CONTENTION – Judicial CONtrol of Immigration DeTENTION

Co-financed by the European Commission
European Return Fund – "Community Actions" 2012

Completed Questionnaire for the project Contention National Report – Czech Republic

David Kosar
in collaboration with National Judge
Zdeněk Kühn

I. SETTING THE SCENE

1. FIRST STAGE of judicial control,
i.e. judicial *control of Initial Detention acc. to Art. 15(2) RD*

Q1. The ***initial*** detention is ordered by:

- **An administrative authority. The TCN concerned has the right to take proceedings by means of which the lawfulness of detention is subject to a judicial review** (AT, BE, BG, CZ, SI, SK)

Detention of the TCNs can be made under three different legal regimes: (1) under the Police Act; (2) under the Aliens' Act (hereinafter also "ALA"); and (3) under the Asylum Act (hereinafter also "ASA"). Even though detention under ALA is the most important one regarding the Returns Directive (hereinafter also "RD"), it is important to mention all three regimes, because according to the Supreme Administrative Court (hereinafter also "SAC") all three detention regimes count towards the maximum length of detention stipulated by ALA and it is not possible to re-detain a TCN under ALA after her detention under ASA expired (see Judgment of the SAC of 02.04.2014, No. 6 As 146/2013 – 44; and Judgment of the SAC of 10.04.2014, No. 2 As 115/2013 - 59).

First, short-time detention (up to 24 hours) can be undertaken by the Police pursuant to Art. 27(1) of the Police Act in case (a) the foreigner has perpetrated violations which could lead to decision on administrative expulsion from the Czech Republic; (b) administrative expulsion proceedings were initiated against the foreigner and there are reasons to detain the foreigner [these reasons are described below]; (c) the foreigner should be expelled upon an enforceable decision on expulsion; (d) there are grounds to believe that the foreigner is staying in the territory of the Czech Republic illegally or has entered the territory illegally. The Police department competent to decide on expulsion or on termination of stay in the Czech Republic has to be informed of this short-time detention without undue delay and the TCN may be further detained until a decision on the termination of his stay in the country or information on commencement of the administrative expulsion proceedings is delivered to him, but only up to 48 hours from the moment her freedom was restricted. If expulsion proceedings are initiated, short-term detention can be followed by a decision on detention pursuant to the ALA. The short-time detention under the Police Act can be in theory challenged before courts, but it is de facto impossible to reach the judgment within 48 hours.

Second, under the ALA there are three different grounds for detention: (1) detention for the purpose of expulsion; (2) detention for the purpose of departure; and (3) detention for the purpose of readmission. The maximum length of detention in "standard cases" is 180 days (for exceptions, see QQ. 72-76). For more details on each of these detention regimes see below. In these cases the Regional Directorate of the Police decides on detention of the TCNs. Decisions under ALA are subject to judicial review before administrative courts.

Finally, if a TCN lodges an application for international protection, her legal regime

is no longer governed by ALA, but by ASA.[1] *According to the CJEU (C-534/11, Arslan, 30 May 2013), the subsequent detention of TCNs after lodging an application of international protection is allowed under the EU law. However, according to the SAC the length of detention under ASA counts towards the maximum length of detention stipulated by ALA (see Judgment of the SAC of 02.04.2014, No. 6 As 146/2013 – 44). Moreover, if the maximum detention limit under ASA (which is 120 days, in contrast to 180 days under ALA) expires, the TCN who lodged an application for international protection cannot be re-detained again under ALA (see Judgment of the SAC of 02.04.2014, No. 6 As 146/2013 – 44).*

***Until 31 December 2013**, judicial review was available both before the civil courts and before the administrative courts. However, these two types of remedies had separate and different procedures.*

(1) Administrative courts follow rules of procedure embodied in the Code of Administrative Justice (hereinafter also "CAJ"). Administrative decisions in immigration law cases, including detention of the TCNs, are subject to judicial review before regional courts that act as courts of the first instance. Subsequently, an extraordinary remedy (the cassational complaint) against a decision of the Regional Court is available before the Supreme Administrative Court. The cassational complaint has to be lodged in 2 weeks from the delivery of the regional court decision. It does not have an automatic suspensive effect, but the complainant may ask for it. Detention of TCNs is decided upon in the first instance by single judges of the administrative law division of the regional courts. The Supreme Administrative Court then decides in 3-judge panels. Judicial review of administrative acts is based on a cassational principle.[2] *There is only one detention facility in the Czech Republic (in Bělá-Jezová). There is no specialized administrative court taking decisions on detention and sometimes TCNs are detained in places located far from the court deciding on their detention. Since 1 January 2011 judicial review before administrative courts has to be undertaken within a seven day time-limit since acquiring a case-file from the Police. This time-limit was adopted in order to remedy the lengthy court review before which frequently led to judgments annulling detention decisions after more than six months, i.e. frequently after the release of the TCN.*[3] *In administrative judicial review, the courts examine the lawfulness of the decisions, i.e. whether conditions were fulfilled to detain a TCN, whether the decision contained sufficient reasons, whether the administrative authority did not step out of the limits for discretion. However, administrative courts which work purely on a cassation principle did not have the power to order the release of the TCN from detention in case they find that the decision was not lawful. In order to rectify this deficiency from the point of view of Art. 5(4) ECHR50, a new article was introduced to ALA pursuant to which detention had to be terminated as soon as the court annulled the*

[1] This is a huge simplification.

[2] See Art. 78(1) CAJ. The exceptions to this rule do not apply in immigration law cases; administrative courts are empowered to change decisions of administrative authorities only regarding the amount of fines imposed for administrative offences [see Art. 78(2) CAJ]..

[3] The problem with lengthy judicial review was addressed by the ECtHR, 27 November 2008, No. 298/07, *Rashed v. Czech* Republic.

decision on detention; this also led to release from detention in case the administrative authority made procedural flaws that could be rectified in the procedure to come (e.g. lack of reasons in the decision). However, the administrative judicial review lacked important aspect required by Art. 5 ECHR50 – a "repeated" review of continuing detention. Being governed by ne bis in idem principle, the TCN may not attack the same decision twice.

(2) The two deficiencies of administrative judicial review were supposed to be rectified by judicial review before civil courts,[4] which could take decisions repeatedly, which could review whether there were conditions for detention fulfilled at the time of decision-making of the court, and which could order a release of a TCN. These courts, however, could not review "lawfulness" of the decisions on detention.

These civil courts review and administrative courts review were supposed to mutually complement each other. However, this "dual system" did not function effectively and caused a lot of problems. Most importantly, civil courts were not able to provide speedy judicial review of continuing detention (see Judgment of SAC of 22.07.2010, No. 9 As 5/2010-74; and Judgment of SAC of 04.09.2012, No. 7 As 97/2012-26) and the criteria of civil courts on the one hand and the administrative courts on the other diverged significantly. For these reasons, ***since 1 January 2014****, all powers regarding judicial control of detention of TCNs were vested with administrative courts [Art. 172(4)-(6) ALA] and the competence of civil courts in these matters was abolished. In order to avoid any confusion I will describe only* ***the current system of judicial review****, unless explicitly specified otherwise.*

- An administrative authority. The order must be endorsed by a judicial authority within a specific time-limit (NL)

Not relevant.

- Administrative authority. However, it can order detention of a certain length, and detention which goes beyond that length is ordered by a judicial authority (IT, HU, FR)

Not relevant.

- A judicial authority on request of an administrative authority (DE)

Not relevant.

Q1.1. For any response you chose in the previous question, please explain whether the judge **controls *ex officio* all the elements of the lawfulness** irrespective of the arguments of the parties or whether the judge **limits the control only to the arguments** raised by the parties:

Strict procedural rules apply before Czech administrative courts. These rules include in particular the principle of concentration before the regional courts (i.e. need to disclose the reasons for considering the decision unlawful within the time-limit to lodge an action) and

[4] Art. 200o of the Code of Civil Procedure (in the wording before 31 December 2013).

the principle that the subject-matter of a case is delimited by the petitioner (the scope of which courts can review ex officio being limited to the errors that lead to the "nullity" of the administrative decision).[5] *This also means that, according to this principle, it is not possible to add a new ground of appeal after the expiration of the statutory terms for filing an appeal.*

In other words, judicial control of detention is limited to consideration of the arguments raised by the TCN. However, the negative consequences of the strict application of the principle of concentration has been mitigated by the broad interpretation of arguments raised by the TCN in detention cases and by the case law of the Constitutional Court[6] *that prohibits overly formalistic treatment of the arguments raised by the parties. We might thus say that, in practice, judicial review of detention is somewhere in between ex officio review and the review of points raised by the parties. Nevertheless, despite the fact that the strict procedural rules have been somewhat relaxed in asylum and immigration law cases in order to ensure the effective access to the court,*[7] *the judge still limits the control only to the arguments, understood broadly, raised by the parties.*[8]

Q1.2. What are in your opinion the **advantages and disadvantages** of the options you chose in **Q1** and **Q1.1**?

There are very few advantages of the Czech system apart from economic considerations (if the initial decision was to be made by a judge, the system would be more expensive), expediency (the initial decision is taken by the Police immediately after a TCN is detained) and the fact that the current system does not overburden administrative courts.

Disadvantages are far more serious, The combination of an initial decision taken by the Police, the strict principle of concentration before administrative courts, judicial review only of the arguments raised by the parties and the lack of comprehensive system of legal aid severely limits the effective judicial review of administrative decisions on detention of the TCNs.

Q2. Please provide below a short description of **the system of legal aid** for pre-removal detainees in your Member State

The provision of legal aid is a general and structural problem in the Czech Republic, which does not affect only detained TCNs, but also Czech citizens. As there is no comprehensive system of legal aid for Czech citizens, it is not surprising that there is no such system for TCNs either.

As regards the detained TCNs, the ALA merely regulates the right of a detained TCN to receive visits of a lawyer or a lawyer from a non-governmental organization which provides

[5] Art. 76(2) of the Code of Administrative Justice (CAJ).
[6] Too rigorous application of these rules would be considered as breach of right to access to court pursuant to Art. 36 of the Charter of Fundamental Rights (No. 2/1993 Coll.), see judgment of the Constitutional Court of 17 December 2008, No. I. ÚS 1534/08.
[7] See ibid..
[8] For further details, see JILEK, D., PORIZEK, P.: *Návratová směrnice: vyhoštění, zajištění a soudní přezkum*, KVOP, 2011, pp. 251-256.

legal assistance to TCN [Art. 145(3) ALA]; this would probably not be sufficient to find Art. 13(3) and 13(4) of the Returns Directive as fully transposed.[9] *In practice, lawyers from non-governmental organizations commute to detention facilities on a regular basis, approximately once per week. However, they describe diverse difficulties that impede their full access to all the detained TCNs, for instance the Prague NGO Organization for Aid to Refugees (OPU) described as a problematic practice of certain detention facilities according to which lawyers had to hand over their mobile telephone at entrance to the facility. This in the end impeded their communication,*[10] *but the Police have recently allowed lawyers to use mobile phones to contact an interpreter in order to be able to communicate with the client. This is doubled with the obligation of clients to also hand over their mobile phones, and thus with their limited possibility to communicate with the outside world.*[11] *In sum, free legal assistance to detained TCNs is not fully guaranteed.*

In contrast to administrative proceedings, anyone has access to free legal assistance in judicial proceedings on the condition that it is necessary for defending his or her rights and that he or she could be liberated from paying court fees (i.e. on the condition that he or she does not have sufficient financial resources to afford legal aid by a lawyer, and on the condition that asserting his or her rights is not clearly abusive or clearly lacking any prospects of success) [Art. 35(8) CAJ]. However, the quality of the assigned lawyers varies a lot (some of them do not visit a TCN at all and file just a formal action). Apart from that, lawyers from specialized non-governmental organizations working with refugees or migrants may represent these in front of regional courts [Art. 35(5) CAJ]; this rule accepting that special qualifications are necessary to deal with asylum and migration issues. Despite this rule, however, compared to appointed advocates, lawyers from non-governmental organizations do not have their expenses for legal representation before the courts covered.[12]

The lack of a comprehensive system of legal aid has also led to poorly argued motions to administrative courts.[13]

A proposal of new law on free legal counselling, which should change the system of free legal aid in the Czech Republic for any administrative procedures and for representation before courts (that is both for Czech citizens and foreigners), is being prepared by the Ministry of Justice. However, this law has not been adopted yet.

