the wording of section 121(1) point 3 which would not, under the current law, prevent authorities from detaining a foreigner based on the need to prevent future threats. This provision is highly problematic as it is clearly based on general prevention. According to the government '[i]t should be possible to take into detention a foreigner constituting an unforeseeable security threat already when the threat is not concrete enough for the measures of the police act or coercive measures act to apply' (*Hallituksen esitys* 2014, 29).

## 5. Crimmigration and othering in the context of administrative detention of foreigners

My purpose in this article is to show that certain legal provisions and practices involving administrative detention in Finland fulfil the criteria of broadly understood crimmigration and point to how the othering element of crimmigration functions under both the previous and the current law. Despite the scarcity of information obtained from court decisions, the cases analysed, government reasoning and legal provisions – both previous and currently in force – clearly point to the close link between ‘the ordered’ (criminal law) and ‘the bordered’ (administrative detention of foreigners) elements of the law on detention in Finland, attaining a level of the distinctive phenomenon of crimmigration. Crimmigration can be seen here both in the form of the immigrationalisation of criminal law and the criminalisation of administrative (immigration) law. However, often the boundaries between these two are blurred. One of the features of crimmigration that is also visible in the Finnish context is the phenomenon of othering, in other words, differing treatment as between foreigners and citizens in relation to crime prevention and punishment, or directly linking migration with crime. In what follows I focus on the legal provisions and practices indicating the interrelation between ‘the bordered’ and the ‘ordered’ and identify the othering qualities of some of those practices.

### 5.1. Immigrationalisation of criminal law and practices of othering

Immigrationalisation of criminal law as an element of crimmigration concerns the situation where criminal law acquires the broadly understood role of border control. This can mean, for instance, that crime is used as a tool for immigration management or that immigration procedure becomes part of – or an add-on to – criminal procedure. In the Finnish context, this phenomenon concerns situations where criminality, whether confirmed by a court or merely suspected, constitutes an automatic basis for administrative detention and when administrative procedure constitutes an add-on to criminal procedure. Judgments of the Helsinki District Court in relation to the previous and current wording of section 121(1) point 3 of the Aliens Act confirm that practice. The former example is visible from monitoring, in cases when even the smallest crimes, such as possession of 16 grams of marijuana – which would normally end with a fine in case of citizens – provided justification for administrative detention in the case of a foreigner, even though administrative detention is in principle related to the severity of the alleged crime.

The latter example is visible, for instance, in the case described concerning suspicion of robbery. In that case, the court merely followed the police argument that the person was suspected of robbery but

without discussing the basis for that argument in more detail. Plausibly, immigration detention in this case in practice replaced criminal punishment, which, according to the findings of the police investigation, would most likely not be possible. In another case mentioned, a person convicted to an 11-months suspended prison sentence had already spent two months in pre-trial detention before being detained on the basis of administrative law for the purpose of expulsion. In this case, deprivation of liberty clearly constituted an add-on to the suspended prison sentence imposed by the criminal court (see Legomsky 2007; Pakes & Holt 2017, 65). Finally, in the case of two foreigners detained on suspicion of a crime, removal from the country was planned before the criminal court decision in the criminal case would be delivered, pointing to the instrumental role of criminal arrest for migration enforcement. That approach shows the cumulative effect of criminal and migration law where administrative detention or deportation takes the place of or follows criminal procedure. In such cases, as mentioned by Pakes and Holt '[a] prison sentence alone is not enough: the job is done only once deportation has been achieved *and* [emphasis in original] measures are in place to prevent re-entry' (Pakes & Holt 2017, 74). This approach is confirmed by the representative of the police quoted in one of the analysed decisions: '[e]nforcement of the decision [on expulsion] will happen soon and commission of a new offence would prolong expulsion from the country' (DCH PK 13/664).

Both of these practices by the Helsinki District Court contribute to the othering effect of the law and practice of detention. In particular, by applying detention in cases of most mundane crimes that do not normally warrant detention, or by applying detention twice as a consequence of the same behaviour (in both criminal and administrative procedure), they poorly reflect the requirement of non-discrimination. In consequence, they turn foreigners into 'crimmigrant Others', those who are treated more severely in both criminal and administrative procedure because of belonging to a group of people with precarious – or without – legal status (Guia et al. 2013, 19–20).

