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 – Italy

Alessia Di Pascale
in collaboration with National Judge
Pier Luigi di Bari

Bibliographical note: in addition to available case-law the national report has made use of the information contained in two research projects carried out by the Università di Pisa (under the supervision of Prof. Alberto Di Martino – Associate Professor of Criminal Law at Scuola Superiore Sant'Anna) and Università Roma 3 – Legal Clinic of Immigration and Citizenship (under the supervision of Prof. Enrica Rigo).

Both projects analysed the practice and case-law of the Justice of the Peace in relation to the detention of irregular migrants.

The reports are the following:

The criminalisation of irregular immigration: law and practice in Italy, Alberto Di Martino ...[et al.], Pisa: Pisa University Press, 2013 (hereinafter referred to as "Pisa report").

Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Rapporto preliminare sulla stato della ricerca, aprile 2014 (hereinafter referred to as "Roma 3 report").

* * *

Very useful information is contained in the report drafted by MEDU (Medici per i diritti umani), *Arcipelago CIE, Indagine sui centri di identificazione ed espulsione italiani*, May 2013 (hereinafter referred to as "Medu report").

See also the *Documento Programmatico sui centri di espulsione e identificazione*, Ministero dell'Interno, 2013.

* * *

The main legal provisions are set out in Legislative Decree 25.07.1998 no. 286 and subsequent amendments, *Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*, hereinafter referred to as the "Consolidated Text".

It must be underlined that after completion of this questionnaire a major amendment to the relevant legal provision (art. 14, Legislative Decree no. 286/1998) was adopted. This has affected the maximum length of detention. The new provision has entered into force on the 25th of November 2014 and will be mentioned as a relevant amendment, while the analysis has been conducted on case-law adopted and based on the rules in force until the end of November.

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, IT)

When the necessary conditions exist (illustrated below in this report) the administrative police authority ("Questore") orders detention for the time that is strictly necessary. The Questore of the centre for identification and expulsion shall then send a copy of the proceedings to the judicial authority ("Giudice di pace") having territorial jurisdiction, for validation, without delay and in any event within forty-eight hours after the adoption of the measure. The measure adopted by the Questore **is only provisional** and becomes fully effective only if it is validated by the Justice of the Peace within the subsequent 48 hours.

According to the Consolidated Text, the measure becomes ineffective if it is not validated by the judicial authority within forty-eight hours.

Please note, however, that some cases of validation adopted after 48 hours have been reported. Roma 3 report mentions one case – registration no. 82192/13 - adopted 24 hours after the expiry of the deadline, while the Pisa report highlights that detention orders have not been validated within the prescribed term on several occasions. This may happen especially if the hearing is set for the last 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 (HU, FR)

- 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:

The Justice of the Peace shall validate the Questore's order, by reasoned decree, within forty-eight hours, after verifying whether the time terms prescribed by the law have been respected, the existence of the expulsion order, the existence of an order for coercive enforcement of the expulsion, and the adoption of precautionary measures, and after hearing the concerned

person, if present. The judge is charged to control *ex officio* the above elements of the lawfulness set by the law irrespective of the arguments of the parties.

It has to be noted that Justices of the Peace basically decide *ex actis*, i.e. based on the information and documents provided in the case file, since they do not carry out any preliminary investigation. In fact the hearing takes place in "camera di consiglio". Such proceedings are characterised by the fact that the dispute is not open to a public audience and has a limited investigation, and are generally decided quite quickly.

Whilst detainees are present at validation hearings, the possibility to adequately and effectively present their position to the Justice of the Peace appears more limited. Practitioners complain that it is only possible to provide evidence if this is immediately available. They affirm that since no other hearings are scheduled, the submission of evidence is usually impossible (Pisa report p. 61).

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

Conferring to the Questore the power to detain migrants, although subject to validation by the Giudice di Pace, seems to conflict with the basis of the legal system which protects personal liberty. According to article 13 of the Constitution in fact only the judicial authority can limit personal freedom, the authority of public safety being allowed only in exceptional circumstances of necessity and urgency to adopt interim measures to be validated by the court.

Moreover the choice to give Giudice di Pace jurisdiction on validation and renewal of detention raises questions with respect to the constitutional guarantees of independence and autonomy that should characterise every magistrate.

