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 – Germany

Kay Hailbronner and Daniel Thym
in collaboration with National Judge
Ulrich Drews

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)

Not relevant.

- 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)

According to Art. 104 (2) of the German constitution, only a judge may rule upon the permissibility or continuation of any deprivation of freedom. If such a deprivation is not based on a judicial order (according to the police laws of the Länder in order to prevent a violation of public order or security) a judicial decision shall be obtained without delay. In this case the police may hold nobody in custody on their own authority beyond the end of the day following the arrest. The details are regulated by police laws of the Länder and federal legislation. *The ordering of a detention in order to enable the preparation of an expulsion order or in order to ensure deportation (detention depending deportation) is regulated in Sec. 62 of the Residence Act (Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory, available online at http://bundesrecht.juris.de/aufenthg_2004). Sec. 62 (2) regulates detention by judicial order in order to prepare an expulsion order. A judicial order is only admissible, if it is not possible to decide immediately upon expulsion and deportation, and detention would be complicated substantially or frustrated without detention. The duration of custody to prepare expulsion should not exceed six weeks. In case of an expulsion, no new judicial order shall be required for the continuation of custody up to expiry of the ordered term of custody. The rules are described below.*

According to Sec. 62 (3) a foreigner may be detained by judicial order in order to prepare a deportation, if one of the following requirements are fulfilled:

1. the foreigner is enforced to leave the federal territory on account of his/her having entered the territory unlawfully;

2. a deportation order has been issued pursuant to Sec. 58 a (special possibility to issue a deportation order in case of a threat to public security), but is not immediately enforceable [note that the provision has only be used in very special cases involving allegedly dangerous terrorist suspects];

3. the period allowed for departure has expired and the foreigner has changed his/her place of residence without notifying the foreigners authority of an address at which he/she can be reached;

4. he/she has failed to appear at the location stipulated by the foreigners authority on a date fixed for deportation, for reasons for which he/she is responsible;

5. he/she has evaded deportation by any other means, ***or***

6. a well-founded suspicion exists that he/she intends to evade deportation.

The foreigner may also be placed in detention pending deportation for a maximum of two weeks, if the period allowed for departure has expired and it has been established that deportation can be enforced (judicial order as well required). By way of exception, the order for detention pending deportation pursuant to this provision may be waived, if the foreigner credibly asserts that he/she does not intent to evade deportation. Detention pending deportation is not permissible, if it is established that it will not be possible to carry out deportation within the next three months for reasons for which the foreigner is not responsible. Where deportation has failed due to reasons for which the foreigner is responsible, the order pursuant to sentence 1 shall remain unaffected until expiry of the period stipulated in the order.

Detention pending deportation may be ordered for up to six months. In cases in which the foreigner frustrates his/her deportation is may be extended by a maximum of 12 months. A period of custody to prepare an expulsion order shall count towards the overall duration of detention pending deportation.

The alien authority responsible for the detention application may exceptionally detain a foreigner without a prior judicial order and place such foreigner in temporary custody where

1. there is a strong suspicion that the conditions pursuant to sub-sect. 3 sent. 1 (requirements for a detention order in order to safeguard a deportation) exists;

2. a judicial decision on the order for detention pending deportation is not obtainable beforehand and

3. there is a well-founded suspicion that the foreigner intends to evade the order for detention pending deportation. The foreigner must be brought before the court without any delay for a decision on the order for detention pending deportation.

These requirements form the basic legal structure for all detention orders relating to the enforcement of return decisions.

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:

In this field of the law, German judges are obliged to exercise a full control over all elements, which might effect the legality of the measure ex officio (Untersuchungsgrundsatz). This extends to both questions of law and of fact. Also, judicial control is not limited to the arguments raised by the parties.
For historic reasons, the judicial control of detention issues is regulated in a law with the (misleading) title 'Act on the Judicial Procedure in Family Law Matters and Concerning Voluntary Jurisdiction - FamFG' (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit, FamFG, available online at http://www.gesetze-im-internet.de/famfg/). It is well-established in the case law of the Constitutional Court that this judicial review must be all-embracing in the sense described above (see for instance Decision of 07.09.2006, 2 BvR 129/04). These constitutional principles are reaffirmed by Sect. 26 FamFG: "The court shall pursue all ex officio investigations which are necessary to establish all relevant facts, which are necessary to rule on the case." A full examination of the legal questions is in line with Art. 20(3) of the German Constitution. Throughout the years, there have been various decisions of the German Constitutional Court and the Federal Law Court (Bundesgerichtshof), which emphasise the requirement of full control of the law and the facts.
In the German legal system there is no administrative discretion with regard to the requirements for ordering detention under Sec. 62. Civil courts, however, will not examine in case of a detention to safeguard deportation, if an expulsion decision has been taken lawfully by the alien authorities. If an expulsion order is taken against a TCN, he/she may appeal against an expulsion order with the administrative courts. As long as there is a valid and enforceable expulsion order, civil courts cannot challenge the lawfulness of the expulsion order as a requirement of a subsequent deportation.

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

The German system of attributing exclusive competence to decide on the lawfulness of a deprivation of liberty exclusively to courts is a result of its historical experience during the Nazi period with informal detention, which explain why the German Constitution lays down strict procedural and substantive requirements for detention. The fact that only civil courts are competent for review of these matters dates back to the 19th century establishment of administrative courts, which were originally part of the public administration.
The major advantage is the quality of decision-making, since judges have a better training than 'ordinary' official and are fully independent. This ensures that also aspects, which support the claim of the migrant (incl its human rights), are taken seriously.
The main disadvantage concerns questions of resources and efficiency. Courts cost a lot of money and, moreover, administrative authorities have to invest resources to obtain a judicial order. Both may affect speedy decision-making in line with the objective of the Return Directive 2008/115/EC to ensure swift returns.