For further details, see KOSAŘ, D., LUPAČOVÁ, H.: Migration Law in the Czech Republic, International Encyclopedia of Laws: Migration Law, Kluwer Law International*, 2012, pp. 287-288.*

[9] For similar conclusion, see JILEK, D., PORIZEK, P.: *Návratová směrnice: vyhoštění, zajištění a soudní přezkum*, KVOP, 2011, p. 88.
[10] HOLA, E., KRYSKA, D. Analysis of Position of the Detained Foreigners, Praha: OPU, April 2010.
[11] For further criticism of the lack of effective system of legal aid, see JILEK, D., PORIZEK, P.: *Návratová směrnice: vyhoštění, zajištění a soudní přezkum*, KVOP, 2011, pp. 86-88.
[12] See judgment of the Supreme Administrative Court of 15 September 2008, No. 4 Azs 51/2008.
[13] See JILEK, D., PORIZEK, P.: *Návratová směrnice: vyhoštění, zajištění a soudní přezkum*, KVOP, 2011, pp. 255-256

Q3. Do the competent judicial authorities, i.e. the courts ordering, endorsing or reviewing (administrative decision regarding) the initial detention belong to:

- □ Civil jurisdiction
- X Administrative jurisdiction
- □ Criminal jurisdiction
- □ Special jurisdiction
- □ Else

Not relevant.

Q4. Is the judge ordering, endorsing or reviewing the ***initial*** detention,

- Hearing only detention cases in general (special competence)?

Not relevant.

- Hearing only immigration law cases?

Not relevant.

- **Hearing a wide range of cases not limited to immigration/detention (general competence)?**

There is no specialization of judges stipulated by law (only specialization of courts). Judges are assigned and reassigned within each court pursuant to the so-called "work schedule" (rozvrh práce), an internal document of the court issued by the court president for a calendar year. Czech law thus vests the power to reassign judges (and, indirectly, also to decide on their specialization) in court presidents. Therefore, the specialization of single-judges as well as panels of chambers is determined by work schedules. These rules apply to all ordinary courts, including the administrative courts.

In theory, court presidents can stipulate in the work schedule that some judges will deal only with immigration law cases or only with detention cases. However, in practice it does not happen, because there are not enough immigration cases to justify a "luxury" of having a specialized judge on immigration law (not to speak of a specialized judge in detention cases only).

The first instance court in administrative law matters is in most cases, including immigration and asylum law cases, the Regional Court. Detention of the TCNs decide upon single judges of the administrative law division of the regional courts. To my knowledge, there has never been an administrative law judge at the Regional Court that dealt only with detention cases. In the past, when there were several thousands of asylum applications, there were first instance judges that dealt only with asylum cases, but, to my knowledge, there were no first instance judges specialized only in immigration law cases (not to speak of detention cases).

Finally, since the establishment of the Supreme Administrative Court in 2003, the court of second instance in administrative law matters, there has never been a chamber specialized only on immigration or detention cases. In fact, asylum and

immigration law cases have been always distributed among all judges of the Supreme Administrative Court.

Q5. If the detention is ordered **by an administrative authority** and **reviewed on the initiative of the detainee by a judicial authority**, does your Member State's legislation provide for a second level of jurisdiction for the examination of the lawfulness of detention?
X YES NO

Q5.1. If the answer to the previous question is YES, please elaborate on **any differences** in the control of lawfulness of detention **between the first and the second levels of jurisdiction**:

There are no significant differences regarding the scope of judicial review. However, there are several differences regarding the procedural rules. In particular, there is a shorter time limit to lodge the cassational complaint before the SAC [2 weeks in contrast to 30 days for lodging an appeal to the regional court; see Art. 172(1) ALA]; (2) the cassational complaint does not have automatic suspensive effect; (3) there is no time limit for the decision of the SAC on detention of the TCN; and (4) there is an obligatory representation by advocates whose quality varies a lot (in other words, in contrast to proceedings before a regional court, a specialized NGO cannot represent a TCN before the SAC).

Q6. If the detention is **ordered/endorsed by a judicial authority**, does your Member State's legislation provide for **a second level of jurisdiction** for the examination of the lawfulness of detention?
YES NO
Not relevant

Q6.1. If the answer to the previous question is YES, please elaborate on any differences in the control of lawfulness of detention between the first and the second levels of jurisdiction:

Not relevant.

Q7. If relevant, please elaborate in the following on **any on-going legislative changes** relating to the **QQ. 1-6**, which will affect in the future the judicial control of detention:

The new Alien's Act is under preparation. In fact, the Ministry of the Interior prepared drafts of three new laws, the new Alien's Act, Act on Free Movement of EU Citizens and in July 2013, and Act on the Border Protection, which would – if adopted – mean a complete overhaul of the Czech legislation regarding TCNs. However, these draft laws met with severe criticism and the Ministry of the Interior eventually withdrew them. Right now, it is not clear which version (if any) of these new laws will be submitted to the Parliament. Hence, a legislative change relating to the QQ. 1-6 might take place in the mid-term future, but it is not possible to comment on the content of these changes at this moment.

2. SECOND and SUBSEQUENT STAGES of judicial control,

i.e. *judicial control of continuing detention according to Art. 15(3)*

Q8. The lawfulness of continuing detention is controlled by a judicial authority:

- □ Only **when** the detention order is **renewed**
- □ **Independently** from the renewal order (i.e. irrespective of the time when the detention order is renewed)
- **X** **Both options** are possible

Q8.1. What are in your opinion the **advantages and disadvantages** of the option you chose in the previous question?

The main advantage of this system is that a TCN can challenge her detention at any moment of her detention and thus she can e.g. immediately react to the new information regarding the prospect of her removal.

The main disadvantage is a possible overburdening of courts with repetitive actions. However, given the relatively low number of detained TCNs, this has not been a serious issue in the Czech Republic so far.

2.1 Judicial control of detention exercised on the occasion of the renewal of detention

Q9. When judicial control is exercised **on the occasion of the renewal of detention** and the renewal decision was taken by the administration, is the judicial review of the lawfulness of the renewal order:

- Automatic

No.

- **Possible only on application of the detainee**

Q9.1. For each of the response you chose in the previous question, please explain whether the judge controls *ex officio* all the elements of the lawfulness irrespective of the arguments of the parties or whether the judge limits the control only to the arguments raised by the parties:

The administrative courts limit the control of detention only to the arguments raised by the parties: See, mutatis mutandis, Q.1.1.

Q10. What are in your opinion the **advantages and disadvantages** of the options you chose in **Q9** and **Q9.1:**

See, mutatis mutandis, Q.1.2.

Q11. If the response to the **Q9** is **"possible only on application of the detainee"**, does your Member State's legislation provide for **a second level of jurisdiction** for the examination of the lawfulness of renewal order

X YES NO

Q11.1. If the answer to the previous question is YES, please elaborate on any **differences** in the control of lawfulness of detention **between the first and the second levels** of jurisdiction:

See, mutatis mutandis, Q.5.1.

Q12. If the renewal decision is taken by a judicial authority, is there any **second level of jurisdiction** for the examination of the lawfulness of renewal of detention?

YES NO

Not relevant

Q12.1. If the answer to the previous question is YES, please elaborate on **any differences** in the control of lawfulness of detention **between the first and the second levels of jurisdiction**:

Not relevant.

2.2 Judicial control of detention exercised independently (in time) from the renewal of detention

Q13. If the lawfulness of continuing detention is controlled **independently from the renewal order**, the lawfulness of detention is reviewed by:

- An administrative authority *ex officio* with an automatic judicial review

Not relevant.

- **An administrative authority *ex officio* with the possibility of judicial review on the application of the TCN concerned**

According to Art. 126(a) ALA, the Police must review whether the reasons for detention of a TCN still exist for the entire period of her detention. Hence, de iure lawfulness od detention is supposed to be reviewed by an administrative authority ex officio at any time. However, de facto the lawfulness of continuing detention is controlled mainly upon application by the TCN concerned as procedural activities of the Police and the Ministry of Interior in this regard usually start few days before the expiry of the initial detention. *A detained TCN may challenge the lawfulness of her continuing detention before the Police [Art. 129a ALA]. However, a TCN can ask for her release from detention only in 30-day intervals after the last decision on her detention – that is after 30 days from the initial decision on detention, after 30 days from the decision on renewal of her detention, after 30 days from the last negative decision on her release taken independently from the renewal, or after 30 days from the last court decision on the initial decision/renewal/release [Art. 129a(3) ALA].*. *If the Police rejects the release of a TCN from detention, **since 1 January 2014** (see Q. 1) she may appeal this decision to the regional court [Art. 172(4)-(6) ALA]. If she is not successful, she may lodge a cassational complaint to the Supreme Administrative Court. ALA stipulates strict time limits for processing the appeal by regional courts. The Police must submit the appeal, the case file and its own arguments to the regional court within 5 days [Art.172(4) ALA] and the regional court must decide on the appeal within 7 days from the moment it receives the case file from the Police [Art.172(5) ALA]. Hence, the decision of the regional court is always rendered within 12 days at the latest from the moment of lodging the appeal. There are no time limits set for the decision of the Supreme Administrative Court.* *Note that **until 31 December 2013**, administrative courts did not have the competence to control of the lawfulness of continuing detention independently (in time) from the renewal of detention. This power was vested with civil courts and this "dual system" caused many problems (see Q.1 for further details).*

- An administrative authority on application by the TCN concerned with an automatic judicial review

Not relevant.

- An administrative authority on application by the TCN concerned with the possibility of judicial review on the application of the TCN concerned

As mentioned above in this question, a detained TCN may challenge the lawfulness of her continuing detention before the Police [Art. 129a ALA]. However, a TCN can ask for her release from detention only in 30-day intervals after the last decision on her detention – that is after 30 days from the initial decision on detention, after 30 days from the decision on renewal of her detention, after 30 days from the last negative decision on her release taken independently from the renewal, or after 30 days from the last court decision on the initial decision/renewal/release [Art. 129a(3) ALA]..

- A competent court *ex officio* with no possibility of second level review of lawfulness of detention

Not relevant.

- A competent court *ex officio* with the possibility of second level review of lawfulness of detention on application of the TCN concerned

Not relevant.

- A competent court on application by the TCN concerned with no possibility of second level review of lawfulness of detention

Not relevant.

- A competent court on application by the TCN concerned with the possibility of second level review of lawfulness of detention

Not relevant.

Q14. What are in your opinion the **advantages and disadvantages of the option you chose** in the previous question?

The new system of judicial review in force since 1 January 2014 – which unified judicial control of detention of the TCNs and vested all powers regarding these matters to the administrative courts – is certainly better than the previous "dual system", when the judicial control of detention was divided between administrative courts and civil courts (for further details see Q.1). It provides a more uniform case law and, moreover, strict time limits for the decisions of first-instance administrative courts were introduced in these matters. A 30-day period for a new challenge against the lawfulness of continuing detention also does not seem excessive. *However, there are still significant problems regarding the effectiveness of judicial control of continuing detention. Most importantly, the same key problem which was already raised regarding judicial control of the initial decision and the decision on the renewal of detention also plagues control of the lawfulness of continuing detention independently from the renewal of detention – the combination of the fact that the Police decides on the release of a TCN from the detention, the strict principle of concentration before administrative*

courts, judicial review only of the arguments raised by the parties and the lack of comprehensive system of legal aid severely limits the effective judicial review of administrative decisions on detention of the TCNs.

Q15. Is the **judge** controlling the lawfulness of continuing detention **the same** as the one ordering/endorsing/reviewing (administrative decision regarding) **the initial order** of detention?
YES NO
IT DEPENDS

Q15.1. If the answer to the previous question is NO, please explain briefly the difference:

As mentioned in Q.4, specialization of judges as well as case assignment is determined by a "work schedule" (rozvrh práce), which is an internal document of the court and thus varies from one court to another. At some regional courts (e.g. at the Municipal Court of Prague[14]), detention cases are distributed among more judges and thus it is not ensured that the same judge will review the initial order of detention as well as the subsequent challenges against continuing detention (even though there is still some probability that it might happen). At other regional courts (e.g. at the Regional Court of Brno), all detention cases are assigned to a single judge (who, apart from detention of the TCNs deals also with other administrative law issues) and hence it is de facto ensured that the same judge will review both the initial decision on detention as well as the subsequent challenges.