The importance of respecting article 13 of the Constitution had actually been clearly affirmed by the Constitutional Court in a landmark judgment pronounced in 2001 where the Court stated that the detention of foreigners at the centres of temporary stay and assistance measure (i.e. the precursors of the current CIEs) limits personal freedom and cannot be applied without complying with the guarantees of Article 13 of the Constitution (Judgment of the Constitutional Court no. 105 of 2001).

Scholars have stressed that the constitutional principle that "personal liberty is inviolable" (art. 13 of the Italian Constitution) would be properly implemented if the only courts who had the jurisdiction to decide matters of personal freedom were those courts that incorporate strong rights protection and procedural safeguards, such as cross-examination (contraddittorio), investigation powers and a timely appeal process.

These critical aspects have been voiced by a Justice of the Peace (Giudice di Pace di Roma) who has raised the question of constitutional legitimacy of the relevant provisions of the Consolidated Text in relation to articles 13 and 97 of the Constitution. (Art. 97 states that Public offices are organised according to the provisions of law, so as to ensure the efficiency and impartiality of administration).

The case was dismissed by the Constitutional Court since the question was deemed to be inadmissible (ordinance no. 93 of 2014). The question was in fact similar to another one

that had already been raised by the same magistrate and also decided in the sense of manifest inadmissibility by ordinance no. 109 of 2010. The Court also considered that the issue had been proposed "in a totally hypothetical and abstract manner" through the enunciation of a series of general concerns that had no concrete reference to actual external influences capable of affecting "the impartiality and independence in the adoption of judicial decision".

The proposition of the question by the same magistrate has not been able to overcome the objections of inadmissibility of the first reference and thus has not yet allowed an examination of the question of the compatibility of the present rules with art. 13 of the Constitution. This episode casts shadows on the adequacy of this category of honorary magistrates. Despite the intentions to protect fundamental rights (and even if any consideration must be limited to an individual case) they show structural limitations that raise concerns especially when personal freedom is at stake.

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

According to Article 24 of the Constitution of the Italian Republic, everyone can take legal action to protect their legitimate rights and interests. Defence is inviolable at every stage and level of the proceedings. The rights of those without means are assured through appropriate institutions, the means for action and defence in each jurisdiction.

The concerned person is granted legal aid at the state's expense and, if he/she is devoid of a defender, is assisted by a lawyer appointed by the court and, if necessary, by an interpreter. So, while the public defender (*difensore d'ufficio*) has the function of ensuring the right to a technical defence to anyone who has not appointed a defence lawyer, legal aid is applied both to the detainee's trust lawyer and *difensore d'ufficio*.

Not all lawyers are able to defend those who have been admitted to legal aid; only the lawyers registered in the register of legal aid defenders, held by the competent Councils of the Order, can be appointed.

In principle, legal aid applies to everyone, both Italian and TCN, EU and non-EU citizen, in criminal, civil, administrative, accounting and tax matters in all levels of courts (specific rules may, however, apply in relation to certain categories of proceedings). As a general principle under Italian law, only those who find themselves in badly-off conditions can be admitted to legal aid (if the applicant lives alone, the amount of his/her income must not exceed 10.766,33 €; this amount is increased in case he/she has family members living with him/her). The requirement must be proven by the applicant with certification or self-declaration.

As far as TCNs are concerned, as far as pre-removal detention proceedings are concerned, the regulations applicable are different from the general principles insofar as they are granted legal aid at state expenses, without considering the income requirements.

Please note, however, that even if the law adequately protects the rights of the defence, the modalities with which both defence and legal counsels operate in practice raise criticisms and concerns about the effectiveness of such right to defence.

More in detail, defenders complain about the difficulty of adequate representation, including the absence of interpreters. Often, the public defenders are appointed on the morning of the hearing and have never seen their client before. In the absence of an interpreter of the lawyer (which is quite unlikely, given the different nationalities and languages spoken), the latter can only briefly confer with their client that morning. The current legal system only provides for interpreters during the validation and extension hearings, whereas a professional interpreting service for client interviews is not guaranteed.

This affects the possibility to adequately prepare and study the case and to understand the complexities of their client's stories.

