CONTENTION – Judicial CONtrol of Immigration DeTENTION

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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)**

The immigration authority (Office of Immigration and Nationality – OIN) may order detention for 72 hours. It may be extended by the court of jurisdiction (local courts) by reference to the place of detention until the TCN's removal, for maximum 60 days at a time. The immigration authority shall file its request for an extension of the detention beyond the 72 hour time limit at the local court within 24 hours from the time when ordered. *Furthermore, there exists another type of immigration detention under Hungarian law: the "detention for the preparation of removal". This may be ordered in order to secure the smooth carrying out of the immigration proceedings; either if the TCN's identity or the legal grounds of his/her residence is not conclusively established, or if the return of the TCN under the bilateral readmission agreement to another EU Member State is in process. Its initial length is also 72 hours, which may be extended by the court of jurisdiction (local court), but only once, maximum up to the 30th day.*

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

Not relevant.

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

Not relevant.

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

Currently, in practice, judicial control limits its control of lawfulness to the arguments of the parties (indicated in the motions or raised at hearings).

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

The advantage is that there is compulsory judicial control in the system, not dependent upon the request of the TCN concerned as well as the local courts shall review regularly the detention, not only once. The disadvantage is that the detainee does not have the individual right to imitate the review himself/herself, and that the OIN is interested in prolonging it, so the proposal is rather to maintain it, while if a TCN started the proceedings, it would be the other way round (to stop detention). All this has an impact on the evidences invoked before the court, too.

Further to that, provided that a specialized immigration court was to solely control the elements of lawfulness, stronger control could be exercised during the control of lawfulness over the acts of authorities.

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

By virtue of the Act No II of 2007 on the Entry and Stay of Third-country Nationals (hereinafter: Aliens Act), in immigration proceedings relating to expulsion, TCNs shall have the opportunity to use the legal counsel of his choice and expense, to hire a legal counsel, or to accept the legal aid offered by any registered non-governmental organisation providing legal protection on a regular basis.

In connection with the legal aid offered by a registered non-governmental organisation providing legal protection, the authority shall provide assistance, where deemed necessary, by means of providing an interpreter. TCNs may have the possibility to use in the proceedings of judicial review of the return decision – upon request – free legal assistance. The detailed rules of this free legal assistance are laid down in Act No LXXX of 2003 on Legal Aid.

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

- □ Civil jurisdiction
- □ Administrative jurisdiction
- X 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)?**

E.g. at the District Court of Kiskunhalas the criminal judges, or at the Buda Central District Court the investigator judges review, or take part in the renewal of the detention.

- Hearing only immigration law cases?

Not relevant.

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

Not relevant.

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

Not relevant

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?
YES NO X

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

Not relevant

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

Not relevant as of now

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:

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

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

This remark does not only apply to the cases of renewal beyond 72 hours, but applies in any other case of renewal (i.e. after every 60 days). The reviewing court in such cases – unless the TCN detainee requests personal presence or a renewal hearing – decides based on the motion of the authorities. In case of a renewal beyond 60 days, the authorities in each case indicate what measures have been taken in the past regarding the preparation and realization of the return or indicate that the return is being delayed due to the lack of cooperation of the detainee or the non-cooperation of the Embassy of his/her nationality.

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**

  The renewal decision is not taken by the administration (the immigration authority – OIN), but only initiated before the competent court, and right after 72 hours, the first renewal is made by the court. Against the order of the court on renewal, no further legal review is applicable, i.e. there is no second level of jurisdiction.

- Possible only on application of the detainee

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

The court on such occasions – unless the TCN detainee requests personal presence or a renewal hearing – decides upon the motion of the authorities. Should the detainee request the personal presence (the right to be heard), the court shall hold a hearing, where the TCN detainee or his/her legal representative may elaborate on their position, which position shall be taken into consideration by the court.

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

Lack of available information.

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

Not relevant

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?
YES NO X

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

Not relevant

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

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

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

Not relevant.