But note that work schedules are issued only for a calendar year and the composition of the court, specialization of judges as well as the rules of case assignment may change from one year to another.

Q16. If relevant, please elaborate in the following on any on-going legislative changes relating to the **QQ. 8-15**, which will affect in the future the system judicial control of detention:

There are no changes of the Code of Administrative Procedure relating to the QQ. 8-15 envisaged in the near future. However, this might change if a new Alien's Act is adopted (for further details, see Q.7).

3. Control of facts and law

Q17. The control exercised by the judge in your Member State on the materiality of the **facts** of a case of detention is:

- **a control limited to a manifest error of assessment**

The judicial control of facts before administrative courts in the Czech Republic is complex. The standard of review of facts is stipulated in Art. 103(1)(b) CAJ, which is rather convoluted and reads as follows:

[14] Note that the Municipal Court of Prague is a standard regional court, just with a different title (due to historical reasons and specific administrative status of the capital of the Czech Republic).

"[Appeal and] Cassation may be submitted … on grounds of the claimed … (b) fault of proceedings consisting in that the facts from which the administrative authority proceeded in the contested decision had no support in the documents or is in contradiction with them, or in that in determining the facts the law was violated in provisions on proceedings before the administrative authority in a way that could have affected its lawfulness, and for this claimed fault the court deciding on the matter should have quashed the contested decision of the administrative authority; such procedural faults include non-reviewability of the administrative authority's decision on grounds of its incomprehensibility,"

This means that the administrative courts will quash the administrative decision because of the wrong factual assessment only in case when the factual assessment has no support in or is in contradiction with the evidence, if procedural rules in establishing facts were severely violated, or if the administrative decision is incomprehensible. Even though the application of this standard in practice varies from one judge to another, it can be concluded that the control of factual elements of a case of detention is (1) considered as being full and not limited to a manifest error of assessment, when the assessment of facts by the Police is explicitly challenged by the TCN in the appeal; but (2) it is limited to a manifest error of assessment of facts if the assessment of facts by the Police is not explicitly challenged by the TCN or is challenged only generically/superficially in the appeal.

In other words, the answer to this question should be understood in conjunction with the lack of ex officio judicial review of detention that results from the principle of concentration applicable before the Czech administrative courts (see Q.1.1 for further details on the principle of concentration).

- a full control not limited to a manifest error of assessment

Not relevant.

Q18. The control exercised by the judge in your Member State on **legal elements** of a case of detention is:

- a control limited to a manifest error of assessment

Not relevant.

- **a full control not limited to a manifest error of assessment**

The judicial control of legal elements before administrative courts in the Czech Republic is stipulated in Art. 103(1)(a) CAJ, which reads as follows: "[Appeal and] Cassation may be submitted … on grounds of the claimed … (a) unlawfulness consisting in incorrect consideration of a legal issue before the court in the previous proceedings". The term "incorrect consideration of a legal issue" has been consistently interpreted by the administrative courts as a full control of legal elements which is not limited to a manifest error of assessment.

Q19. If relevant, please elaborate in the following on any on-going legislative changes relating to the **QQ. 17-18**, which will affect in the future the control of facts and law:

There are no changes of the Code of Administrative Procedure relating to the QQ. 17-18 envisaged in the near future. However, this might change if a new Alien's Act is adopted (for further details, see Q.7).

4. Proportionality in general

Q20. Describe briefly how the judge will in your Member State assess the proportionality of a detention (quote the **main elements to be controlled** on that basis):

The Czech Constitutional Court applies a standard three-step test of proportionality to the limitation of the right to liberty, which consists of the following stages: (1) Test of Suitability/Appropriateness:, i.e. whether the institute restricting a certain basic right allows the achievement of the desirable aim; (2) Test of Necessity, i.e. comparison of a given solution with alternative measures allowing to achieve the same objective without impinging upon fundamental rights and freedoms; and (3) Test of Balancing. i.e. weighing of conflicting right and public interests (on the proportionality test in general, see Judgment of the Constitutional Court No. Pl. US 4/94 Anonymous Witness I of October 12, 1994; or Judgment of the Constitutional Court No. III. ÚS 256/01 Photo-Identification of March 21, 2002; for the application of this test to criminal detention, see Judgment of the Constitutional Court No. I. ÚS 2208/13 David Rath of December 11, 2013).

However, administrative courts have not explicitly applied this stringent proportionality test so far in cases of detention of TCNs and the Constitutional Court was likewise somewhat reluctant to require from administrative courts to adopt a more intensive standard of review (see e.g. Judgment of the Constitutional Court Pl. US 10/09 Detention of Foreigners of December 15, 2009).

As a result, administrative courts often proceed on the case by case basis and have not stipulated a coherent set of criteria so far. The leading cases are as follows. In Judgment of SAC No. 1 As 132/2011-51 the SAC held that the Police must always consider alternatives to detention before resorting to detention; in order to assess the viability of alternatives to detention the Police must examine whether a TCN lives permanently on a particular address and is willing to report on regular basis, and/or whether he possesses enough finance to deposit a financial guarantee. This case was repeatedly cited to in the subsequent cases before SAC (see e.g. Judgment of SAC No. 1 As 11/2012 – 81; Judgment of SAC No. 3 As 30/2011 – 61; Judgment of SAC No. 4 As 12/2012-23).

In several cases the SAC also explained when detention is proportional and alternatives of detention are insufficient. According to this case law detention is proportional, if a TCN violated the conditions of the alternatives to detention in the past, failed to depart from the territory of the Czech Republic despite being subject to removal order in the past and stopped communicating with the IOM which was organizing his removal (Judgment of SAC No. 1 As 72/2013–31; see also Judgment of SAC No. 1 As 83/2012-31); when a TCN has a record at ICIS, is looked for by Interpol and did not leave the Czech Republic after a

previous expulsion order (Judgment of SAC No. 2 As 39/2013–50); when a TCN repeatedly violated the ALA by hampering expulsion and violating the prohibition to stay on the territory of the Czech Republic and when he served a prison sentence for staying in the Czech Republic illegally (Judgment of SAC No. 8 As 33/2013–35); Most of these cases involved TCN with rather convoluted "history" of violating immigration laws.

Under any circumstances, the Police must provide reasons why it did not use the alternatives to detention and no time constraints may justify departure from this duty (see Judgment of SAC No. 9 As 130/2011-83; Judgment of SAC of 18.10.2012, No. 7 As 107/2012-40; Judgment of SAC of 28.03.2012, No. 3 As 30/2011-57; Judgment of SAC of 18.01.2012, No. 8 As 36/2011-83; Judgment of SAC of 07.12.2011, No. 1 As 132/2011-51; or Judgment of SAC of 23.11.2011, No. 7 As 79/2010-150). The SAC also requires the Police to show that there is a reasonable prospect of expulsion of a TCN (see e.g. Judgment of the SAC of 05.04.2013, No. 7 As 139/2012-59; and Q.35.1. for further details) and to take into account the potential interference into family life of a TCN (see Decision of the Grand Chamber of the SAC of 23.11.2011, No. 7 As 79/2010–150; and Q.35.1. for further details).

5. Expediency (or deference in English & opportunité in French) in general

Q21. The control exercised by the judge in your Member State on a case of detention can touch upon expediency?

YES

Not relevant.

NO

The wording of the Aliens Act, competences of the Administrative Court and application of the proportionality test exclude deference. Moreover, the deferential review of decisions of administrative agencies (regarding the questions of law) with general principles of Czech administrative law and would probably be found unconstitutional by the Czech Constitutional Court.

The SAC explicitly rejected deferential review of detention e.g. in Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39, §§ 22-31 (for further details, see Q.65).

Q21.1. If the response to the previous question is YES, please elaborate on any changes in this respect, brought about by the implementation of the Return Directive:

Not relevant.

Q22. If relevant, please elaborate in the following on any on-going legislative changes relating to the **QQ. 20-21**, which will affect in the future the control of expediency:

There are no changes of the Code of Administrative Procedure relating to the QQ. 20-21 envisaged in the near future.

II. ELEMENTS OF LAWFULNESS NOT EXPLICITLY MENTIONED IN ART. 15 RD

1. Quality of law

Q23. Is there any case-law in your Member State concerning the assessment of the quality of the legal provisions applying to pre-removal detention in terms of their **preciseness**, **foreseeability** or **accessibility**?

X YES NO

Q23.1. If the response to the previous question is YES, please elaborate on the relevant case-law:

The relevant case law on the "quality of law" concerns cases that reacted to the preliminary question to the CJEU and subsequent judgment in C-534/11, Arslan, 30 May 2013, and subsequent amendments to ALA and ASA.

In Judgment of the SAC of 29.08.2013, No. 4 As 122/2013-24, the SAC held that if a detained TCN lodges the application for international protection, she may be further detained only if she lodged the application for international protection only in order to hamper her expulsion; any other interpretation would violate the principle of foreseeability of law.

In Judgment of the SAC of 17.09.2013, No. 5 Azs 13/2013-30, the SAC had to interpret the term "public order" in Art. 46a(1)(c) and Art. 46a(2) ASA. Under these provisions (amended after the preliminary reference in Arslan was made, but before the CJEU's judgment), a detained TCN who lodges the application for international protection may be further detained is she represents "the danger for the public order". The SAC held that the term "public order" must be interpreted narrowly in this context and must meet the standards of the SAC's and CJEU's interpretation of the term "public order"; otherwise this provision would not meet the necessary quality of law.

Most recently, in Judgment of the SAC of 02.04.2014, No. 6 As 146/2013-44, the SAC held that if a TCN detained under ALA (Art. 124 ALA) lodges the application for international protection, is detained under ASA (Art. 46a ASA) and the maximum limit for detention under ASA expired, she cannot be again "re-detained" under ALA (Art. 124a ALA). According to the SAC, such re-detention does not meet the requirements of precise and foreseeable law.

2. Compliance with procedural rules

Q24. What is the impact of (non-)compliance with domestic procedures relating to detention on the lawfulness of detention? *Please also elaborate on possible **procedural flaws** which according to your Member State's case-law **do not affect the lawfulness of detention** (e.g. the right to be heard as suggested by the CJEU in G.R.)*

As mentioned, in Q.17, Art. 103(1)(b) CAJ stipulates that "[Appeal and] Cassation may be submitted … on grounds … (b) … that in determining the facts the law was violated in provisions on proceedings before the administrative authority in a way that could have affected its lawfulness, and for this claimed fault the court deciding on the matter should have quashed the contested decision of the administrative authority; …"

This means that the administrative courts will quash the administrative decision only if procedural rules in establishing facts were severely violated. However, the principle of legality is considered a cornerstone of the rule of law (in contrast to review of facts addressed in Q.17) and most judges exercise a strict review of procedural flaws, which means that they strike down the administrative decision if there is a procedural flaw unless it is clear that this flaw could not have influenced the outcome of the case.

However, a relevant case law of administrative courts in the context of detention of TCNs is missing.

Q25. If relevant, please elaborate in the following on any on-going legislative changes relating to the **QQ. 23-24**, which will affect in the future the judicial control of detention:

There are no changes of the Code of Administrative Procedure relating to the QQ. 23-24 envisaged in the near future. Regarding the assessment of the quality of law (Q.23) any change by an ordinary legislation would be highly likely found unconstitutional, as the criteria for assessing the quality of law are stipulated by the case law of the Czech Constitutional Court and the European Court of Human Rights. Regarding the (non-)compliance with procedural rules (Q.24), there are no changes envisaged in the near future, but this might change if a new Alien's Act is adopted (for further details, see Q.7).