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

Those without sufficient resources may obtain legal aid in line with section 114-127 of the Civil Procedure Code (Zivilprozessordnung ZPO, available online at http://www.gesetze-im-internet.de/zpo/BJNR005330950.html#BJNR005330950BJNG052302301). These rules apply to detention issues due to a reference in section 76(1) FamFG (see above question 1.1). According to these rules, the applicant has to apply for legal aid with the Court which will decide the case in the end. The Court then embarks upon an analysis of both the economic-financial situation of the applicant and the suitability of the complaint (in situations of complaints without any reasonable chance of success no aid will usually be given). In cases of denial, the applicant may complain against the decision in line with the procedural rules in the Civil Procedure Code. Moreover, section 78 FamFG (see above question 1.1) provides for a lawyer being assigned to the applicant under certain circumstances.

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

- X Civil jurisdiction
- □ 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)?

The judge ordering the detention decision is as a rule determined by internal attribution of competences in the respective municipal courts. The attribution of competences is regulated according to the administrative rules on court organization of the respective Länder. Frequently, in many Länder of the Federal Republic judges at a municipal court may be competent for detention orders within the criminal jurisdiction as well as for the detention under Sec. 62 of the Residence Act. However, in other Länder the distribution of the competences may be different. A judge may well be competent for regular civil court procedures. The internal distribution of competences will primarily remain within the power of the respective municipal court. Large courts with many judges will tend to attribute a specialised competence to some judges dealing frequently with detention orders. This solution has the advantage that the attribution of jurisdiction is decided locally, where courts can best assess how to divide labour between them. It should be noted, however, that this system is not arbitrary. To the contrary, the German Constitutional Courts interprets Art. 101(1)(2) of the German Constitution to require the abstract (local) criteria which define the attribution of cases to specific judicial bodies to be laid down in advance in order to guarantee a neutral system of case attribution.

- Hearing only immigration law cases?

For historic reasons, described above, the review of detention is with civil courts, while general immigration and asylum law falls within the responsibility of administrative courts.

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

See above.

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?
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**:

Not relevant.

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?
X YES NO

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:

The law mentioned above (question 1.1) regulates the procedure before civil courts in case of judicial orders relating to a deprivation of liberty. According to Sec. 58 of this act any judicial order of detention is subject to an appeal before a court of appeal at the initiative of the migrant. The appeal contains a full examination of the lawfulness of detention, including the factual situation. Sec. 70(3) No. 1 of the Law provides for a third level of jurisdiction limited to questions of law (so-called Rechtsbeschwerde). When it comes to questions of law, there is no difference in the control of lawfulness of detention between the first and second level of jurisdiction.

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:

Not relevant.

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?

If you follow the German system that only courts may order detention, it is necessary that besides situations of renewal, an independent review of legality is possibly in line with Art. 15(3) of the Return Directive 2008/115/EC, since only courts may renew and/or review detention. The system of renewal/review will be described in the answer to question 13 below.

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

  Not applicable due to the German system of exclusive judicial decision-making.

- 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:

There is no difference with regard to the control of lawfulness of detention between the first and the second level of jurisdiction. The answer given to question 1.1. also applies to the judicial control of renewal.

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

Since there is no difference between the judicial review of initial detention and renewal, the answer given to question 1.2 applies.

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
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:

Not relevant.

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?
X YES NO

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**:

Since there is no difference between the judicial review of initial detention and renewal, the answer given to question 6.1 applies.

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

Not relevant.

- 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

Not relevant.

- 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

The lawfulness of extending detention is controlled by the judicial authority in case of a renewal of a detention order as well as independently from the renewal order, if the reason for continuing detention has ceased to exist. Under Sec. 426(1) FamFG (question 1.1) the court has an obligation ex officio to cancel detention, if the conditions for that detention no longer exist. Before stopping detention, the Court has to hear the responsible administrative authority (see the second sentence of section 426(2) FamFG). On initial review at first level at the initiative of the migrant see below. *Since there is no difference between the judicial review of initial detention, renewal and autonomous review the answer given to question 6.1 applies insofar as the second (and third) level of judicial review are concerned.*

- 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

Moreover, the migrant may, at any time, ask the Court to decide whether the necessary conditions for detention still exist (see section 426(2) FamFG). *Since there is no difference between the judicial review of initial detention, renewal and autonomous review, the answer given to question 6.1 applies insofar as the second (and third) level of judicial review are concerned.*

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

If you follow the German system that only courts may order detention, the situation described above is a logical continuation in line with Art. 15(3) of the Return Directive 2008/115/EC, since only courts may renew and/or review detention. In this respect, the (dis-)advantages described in our answer to question 1.2 apply mutatis mutandi.

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?

X YES NO

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

In line with the answer to question 4, the internal distribution of jurisdiction is decided locally. Usually, the same judge will be responsible, but occasionally a different judicial body may have to step in – in line with the abstract criteria on the attribution of cases to specific judicial bodies described above.

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:

Not relevant.

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

Not relevant.

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

The control exercised by the judge on the facts, which underlie any decision about detention, is not limited to a manifest error of assessment. The law requires a full examination, by the judge, of whether all the relevant factual requirements are fulfilled. For further detail see the answer to question 1.1 above.

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 control exercised by the judge on questions of law is not limited to a manifest error of assessment. The law requires a full examination, described in the answer to question 1.1 above.

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:

Not relevant.

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 main elements guiding the assessment of proportionality of detention consists are: suitability (is detention suitable to further the purpose?), necessity (is detention necessary or are less stringent measures available to achieve the purpose?), and acceptability (is the restriction of a fundamental freedom in the right proportion to the purpose achieved by the detention?). It should be noted that the principle of proportionality is well established in the German legal system.

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

German courts will examine whether the alien authorities have taken all necessary means in order to further a deportation and whether detention is necessary in order to execute a deportation order. Therefore, alien authorities have to take without delay any measures necessary to make detention dispensable or reduce it to the shortest extent possible (see Federal Court of 25.3.2010, V ZA 9/10).

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:

Not relevant.