## 5.2. Criminalisation of immigration law and practices of othering

Criminalisation of immigration law takes place when administrative law on immigration acquires a preventive role. This may happen, most commonly, when migration offences, such as irregular stay or work, are considered as crimes and dealt with through criminal law, but also when criminal law procedure is applied to immigration offences (Stumpf 2013b, 66–68) or when the role of immigration enforcement is to prevent future crimes. Interestingly, the multifaceted relationship between 'the bordered' and 'the ordered' in Finnish detention policy is not characterised by criminalisation of immigration offences. As can be seen from monitoring, immigration-related crimes were never

considered as a sole basis for applying section 121(1) point 3 of the Aliens Act. In the Finnish context, this phenomenon is demonstrated, first, by strengthening the role of the police and border guards in the administrative procedure, second, the use of analogy from criminal procedure in administrative detention cases, as described above, and, third, the preventive character of Finnish immigration detention law as seen in the practice of the police and the courts. In the case of the first element, as the results of monitoring show, only in 14 out of 167 cases analysed did the court provide its own justification for the decision on detention and only in 2 cases did not confirm the decision of the police to detain a foreigner. The second aspect can also be pointed to in some cases when the court applies terminology borrowed from criminal law, for instance in relation to the test of rationality of detention, which can be found in the Coercive Measures Act.

However it is the third situation – the preventive role of detention law – that constitutes the most interesting element of crimmigration, resulting also in differing practices towards foreigners in comparison to citizens, whose preventive detention has to fulfil much stricter conditions in order to be justified. As we underlined in the monitoring report:

[h]aving the focus on the suspicion of a crime committed blurs the line between immigration detention and arrest within a criminal procedure. Administrative immigration detention cannot serve as preventive detention in cases where prosecution is not the object of detention or as a measure applied to circumvent restrictions on other forms of legal actions. In the context of the standard of proof, in some cases the accepted basis for detention seems problematic either because the claimed involvement in crime is rather weakly established or the threat posed to public order is quite insignificant in comparison to right to liberty (Seilonen and Kmak 2015, 37).

The preventive element of detaining foreigners is, however, visible not only in the practice of the Helsinki District Court but also in how the government justified the new law on detention as quoted in the previous section of this article. The othering element has been retained in the new law where the standard of proof for detaining a foreigner has been lowered as juxtaposed with the definition of public order from the Recast Reception Directive. This new provision detaches article 121(1) point 3 from the original purpose, which was to prevent entry of foreigners who cross the border with the sole purpose of committing a crime. Even though this intent was previously not explicitly stated in the law, it was visible in practice, where the police referred to it when issuing decisions. The new law, however, provides explicit support for the use of suspicion of crime as justification for detention; moreover, its narrow formulation does not invite the court to apply restraint and limit detention based on the criminality ground. Such consistent and automatic use of crime as a

basis for detention suggests a bias towards coercion and punishment beyond the requirements of necessity and proportionality, which in particular targets foreigners, thus contributing to their othering.

## 6. Conclusions

The purpose of this article was to contribute to a deeper understanding of the phenomenon of crimmigration and the implications for the law and practice of detention of foreigners in the processes of othering. By analysing the strong relationship between crime ('the ordered') and migration ('the bordered') in Finnish law and practice, the article shows that this relationship attains a level of strength that simultaneously transgresses and synergises the disparate roles of migration and criminal laws, such as crime prevention and protection of public order – in the case of the former – and border control in the case of the latter. The claim posed in this article is based on recent developments in Finnish law and on decisions of the Helsinki District Court through the lens of crimmigration, understood as a two-pronged process: immigration of criminal law and criminalisation of administrative law. This approach allowed me to show that the strong relationship between migration and crime prevention are orienting contemporary perceptions of migration in Finland and in certain situations have acquired the unique characteristic of crimmigration.

These crimmigration practices contribute to the process of turning foreigners into 'crimmigrant Others'. Treating criminality as an automatic basis for administrative detention, using administrative procedure as an add-on to criminal procedure or the preventive role of administrative detention fulfil the definition of crimmigration and result in differential treatment of foreigners. This othering effect has been retained in the new law on detention, which provides explicit support for using suspicion of crime as justification for detention and lowers the standard of proof for detention of foreigners. These changes further contribute to the othering function of Finnish law.

These practices put in question the claim by the Finnish government according to which detention in Finland is applied in accordance with the principles of reception, service and care, and its 'starting point is that foreigners are not criminals' (*Hallituksen esitys* 2014, 7). Even though the practical arrangements for detention and conditions of detention in Finland confirm this approach in principle, the judgments analysed in this article as well as the wording of the new section 121(3) of the Aliens Act often point to different practice, grounded in a historically strong control-oriented approach to migrants in Finland. More research would, however, be required to confirm this trend. In particular, an analysis of the most recent judgments issued after the entry into force of the Aliens Act of 2015 and after setting up the new detention centre in Joutseno

would be needed. Such a study would in particular allow a comparison between decisions issued by the Helsinki District Court with those issued by the Southern Karelia District Court responsible for detention decisions in the case of Joutseno detention centre, and, in the result, would shed more light on the existence and scope of the most recent crimmigration and othering practices in Finland.

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