III. PARTICULAR ELEMENTS OF ART. 15 RD

1. Purposes of detention

Q26. Does the **judge** controlling the lawfulness of pre-removal detention **also control the lawfulness of a return decision**?
YES NO X

Q26.1. Please elaborate in the following on consequences of the response you chose in the previous question:

A return decision is a separate administrative decision, which is governed by different provisions of the ALA, and hence its lawfulness is controlled in a separate procedure. For instance, a TCN must challenge the expulsion order in a separate procedure.

But of course, if the return decision is quashed by courts, then the major precondition for detention is missing and and the administrative court will most probably quash the detention decision, if it is appealed against by the TCN [if it is not quashed by the Police itself, as required by Art. 127(1)(a) ALA].

Q27. Does your Member State's legislation differentiate between the two possible purposes of detention according to Art. 15 RD*, i.e.* the preparation of the return or carrying out the removal process?
YES NO X

1.1 Preparation of the return

Q28. If the answer to the **Q27** is YES, please elaborate on the **meaning of "the preparation of the return"** with reference to relevant provisions and pertinent case-law:

Not relevant.

Q29. Does the judicial control of the cases where the purpose of detention is "the preparation of the return" differ from the cases where the purpose of detention is "carrying out the removal process"?
YES NO Not relevant.

Q29.1. If the answer to the previous question is YES, please elaborate on those differences (*e.g. no or restricted application of the principle of proportionality during "preparation of return", especially the impossibility to evaluate whether there is a reasonable prospect of removal. Another example of the restricted application of the proportionality principle in such cases might be the impossibility to assess in detail whether the administration acts with due diligence*):

Not relevant.

Q29.2. Please indicate if there is any time-limit fixed in the national legislation for the detention "in order to prepare the return":

Not relevant.

Q29.3. Please elaborate on **any changes** in the treatment by judges of the questions raised in **QQ. 28-29.2**, brought about by **the implementation of the Return Directive**:

Not relevant.

Q30. If relevant, please elaborate in the following on any on-going legislative changes relating to the above-mentioned questions on the "preparation of return", which will affect in the future the interpretation of this criterion:

Not relevant.

1.2 Successful removal and its reasonable prospect

Q31. Do courts apply the criterion of **a reasonable prospect of removal** when reviewing the lawfulness of an ***initial*** **detention order**?

X YES NO

Q31.1. If the answer to the previous question is NO, please elaborate on any known reasons **why** the courts do not apply this test at that stage of review:

Not relevant.

Q32. What are the **defining factors** for assuming that there is **no reasonable prospect** of removal? Please choose from the following list:

- Lack of **due diligence** of national authorities

There is no such provision in the ALA. However, Czech administrative courts want to see evidence of removal arrangements that goes beyond formal acts such as notices that reasons for detention still persist (Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39). In this case, the Police made an inquiry regarding the expulsion of a TCN of Chinese nationality, but this inquiry took place only 2 months after his detention and was not able to provide any further evidence regarding other steps (such as contacting the embassy of the Chinese Republic, verifying the identity of a TCN etc.) taken in order to prepare the expulsion of this TCN (Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39, §§ 37-38).

- The **resources** (human and material) at the disposal of the authorities

Not relevant. (There is no such provision in the ALA and there is no relevant case law.)

- **Transport infrastructure** (e.g. when there is no functioning airport in the Member State of return or there is no route of return)

Not relevant. (There is no such provision in the ALA and there is no relevant case law.)

- **Conduct of the TCN concerned**, especially if the latter refuses the cooperation which is indispensable for the issuance of relevant documentation by the Member State of return (cf. ECtHR, *Mikolenko)*

Not relevant. (There is no such provision in the ALA and there is no relevant case law.)

- **Conduct of the Member State of potential return** (*e.g. an embassy in a given MS refuses generally the cooperation in cases of forced return and accepts only voluntary returns or it does not confirm the nationality of the person concerned (Cf. ECtHR, Tabesh))*

Not relevant. There is no such provision in the ALA and the only relevant judgment of the SAC dismisses this argument, albeit only obiter dictum; see. Judgment of the SAC of 29.07.2011, No. 8 As 35/2011-80, § 16)

- The **lack of a readmission agreement** or no immediate prospect of its conclusion;

Not relevant. (There is no such provision in the ALA and there is no relevant case law.)

- **Strasbourg proceedings** (especially when the Rule 39 is applied)

Not relevant. (There is no such provision in the ALA and there is no relevant case law.)

- Parallel **national judicial proceedings of suspensory character**, making the return impossible within the fixed time-limits

According to the SAC, if a TCN lodges the application for international protection and it is clear that the proceedings on international protection will not finish within 180 days (e.g. because of the suspensory effect of the appeal to the regional court or to the SAC), it means that there is no reasonable prospect of removal and thus a TCN cannot be further detained (Judgment of the SAC of 31.07.2013, No. 1 As 90/2011-124 – note that this is the Arslan case in which the preliminary reference was made to the CJEU). However, the mere fact that a TCN lodged the application for international protection does not automatically mean that there is no reasonable prospect of removal as in some cases (e.g. repeated applications for international protection) there is no automatic suspensive effect of the appeal to administrative courts (ibid). For similar conclusions, see also Judgment of the SAC of 05.04.2013, No. 7 As 139/2012-59; and Decision of the Grand Chamber of the SAC of 23.11.2011, No. 7 As 79/2010 – 150.

Note that the position in the pre-Arslan/Kadzoev era the TCN concerned used to be still detained on the basis of the initial "return detention" decision (based on the RD)

even after lodging an application for international protection and she could effectively challenge only the subsequent "asylum detention" decision which was issued once the initial "return detention" decision had expired. In other words, when a TCN lodged an application for international protection, there was no automatic immediate review of the prospect of her removal; this review took place only when the initial detention decision expires and the Police had to decide whether to prolong the detention or not.

However, this has changed on 1 May 2013 (that is 30 days before the CJEU published its Arslan judgment). Law No. 103/2013 stipulated that once a TCN lodges an application for international protection, the Police must issue a new detention decision within 5 days if it wants to keep a TCN in detention [see Art. 46a(2) ASA]. Once this new "asylum detention" decision is issued, the initial "return detention" decision automatically expires (see e.g. Judgment of the SAC of 31.07.2013, No. 1 As 90/2011-124, § 17).

Unfortunately, Art. 46a(2) ASA does not cover all situations of detention under the ALA and hence the SAC had to decide whether in the cases, when Art. 46a(2) ASA is not applicable, a new detention decision under the ALA must be issued or whether it is enough to review the initial detention decision internally without issuing a new decision. The SAC eventually opted for the former and held that despite the fact the ALA does not stipulate such a process, a new decision on detention must be issued; other interpretation would be inconsistent with the CJEU's Arslan judgment (see e.g. Judgment of the SAC of 31.07.2013, No. 1 As 90/2011-124, §§ 21-24).

For further details, see: VĚTROVSKÝ, J.: Reálný předpoklad pro vyhoštění: Interpretace právního kritéria ve třech krocích, KVOP, 2011, pp. 13-28.

- Return will be impossible because of the **considerations in accordance with Art. 5 RD** (*non-refoulement* in broader sense, i.e. also covering all cases mentioned in Art. 15 Qualification Directive; best interest of the child; family life; the state of health of the third Member State national concerned)

According to Decision of the Grand Chamber of the SAC of 23.11.2011, No. 7 As 79/2010–150, if return of a TCN is impossible the considerations of the private and family life, there is no reasonable prospect of removal and a TCN cannot be detained. In the present case, a TCN was a mother in the fourth month of pregnancy and she awaited her child with an EU citizen who was living in the Czech Republic. Note that the Art. 126b(2) ALA provides that if a TCN is in such a state of health that she has to stay in hospital longer than the remaining period until 180 days (or a lower number of days stipulated in the detention decision), she must be released; this provision does not apply if a TCN intentionally caused a harm to him/herself with the intention of evading detention [Art. 126b(3) ALA]. One can thus infer that if a TCN is hospitalized before being detained, her detention is not possible because reasonable prospect of removal would be missing (however, there is no case law that would confirm this position so far).

In addition,

- *Art. 124(3) ALA stipulates that the Police must pay special attention to detention of unaccompanied minors and families with children under 18 years.*

- *Art. 124(5) ALA provides that unaccompanied minors can be detained only on public order or state security grounds (see also Art. 129(4) ALA regarding readmission treaties).*
- *Art. 125(1) ALA stipulates a shorter maximum limit for detention of unaccompanied minors and families with children under 18 years, namely 90 days.*

- Else

Not relevant.

Q33. Assuming that the national courts apply the test of a reasonable prospect of removal already at the FIRST STAGE of judicial control of detention, does the relevant case-law indicate **any differential treatment** of the above-listed factors **during that FIRST vs. SECOND and any subsequent STAGES** of judicial control?

YES NO X N/A

Q33.1. If the answer to the previous question is YES, please elaborate on any such differences, also indicating any difference in the intensity of review:

Not relevant.

Q34. Please elaborate on the issue of the **time-frames** within which a reasonable prospect of removal must exist according to the national case-law. Consider if necessary different scenarios applicable to the above-listed factors (cf. Concept Note, III. 2.2.2):

There is no relevant case law.

Q35. When deciding on the existence of a reasonable prospect of removal, the courts:

- Limit their assessment to **an abstract or theoretical possibility of removal**
- Require **clear information on its timetabling or probability** to be corroborated with relevant **statistics** and/or **previous experience in handling similar cases**

X Else

Q35.1. Please elaborate in detail (with reference to pertinent national case-law) on the selected responses in the previous question:

The administrative courts are, right now, somewhere in between these two positions. Their assessment of a reasonable prospect of removal certainly goes beyond an abstract or theoretical possibility of removal (see the abovementioned cases: Judgment of the SAC of 31.07.2013, No. 1 As 90/2011-124; Judgment of the SAC of 05.04.2013, No. 7 As 139/2012-59; and Decision of the Grand Chamber of the SAC of 23.11.2011, No. 7 As 79/2010–150), but they have not explicitly required from the Police to provide clear information on timetabling of removal so far. Similarly, I am not aware of any case, where the administrative court corroborated a reasonable prospect of removal with relevant statistics (or required the Police to produce such statistics) and/or previous experience in handling

similar cases. However, it seems that such argument has not been raised before administrative courts and thus the courts have not had the opportunity to rule on it.

As to the relevant case law, the SAC stipulated the following guiding principles for assessing a "reasonable prospect of removal":

- *In Judgment of 05.04.2013, No. 7 As 139/2012-59, the SAC reviewed the decision of the Police to prolong detention of a TCN who lodged an application for international protection. It eventually quashed the detention decision mainly on the following grounds: (1) the Police did not stipulate in its detention decision which concrete steps to execute the expulsion of a TCN it has already done and which concrete steps are still necessary to do in future; (2) at the moment of the decision to prolong the detention of a TCN the standard limit for issuing the decision on international protection stipulated in the ASA already expired (which might have suggested that this is a more difficult case), which was not taken into account in the Police's detention decision at all; and (3) the remaining period of possible detention of a TCN (out of the maximum total detention period) at the moment of prolonging the detention was only 60 days.*
- *In Judgment of 31.07.2013, No. 1 As 90/2011-124 (this is the Arslan case), the SAC reviewed the detention of Turkish national who lodged an application for international protection. It distinguished the facts in the present case from Judgment No. 7 As 139/2012-59 discussed above and upheld the prolonged detention on the following grounds (see in particular §§ 31-36 of the judgment): (1) the Ministry of Justice has not yet issued a decision on international protection and (in contrast to Judgment No. 7 As 139/2012-59) the standard period under the ASA to do so had not yet expired; and (2) the remaining period of possible detention of a TCN (out of the maximum total detention period) at the moment of prolonging the detention was 120 days (in contrast to 60 days in Judgment No. 7 As 139/2012-59). It also seems that the SAC took into account an "immigration history" of Arslan, who entered the Schengen Area illegally, who arrived to the Czech Republic without the passport, used the falsified passport in 2009 in Greece, and had a record in SIS (see § 38 of the judgment)).*
- *In Decision of the Grand Chamber No. 7 As 79/2010–150, the SAC discussed the necessity to take into account the right to family life in the detention decision. In the present case, the Ukrainian TCN was pregnant (she was in the 4th month of her pregnancy) and claimed that she had the child with a Slovak citizen (i.e. with a EU national). The Police as well as the regional court did not address the family life of the applicant in the detention decision, because under the earlier precedent of the SAC, the family life should be discussed only in the expulsion decision. However, the Grand Chamber overruled the previous precedent and held that the Police must take into account the Art. 8 rights of the applicant already in the detention decision, even though, due to time constraints, it does not have to conduct a full-fledged proportionality test at this stage (see in particular §§ 27-31 of the judgment).*

Q36. The control exercised by the judge in your Member State on the requirement "that prospects of removal be reasonable" is:

- a control limited to a manifest error of assessment

Not relevant.