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:

Given that the basic rules for detention are regulated in the constitution, there is no general issue about foreseeability. There have been some decisions throughout the years, specifying the constitutional requirements for access to the courts in particular. The most prominent constitutional case is Federal Constitutional Court. (Decision of 15. 05. 2002, 2 BvR 2292/00, BVerfGE 105, 239 – Richtervorbehalt), which specified the legal requirements for the availability of judges to take speedy decisions. In a comparative perspective, it should be noted that this decision stems very much from the specificity of the German situation with detailed constitutional prescriptions.

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.)*

Whether procedural flaws affect the lawfulness of detention depends on the relevance of the procedural provision for the effective application of individual rights of the TCN to a lawful procedure. Therefore, procedural flaws relating to provisions intended to protect the TCN make detention unlawful. The violation of a right to a proper hearing generally makes detention unlawful (Federal Constitutional Court of 4.10.2010, 2 BvR 1825/08). The same is true with regard to a lack of information about the right of consular protection and the failure to file a proper application by the alien authorities. Therefore, alien authorities must comply with all legal requirements with regard to a detention order (Federal Court of 29.4.2010, 5 ZB 118/09). The lack of a proper representation by a lawyer in the first instance procedure on the continuation of detention, however, does not make the detention decision unlawful since the procedure flaw can be cured in the second instance judicial proceedings.

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:

Not relevant.

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:

According to German law the meaning of the preparation of return relates to the administrative procedure on an expulsion provision. Since German law distinguishes between expulsion and deportation, detention may be ordered if an expulsion decision on account of one of the reasons laid down in Sec. 53 et seq. of the Residence Act cannot be taken immediately for instance since the necessary proof for a criminal offence has yet to be submitted, cannot yet be taken. This has been reaffirmed by the Federal High Court (Bundesgerichtshof, Decision of 6.6.2010, V ZB 193/09), which has been elaborated upon in the database: The detention order finding civil court has not to consider whether the competent authority's decision about the third- country national's obligation to leave the country is admissible or not. This decision is only to be ruled by the administrative court. Federal High Court (Bundesgerichtshof, Decision of 25.2.2010, V ZB 172/09): The order of detention pending removal against a third-country national illegally entered the country from another Member State is not already inadmissible because the third-country national applied for asylum at the border authority. For the necessary forecast whether the removal may be carried out within three months, the court must take into account the probable result of an application for suspension of the removal submitted by the third-country to the Administrative Court.

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

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 X

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":

Generally, detention in order to ensure deportation is regulated in Sec. 62 of the Residence Act (see answer to question 1 above). Sec. 62 (2) regulates detention in order to prepare an expulsion order. It is laid down explicitly that the duration of custody to prepare expulsion should not exceed six weeks (see the second sentence). The six-weeks-time limit may only be extended if there are special circumstances which make it necessary, for reasons for which the alien authorities are not responsible, to exceed the time limit in order to effect a likely deportation order. In addition, the termination of the expulsion procedure must be foreseeable.

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

A typical instance would be the unavailability of flights. If, for instance, a flight had to be cancelled due to fog or a strike, it does not hinder detention, if it can be assumed that the flight will take place later. If it turns out, however, that flights to a certain region will not take place for whatever reason, this lack of resources on the side of the authorities will hinder detention. Note that this conclusion will never automatically be reached since there always has to be a full assessment of all relevant facts. For further comments see No. 62.2.5.0 of the Administrative Guidelines on the Implementation of the Residence Act (Allgemeine Verwaltungsvorschrift AufenthG vom 26. 10. 2009).

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

Not relevant.

- **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.

- **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)*

The conduct of the third-country national concerned may be taken into account in assessing the question as to whether the alien authorities have observed due diligence. However, if the conduct of the third-country national concerned successfully frustrates a reasonable prospect of removal, further detention becomes unlawful. The courts have frequently decided that detention cannot be used in order to enforce cooperation. For instance, a migrant can be held responsible for having voluntary given his travel documents away knowing that this would suspend deportation (Regional Appeal Court of Cologne, Decision of 13.10.2004 – 16 Wx 194/04). Note again that such a conclusion will never automatic, since there always has to be a full assessment of all relevant facts.

- **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))*

The conduct of the country of potential return (refusal of cooperation) will generally exclude the prospect of return unless an alternative country of return can be found. The same is true with regard to the lack of a readmission agreement unless there is a concrete likelihood that even in the absence of a readmission agreement a person may be returned. *For instance, a refusal on the side of the receiving state to grant someone travel documents, will usually render detention illegal – unless the authorities submits new evidence that the state may now, on the basis of new documents, consent. This last conclusion will be not automatic, however, since there always has to be a full assessment of all relevant facts (for the example cited see the Regional Appeals Court of Munich, Decision of 17 May 2006, 34 Wx 025/06).*

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

Not relevant.

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

Not relevant.

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

National proceedings of suspensory character have to be taken into account by the judge deciding on an application for a detention order. The judge must assess the present state and the likely outcome of administrative court proceedings on suspension of administrative decisions in order to grant effective protection (Federal Constitutional Court, BVerfG of 27.2.2009, 2 BvR 538/07). *What more should we say? There is a judgment of the Constitutional Court and judges are obliged to follow it. Again, this is about an overall assessment of all relevant facts, as in all cases involving prospective analyses; it will always depend on the circumstances of the case, what is (not) relevant. Remember that in Germany judges have to decide on the legality of detention, i.e. they are judging the length and likely outcome of a judicial decision by a peer, who will often sit on the closest administrative court, i.e. the judges can assess quite well whether the judicial proceeding will be successful and how long it will take.* *Federal High Court (Bundesgerichtshof, Decision of 25.2.2010, V ZB 172/09), which has been elaborated upon in the database, is a typical example: For the necessary forecast whether the removal may be carried out within three months, the court must take into account the probable result of an application for suspension of the removal submitted by the third-country to the Administrative Court.* *Note that this does not for structural reasons, which have to do with the not German law on deportation, usually apply to administrative proceedings (as your questions suggests), but to judicial proceedings primarily (since the TCN must be "vollziehbar ausreisepflichtig", potential new applications with an authority, such as for a new*

residence permit, will not usually suspend the obligation to leave the country in line with section 81.3, which lays down a different rule for those staying legally). For asylum applications see the answer to Q.79.1 below.