As a general remark, also in the event the concerned person has appointed a legal counsel of his/her choice, the very small advance with which the dates and times of validation hearings are notified, combined with the impossibility of a prior confrontation with the client, make it extremely difficult to prepare the defence for the counsel. It should also be taken into account that lawyers who provide free legal aid may not be particularly qualified.

As it has been pointed out, validation and extension hearings are absolutely crucial because they are the forums where *Questura*'s representative claims for the validation or extension of detention and consequently the detainee's lawyer should have all of the individual information and time necessary to adequately explain the detainees' side of the case.

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
- □ Criminal jurisdiction
- □ Special jurisdiction
- X Else

Not Relevant.

The Justice of the Peace is an honorary magistrate to whom judicial duties are temporarily assigned. They hold the office for four years and can be confirmed only once. They are appointed upon resolution of the Judges' governing body ("Consiglio Superiore della Magistratura") and the Minister of Justice, at the end of a competition based on qualifications and an internship of six months.

As to their requirements, they do not include a specific preparation or professional experience on the matter, apart from general knowledge of legal issues. In fact it is not necessary to have years of experience as a lawyer or barrister before undertaking the *Giudice di Pace* role. They must be between thirty and sixty-five years of age, have a bachelor's degree in law and have passed the qualifying examination for the legal profession. When they are appointed they must have ceased, or commit to cease before the entry into office, the exercise of any employed public or private activity.

They must apply the law and are subject to disciplinary liability. However, it must be stressed that they do not have an employment relationship with the State and are paid a benefit in relation to the work effectively carried out (hearings held, measures taken) rather than to the

amount of time that they spend hearing and deliberating over matters (for every validation of detention, pursuant to art. 14, para. 4, Single Text on Immigration, the Justice of the Peace receives 10 euros and for every hearing 20 euros).

These peculiarities have raised criticism. It has been affirmed that , "Justices in Peace are paid on the basis of the number of acts they adopt per day, so that they have a vested interest in issuing many acts, rather than in conducting hearings where the rights of the defence are fully ensured" (Pisa report p. 60).

In addition to their limited knowledge and experience in the application of law, they are also criticized since they have less authority in comparison to career Judges. Practitioners point out that the fact that their office is temporary and the fact that they can be reappointed limits their independence, neutrality and courage in adopting detention measures.

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

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

Not relevant.

- Hearing only immigration law cases?

Not relevant.

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

The Justice of the Peace is not specialised in immigration matters. They have a broad jurisdiction on minor cases and disputes under civil, administrative and criminal matters and, in principle, have been designed to resolve small claims of a limited value. The *Giudice di Pace* can be in charge of solving matters like neighbourhood disputes, trespass to land, traffic fines, contraventions of legislation, the supplying alcohol to drunk people and summary criminal offences.

At the same time, the concerned Justice of the Peace may therefore run a number of different hearings on completely different issues.

As pointed out above, the main inconvenience of this choice, made by the legislator, is that decisions which affect personal freedom are taken by a judge without specific expertise and preparation on immigration matters. "Practitioners reported that they often do not have legal codes and other legislative texts with them. The representative of the police often acts as a legal advisor for the judge," (Pisa report p. 68).

Similar concerns have also been expressed by the UN Special Rapporteur on the Human Rights of Migrants in his 2013 report following his visit to Italy in September 2012: "the judge deciding whether expulsion and detention orders should be extended is a Justice of the Peace without any particular expertise on immigration issues. Moreover, there seem to be limited ability of these lay judges to review the detention orders on the merits: rather, the

confirmation of the orders appears to be limited to formal checks, thus resulting in a lack of real judicial control over the order". (A/HRC/23/46/Add.3, page 17).

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?

N/A

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:

It is not possible to appeal a Giudice di Pace's decision (validation and renewal) to the local Court or appellate Court. Against the decrees of validation and renewal it is only possible to appeal to the Supreme Court, which is Italy's Supreme Court located in Rome.

It has to be noted, however, that the Corte di Cassazione cannot undertake a merits review, but it hears questions about the interpretation of law or judicial review. Appealing to the Corte di Cassazione is a complicated and time-consuming procedure and not all lawyers can personally appear in the Corte di Cassazione because to appear in this Court a lawyer must have practiced law for at least twelve years. In practice, this issue can force detainees to look for another lawyer if they would like to appeal the Giudice di Pace's decision.