- a full control not limited to a manifest error of assessment, also substituting **judge's own discretion to that of decision-making authority**

The interpretation of what prospects of removal are "reasonable" is a legal question and thus the full judicial control applies (see also Q. 18).

Q37. Please elaborate on any changes in adjudicating the issue of a reasonable prospect of removal, brought about by the implementation of the Return Directive:

Not relevant. There has been no case law before transposition of the RD and very little case law after the transposition of the RD.

Q38. If relevant, please elaborate in the following on any on-going legislative changes relating to the above-mentioned questions on "a reasonable prospect of removal", which will affect in the future the interpretation of this criterion:

There are no changes of the ALA regarding "a reasonable prospect of removal" foreseen in the near future. However, this might change if a new Alien's Act is adopted (for further details, see Q.7).

2. Necessity grounds of detention

2.1 Avoiding or hampering the preparation of return or the removal process

Q39. Does your Member State's legislation further specify the meaning of ***avoiding*** the preparation of return or the removal process?

YES NO X N/A, *i.e. in your MS avoiding return is not a detention ground*

Q39.1. If the answer to the previous question is YES, please elaborate *with reference to pertinent case-law* on the specific cases falling under this concept:

Not relevant.

Q39.2. If the answer to the previous question is NO, please elaborate on how this concept is interpreted by the courts:

From the legislation and the case law of the SAC one may get an impression that concepts of avoiding the preparation of return, hampering the preparation of return or the removal process and risk of absconding overlap and it is hard to separate these three concepts, in particular since the administrative courts have not addressed the distinction between these three reasons for detention.

The most relevant cases regarding the avoiding of return (bearing in mind the abovementioned caveat that the SAC often does not formally distinguish between the three reasons of detention) are Judgment of SAC No. 1 As 72/2013–31 and Judgment of SAC No. 1 As 83/2012-31.

- *In judgment No. 1 As 72/2013–31, the SAC reviewed detention of a Vietnamese TCN who had previously violated the conditions of the alternatives to detention, had failed to depart from the territory of the Czech Republic despite being subject to expulsion decision and several removal orders, and had stopped communicating with the IOM which was organizing his removal. The SAC rejected his cassational complaint and upheld the detention decision (Judgment of SAC No. 1 As 72/2013–31, §§ 33-36). The fact that the TCN concerned voluntarily reported to the Police every week was not considered, given his "immigration history", sufficient to dispel the doubts about his willingness to cease avoiding return (ibid, § 36). Moreover, a TCN did not have enough money to meet the conditions of a financial guarantee (ibid.).*
- *In judgment of SAC No. 1 As 83/2012-31 the SAC reviewed detention of a TCN who had previously failed to depart from the territory of the Czech Republic despite being subject to expulsion decision and several removal orders, had attempted to mislead the Police by submitting false documents, and breached other obligation stipulated in ALA. The SAC rejected his cassational complaint and upheld the detention decision (Judgment of SAC No. 1 As 72/2013–31, §§ 20-23)*

According to this case law detention is proportional, if a TCN violated the conditions of the alternatives to detention in the past, failed to depart from the territory of the Czech Republic despite being subject to removal order in the past and stopped communicating with the IOM which was organizing his removal (Judgment of SAC No. 1 As 72/2013–31; see also Judgment of SAC No. 1 As 83/2012-31);

For information regarding the other relevant case law, see Q.20.

Q40. Does your Member State's legislation further specify the meaning of ***hampering*** the preparation of return or the removal process?

YES NO X N/A, *i.e. in your MS hampering return is not a detention ground*

Q40.1. If the answer to the previous question is YES, please elaborate *with reference to pertinent case-law* on the specific sub-categories falling under this concept:

Not relevant.

Q40.2. If the answer to the previous question is NO, please elaborate on how this concept is interpreted by the courts:

From the legislation and the case law of the SAC one may get an impression that concepts of avoiding the preparation of return, hampering the preparation of return or the removal process and risk of absconding overlap and it is hard to separate these three concepts, in particular since the administrative courts have not addressed the distinction between these three reasons of detention (see Q.20).

However, a good example of hampering the removal process is Judgment of SAC No. 8 As 33/2013–35. In this case, the Police detained a TCN because of repeated violations of the ALA, namely for hampering expulsion, violating the prohibition to

stay on the territory of the Czech Republic, and staying in the Czech Republic illegally after serving a prison sentence (Judgment of SAC No. 8 As 33/2013-35, § 27). According to the SAC, this "immigration history" clearly justified his detention (§§ 28-34). The SAC also rejected his arguments based on Art. 8 ECHR (§§ 37-47).

2.2 Risk of absconding

Q41. Does your Member State's legislation define ***objective criteria*** based on which the existence of a risk of absconding can be assumed?
YES NO X N/A *i.e. in your MS a risk of absconding is not a detention ground*

Q41.1. If the answer to the previous question is YES, please elaborate *with reference to pertinent case-law* on those objective criteria (*please also mention if the consideration whether there is a risk of absconding* ***goes beyond the mere fact of an illegal stay or entry***):

Not relevant.

Q42. If your Member State's legislation does not define aforementioned objective criteria, can the criterion of a risk of absconding still be invoked as a ground of detention?
X YES NO

Q42.1. If the answer to the previous question is YES, please elaborate on how this concept is interpreted by the courts:

From the legislation (the specific case law of the SAC on the concept of "absconding" is missing) one may get an impression that concepts of avoiding the preparation of return, hampering the preparation of return or the removal process and risk of absconding overlap and it is hard to separate these three concepts, in particular since the administrative courts have not addressed the distinction between these three reasons of detention. For the general review of related case law, see Q.20.

Q43. Assuming that your Member State' legislation sets objective criteria defining a risk of absconding, please elaborate on the question **how individual situation and individual circumstances are taken into consideration by courts** when establishing whether there is a risk of absconding?

Not relevant.

Q44. Please elaborate on any **overlaps between** the concepts **"risk of absconding"** and **"avoiding/hampering return",** which can be observed in the national legislation and/or case-law:

Art. 124(1)(b) ALA stipulates that a TCN can be detained, "if there is a risk that an alien could obstruct [mařit] or hamper [ztěžovat] the execution of the decision on expulsion".

Neither the term "obstruct" [mařit] nor the term "hamper" [ztěžovat] are further defined by the ALA. The term "obstruct" [mařit] tends to be interpreted broadly so as to encompass both absconding and avoiding removal by the Police and the SAC. However, no one has raised this issue before administrative courts and hence their position is unclear.

In sum, the ALA, the Police as well as administrative courts do not distinguish clearly between the concepts "risk of absconding" and "avoiding/hampering return" and thus there are huge overlaps between them.

Q45. Having regard to the phrase "in particular" in Art. 15(1) RD, does either your Member State's legislation or the relevant case-law **allow any other ground of detention** apart from "avoiding/hampering return" and "a risk of absconding" (*please note that **we do not refer here to public order grounds** which are excluded from Art. 15(1) RD*)?
X YES NO

Q45.1. If the response to the previous question is YES, please elaborate in the following on those grounds *with reference to pertinent case-law:*

There are several additional grounds for detention provided by the ALA.

According to Art. 124(1) ALA (that concerns detention in order to execute expulsion), , the Police may detain a TCN:

1. *if she presents a danger to the state security or seriously violates the public order [Art. 124(1)(a) ALA]*
2. *if she has not left the territory of the Czech Republic within the period stipulated by the expulsion decision [Art. 124b(1)(c) ALA]*
3. *if she seriously violated conditions of the alternative to detention [Art. 124b(1)(d) ALA]*
4. *if she has a record in the Schengen Information System [Art. 124b(1)(d) ALA].*

According to Art. 124b ALA (that concerns detention in order to execute removal), the Police may detain a TCN

1. *if she has not lodged an application for international protection even though she was invited to so [Art. 124b(1)(a) ALA]*
2. *if she has not left the territory of the Czech Republic after an unsuccessful application for international protection within the period stipulated by the Police [Art. 124b(1)(b) ALA]*
3. *if her subsidiary protection status expired [Art. 124b(1)(c) ALA].*

According to Art. 129(1) ALA (that concerns detention in order to execute readmission agreements or Dublin Regulation) the Police may detain a TCN, if she entered or stayed on the territory of the Czech Republic illegally for the purpose of removal pursuant to the readmission agreements of the Dublin Regulation. The Police can detain such TCN even if her readmission or transfer is not possible due to objective obstacles [Art. 129(1) ALA in fine].

Q46. Please elaborate on **any changes in adjudicating** the issues relating to "a risk of absconding" and "avoiding/hampering return", brought about by the **implementation of the Return Directive**:

Not relevant.

Q47. If relevant, please elaborate in the following on any on-going legislative changes relating to the above-mentioned questions on the "avoiding/hampering return" and "a risk of absconding", which will affect in the future the interpretation of these criteria:

There are no changes of the ALA regarding this issue foreseen in the near future. However, this might change if a new Alien's Act is adopted (for further details, see Q.7).

3. Alternatives to detention

Q48. Does your Member State's legislation oblige administrative or judicial authorities taking detention decisions to consider alternatives to detention?
X YES NO

Q49. Which of the following alternatives to detention exist in your Member State (in law as well as in practice)?

- Registration obligation

Not available as a separate alternative, but only in combination with regular reporting to the authorities and designated residence (see "Else" for further details).

- Deposit of (travel) documents

Not available.

- Bond/bail, i.e. deposit of an adequate financial guarantee

The ALA includes two alternatives to detention [Art. 123b(1)(b) ALA]. One of them is the so-called "financial guarantee" that operates as a bail.

According to Art. 123c ALA, the financial guarantee operates as follows. The TCN deposits the financial guarantee to the bank account of the Police, where it stays until the TCN departs the territory of the Czech Republic or is granted on the residence permits (permanent residence permit, long-term residence permit, long-term visa or temporary residence permit). If the TCN does not depart from the territory of the Czech Republic or does not apply for returning the financial guarantee within 5 years, the guarantee will be forfeited and belong to the State [Art. 123c(2) and Art. 123c(6) ALA]. If the TCN does not leave the territory of the Czech Republic voluntarily within the stipulated period or stays on the territory of the Czech Republic illegally, the Police may use the guarantee to cover the expenses related to her expulsion [Art. 123c(5) ALA].

- Regular reporting to the authorities

Not available as a separate alternative, but only in combination with registration obligation and designated residence (see "Else" for further details).

- Community release/supervision

Not available.

- Designated residence

Not available as a separate alternative, but only in combination with registration obligation and regular reporting to the authorities (see "Else" for further details).

- Electronic tagging

Not available.

- Home curfew

Not available.

- Else

The second alternative to detention stipulated by the ALA is a combination of the registration obligation, designated residence and a regular reporting to the authorities [Art. 123b(1)(a) ALA]. All of these conditions must be met cumulatively.

(1) *Under the registration obligation prong of this alternative, returnees have an obligation to register their address with the Police and report any change of their address the following day at the latest [Art. 123b(1)(a) ALA].*

(2) *Under the designated residence prong of this alternative, the returnee is obliged to live at the address registered with the Police and the Police officer may check if a returnee still lives there. If a returnee changes her address, she is obliged to report this change to the Police the following day at the latest (see above). If a returnee does not comply with the obligation, detention can be ordered [Art. 123b(7) ALA].*

(3) *Under the regular reporting to the authorities prong of this alternative, returnees have an obligation to go and report at the nearest Police station in intervals determined by the Police. There are no specific standards on the manner and time intervals for reporting in the ALA. According to the Police practice, interval for reporting is usually one month. If returnee is sick or for other excusable reason cannot report to the Police, he/she should make a phone call, explain the situation and report to the Police as soon as she can [Art. 123b(7) ALA]. If a returnee does not comply with the obligation, detention can be ordered [Art. 123b(7) ALA].*

Q50. When there is a **certain <u>risk of absconding</u>**, what are the main considerations (embodied in the national legislation and/or in the relevant case-law) for opting for **alternatives to detention instead of detention**?

