

On the Expansion of the Function of and Alternatives to Detention Review

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Abstract: By inspecting the functional orientation of and alternatives to immigration detention in major immigrant countries in Europe and America, and basing on Chinese regulation about the functional orientation of and alternatives to detention review, the article analyzes the issue of the functional orientation of and alternatives to Chinese detention review, and suggests to add the function of serving to pending deportation and the guarantor and bail system.

1. Introduction

Detention review refers to the measures taken by immigration and exit and entry administration authorities to restrict the personal freedom of aliens who are still unable to remove the suspicion after on-the-spot interrogation or continuous interrogation so as to facilitate further investigation and collection of evidence. Detention review is an important guarantee to control illegal entry, residence and employment of foreigners [1]. However, the functional orientation and alternatives to detention review are single. It is difficult to meet the needs of immigration and modernization of immigration and governance, and needs to be improved.

2. Expanding the function of detention review and adding the function of serving to pending deportation of detention review

Function refers to the beneficial role played by things or methods [2]. As a legal system, the function of detention review refers to its beneficial role in the legal sense. In the literal sense, detention review has the function of “examination” or “investigation”. From the official English translation of the “Detention Review”, both the early “detained for examination” [3] and the current “detention for investigation” can be seen to have the function of “review” or “investigation” [4].

3. Evolution of Functional Orientation of Detention Review in China

From the perspective of the evolution of Chinese entry-exit legislation, the function of detention review has gone through a period of expansion and narrow. Investigation and evidence collection → investigation and evidence collection and serving to pending deportation → investigation and evidence collection.

The Law of the People's Republic of China on the Administration of the Entry and Exit of Aliens (hereinafter referred to as the Law on the Administration of the Entry and Exit of Aliens), which came into force on February 1, 1986, introduced detention review for the first time, but only stipulated in its Article 27 that the object of detention review is “foreigners who enter or stay illegally”, without indicating the function of detention review. The Implementation Rules of the Law of the People's Republic of China on the Entry and Exit of Foreigners, which was enacted on December 27, 1986, did not mention the detention review system.

For the first time, the detention review has the function of investigation and evidence collection. It was promulgated and implemented by the Ministry of Public Security on March 20, 1988. Article 4, paragraph 1, stipulates: “The detention review applies to foreigners with suspected illegal immigration, illegal residence and the unclear main illegal facts. Failure to take detention review and surveillance of residence measures will affect the identification of facts or the control of foreigner’s illegal activities.”

On April 6, 1992, the Ministry of Public Security promulgated and implemented the Notice Concerning the Processing of Illegal Entry and Illegal Residence of Aliens in accordance with the Law, which expanded the function of detention review to serving to pending deportation. Article 1 of the Notice stipulates that if nationality is not recognized and foreign embassies in China do not recognize and have nowhere to be sent, detention review shall be conducted in accordance with Article 27 of the Law on the Administration of the Entry and Exit of Aliens until nationality is determined and repatriated.” In 2004, the Ministry of Public Security confirmed the functions of serving to pending deportation as defined in the above-mentioned internal normative documents in the form of legislation of departmental regulations. Article 184, paragraph 3, of the Provisions on Procedures for Handling Administrative Cases by Public Security Organs, which came into effect on January 1, 2004, stipulates that: “If the nationality is unknown and cannot be deported and the security cannot be guaranteed after release, the time for detention review may be extended until the nationality is determined and deported after approval by provincial public security organs.” The “Regulations on the Procedures for Administrative Procedures of Public Security Organs” promulgated after the amendment on August 24, 2006 remained the functions of serving to pending deportation, but the expression was more concise. Article 193, paragraph 3, stipulates: “There is no immediate deportation. After leaving the country and failing to guarantee safety after release, the detention review period may be extended to the nationality authorization and sent out after being approved by the provincial public security organ.”

The Law of the People's Republic of China on Exit and Entry Administration (hereinafter referred to as the Law on Exit and Entry Administration) which came into force on July 1, 2013 only clarifies the functions of investigation and evidence collection of detention review, but does not absorb the functions of service to be repatriated as specified in the normative documents of the Ministry of Public Security and affirmed by the regulations of the departments. Article 60, paragraph 1, stipulates that “Aliens have one of the situations specified in Article 59, paragraph 1, of this Law If the suspect can not be ruled out after on-the-spot interrogation or further interrogation, and further investigation is needed, the suspect may be detained for examination.” Moreover, the Exit and Entry Administration Law juxtaposes the “detention review” and the “detention” of deportation. The 63rd provision: “Persons detained for censorship or decided to be deported but not immediately enforceable shall be detained in a detention facility or Deportation sites.” It can be seen that the function of the current detention review is to ensure the smooth implementation of investigation and evidence collection.