- 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)

If return is impossible due to the considerations in according with Art. 5, an application for detention has to be rejected due to the impossibility to effect a deportation. However, it is up to the administrative court to decide on toleration respectively a humanitarian residence permit. If the applicant makes an application for temporary protection the judge deciding on a detention order has to the take these procedures into account.
With regard to Art. 5 RD it is evident that the health, for instance, will have to be taken into account in two ways: first, in deciding whether removal is possible at all.Health problems may be a factor in deciding upon that removal and, as a result, detention is unlawful. Second, detention always has to be proportionate for constitutional reasons – and proportionality refers to the situation of the migrant concerned. A typical situation would be a suicidal tendency, when the migrant may try to kill him/herself during deportation (see Administrative Court of Stuttgart, Decision of 18.10.2012 - 11 K 3391/12). Again, a final decision will never be automatic, since there always has to be a full assessment of all relevant facts.

- Else

According to Sec. 62 (3) sentence 4 of the Residence Act, detention pending deportation shall not be permissible if it is established that it will not be possible to carry out deportation within the next three months for reasons, for which the TCN is not responsible. According to the jurisprudence of the Constitutional Court the prognosis has to be taken by the judge on the basis of a sufficiently complete factual basis (Federal Constitutional Court, BVerfG of 27.2.2009, 2 BvR 538/07; Federal Constitutional Court, BVerfG of 15.12.2000, 2 BvR 347/00). According to the court, decisions on deprivation of personal liberty must be based on a full examination of the factual reasons on which the prognosis is based. It is required that all the files of the alien authorities have to be included in the judicial procedure and have to be examined independently by the judge. These strict requirements are applicable in case of an initial detention order as well as in case of a judicial order on a continuation of a detention (Federal Constitutional Court, BVerfG of 10.12.2007, 2 BvR 1033/06).
It follows that all the factors mentioned in the questionnaire are relevant for assuming whether there is a reasonable prospect of removal. The judge, therefore, is obliged to examine all factors which may be relevant for the prognosis of whether there is a reasonable prospect of removal (see Federal Constitutional Court, BVerfG, NJW 2009, 2659, 2660).

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):

As previously noted, Sec. 62 provides for an obligatory time frame six weeks for the purpose of preparing return. The time frame for detention pending deportation (in order to effect a deportation order) is a maximum of two weeks of the period allowed for voluntary departure has expired and it has been established that deportation can be enforced.
In accordance with Section 62(3) sentence 4 of the judicial assessment of the prospect of removal relates to a three-month time-frame in regular circumstances, i.e. when assessing all of the different factors addressed above, the Court will ask whether they will result in deportation within 3 months. Under sentence 6 this time-frame can be extended, if the migrant is responsible for a delay. However, in line with constitutional law, such extension will never be automatic, i.e. there always has to be an assessment of the proportionality in each individual case.

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**
- Else

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

The courts do not limit the assessment to an abstract or theoretical possibility of removal but require clear information on the time table proposed and/or the probability of executing a deportation order. As the case may be, the previous experience in handling similar cases and/or statistics may be taken into account. The jurisprudence of the supreme courts has been rather strict with regard to the level of judicial examination of the factual assumption of alien authorities as to the existence of a prospect of removal. Thus, appeal courts have frequently challenged a general assumption of a prospect of removal by alien authorities if the alien authorities have not provided concrete facts on the different steps to be taken in order to effect a deportation order and potential barriers to deportation.
We have listed some case law in our answer to question 32 above. Additional decisions

include:
Federal High Court (Bundesgerichtshof, Decision of 14.4.2011, V ZB 76/11), which has been elaborated upon in the database: The extension of a three months detention order is rather not permitted if the removal was omitted for reasons which the third-country national is not responsible for. This requires a forecast that the removal within three months from the date of (the first) detention order could normally be carried out without considering the removal delaying circumstances attributable to the affected.
Federal High Court (Bundesgerichtshof, Decision of 18.08.2010, V ZB 119/10), which has been elaborated upon in the database: For the determination of whether the deportation within three months is possible, concrete information about the timing of the procedure and a presentation of the period are required in which the individual steps can be run under normal conditions. The court is not limited to a repetition of the assessment of the applying authority, that the removal is expected to take place within three months. As far as the application does not include concrete and suitable facts, it is the responsibility of the court to inquire.
Federal High Court (Bundesgerichtshof, Decision of 25.2.2010, V ZB 172/09), which has been elaborated upon in the database: For the necessary forecast whether the removal may be carried out within three months, the court must take into account the probable result of an application for suspension of the removal submitted by the third-country to the Administrative Court.
Federal High Court (Bundesgerichtshof, Decision of 10.05.2012, V ZB 246/11), which has been elaborated upon in the database: Information on the feasibility of the removal within the applied period of detention must occur with a specific reference to the country, in which the affected should be removed. It is necessary to show up how long a removal under which single steps in that country in general is possible.
Federal High Court (Bundesgerichtshof, Decision of 14.2.2012, V ZB 4/12), which has been elaborated upon in the database: As far as readmission agreements with third countries exist (in this case the agreement of the Federal Republic of Germany and the Republic of Austria and the Republic of Kosovo), the single steps to be taken for removal according to these readmission agreements must be presented in the application together with the periods of time, the single steps usually take.
Federal High Court (Bundesgerichtshof, Decision of 31.1.2012, V ZB 127/11), which has been elaborated upon in the database: Under the readmission according to the Dublin II Regulation it can in general be expected and assumed, that under normal circumstances a return to a Member State within three months since the detention order will be successful. A prerequisite of the assumption is however the obligation of that Member State to readmit the affected.
Federal High Court (Bundesgerichtshof, Decision of 27.10.2011, V ZB 311/10), which has been elaborated upon in the database: For a permissible application for detention the information required on the feasibility of removal must be based on the country in which the affected is to be removed, and must indicate whether and in what time removals in this country are usually possible.
Higher Regional Court of Brandenburg (Brandenburgisches Oberlandesgericht, Decision of 23.09.2008, 11 WX 46/08), which has been elaborated upon in the database: The detention pending removal is inadmissible in the case it is ascertained that the removal of the third-country national cannot be carried out within three months and the hampering circumstances are not based on the conduct of the third-country national.