The ALA does not explicitly address the situation, when there is a certain risk of

absconding. However, it mentions three criteria that can be used in these situations

(1) The Police shall take into account to what extent the alternatives to detention may jeopardize a successful expulsion of a given TCN [Art. 123b(3) ALA].

(2) The Police shall take into account the intensity of the interference to the private and family life of a given TCN [Art. 123b(4) ALA]. This has been indirectly confirmed by the Grand Chamber of the SAC of 23.11.2011, No. 7 As 79/2010–150, which held that if return of a TCN is impossible the considerations of the private and family life, there is no reasonable prospect of removal and a TCN cannot be detained (in the present case, a TCN was a mother in the fourth month of pregnancy and she awaited her child with an EU citizen who was living in the Czech Republic; see also Q.32). However, the SAC did not discuss the alternatives to detention in this case.

(3) The alternatives to detention cannot be imposed on an unaccompanied minor [Art. 123b(4) ALA].

There is no relevant case law of administrative courts that would address substantive criteria to be used to choose between detention and alternatives to detention in cases, when there is a certain risk of absconding. The cases before administrative were either clear and given the "history" of violations of immigration laws by the TCNs concerned (violating the expulsion order, criminal sanctions, repetitive illegal entry and stay on the territory, repetitive attempts to abscond etc.) there was no doubt that detention was necessary (see e.g. Judgment of SAC No. 1 As 72/2013–31; Judgment of SAC No. 1 As 83/2012-31; Judgment of SAC No. 2 As 39/2013–50; Judgment of SAC No. 8 As 33/2013-35)[15] *or the SAC quashed the decisions of the Police because the Police did not provide sufficient reasoning why alternatives to detention are not sufficient (see Judgment of SAC No. 9 As 130/2011-83; Judgment of SAC of 18.10.2012, No. 7 As 107/2012-40; Judgment of SAC of 28.03.2012, No. 3 As 30/2011-57; Judgment of SAC of 18.01.2012, No. 8 As 36/2011-83; Judgment of SAC of 07.12.2011, No. 1 As 132/2011-51; or Judgment of SAC of 23.11.2011, No. 7 As 79/2010-150). In sum, there has been so far no case law on the "grey zone" where there was only a certain risk of absconding and the Police provided reasons on why it did not opt for alternatives to detention instead of detention.*

In several cases the SAC also explained when detention is proportional and alternatives of detention are insufficient. According to this case law detention is proportional, if a TCN violated the conditions of the alternatives to detention in the past, failed to depart from the territory of the Czech Republic despite being subject to removal order in the past and stopped communicating with the IOM which was organizing his removal (Judgment of SAC No. 1 As 72/2013–31; see also Judgment of SAC No. 1 As 83/2012-31); when a TCN has a record at ICIS, is looked for by Interpol and did not leave the Czech Republic after a previous expulsion order (Judgment of SAC No. 2 As 39/2013–50); when a TCN repeatedly violated the ALA by hampering expulsion and violating the prohibition to stay on the territory of the Czech Republic and when he served a prison sentence for staying in the Czech Republic illegally (Judgment of SAC No. 8 As 33/2013–35); Most of these cases involved TCN with rather convoluted "immigration history".

Under any circumstances, the Police must provide reasons why it did not use the alternatives to detention and no time constraints may justify departure from this duty

[15] These judgments are discussed in more detail in Q.20.

Q51. When the TCN concerned **avoids or hampers the return procedures**, but there is still no risk of absconding, what are the main considerations (embodied in the national legislation and/or in the relevant case-law) for opting for **alternatives to detention instead of detention**?

There are no legal standards explicitly stipulated in the ALA and there is no relevant case law.

Q52. When deciding on the use of pre-removal detention, are competent authorities required to **assess every available or possible alternative to detention** to justify their effectiveness or the lack thereof in a given case?
X YES NO

Q52.1. If the response to the previous question is NO, please elaborate on the reasons why it is not the case *(please also explain here whether in cases where administration does not indicate the appropriateness of any alternative to detention, **the courts can take initiative and assess if there is any alternative to detention** which can be applied effectively in a given case*):

Not relevant.

Q52.2. The control exercised by the judge in your Member State on the consideration of alternatives to detention by the administration is:

- a control limited to a manifest error of assessment

  Not relevant.

- a full control not limited to a manifest error of assessment, also substituting **judge's own discretion to that of decision-making authority**

  The decision on whether the alternatives to detention are sufficient is a legal question and thus the full judicial control applies (see also Q. 18).

  Most importantly, administrative courts are not limited by any rules that would not allow judges to fully assess all legal elements while adjudicating a case of detention. They are not bound by evidential submissions of the parties and can take any evidence they deem to contribute to the clarification of the case and to the legal and correct decision. However, as mentioned above, administrative courts are bound by grounds of appeal; the so-called principle of concentration is discussed in more detail in Q1.1.

Q53. Please elaborate on the question whether and how **an individual, case-by-case evaluation** is conducted when deciding on whether detention or any alternative to it should be applied (*especially in those cases where **statistics or previous experience with the same group** of people speak clearly in favour of detention*):

The administrative courts study primarily the past "immigration history" of a TCN, namely:

- *whether a TCN concerned violated the conditions of the alternatives to detention in*

the past (Judgment of SAC No. 1 As 72/2013–31; see also Judgment of SAC No. 1 As 83/2012-31)

- *whether failed to depart from the territory of the Czech Republic despite being subject to removal/expulsion order in the past (Judgment of SAC No. 1 As 72/2013–31; Judgment of SAC No. 2 As 39/2013–50; or Judgment of SAC No. 1 As 83/2012-31)*
- *whether a TCN concerned stopped communicating with the IOM which was organizing his removal (Judgment of SAC No. 1 As 72/2013–31)*
- *whether a TCN concerned has a record at ICIS (Judgment of SAC No. 2 As 39/2013–50)*
- *whether a TCN concerned is looked for by Interpol (Judgment of SAC No. 2 As 39/2013–50)*
- *whether a TCN concerned violated the prohibition to stay on the territory of the Czech Republic in the past (Judgment of SAC No. 8 As 33/2013–35)*
- *whether a TCN concerned was successfully prosecuted under the Criminal Code and a final judgment has been imposed on her for a criminal offence (Judgment of SAC No. 8 As 33/2013–35).*

I am not aware of any case, in which the administrative court, when deciding on whether detention or any alternative to it should be applied, used relevant statistics (or required the Police to produce such statistics) and/or previous experience in handling similar cases (see, mutatis mutandis, Q.35.1).

Q54. Please elaborate on **any changes in adjudicating** the issues relating to alternatives to detention, brought about by **the implementation of the Return Directive**:

Not relevant. There were no alternatives to detention before the transposition of the Return Directive and hence it is not possible to compare the adjudication of the issues relating to alternatives to detention before and after the transposition.

Q55. If relevant, please elaborate in the following on any on-going legislative changes relating to the above-mentioned questions on "alternatives to detention", which will affect in the future the interpretation of this criterion:

There are no changes of the ALA relating regarding the "alternatives to detention" envisaged in the near future. However, this might change if a new Alien's Act is adopted (for further details, see Q.7).

4. Proportionality of the length of detention

4.1 Defining the length of detention

Q56. Taking into consideration the requirement that any detention shall be for "as short a period as possible", **how is the length of *initial* detention determined in your Member State**?

- By wholesale application of the time-periods fixed by national law

Not relevant.

- By exact determination of the length of detention, which is strictly necessary for successful removal in each particular case:

Article 125(1) ALA is very cryptic and stipulates that "detention cannot exceed 180 days" (unless strict conditions for renewal of detention beyond 6 months are met; see Q. 72). However, Art. 124(3) ALA (that concerns expulsion) and Art. 124b(3) ALA (that concerns removal) provide an additional condition that the Police, when determining the length of detention, must take into account:

(1) the complexity of the preparation of removal/expulsion; and

(2) the needs of unaccompanied minors and the families with children under 18 years.

In practice, the length of the initial detention varies. There is no statistics available, but it is not uncommon that detention is ordered for a period shorter than six months (e.g. for 60 or 90 days). On the other hand, the standard "as short as possible" is not explicitly mentioned in the ALA and is not explicitly applied by the Police.

There is very little case law that would deal with the length of detention in more detail and no coherent set of criteria or a test to review the exact length of detention has been developed by courts so far.

The leading judgment of the SAC that addressed the situation when the judicial review of detention before civil courts (Judgment of the SAC of 04.09.2012, No. 7 As 97/2012-26) is no longer relevant, because the power of civil courts to review detention of the TCNs was abolished as of 1 January 2014 (see Q.1 for further details), but it is still worth mentioning. In this judgment the SAC held that as civil courts were usually not able to review continuing detention of TCNs within less than two months, the Police must stipulate shorter detention periods in its decisions in order to allow effective judicial control of detention by administrative courts (which were much faster).

Q56.1 Please also elaborate on the question when the time of Art. 15 RD-detention starts running according to your national legislation (e.g. from the date of removal/detention order, from the date of apprehension, from the date of actual placement under detention, etc.)?

According to the ALA, detention starts running from the date of apprehension [Art. 125(1) ALA]. The Police interpreted this provision to mean that detention starts running from the date of apprehension under the ALA. This interpretation meant that detention under the Police Act (see Q.1) does not count towards the 6-month limit. However, the SAC changed this practice and held that both detention under the ALA and detention under the Police Act count towards the 6-month limit (Judgment of the SAC of 10.04.2014, No. 2 As 115/2013-59). This means that detention starts running from the moment of apprehension no matter under which regime this apprehension was ordered.

Q57. Taking into consideration the requirement that any detention shall be for "as short a period as possible", how is the length of ***subsequent*** detention determined in your Member State?

- By wholesale application of the time-periods fixed by national law

Not relevant.

- By exact determination of the length of detention, which is strictly necessary for successful removal in each particular case:

The same criteria as in the initial detention apply (see Q.56). The ALA merely stipulates that if necessary the Police may renew detention and it may do so repeatedly [Art. 124(3) ALA and Art. 124b ALA(4)].

The standard "as short as possible" is not explicitly mentioned in the ALA and is not explicitly applied by the Police.

The relevant case law that would stipulate criteria to determine the exact length of renewal of detention is missing. One of the few cases in which the SAC reviewed renewal of detention is Judgment of the SAC No. 5 As 96/2011-53. In this case the Police detained a Ukrainian TCN, but his expulsion failed because the Ukraine refused to confirm his identity and issue him a new travel document. However, the Police still renewed his detention. The SAC disagreed with the Police, held that in such a case there is clearly no prospect of removal and a TCN's detention thus cannot be renewed. Unfortunately, the SAC did not develop more detailed criteria to review the length of subsequent detention.

Q58. The control exercised by the judge in your Member State on the requirement that detention should be "as short as possible" is:

- a control limited to a manifest error of assessment

Not relevant.