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

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

This option is the closest to our system. However, it is to be noted that besides the decisions on the renewal, the court does not control independently the lawfulness of the detention. For instance, between two eventual renewals, there is no ex officio or any other whatsoever judicial control on lawfulness. This exercise is made only when the immigration authority requests the renewal and on that occasion the competent court conducts the control of legality, too.

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

Not relevant.

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

Not relevant.

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

Not relevant.

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

Lack of available information.

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:

Not relevant.

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 as of now.

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**

Not relevant.

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

- a control limited to a manifest error of assessment

Not relevant.

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

Not relevant.

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 as of now.

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):

Lack of available information.

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

Not relevant.

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 as of now.

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:

Regarding 'foreseeability' in the judicial practice, the question concerning the time duration of organizing the return always arises. The authorities can only give an approximated answer to this, depending on the cooperation or non-cooperation of the TCN detainee himself/herself, or the Embassy of the nationality of the detainee in identification or issuing the necessary travel documents. The court always assesses the foreseeability of the return/removal.

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.)*

Lack of available information.

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 as of now.

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:

The local courts in charge of the renewal of the detention are not obliged to examine the lawfulness of the expulsion.

The expelled illegally staying TCN may request the judicial review of the return decision from the exclusively competent Metropolitan Court of Public Administration and Labour (Aliens Act, Article 46(2)). Besides the ex officio review mechanisms, there is no judicial remedy available on request of the detainee against immigration detention orders.

Detainees may raise an objection if and when the immigration authority has not informed them of their rights and duties in their mother tongue or any other language they know, or has not informed the consular or diplomatic mission, or has not taken the necessary interim measures (Article 57, Aliens Act).

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?
X 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:

By virtue of Article 54(1) lit. b) of the Aliens Act, in order to secure the removal of an illegally staying TCN, the immigration authority shall have powers to detain the person concerned if he/she has refused to leave the country, or, based on other substantiated reasons, is allegedly delaying or preventing the enforcement of the return decision as well as in case of risk of absconding.

Moreover, Article 55 of the same Act also stipulates that the immigration authority may order the detention of the TCN in order to secure the smooth carrying out of the immigration proceedings; either if his/her identity or the legal grounds of his/her residence is not conclusively established, or if the return of the TCN under the bilateral readmission agreement to another EU Member State is in process.

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":

No, the general time limits apply (see e.g. the answer for Q1).

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**:

Lack of available information.

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 as of now.

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

Comment: *in problematic cases, during the subsequent renewal of the detention, when the TCN detainees request personal presence and present their complaints, the reviewing judge will investigate the "reasonable prospects of removal". The authorities and the detainees or their legal representatives usually comprehend "reasonable prospect of removal" differently. During the hearing it is possible to present arguments and the court, mindful of these, shall decide upon the renewal of the detention.*

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

Not relevant.

- 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)*

Under the Aliens Act, there is only a general, quite vague provision stating that "immigration detention ordered shall be terminated immediately […] *when it becomes evident that the removal cannot be executed." (Article 54(6) lit. b)). More detailed rules are set forth in Implementing Government Decree No 114/2007: the above rule may be applied if there is evidence that the return cannot be carried out after 12 months from the date when detention was ordered (or in case of families with minor children, after 30 days), in particular when a) the conditions for his/her return cannot be ensured; or b) the detainee is to be hospitalized due to his/her health (Article 126(6)).*

The exact meaning and the scenarios falling under the ambit of those provisions is shaped by administrative practice and the case-law of the reviewing courts. Lack of cooperation by the TCN concerned is one of these practical obstacles.

- **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))*

See above the legal framework.

The exact meaning and the scenarios falling under the ambit of those provisions is shaped by administrative practice and the case-law of the reviewing courts. Lack of cooperation by some embassies (e.g. Iraq, Afghanistan, and Pakistan) is one of these practical obstacles; either due to non-identification or non-issuance of travel

documents or accepting only voluntary returnees.

- 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

Not relevant.