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 control exercised by the judge is a full control relating to the prospect of removal; it is not limited to a manifest error of assessment. The law requires a full examination, described in the answer to question 1.1 above. However, some courts may emphasize that the evaluation of facts relating to the reasonableness of a prospect of removal cannot be considered as a mathematical decision but must be taken by the authorities responsible. As long as the conclusion based on a correct examination of the relevant facts is reasonable, the application of alien authorities will be accepted (see Regional Appeals Court of Munich, OLG München of 27.5.2009, 34 WX 43/09).

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.

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:

Not relevant.

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?

X YES NO 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:

The jurisprudence has developed certain criteria in order to examine the requirement that there is a well-founded suspicion that he/she intends to evade deportation. The intention to avoid the removal process can be based upon various factors such as criminal convictions provided that they allow the conclusion that the TCN will not comply with court orders related to previous sentences for criminal

offences. The general assumption that penal judgements did not impress a convicted person may justify the conclusion of avoiding the preparation of return of the removal process. This was spelled out more clearly in Federal High Court (Bundesgerichtshof, Decision of 28.04.2011, V ZB 14/10), which has been elaborated upon in the database. The reasonable suspicion that the TCN would seek to evade the enforcement of the obligation to leave can be based on that TCN's convictions of the affected and multiple specifications of incorrect personal data.

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

Not relevant.

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

X YES NO 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:

Hampering the preparation of return of the removal process can be based upon a variety of factors such as the use of falsified documents, previous behaviour of a person in connection with a deportation etc. It should be noted that the German law does not distinguish systematically between hampering return and the risk of absconding (the latter is considered to be a specific example of the former). Case law will therefore be dealt with more extensively further down.

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

Not relevant.

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?

X YES NO 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***):

YES
As indicated above, the German law does not distinguish systematically between hampering return and the risk of absconding (the latter is considered to be a specific example of the

former). Instead, Section 62(3) of the Residence Act lay down the following examples for hampering deportation and/or risk of absconding:

1. the foreigner is required to leave the federal territory on account of his/her having entered the territory unlawfully; ...

3. the period allowed for departure has expired and the foreigner has changed his/her place of residence without notifying the foreigners authority of an address at which he/she can be reached;

4. he/she has failed to appear at the location stipulated by the foreigners authority on a date fixed for deportation, for reasons for which he/she is responsible;

5. he/she has evaded deportation by any other means, or

6. a well-founded suspicion exists that he/she intends to evade deportation.

Generally, according to case law on the issue of the risk of absconding requires concrete facts, in particular statements or behaviour of the TCN which will allow, with a certain degree of likelihood, the conclusion that the TCN intends to abscond or hamper the deportation in a way which cannot be simply overcome by the application of ordinary enforcement measures, which do not require a deprivation of liberty. A multiple change of domicile which has not been communicated to the alien authorities in spite of respective warnings and a subsequent going into hiding as well as a flight attempt at the occasion of a police arrest may be taken as a factor justifying a risk of absconding. The mere fact of an illegal stay or entry does not justify a risk of absconding.

It should be noted that the Federal High Court (Bundesgerichtshof, Decision of 26.6.2014, V ZB 31/14) decided in June 2014 that the German legislator had failed to implement the Dublin III Directive by not specifying in section 62 of the Residence Act, the objective criteria which define a risk of absconding. The law will have to be changed as a result and this amendment cannot be limited to Dublin cases, since the legal criteria in the RD are identical.

More specifically the following lead cases can be reported:

Federal High Court (Bundesgerichtshof, Decision of 3.5.2012, V ZB 244/11), which has been elaborated upon in the database: The assumption of a risk of absconding is not the pure result, that the third-country national entered the country with the help of smugglers, but the herewith in general associated expenditure of substantial financial resources, which the third-country national would have spent in vain in the case of removal. This fact may be a stimulus of the third-country national not to leave Germany voluntarily but to abscond.

Federal High Court (Bundesgerichtshof, Decision of 15.12.2011, V ZB 302/10), which has been elaborated upon in the database. If an extension is applied for, the competent authority has to show up when the obstacle which hampered the removal of the affected in the first three months of detention may be abolished. Detention is only permissible for securing the removal and not for the purpose of coercive imprisonment.

Federal High Court (Bundesgerichtshof, Decision of 29.09.2011, V ZB 307/10), which has been elaborated upon in the database: The pure fact, that the third-country national violated the obligation to tell the authority for foreign nationals that a change of residence before the deadline to leave the country expired, cannot justify a risk of absconding.

Federal High Court (Bundesgerichtshof, Decision of 15.9.2011, V ZB 123/11): The application for detention is admissible only if it addresses to all essential facts required for the judicial decision.

Federal High Court (Bundesgerichtshof, Decision of 28.4.2011, V ZB 14/10): The reasonable suspicion that the TCN would seek to evade the enforcement of the obligation to leave can be based on previous convictions of the TCN

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?
YES NO

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

Not relevant.

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?

It has been demonstrated above that the Courts insist upon a careful analysis of each individual situation. That is the very essence of applying an abstract rule to an individual. For more detail see the answer to questions 35 and 41.
It should be noted that the Federal High Court (Bundesgerichtshof, Decision of 26.6.2014, V ZB 31/14) decided in June 2014 that the German legislator had failed to implement the Dublin III Directive by not specifying in section 62 of the Residence Act the objective criteria which define a risk of absconding. The law will have to be changed as a result and this amendment cannot be limited to Dublin cases, since the legal criteria in the RD are identical.