- a full control not limited to a manifest error of assessment

The interpretation of what "as short a period as possible" in Art. 15(1) RD means is a legal question and thus the full judicial control applies (see also Q. 18). As to the

control, whether "the complexity of the preparation of removal" according Art. 124b(3) ALA justifies the period of detention ordered by the administration the administrative courts usually quash judgments that do not explain at all why a particular length of detention was chosen and defer to the Police, if a detailed justification is provided. The following two judgments of the regional court concerning a Nigerian TCN are good examples (for further details of this case, see also Q.78). In the first detention decision the Police detained the Nigerian TCN for 90 days. However, the Regional Court of České Budějovice (in the judgment of 3 May 2012, No. 10 A 40/2012-16) quashed this decision for procedural flaws, as the Police did not justify the length of TCN's detention. The Police then issued the second detention decision, by which it detained the same TCN for 120 days, but this time it carefully explained the complexity of the case (the Nigerian TCN did not have a passport and there is no Nigerian consulate in the Czech Republic, which meant that the Czech authorities had to request this passport from a consulate abroad; in addition, the Czech authorities had to wait with its request until the decision on TCN's application for international protection comes into force) which justified the length of detention in the second decision. This time the Regional Court of České Budějovice (in the judgment of 13 June 2012, No. 10 A 52/2012-21) was satisfied with the reasoning of the Police and rejected the appeal of the TCN. [However, the SAC quashed both the judgment of the Regional Court of České Budějovice of 13 June 2012 and the second detention decision of the Police for another reason – because it was not possible to "re-detain" the TCN after the end of his application for international protection under ALA again.] The lack of relevant case law that would explicitly address the "as short as possible" requirement might also be partly explained by the fact that this requirement was not explicitly transposed in the Czech Republic.

Note also that the Czech administrative courts cannot shorten the period of detention ordered by the Police. They can only quash the original detention decision. The Czech administrative court cannot in general replace the decision of the administrative authorities; subject to rare exceptions (e.g. administrative courts can moderate administrative fines), they operate on the cassational principle.

Q59. Please elaborate on any **changes in adjudicating the issues relating to the length of detention**, brought about by the implementation of the Return Directive:

The Returns Directive, the case law of the CJEU regarding the RD (especially the Arslan judgment) and the case law of SAC have brought the following changes in adjudicating the issues relating to the length of detention:

- *regarding the **starting date** the SAC held that detention starts running on the date of apprehension, irrespective of the regime of detention (i.e. it does not matter whether it was under the ALA, the Police Act or the ASA) instead of the previous position that detention starts at the moment of the detention order under the ALA (Judgment of the SAC of 10.04.2014, No. 2 As 115/2013-59).*
- *regarding the **ending date**, the SAC held that the ending date must be determined in a manner that is most favourable to a TCN and hence every day (even if it was only for few hours) when a TCN was deprived of his liberty counts towards the six month limit (Judgment of the SAC of 10.04.2014, No. 2 As 115/2013-59)*
- *regarding **re-detention**, the SAC held that if the maximum detention limit under ASA*

expires, the TCN who lodged an application for international protection cannot be re-detained again under ALA (see Judgment of the SAC of 02.04.2014, No. 6 As 146/2013 – 44); for further details, see Q.69.1.

- *regarding **inefficient review of detention before civil courts**, the RD led to the reform that abolished the dual system of review of detention before both civil and administrative courts and vested all powers regarding the judicial control of detention with administrative courts (for further details, see Q.1).*

Q60. If relevant, please elaborate in the following on any on-going legislative changes relating to the above-mentioned questions on the "defining the length of detention", which will affect in the future the interpretation of this criterion:

There are no changes of the ALA relating regarding the "defining the length of detention" envisaged in the near future. However, this might change if a new Alien's Act is adopted (for further details, see Q.7).

4.2 Due diligence

Q61. Please elaborate **on how national courts interpret the "due diligence"** criterion:

The term "due diligence" has not been explicitly transposed to the ALA and hence there are only few relevant cases. In Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39, §§ 22-31, the SAC concluded that deprivation of liberty is a serious interference in TCNs' rights and hence the Police must in the process of arranging the removal act with due diligence, actively, dutifully and without undue delays (Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39, § 31). Interestingly, the SAC drew its conclusions from the extensive discussion of the Strasbourg case law (see Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39, §§ 27-28). Subsequently, the SAC wanted to see evidence of removal arrangements that goes beyond formal acts such as notices that reasons for detention still persist (Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39). In this case, the Police made an inquiry regarding the expulsion of a TCN of Chinese nationality, but this inquiry took place only 2 months after his detention and was not able to provide any further evidence regarding other steps (such as contacting the embassy of the Chinese Republic, verifying the identity of a foreigner etc.) taken in order to prepare the expulsion of this TCN (Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39, §§ 37-38).

The other two cases mentioned in the database (Judgment of the SAC No. 5 As 96/2011-53; and Judgment of the SAC No. 8 As 33/2013-35) touch upon this issue only very loosely as they primarily discuss whether there is a reasonable prospect of removal of the TCNs and not whether the Police made used all available avenues and acted as fast as possible in executing the removal arrangements. There is also no reference to the Strasbourg case law on due diligence in these two cases.

*The problem regarding the due diligence criterion lies also in the Czech version of the RD, which shifts the original meaning of the RD. While the English version clearly stipulates that "Any detention shall be … only maintained as long as removal arrangements are in progress **and** executed with due diligence" (emphasis added), the Czech version reads as*

*follows "Jakékoli zajištění musí trvat … pouze dokud jsou s náležitou pečlivostí činěny úkony směřující k vyhoštění", which means "Any detention shall be … only maintained as long as **actions** towards expulsion **are taken with due diligence**". This means that due diligence is not considered a separate criterion for review of actions taken by the Police.*

Q62. The control exercised by the judge in your Member State on the requirement that removal arrangements to be executed with "due diligence" is:

- a control limited to a manifest error of assessment

Not relevant.

- **a full control not limited to a manifest error assessment**

The interpretation of what "due diligence" in Art. 15(1) RD means is a legal question and thus the full judicial control applies (see also Q. 18). The good example of the standard of review exercised by the Czech administrative courts is Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39. In this case, the SAC explicitly rejected the deferential review exercised by the Municipal Court in Prague, which held that it is up to Police how to proceed with removal arrangements. The SAC held that such a limited judicial control would not be able to exclude arbitrariness and is contrary to the ECtHR's case law (Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39, §§ 22-31). Therefore, administrative courts are not satisfied with the basic information that the Police made some progress in removal arrangements. Instead, they require the Police to show concrete steps taken in order to remove a TCN. Moreover, these steps must be included in the case file; otherwise they cannot be used as evidence before courts (Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39, § 37 in fine).

Regarding the possibility of the reviewing administrative court to take initiative and search for new elements in order to prove that the action taken by the competent authorities could have taken less time than that claimed by the latter, there has been no case law so far.

Q63. Please elaborate on **any changes in adjudicating** the issues relating to the due diligence criterion, brought about by the **implementation of the Return Directive**:

Not relevant.

Q64. If relevant, please elaborate in the following on any on-going legislative changes relating to the above-mentioned questions on the "due diligence", which will affect in the future the interpretation of this criterion:

There are no changes regarding the "due diligence" foreseen in the near future.

4.3 Removal arrangements in progress

Q65. Please elaborate on how national courts check whether removal arrangements are in progress:

Administrative courts want to see evidence of removal arrangements that goes beyond formal acts such as notices that reasons for detention still persist (Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39). In this case, the Police made an inquiry regarding the expulsion of a TCN of Chinese nationality, but this inquiry took place only two months after his detention and was not able to provide any further evidence regarding other steps (such as contacting the embassy of the Chinese Republic, verifying the identity of a TCN etc.) taken in order to prepare the expulsion of this foreigner (Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39, §§ 37-38).

In the same case, the SAC explicitly rejected the deferential review exercised by the Municipal Court in Prague, which held that it is up to Police how to proceed with removal arrangements. The SAC held that such a limited judicial control would not be able to exclude arbitrariness and is contrary to the ECtHR's case law (Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39, §§ 22-31).. Therefore, administrative courts are not satisfied with the basic information that the Police made some progress in removal arrangements. Instead, they require the Police to show concrete steps taken in order to remove a TCN. Moreover, these steps must be included in the case file; otherwise they cannot be used as evidence before courts (Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39, § 37 in fine).

Q65.1. The control exercised by the judge in your Member State on the requirement "that removal arrangements are in progress" is:

- a control limited to a manifest error of assessment

  Not relevant.

- a full control not limited to a manifest error of assessment, also substituting **judge's own discretion to that of decision-making authority**

  The interpretation of the requirement "that removal arrangements are in progress" is a legal question and thus the full judicial control applies (see also Q. 18).

Q66. How do **Strasbourg proceedings**, namely when an interim measure based on the Rule 39 has been ordered, **impact on (the lawfulness of) the length of detention** (*please also consider three requirements developed by the Strasbourg court in this respect – see Concept Note III. 4.2*):

There is no relevant case law.

Q67. How **do internal judicial proceedings suspending the return**, impact on (the lawfulness of) the length of detention:

There is no relevant case law.

Q68. Is there any obligation on the side of the administration or the reviewing court to **inquire with the court where the parallel proceedings about return are pending** about the possible length and/or outcome of those proceedings?
YES NO X

Q68.1. If the response to the previous question is YES, please elaborate on the relevant modalities of the mentioned inquiry:

Not relevant.

Q69. Does the period when **asylum proceedings** are pending have any impact on calculating the length of detention?
X YES NO

Q69.1. If the response to the previous question is YES, please elaborate on the relevant national case-law in this respect (please also consider CJEU, *Kadzoev and Arslan*):

The Czech Supreme Administrative Court was the court that made a preliminary reference to the CJEU in Arslan. According to the CJEU (C-534/11, Arslan, 30 May 2013), the subsequent detention of TCNs after lodging an application of international protection is allowed under the EU law. *In the follow-up procedure in the Arslan case before the SAC, the SAC held that detention under ASA counts towards the maximum length of detention stipulated by ALA (see Judgment of the SAC of 02.04.2014, No. 6 As 146/2013 – 44). Moreover, if the maximum detention limit under ASA expires, the TCN who lodged an application for international protection cannot be re-detained again under ALA (see Judgment of the SAC of 02.04.2014, No. 6 As 146/2013 – 44).*

Q70. Please elaborate on **any changes in adjudicating** the issues relating to the removal arrangements in progress criterion, brought about by the **implementation of the Return Directive**:

The CJEU's Judgment in Arslan caused significant changes in detention of asylum seekers, as the length of detention under the ALA and the ASA is considered cumulatively. Moreover, re-detention under different regimes (e.g. under ALA, the under ASA, and again under ALA) was severely limited.

Q71. If relevant, please elaborate in the following on any on-going legislative changes relating to the above-mentioned questions on the "removal arrangements in progress", which will affect in the future the interpretation of this criterion:

There are no changes of the ALA regarding this issue foreseen in the near future. However, this might change if a new Alien's Act is adopted (for further details, see Q.7).

5. Necessity of the extension of the length of detention beyond 6 months

Q72. Does your Member State's legislation provide for the **possibility of extension of detention beyond 6 months** because of:

- A **lack of cooperation by the third-Member State national concerned**

The Czech legislature in fact transposed only Art. 15(6)(a) RD (this was confirmed by Judgment of the SAC of 31.08.2012, No. 8 As 67/2012-54). According to the Explanatory Memorandum to Law No. 427/2010 Coll. that transposed the RD, Item 257), the Czech Republic:

- *transposed Art. 15(6)(a) RD, because some TCNx intentionally declined to cooperate with the Czech authorities in order to delay their expulsion. They often destroyed their travel documents and lied to the authorities about their identity. The authorities were then forced to verify their identity with the in the state of their nationality, which often took several months (37 % of requests for verification of identity of a TCN were not replied within 180 days in 2008 and 2009);*
- *did not transpose Art. 15(6)(b) RD, because it would unnecessarily infringe the liberty of a TCN and because it was thought that this provision would apply only to few cases.*

In Judgment of the SAC of 31.08.2012, No. 8 As 67/2012-54, the SAC reviewed the detention of a Vietnamese TCN beyond 180 days pursuant to Art. 125(2)(b) ALA [which transposed Art. 15(6)(a) RD] in a situation, when the Vietnamese authorities refused to cooperate with the Czech Police and did not issue the travel document to the TCN concerned. The SAC eventually quashed the decision of the Police on the ground that it detained the TCN pursuant to the provision which transposed Art. 15(6)(a) RD, even though the factual situation fell within Art. 15(6)(b) RD [it was the Vietnamese authorities that were the reason for the impossibility to expel the TCN concerned], which was not transposed by the Czech Republic, and the fact that the TCN concerned mentioned untrue information about his identity was secondary (as his identity was already known, when the request was made to the Vietnamese authorities). In other words, according to the SAC, the Police wanted to keep the Vietnamese TCN in detention without a proper legal ground (see in particular Judgment of the SAC of 31.08.2012, No. 8 As 67/2012-54, §§ 39-43).