- 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 because of the principle of non-refoulement, the person is given the status of tolerated stay in the form of an autonomous legal status called "exile". Once this status is granted, detention is no longer possible. Under Article 2 lit. f) of the Aliens Act, "exile" means any person who is provided temporary shelter and may not be returned to the country of his/her nationality, or in the case of a stateless person to the country of domicile, for fear of being subjected to capital punishment, torture or any other form of cruel, inhuman or degrading treatment, and there is no safe third country offering refuge, and who is not entitled to asylum or treatment as a stateless persons, nor to any subsidiary form of protection or temporary protection. A residence permit on humanitarian grounds is issued to the person having been granted the status of exile. The validity period of a residence permit granted on humanitarian grounds shall be one year that may be extended by a maximum of one year at a time and shall be withdrawn if any requirement for issue is no longer satisfied; the third-country national in question has disclosed false information or untrue facts to the competent authority in the interest of obtaining the right of residence; or the withdrawal is requested by the authority or body on whose initiative it was for some other reason. Exiles shall be entitled to the rights afforded to persons with residence permits and to the rights granted to exiles in specific other legislation.

As for children, they cannot be detained in any circumstances if they are unaccompanied. Children with families can only be detained up to 30 days, as a measure of last resort (in practice does not occur).

- Else

Not relevant.

Q33. Assuming that the national courts apply the test of a reasonable prospect of removal already at the FIRST STAGE of judicial control of detention, does the relevant case-law indicate **any differential treatment** of the above-listed factors **during that FIRST vs. SECOND and any subsequent STAGES** of judicial control?
YES NO N/A X

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):

Lack of available information.

Q35. When deciding on the existence of a reasonable prospect of removal, the courts:
- Limit their assessment to **an abstract or theoretical possibility of removal**
- Require **clear information on its timetabling or probability** to be corroborated with relevant **statistics** and/or **previous experience in handling similar cases**

X Else

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

Lack of available information.

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**

Not relevant.

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:

Lack of available information.

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 as of now

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:

By virtue of Article 54(1) lit. a)-b) of the Aliens Act, the immigration authority may detain the returnee if he/she was hiding from the authorities or is obstructing the enforcement of the removal in some other way; or he/she has refused to leave the country, or, based on other substantiated reasons, is allegedly delaying or preventing the carrying out of removal. *There is no case-law available elaborating more on that.*

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:

By virtue of Article 54(1) lit. a)-b) of the Aliens Act, the immigration authority may detain the returnee if he/she was hiding from the authorities or is obstructing the enforcement of the removal in some other way; or he/she has refused to leave the country, or, based on other substantiated reasons, is allegedly delaying or preventing the carrying out of removal. *There is no case-law available elaborating more on that.*

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***):

The term "objective criteria based on which the existence of a risk of absconding can be assumed is defined more in details by the Implementing Government Decree of the Aliens Act. Its Article 126(5a) stipulates: risk of absconding of the ISTCN may be determined if the returnee is unwilling to cooperate with the immigration authority, in particular if a) denies communication and signing the minutes; b) provides false personal information; c) based on his statement to the authority his/her departing to unknown place is likely to happen; and based on the aforementioned it can be reasonably supposed that the TCN will prevent the carrying out of the return. *There is no case-law available that elaborates on this point.*

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

N/A

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?

The justification of "risk of absconding" is always included in the motion of the authorities, and the reviewing court is entitled to assess the soundness of the justification and always does so.

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:

As it can be seen from the answers given to Q39.1 and 40.1, there are certain overlaps between the two categories in our national legislation. In our understanding, one difference is the time factor: in case of "avoiding/hampering" , the person has already did something to prevent removal, or is still doing something, while in case of "risk of absconding" this is just an eventual, but well-founded risk for the future (e.g. the person has not disappeared yet but planning to do so).

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:*

The following other grounds are foreseen in the Aliens Act [Article 54(1) lit c)-e)]: 1) the returnee has seriously or repeatedly violated the code of conduct of the place of compulsory confinement; 2) he/she has failed to report to the authorities as ordered, by means of which to forestall conclusion of the pending immigration procedure or the Dublin transfer process; 3) he/she is released from imprisonment as sentenced for a deliberate crime.