4. Functional Orientation of Immigration Detention System in EU Countries and American

Throughout the systems and practices of European countries and American, immigration detention has the functions of investigation and evidence collection, serving for deportation and ensuring national and public order. Article 15, paragraph 1, of the 2008 Common Standards and Procedures Directive for the Deportation of Illegally Resident Third Country Citizens by EU Member States (hereinafter referred to as the EU Deportation Directive) stipulates that immigration detention is only applicable to the deportation process, especially in cases where there is a possibility of absconding, avoiding and obstructing deportation. In practice, immigration detention in most EU Member States has the functions of verifying identity information, preventing absconding, avoiding or hindering deportation and endangering national security and public order [5]. According to Sections 232, 236 and 236 (A) of the Immigration and Nationality Act of the United States, the Minister of Justice has the power to detain the following foreigners: not allowed to enter or to be determined whether they are inaccessible; to be deported or to be determined whether they are deported Out of the country; suspected of engaging in other activities that endanger US national security [6]. Combined with the applicable situation of the above-mentioned US immigration detention, it can be known that its functional orientation lies in investigation and evidence collection, service waiting and national security. Safeguarding national security and public order is the macroscopic function of detention review as an entry and exit management system. Investigation and evidence collection and service waiting are the specific institutional functions of

immigration detention [7].

5. Suggestions on Adding the Function of Serving to Pending Deportation of Detention Review

Chinese detention review once played an important role in serving to pending deportation, which has not somehow recognized by the Entry and Exit Administration Law. In the theoretical circle, there is a view that the detention review's function should be limited to investigation and evidence collection. It puts forward three reasons: first, it leads to excessive discretion in the period of investigation and detention; Second, the treatment of detainees at the detention stage is difficult to reflect. Third, the detention review system is not connected with the administrative and criminal punishment systems [8]. As for the first point, many EU countries, as well as the United States, Britain, Canada Australia and Japan, have dual functions in immigration detention. Don't they worry about excessive discretion? As for the second point, article 10, paragraph 2 (a), of the Covenant on Civil and Political Rights provides not that "Persons convicted and those awaiting adjudication shall be detained separately", but "Accused persons shall be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons". The above provisions refer to criminal cases, not administrative cases where detention review is applicable. As for the third point, with the same legal detention period, the dual functions of "investigation detention" and "detention for pending deportation" are more acceptable than the single function of "investigative detention". After all, more considerations mean longer processing times. As for its concern that it cannot be discounted and compensated, does the function of detention review only exist in "investigative detention"? In a society under the rule of law, power accompanies with responsibility. The discount that can be deducted should be deducted, there will be compensation when the discount cannot be deducted. In contrast, the current provisions of the "exit and entry administration law" distinguish between "investigative detention" and "detention for pending detention", but there is no difference between detention places under the two circumstances, and it is more likely to be questioned that there is no statutory period for "detention for pending detention". Considering the important role of detention review in promoting repatriation, and its function of serving to pending deportation is also a common practice in mainstream immigrant countries, it is suggested to add the function of serving to pending deportation of detention review under the background of prominent immigration and exit and entry management work.

6. Improve alternatives to detention review and add guarantor and bail system

Detention review is a compulsory means to restrict the personal freedom of foreigners. It can only be applied when non-compulsory means or less compulsory means can not achieve the same purpose of law enforcement. If non-coercive means or less coercive means can achieve the same purpose of law enforcement, they shall be given priority. In the system of compulsory measures for immigration and entry-exit management, detention review is the most powerful means to restrict the freedom of foreigners, often only as a last resort. Only when non-coercive means or less coercive means can not achieve the same purpose of law enforcement can they be applied. If non-mandatory means or lighter coercive means can achieve the same law enforcement purpose, it should be applied first. Article 29, paragraph a of the United Nations Global Compact for Safe, Ordered and Normal Immigration, which entered into force in December 2018, states: "ensuring that it is a measure of last resort, that human rights violations do not occur, and that States promote, implement and expand alternatives to detention, favouring non-custodial measures and community-based care arrangements, especially in the case of families and children" [9].