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:

In the case law there is no strict distinction between the concept of risk of absconding and avoiding/hampering return since the legal requirement is whether there is a well-found suspicion that he/she intends to evade deportation. Thus, the concept of avoiding return can be considered as a general concept while risk of absconding is a particular case of avoiding return. See also the answers to questions 40.1 and 41.1.
It should be noted that the Federal High Court (Bundesgerichtshof, Decision of 26.6.2014, V ZB 31/14) decided in June 2014 that the German legislator had failed to implement the Dublin III Directive by not specifying in section 62 of the Residence Act the objective criteria which define a risk of absconding. The law will have to be changed as a result and this amendment cannot be limited to Dublin cases, since the legal criteria in the RD are identical. As a result, the question put forward here will have to be assessed anew in the future.
Note that we did not argue that courts base their argument on both a risk of absconding and avoidance. Instead we mean that both concepts require a full and comprehensive assessment of real-life facts in order to determine potential future behaviour – and it is in this assessment where the criteria will overlap. Arguments in favour of absconding can often be used to support a risk of avoidance, for instance situations of previous non-cooperation.

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:*

See the answer to question 41.1 above, where we explained that Sec. 62 (3) allows detention as well for the reason of failure to appear at the location fixed for deportation or changing a place of residence without notifying the foreigners authority. However, both reasons are as good examples of avoiding return. Thus, they are not a deviation from the principle that detention must be ordered for the purpose of executing a return decision.

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**:

The Return Directive did not lead to a change in adjudicating issues relating to a risk of absconding and avoiding/hampering return.

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:

In a recent answer to a parliamentary question, the federal government said that it was currently in the process of examining whether the requirements of the law should be changed in the light of European law. See the answer to question No. 3 in Antwort der Bundesregierung auf eine Kleine Anfrage der Fraktion Bündnis 90/Die Grünen: Umsetzung der EU-Rückführungsrichtlinie in Deutschland, BT-Drs. 18/1785 of 19.6.2014, at p. 2, available online at http://dipbt.bundestag.de/dip21/btd/18/017/1801785.pdf .

3. Alternatives to detention

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

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

- Registration obligation

Not relevant.

- Deposit of (travel) documents

Not relevant.

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

Not relevant.

- Regular reporting to the authorities

Not relevant.

- Community release/supervision

Not relevant.

- Designated residence

Not relevant.

- Electronic tagging

Not relevant.

- Home curfew

Not relevant.

- Else

The legislation does not require judges to consider alternatives to detention. However, under the general principle of proportionality courts in deciding on an application for detention, judges do have to examine whether detention is necessary. Since deprivation of liberty is a severe restriction of a fundamental freedom, any

other less stringent measure must be taken if they are suitable to further the purpose of return respectively to enable an execution of a deportation order.
Some of the alternatives mentioned are already part of the German legislation. This means that these measures are already part of a return procedure rather than alternatives to detention, but they can be used by the authorities or instructed by the Courts also in the context of detention. These include the deposit of travel documents, registration obligation, and designated residence (see section 83 of the Residence Act). Other measures mentioned cannot be taken under the German legislation such as electronic tagging, home curfew etc. Specific alternatives as mentioned in the question are not dealt with in the case law.

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**?

Not relevant.

Q51. When the TCN concerned **<u>avoids or hampers the return procedures</u>**, 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**?

Not relevant.

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*):

Yes, but 'only' in line with the principle of proportionality described in the answer to question 49 above which applies during all stages of return and detention. Moreover, not all alternatives listed above can be considered, since courts and the public administration have to act within the realm of its administrative powers and competences. Thus, in the absence of legally regulated alternatives to detention, no consideration can be taken with regard to the measures mentioned above unless they are already part of the existing German return procedures.

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**

Insofar as there is a limited consideration of alternatives to detention in the light of the principle of proportionality, again the very general rules mentioned at least five times before, again apply- there is a full control of legal and factual grounds.

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*):

This question cannot be answered, since it involves a qualitative empirical analysis of the case law and/or administrative practice in a research project over various months for which a full-time research assistant would be required.

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.

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:

In the answer to the parliamentary question mentioned in the answer to question 47 above, the government states that it is currently considering whether the implementation of the Asylum Reception Conditions Directive 2013/32/EU may be an opportunity to amend the residence act in order to consider alternatives to detention (for asylum seekers, but also for returnees, since the amendment would not have to be limited to asylum seekers). It underlines, however, that it is in the process of deliberating and that no decision has been taken and that this might not happen at all.

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:

Determining the length of detention is based upon the concept of strict necessity for successful removal. Therefore, an application by the alien authorities must contain sufficient information as to the specific time of detention necessary to execute a deportation *- with regard to transportation into the country of destination* *- with regard to statistical information about the usual length of time of transfer in a country of destination* *- concrete facts on the different steps to be undertaken and their duration in the deportation procedure.* *See the comments to question 32. Under German law the criteria guiding the question of whether there should be initial deportation and, if yes, how long this should be are the same.* *The last principle is particularly important to understand the German case law, since the judicial review of detention in general (i.e. not only for the return of aliens) is defined by the 'principle of acceleration' (Beschleunigungsgebot). Since the deprivation of liberty is an important infringement of human rights, the state authorities must do their best to limit to the shortest time-period possible the period of detention. This has been interpreted by the courts to require the aliens authorities to demonstrate that return is feasible in the near future and that it must take relevant steps to accelerate return. If not, the Court will not authorise detention in the first place and/or stop it at the point of later review. Moreover, the court cannot limit itself to evaluate the facts provided by the authorities, but must embark upon an autonomous assessment of the facts, incl. hearing the migrant.*

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.)?

It is a period of detention, i.e. actual placement under detention.

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 principles apply with regard to subsequent detention. The case law does not indicate any significant distinctions with regard to the factors determining exactly the length of detention which is necessary for successful removal. In both instances, the review is very detailed in line with the general rules which have been elaborated upon in the answer to question 46.