There is no case-law available elaborating more on that.

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

Not relevant.

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

Not relevant as of now

3. Alternatives to detention

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

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

- Registration obligation

Not 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

Not relevant.

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

The <u>designation of a place of compulsory confinement</u> is ordered even in case of risk of absconding, if detention of the returnee would result in a disproportionate punishment taking into account the state of health and age of the TCN concerned [Article 62(1) lit. g) of the Aliens Act]. This obligation is coupled with the <u>obligation to regularly report</u> before the immigration authority if the designated place is a private accommodation (and not a community shelter).

As for the <u>deposit of the travel document</u>, there are no relevant considerations indicated in the legislation related to the assessment of the risk of absconding. The Aliens Acts only sets forth the following: "In order to secure the carrying out of the return, the immigration authority shall be authorized to confiscate the travel document of the third-country national affected" and "[b]efore ordering detention […], the immigration authority shall consider whether the removal can be secured in accordance with" the above option [Articles 48(2) and 54(2) of the Aliens Act].

There is no case-law available elaborating more on that.

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**?

See the answer for Q50.

Further to that, in practice, the risk of absconding generally also arises in cases where the detainee avoids or hampers the removal process, which is one of the legal grounds for ordering detention. This is included in the motion of the authorities and the motion is considered by the court of review during the hearing.

Q52. When deciding on the use of pre-removal detention, are competent authorities required to **assess every available or possible alternative to detention** to justify their effectiveness or the lack thereof in a given case?

X YES NO

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

Not relevant.

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

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

Not relevant.

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

Not relevant.

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

The alternatives to detention are systematically considered when assessing whether to place a person in detention. Before ordering detention the immigration authority shall consider, in each and every case, whether the return/removal can be secured with any of the alternatives to detention. For conducting the individual assessment procedures the responsible national authorities are the Alien Policing Departments of the Regional Directorates of the OIN. Deciding on the placement of a TCN in detention is in the competence of the Alien Policing Departments of the Regional Directorates of the OIN and the Police.

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:

Not relevant as of now.

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**

The length of the initial immigration detention is 72 hours, which is ordered by the immigration authority (OIN or the Police).

Furthermore, the initial length is also 72 hours for the other type of immigration detention, the "detention for the preparation of removal" (ordered also by the OIN or the Police).

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

Not relevant.

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.)?

The time starts running from the date of the detention order. The length of the detention is calculated in hours during the initial phase (up to 72 hours), then after the prolongation by the court, it is further counted in days [Implementing Government Decree, Article 126(3)-(4)].

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**

After 72 hours, immigration detention may be extended by the court of jurisdiction (local courts) by reference to the place of detention until the TCN's removal, for maximum 60 days at a time. The immigration authority shall file its request for an extension of the detention beyond the 72 hour time limit at the local court within 24 hours from the time when ordered. After the prolongation by the court, its length is calculated in days. It is also written is law that the ordering authority shall endeavour to keep persons in detention as short a period as possible. For that purpose, e.g. the authorities shall take all appropriate measures to establish the detainee's identity and the legality of his/her stay as quick as possible (out of turn).

Furthermore, the "detention for the preparation of removal" may also be extended by the court of jurisdiction (local court), but only once, maximum up to the 30th day. After the prolongation by the court, its length is calculated in days.

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

Not relevant.

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

Not relevant.

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 as of now

4.2 Due diligence

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

Lack of available information.

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

Not relevant.

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 as of now

4.3 Removal arrangements in progress

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

It is a relatively new practice to include in the authorities' motion those measures that were taken in order to organize the return. No separate document is attached thereto but it is not in the immigration authority's interest to provide false data. The interest of the authorities is also to organize the removal as soon as possible. Therefore the answer to the question is that based on the motion of the authorities to renew the detention, the reviewing courts may investigate what measures have been taken so far to make the removal happen. (N.B.: this does not apply to the motions to renew the detention beyond 72 hours, since in case of a new detainee (being kept for 1-3 days) the first steps of arranging removal have not been taken yet.)