7. Alternatives to immigration detention in European and American countries

Based on the advantages of low cost of law enforcement and full protection of the legitimate rights and interests of foreigners, alternatives of immigration detention are widely used in European and American countries. The UNHCR Guidelines on Detention (revised in 2012) recommend seven

alternatives to immigration detention: registration and/or deposit/ surrender of documents, bond/bail/sureties, reporting conditions, community release and supervision, designated residence, electronic monitoring, or home curfew [10]. To the end of 2013, of the 24 EU member states that used alternatives, there are 23 countries used reporting obligations, 18 countries used residence requirements, and 15 countries used obligation to surrender a passport or a travel document, 13 countries used release on bail (with or without sureties), and 4 countries used electronic monitoring (e.g. tagging) and guarantor requirements. In fiscal year 2013, there were six alternatives to immigration detention in the United States: bond, order of recognizance, order of supervision, parole, electronic monitoring and on condition of participation [11]. The above alternatives are not all single options and are often combined used [12].

8. Risk Assessment of Alternatives to Immigration Detention in European and American Countries

Before deciding on alternatives to immigration detention, it is generally necessary to assess the risk level of foreigners. Aliens at different risk levels will be subject to alternatives to immigration detention with different degrees of restriction. In most European Union countries, the application of alternatives to immigration detention mainly considers three factors: first, the compliance of the parties, that is, the possibility of the parties to comply with alternatives and flight; second, the vulnerability of the parties, that is, whether the parties have special needs, whether they belong to minors, whether they are healthy; third, alternatives. The practicability of implementation means the cost and feasibility of specific alternatives. In the United States, when applying alternatives to immigrant detention, risk assessment is made about the flight and endangers to the community security: the former considers factors such as community relations, family background, residence experience, employment experience, drug abuse experience, immigration experience and the situation of seeking legal representation [13]. The latter considers factors such as foreigners' criminal prosecution, public wanted, supervision, disciplinary violations and gang attachments [14]. A report from the US Court of Auditors to the US Congress in 2014 showed that bond are the most used alternatives by US Immigration and Customs Enforcement [15]. See the Table below for details:

Table 1

Fiscal year Number	2011	2012	2013
Bond	40,408	47,091	40,714
Order of recognizance	9,693	16,633	29,672
Order of supervision	8,816	11,646	13,108
Parole	2,132	2,079	6,242
Alternatives to Detention	16,933	17,107	23,954
Total	77,982	94,556	113,690

Use of alternative to immigration detention by the U.S. Immigration and Customs Enforcement Agency in the fiscal year 2011-2013

9. Suggestions on Adding Guarantor and Bail System

In view of the inappropriate application of detention review for reasons such as physical vulnerability, Article 61 of the Law on the Administration of Exit and Entry sets out alternatives to limit the scope of activities. Single alternative to detention review are tired of dealing with complex immigration and entry-exit management practices [16]. Based on the rich practical experience of Chinese public security departments in the aspects of guarantor and bail in administrative detention, and considering that guarantor and bail system have a wide market in European and American countries, it suggested that the alternatives to detention review for guarantor and bail be given priority. After the decision of detention review has been made, illegal immigrants who have little

possibility of living or absconding without endangering public and national security shall be released on bail by providing guarantors and paying bonds. Before making a decision, a risk assessment should be carried out, taking into account the parties' permanent residence, resident time, family relationship, employment experience, court appearance, immigration violations, evasion of law enforcement and entry methods. The bailer must report the personal movements to the law enforcement department on a regular basis during bail, and may not leave the restricted area without permission; the bailer must cooperate with the law enforcement case in a timely manner [17]. If the conditions of bail are not complied with, the deposit will be forfeited or a fine will be imposed on the guarantor, and the person who is released on bail will be admitted. For other alternatives to immigration detention used by European and American countries, China can also try and explore according to practical needs, and adjust them in light of the specific situation.

References

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- [16] Alternatives projects refer to releases based on other circumstances (parties should appear in court in a timely manner and report regularly to the Immigration and Customs Enforcement Authority).
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