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 control exercised by the judge is a full control relating to the facts as well as to the legal requirements (see again the answer to question 1.1). Courts will not accept a general assessment of the alien authorities based upon the legal maximum limits of detention. They require in the application, precise information as to the time required in each step of the return procedure. However, since it is up to the alien authorities to execute a deportation order they will accept the assessment of alien authorities as to the time necessary in the different procedural steps to execute a deportation order, provided it is based on facts and the court's own experience and knowledge about administrative procedures and dealings with authorities of third countries. The judge, however, cannot simply refer to the assessment of the alien authorities that within a time frame of three months it will be possible to deport a TCN. The assessment must be based on concrete facts and the judge will have to examine whether there might be any reasons or factors which may prevent or seriously obstruct the execution of a deportation order within the maximum time frame of three months under Sec. 62 (3) of the Residence Act. Therefore, in case of a Vietnamese national it is not sufficient to simply rely upon the statement that a Vietnamese national may as a rule be deported within a time frame of three months (Bundesgerichtshof, Decision of 14.4.2011, 5 ZB 76/11).
With regard to the detention in preparation of an expulsion decision it is necessary that an expulsion order can be issued within the legally determined time frame of six weeks under Sec. 62 (2) Residence Act. It is necessary that the expulsion order is likely to be adopted on the basis of concrete facts. This requirement is not fulfilled if an alien is already enforceably obliged to leave Germany subsequent to an illegal entry ((Bundesgerichtshof, Decision of 12.7.2013, 5 ZB 92/12).

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:

Not relevant

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:

Not relevant.

4.2 Due diligence

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

According to Sec. 62 (1), the general requirement that detention is inadmissible if the purpose of detention can be achieved by a less severe measure and that detention must be restricted to the shortest possible duration requires, according to the case law of the courts, an obligation to take all necessary measures in order to make sure that the detention is limited to the shortest possible time (Bundesgerichtshof, Decision of 7.4.2011, 5 ZB 11/10; BGHZ 133, 235, 239). This obligation includes a duty to accelerate the procedure and observe "due diligence" in the return procedure. There is a multitude of judicial decisions on what exactly the duty to speed up the procedure (in German: Beschleunigungsgebot) implies. The courts have to examine whether the alien authorities act with due diligence and with the intention of the greatest possible speed (Bundesgerichtshof, Decision of 10.6.2010, 5 ZB 204/09; Bundesgerichtshof, Decision of 18.08.2010, 5 ZB 119/10; Bundesgerichtshof, Decision of 7.4.2011, 5 ZB 111/10). The duty to speed up procedures is valid for Dublin transfer procedures as well as for return procedures of aliens who have illegally entered, or for asylum seekers. All failures to act with due diligence by the alien authorities or the Federal Office for Migration which is responsible for modalities of a transfer under the asylum procedure will in principle lead to unlawfulness of a detention order. Failures to apply for a transfer under Dublin to a responsible EU Member State are to be accounted to the alien authorities and make detention unlawful (Bundesgerichtshof, Decision of 7.4.2011, 5 ZB 111/10). *Federal High Court (Bundesgerichtshof, Decision of 16.2.2012, V ZB 320/10), a decision which has been elaborated upon in the database, stated that the competent authority has to operate the removal in accordance with the principle of proportionality with the greatest acceleration, so that the detention is limited to the shortest possible time. It is not permitted to detain a third-country national longer than necessary due to an overload of the authorities. It is an unjustified violation of the liberty when the TCN had to spend more than a month in detention after the initial foreseen date for the removal because of a particular burden on the police regarding a major police operation.* *Federal High Court (Bundesgerichtshof, Decision of 26.9.2013, V ZB 2/13), a decision*

which has been elaborated upon in the database stated that the detention must be limited to what is strictly necessary. The removal process of a third-country national, who is in detention, must be carried out without undue delay. The principle of proportionality is violated when the competent authority has not taken all reasonable efforts to obtain in lieu of a passport, so that the detention may be limited to the shortest possible time. In cases where an application for asylum is rejected as manifestly unfounded, the competent authority cannot wait until the finality of the decision about the asylum application before initiating further actions.
Federal High Court (Bundesgerichtshof, Decision of 25.3.2013, V ZA 9/10), a decision which has also been elaborated upon in the database, stated that the extension of detention for removal beyond three months to as long as six months is permissible if the TCN hampers the preparation of the removal process. A third-country national who has no identity papers and does not cooperate in the procedure with the passport replacement by giving continuously false and contradictory information about the background must accept delays that arise from the fact that the authorities of the third country must be asked by German authorities for the determination of the identity and for passport replacement documents. The German authorities cannot be blamed for delays regarding appearance at the third-country authorities in Germany.

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 courts exercise full control in deciding if the administrative acted with due diligence (see, once again, the general answer to question 1.1). The courts will examine whether necessary procedural acts could have taken less time, whether necessary applications could have been made earlier (see 5 ZB 111/10 – with regard to an application for readmission to Italy in the framework of the Dublin rules).

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:

Not relevant.

4.3 Removal arrangements in progress

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

It has already been answered that national courts apply the so-called 'principle of acceleration' (see the answer to question 56 above). This has been interpreted by the courts to require the aliens authorities to demonstrate that return is feasible in the near future and that it must take relevant steps to accelerate return. If not, the Court will not authorise detention in the first place and/or stop it at the point of later review. Moreover, the court cannot limit itself to evaluate the facts provided by the authorities, but must embark upon an autonomous assessment of the facts, incl. hearing the migrant.
More specifically, the Courts require that the alien authorities in their application for a detention provide extensive information as to the organization of a deportation and the necessity of detention. It is not sufficient that the alien authorities explain in general terms their intention to deport a person and the necessary time frame. The concrete steps with regard to the particular person and the details of deportation have to be laid down in the application, including potential barriers which may prevent or delay the execution of a deportation order. The lack of information results in the inadmissibility of the application (Bundesgerichtshof, Decision of 22.07.2010, 5 ZB 28/10; Bundesgerichtshof, Decision of 8.11.2012, 5 ZB 139/10). Since the entry into force of the Return Directive courts will also require the precise information on all legal requirements as to the deportation, in particular the existence of a formal notice of intention to deport a foreigner. A danger of absconding does not with the required notice (Bundesgerichtshof, Decision of 16.5.2013, 5 ZB 44/12).

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**

  As always in German detention proceedings, there is a full control (see the answer to question 1.1 above).