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**

Not relevant.

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*):

Lack of available information.

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

Lack of available information.

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

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

Not relevant.

Q69. Does the period when **asylum proceedings** are pending have any impact on calculating the length of detention?
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*):

<u>Explanation</u>: If the illegally staying TCN lodged an asylum application, detention cannot be ordered and if the asylum claim was submitted during detention, the person shall be set free [Article 56(1), (4) of the Aliens Act]. During the asylum proceedings, since 1 July 2013, the asylum seeker may be put in to the so-called "asylum detention", which is a separate legal institution and regime, regulated by the Asylum Act (applied exceptionally, on grounds exhaustively determined by law and as a measure of last resort). The period spent is asylum detention may not be calculated together with previous or subsequent immigration detention or "detention for the preparation of removal" [Article 54(7) of the Aliens Act].

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 as of now***.**

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**

Not relevant.

- **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**

Not relevant.

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*:

According to national case-law, the new assessment of a risk of absconding is made by the reviewing court as much as in the case of the first renewal.

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

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

According to national case-law, ordering the designation of a place of compulsory confinement may be a possible alternative even in case of deciding on subsequent extensions of the detention, which is considered by the court and it decides on terminating or upkeeping the detention based on the arguments of the parties.

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

Not relevant.

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

*Not relevant as of now***.**

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

Both in law and in practice, should the court find that the detention is unlawful; the authorities must immediately release the detainee regardless of the reasons for detaining them.

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

Not relevant.

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

Not relevant.

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

Not relevant.

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

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:

By virtue of Article 56(4) of the Aliens Act, if against an illegally staying TCN who was previously detained, new immigration proceedings are initiated on the basis of new facts, the duration of such previous detention shall not be calculated in the duration of the newly ordered detention (here the factual and legal grounds differ from the previous one).

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

YES NO X

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

Not relevant.

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

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:

Under the Act No. CXL of 2004 on the General Rules of Administrative Proceedings and Services, administrative authorities (including the immigration authorities) shall be subject to civil liability (according to the general rules of the Civil Code) for damages caused to the client by any unlawful proceedings. This legal provision is thus the ground for the right to compensation for victims of unlawful detention. In other words, the Act on Administrative Proceedings is the lex generalis behind the Aliens Act, so this is the generally applicable, complementary legislation where there is no specific provision on a given issue in migration law and procedures. Such a claim for compensation shall be directed in form of civil proceedings against the ordering authority, either against the OIN, or the Police before the courts.

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

Such civil proceedings for compensation have already occurred in practice, but they have been rather sporadic so far.

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**:

In 2011, there were 5325 cases relating to the judicial review of detention. In all of the cases, the immigration authority initiated the upholding/prolongation of the detention, and out of this high number of cases, only in three cases the reviewing courts did not follow the authorities' initiative (i.e. in only 3 cases the TCN was released).

In 2012, a Case-law Analysing Working Group in Migration Affairs had been set up by the Hungarian Supreme Court (Curia), which prepared a report on the judicial practice related to immigration cases, including the judicial control of immigration detention (the report was published in September 2013, link: http://www.lb.hu/sites/default/files/joggyak/idegenrendeszeti_osszefoglalo_velemeny_kuria.pdf*).*

Due to the almost 100% conformity with the authorities' requests, the report established that the judicial control of immigration detention is not effective.

As for the extension of detention beyond 6 months, it was applied in a relatively few cases by the courts in 2011, and then there was a slight increase in 2012.

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:

Not relevant.

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

As for the recurring question on the treatment by judges of the certain questions brought about by the implementation of the Return Directive, we have indicated "not relevant" everywhere in the Questionnaire.

Nevertheless, it is worth mentioning that the above mentioned Case-Law Analysing Unit of the Curia is aware of the changes brought up by the Return Directive, since it examines and discusses in details these legislative changes induced by the requirements of the Directive in its report. However, this awareness is not present in lowers courts that actually adjudicate cases on detention.