The "lack of cooperation" ground [Art. 15(6)(a) RD] of detention beyond the six month limit was transposed into two separate provisions of the ALA:

1. *Art. 125(2)(a) ALA stipulates that detention can be prolonged beyond the 6 month limit if a TCN "hampers the preparation of expulsion during her*

detention" (emphasis added)

2. *Art. 125(2)(b) ALA stipulates that detention can be prolonged beyond the 6 month limit if a TCN "provides false information regarding data that are necessary for obtaining her substitute travel document". However, the SAC narrowed down the application of this provision as it held that detention of a TCN can be prolonged under Art. 125(2)(b) ALA only if there is causal nexus between providing false information and the impossibility to remove her (Judgment of the SAC of 31.08.2012, No. 8 As 67/2012-54; this is in line with the CJEU's position in Mahdi, § 82).*

- **Delays in obtaining the necessary documentation** from the third countries

Not relevant.
The "delays in obtaining the necessary documentation" ground [Art. 15(6)(b) RD] of detention beyond the six month limit was not transposed to the ALA (see Judgment of the SAC of 31.08.2012, No. 8 As 67/2012-54; and Explanatory Memorandum to Law No. 427/2010 Coll. that transposed the RD, Item 257).

- Else

Not relevant.

Q72.1. The control exercised by the judge in your Member State on the "lack of cooperation" or "delays in obtaining the necessary documentation" is:

- a control limited to a manifest error of assessment

Not relevant.

- a full control not limited to a manifest error of assessment, also substituting **judge's own discretion to that of decision-making authority**

As to the "lack of cooperation" ground [Art. 15(6)(a) RD] of detention beyond the 6 month limit, the interpretation of what "a lack of cooperation" means is a legal question and thus the full judicial control applies (see also Q. 18). However, there is no relevant case law.

As to the "delays in obtaining the necessary documentation" ground [Art. 15(6)(b) RD] of detention beyond the 6 month limit, it was not transposed to the ALA (see Q72).

Q73. When deciding on the extension of detention, is **a new assessment of a risk of absconding** conducted?
X YES NO

Q73.1. Please elaborate on any selected response to the provisions question *with reference to pertinent national case-law*:

There is no case law, but the ALA is explicit in providing that the Police must assess a risk of absconding (or any other reason for detention of a TCN) in any decision on detention, be it the decision on the initial detention or the decision on the renewal of detention [Art. 124(1) ALA], as well as in the decision on the request to release from detention [Art.

129a(1) ALA]. This conclusion is also confirmed by the explicit wording of the Explanatory Memorandum to Law No. 427/2010 Coll. that transposed the RD, Item 257.

Q74. When deciding on the extension of detention, is **a new assessment of alternatives to detention** conducted?
X YES NO

Q74.1. Please elaborate on any selected response to the provisions question *with reference to pertinent national case-law*:

There is no case law, but the ALA is explicit in providing that the Police must consider alternatives to detention in any decision on detention, be it the decision on the initial detention or the decision on the renewal of detention [Art. 124(1) ALA], as well as in the decision on the request to release from detention [Art. 129a(1) ALA].

Q75. Please elaborate on **any changes in adjudicating** the issues relating to the extension of detention criteria, brought about by the **implementation of the Return Directive**:

Not relevant.

Q76. If relevant, please elaborate in the following on any on-going legislative changes relating to the above-mentioned questions on the **possibility of extension of detention beyond 6 months**, which will affect in the future the interpretation of this criterion:

There are no changes of the ALA regarding this issue foreseen in the near future. However, this might change if a new Alien's Act is adopted (for further details, see Q.7).

6. Different intensity of review with the lapse of time

Q77. Does your Member State's legislation, case-law or any other written or unwritten judicial practice indicate **any difference of the intensity** of the lawfulness review of detention **depending on the time spent in detention** (i.e. does the intensity of review increase with the lapse of time spent in detention)?
YES NO X

Q77.1. If the response to the previous question is YES, please elaborate on relevant national provisions and/or pertinent case-law and explain if relevant how the intensity of review increases:

Not relevant.

7. Consequences of unlawful detention and re-detention

Q78. In your Member State, the declaration of detention as unlawful by judges leads to:

- Immediate release of the TCN concerned **irrespective** of whether the reasons of unlawfulness were **procedural flaws** or the breach of one of the **necessity and proportionality criteria** foreseen under Art. 15 RD

In Judgment of the SAC of 01.11.2012, No. 9 As 111/2012 – 34, the SAC held that if detention is found unlawful by an administrative court, the TCN concerned must be released irrespective of whether the reasons of unlawfulness were procedural flaws[16] or issues of substantive law. The subsequent re-detention within three days from the date of the decision of the administrative court was found inconsistent with Art. 15(2) RD and, given the direct effect of Art. 15(2) RD, also inapplicable. The Czech legislature eventually abolished this re-detention system (see Q.79.1) and the current wording of Art. 127(1)(b) explicitly stipulates that a TCN must be released if the administrative court (1) quashes the initial decision on detention; or (2) quashes the decision on renewal of detention; or (3) quashes the decision to not release a TCN. *Note that this judgment of the SAC was also heavily influenced by the ECtHR's judgment in Buishvili v. the Czech Republic, 25. 10. 2012, No. 30241/11.*

- Immediate release of the TCN concerned **only when** the reason of unlawfulness was the **breach of one of the necessity and proportionality criteria** foreseen under Art. 15 RD

Not relevant.

- No release of the TCN concerned when it is possible to regularise the breach with a new detention order

Not relevant.

[16] This case was rather complex. In the first detention decision the Police detained the Nigerian TCN for 90 days. However, the Regional Court of České Budějovice (in the judgment of 3 May 2012, No. 10 A 40/2012-16) quashed this decision for procedural flaws, as the Police did not justify the length of TCN's detention. The Police then issued the second detention decision, by which it detained the same TCN for 120 days, but this time it carefully explained the complexity of the case (the Nigerian TCN did not have a passport and there is no Nigerian consulate in the Czech Republic, which meant that the Czech authorities had to request this passport from a consulate abroad; in addition, the Czech authorities had to wait with its request until the decision on TCN's application for international protection comes into force) which justified the length of detention in the second decision. This time the Regional Court of České Budějovice (in the judgment of 13 June 2012, No. 10 A 52/2012-21) was satisfied with the reasoning of the Police and rejected the appeal of the TCN. However, the SAC quashed both the judgment of the Regional Court of České Budějovice of 13 June 2012 and the second detention decision of the Police for another reason – because it was not possible to "re-detain" the TCN after the end of his application for international protection under ALA again.

- No release of the TCN concerned until the decision of the second level of jurisdiction

Not relevant.

Q79. After release of the TCN concerned as a result of **declaring detention unlawful**, is it possible in your Member State to **re-detain** the TCN concerned?

Yes No X

Q79.1. If the response to the previous question is YES, please elaborate with reference to relevant provisions and pertinent national case-law on the reasons which can be invoked for the re-detention:

Note that this is a very recent development. Since 1 January 2011 ***until 23 June 2014*** *the Police could issue a new decision on detention within three days from the annulling judgement of the administrative court [Art. 127(1)(b) ALA in the wording before being amended by Law No. 101/2014 Coll.]. This system of re-detention procedure was criticized because of its inconformity with Art. 5(4) ECHR50 and was eventually abolished in 2014 (by Law No. 101/2014 Coll.).*

Q80. After the release from detention because of the **expiry of the maximum time-limits**, is it possible in your Member State to **re-detain** the TCN concerned?

YES NO X

Q80.1. If the response to the previous question is YES, please elaborate with reference to relevant provisions and pertinent national case-law on the reasons which can be invoked for the re-detention like for instance a new element:

Not relevant.

Q81. Do the victims of unlawful pre-removal detention have **an enforceable right to compensation** in your Member State?

YES NO X

Q81.1. If the response to the previous question is YES, please elaborate on the relevant provisions and pertinent case-law, including some elements on the amounts of compensation:

Not relevant.

Q82. If possible, please explain how widespread is the practice of asking for compensation by unlawfully detained third-country nationals:

Not relevant.

IV. STATISTICS

Q83. If possible, please elaborate on any available **statistics on judicial control of lawfulness of detentio**n, especially concerning the **release from detention as a consequence of the judicial control**:

According to the Alien Police Directorate, the number of detained TCNs in the years 2010-2014 is as follows:[17]

The number of TCNs detained in the detention centres in 2010-2014						
Year	**Art. 124/1 ALA**	**Art. 124/3 ALA**	**Art. 124a ALA**	**Art. 124b ALA**	**Art. 129 ALA**	**Total**
2010	125	16	42	7	555	**745**
2011	273	3	17	9	74	**376**
2012	197	2	2	1	121	**323**
2013	184	-	2	2	172	**360**
1-6/2014	96	1	1	1	39	**138**

According to the Alien Police Directorate, the length of detention TCNs released from the detention centres in the years 2010-2014 is as follows:[18]

The length of detention of TCNs released from the detention centres in 2010-2014					
Length of detention	**2010**	**2011**	**2012**	**2013**	**1-6/2014**
> 180 days	123	41	19	4	0
< 180 days	965	441	305	388	132
Total number of TCNs	1088	482	324	392	132

Unfortunately, the Alien Police Directorate does not collect statistics on judicial control of lawfulness of detention.

According to the information collected by the Ombudsman's Office, the following tentative data regarding judicial control of lawfulness of detention are available. However, please

[17] All of these numbers are taken from the Reply of the Alien Police Directorate of 15 July 2014, No. CPR-11016-2/ČJ-2014-930102 to the author's request under the Law No. 106/1999 Coll, on the Free Access to Information (on file with the author). Note that the Alien Police Directorate explicitly stressed in its Reply that these numbers are only tentative, but I compared them with other sources (with the Ombudsman's office and NGOs) and they seem to be very precise.

[18] All of these numbers are taken from the Reply of the Alien Police Directorate of 15 July 2014, No. CPR-11016-2/ČJ-2014-930102 to the author's request under the Law No. 106/1999 Coll, on the Free Access to Information (on file with the author). Note that the Alien Police Directorate explicitly stressed in its Reply that these numbers are only tentative, but I compared them with other sources (with the Ombudsman's office and NGOs) and they seem to be very precise.

note that the following numbers are just rough estimates and cannot be corroborated by other evidence.[19]

Detention decisions challenged before the regional courts in 2011-2014								
Year	**Art. 124 ALA**	**Art. 124a ALA**	**Art. 124b ALA**	**Art. 129 ALA**	**Unclear ground of detention**	**Total**	**Number of TCNs released**	**% of TCNs released**
2011	45	4	2	3	8	**62**	12	**19%**
2012	21	1	0	5	-	**27**	6	**22%**
2013	9	0	3	0	-	**12**	2	**17%**
1-6/ 2014	7	0	0	0	-	**7**	2	**29%**

Detention decisions challenged before the Supreme Administrative Court in 2011-2014								
Year	**Art. 124 ALA**	**Art. 124a ALA**	**Art. 124b ALA**	**Art. 129 ALA**	**Unclear ground of detention**	**Total**	**Number of TCNs released**	**% of TCNs released**
2011	3	1	1	0	6	**11**	3	**27%**
2012	10	1	3	0	4-	**18**	12	**67%**
2013	2	0	0	0	-	**2**	1	**50%**
1-6/ 2014	0	0	1	0	-	**1**	1	**100%**

[19] All data in the following two tables are taken from the Reply of the Ombudsman's Office of 19 August 2014 (on file with the author).

V. BEST PRACTICES

Q84. Please list here any **best practices relating to the judicial control of detention**, which you think can be deduced from your previous responses and explain briefly why you think that any particular practice is a best practice:

The best practice relating to the judicial control of detention is a proportionality test, when the administrative courts, and the Supreme Administrative Court in particular, makes assessment of all given evidence. Since free legal aid does not function in practice (see Q.2), strict proportionality test is the best way to protect the TCN against the arbitrary action of the Police.

Q85. Please add here any other element not related to previous questions and that you would like to cover:

Not relevant.