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*):

Strasbourg proceedings and the enactment of an interim measure will be taken into account when courts decide whether deportation can be executed within the legally prescribed time limit. The alien authorities will examine whether on account of an interim measure based on Rule 39, the time limit of detention can be still observed and will consider detention as

unlawful if it is evident that the detention will not be executed within the legally required time frame.
Strasbourg proceedings and the enactment of an interim measure will be taken into account when courts decide whether deportation can be executed within the legally prescribed time limit. The alien authorities will examine whether on account of an interim measure based on Rule 39, the time limit of detention can be still observed and will consider detention as unlawful if it is evident that the detention will not be executed within the legally required time frame.
We are unaware of case law, which we assume means that there are no practical disputes, i.e. most orders from Strasbourg will be respected and the person concerned will be released.

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

Internal judicial proceedings suspending the return have to be taken into account. The civil court judge has to enquire with administrative courts about the state of proceeding relating to an application for suspension of return decisions and making an assessment concerning the prognosis whether a detention can be executed within the legally required time frame.

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?
X YES NO

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

See the answer to question 67. Courts are independent and the arrangement of internal working relations are decided locally. There are no general rules for Germany.

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*):

Under Sec. 14 (3) Asylum Procedure Act the application for asylum, however, does not as such exclude the ordering of detention or continuation of detention for executing a return order. However, courts will have to examine whether, on account of the asylum procedure, a deportation can be executed within the required time frame under Sec. 62 of the Residence Act. However, since under the court's decision in Kadzoef and Arslan, the application for asylum of a detainee results in a change of the legal basis of detention, it follows that the period of asylum proceedings should not be taken into account when calculating the maximum length of detention (see research report 4.2).
High court cases, which have elaborated upon the issue include: Federal High Court (Bundesgerichtshof, Decision of 21.07.2011, V ZB 222/10), which has been elaborated upon in the database. A third country-national who applied for asylum again may in principle

only be removed after the decision of the competent authority that a new asylum procedure will not have taken place.

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**:

Not relevant.

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:

Not relevant.

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**

As previously noted in the answer to question 1, the maximum period of six months according to Sec. 62 (4) of the Residence Act can be prolonged in cases in which the TCN prevents his/her deportation. A prevention of deportation is not yet proven by a lack of cooperation by the third-country national concerned or delays in obtaining the necessary documentation. It requires concrete obstruction measures attributable to the foreigner and evidence that the obstruction measure has caused the impossibility of a deportation.
See the answer to question 32; the criteria elaborated upon there applies mutatis mutandi.

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

Not relevant.

- 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**

See the answer to question 1.1 above.

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*:

The requirement of a new assessment follows from the general principle that deprivation of liberty must always comply with the legal requirements of proportionality and that under Sec. 426 courts are obliged ex officio to quash a detention order if the reason for deprivation of liberty does not exist anymore. The court is only obliged to hear the competent alien authorities (Sec. 426 (1) sent. 2). For more detail, see the answer to question 1.1.
The judicial criteria for risk of absconding have been listed in the answer to question 46.1. More specifically, in case of a lack to cooperation in the procurement of travel documents, the alien authorities have to proof that the passed detention time has been fully used to organise the issuance of such documents in so doing, the denial of the due participation of a TCN justifies an extension of detention beyond six months only if that refusal is the cause of the non-removal. Therefore, a potential refusal to cooperate has to be taken into account by the alien authorities in planning and organising the process of return (Bundesgerichtshof, Decision of 13.10.2011, 5 ZB 126/11).

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

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

The answer to question 49 applies mutatis mutandi.

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 (the case law has always been strict).

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:

Not relevant.

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

Detention requires a court order in Germany. If that order no longer exists, the migrant will be released. In this decision, procedural issues will be taken into account in line with the rules described in the answer to question 24 above.

- 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

See above.

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

Not relevant.

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

There are complicated judicial rules concerning the enforceability of judgments in cases of review and the answer to the question will depend on the circumstances. As a matter of principle, however, release is always possible and can, if necessary, be ordered by the higher court on a preliminary basis.

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?

X YES No

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:

Only on the basis of a NEW application and corresponding court order. This new application must comply with all the legal requirements.

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?

X YES NO

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:

Only on the basis of a NEW application and corresponding court order after previous release. The court has to find that the new detention is not part of the original proceedings, i.e. it has to assess whether it is a new return proceeding. See also Federal High Court (Bundesgerichtshof, Decision of 13.2.2012, V ZB 46/12), a decision which has been elaborated upon in the database. Earlier detention periods are to be included in the total duration of detention, if the detention goes back to the same obligation of the third-country national to leave Germany. This is difference in cases where a gap has occurred between the detention periods. Such a break is assumed if there is gap of several years between detention orders or the third-country national's stay in Germany was tolerated for a multi-year period.

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

X YES NO

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:

There is a specific law for compensation after unlawful detention after criminal proceedings, which does not apply to return detention (see Gesetz über die Entschädigung

für Strafverfolgungsmaßnahmen, StrEG, available online at http://www.gesetze-im-internet.de/streg/BJNR001570971.html). There are, however, customary rules for state liability (not much different from Francovich liabilities under EU law), which migrants may rely upon. These are laid down in Art. 34 of the Constitution and Sect. 839 of the German Civil Code. In essence, it has to be proven that detention was unlawful.

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

We are unaware of a widespread practice, which may also have to do with the situation that courts order detention, i.e. there is a strict control of lawfulness ex ante.

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**:

There are no statistics available concerning the release from detention as a consequence of the judicial control. The application and execution of federal laws is within the competence of the Länder. The Länder does not register release from detention separately. It can be assumed that in all cases in which a civil court has declared detention as unlawful, alien authorities will release a TCN from detention as a consequence of judicial control.

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 German system is quite specific and many of its rules therefore depend on the national legal context which cannot be transplanted to other Member States. Yet, the German example demonstrates that full judicial control can result in strict requirements.

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

The previous 84 (!) question on a single Article in the Return Directive have covered anything which we consider relevant.