Only senior lawyers are in fact qualified to appear before the Supreme Court. From a practical perspective this may complicate the possibility to appeal since younger lawyers may apply lower fees and be more interested in cases involving fundamental rights. Also, it is not easy for a TCN detained in the centre to make contact with a senior lawyer, qualified to act before the Supreme Court.

Moreover, the TCN may have a limited interest in appealing the measure, since in any event the appeal does not suspend the measure's enforcement .

The limited number of decisions issued by the Supreme Court in relation to pre-removal detention can be regarded as an index of the practical difficulties to have access to this form of appeal.

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:

- 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?

The fact that the lawfulness of continuing detention is controlled only when the detention order is renewed means that the TCN (except in the case where he/she can be expelled before expiry) must remain in the centre for at least the first thirty days. *The Italian system is based on frequent short-term renewals of detention. The Law in force until the end of November 2014 provided that the initial detention was ordered for 30 days and then renewed according to the following formula: 30+30+(60×8).* *This provision was recently changed very significantly by Law of October 30, 2014, no. 161, which reduced the maximum period of detention to 90 days (30 days for those who have already been held in prison for whatever reasons for 90 days). Therefore the new formula is 30+30+ an addition up to 30.* *Although control is not exercised independently from renewal of detention, these frequent reviews should be suitable to ensure the frequent re-examination of the third country person's position.*

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:

- X Automatic

As for the initial detention, renewal is adopted by the Questore that is however

always required to promptly submit such request to the Giudice di Pace for validation. If the Giudice di Pace does not validate the renewal, this becomes ineffective.

Validation by the Giudice di Pace is subject to the assessment that the reasons which ground renewal persist.

- 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 judge should control ex officio all the elements of the lawfulness (i.e. the elements grounding the extension), as set by the Consolidated Text, irrespective of the arguments of the parties.

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

It has to be noted that in contrast to what happens in the validation hearing, in extension hearings there isn't a formal right to contraddittorio, i.e. to the presence of the TCN. As mentioned above, the Corte di Cassazione addressed this particular issue in 2010 by granting contraddittorio for extension hearings and confirmed its guidance also in order n. 9596/12 of 13 June 2012. Nevertheless, in practice this is not always ensured.

Since Italy is a system of civil-law, the absence of a specific provision in the law entails that the principle of cross-examination may be disregarded. The legislator, when (belatedly) transposing the Directive 2008/115/EC, into the Law Decree n. 89/2011 of 23 June 2011, has not filled the gap, failing to insert in the law the principles expressed by the Court of Cassation.

Practitioners complain that the Giudice di Pace conducts extension hearings, only at presence of a representative from Questura and the detainee's lawyer. The control ex officio, the absence of the concerned party and the features of the extension hearing (which does not include an investigation) are likely to affect the right of defence, since any decision is left to the magistrate.

This practice appears of doubtful legitimacy also in light of the ECJ Judgment in Case C-146/14 PPU Bashir Mohamed Ali Mahdi. The Court affirmed that the magistrate must take into account all relevant matters in giving a decision of renewal. Accordingly, the powers of the court in the context of such a review can under no circumstances be confined to the evidence adduced by the administrative authority.

The decree issued by the Justice of the Peace of Palazzo San Gervasio on 9.6.2011 is rather emblematic in this respect. None of the 57 persons subject to the decision of extension has been heard, nor did their lawyers have the chance to say a word in the proceedings. Thus, the decision to extend the detention has been taken solely on the basis of the request of

extension related to 57 Tunisian nationals, made by the immigration authorities.

Moreover, the decision has concerned cumulatively 57 persons. No evaluation on a case-by-case basis has been made, and no reasons for the validation of the request have been given by the judge. Consequently the decision lacks sufficient reasoning.

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**:

It is always the Justice of the Peace that is charged to validate the renewal proposed by the Questore.

The reasons grounding the extension of detention are, however, different from those which ground initial detention.

This point has been substantially amended by Law no. 161/2014. Pursuant to the new provisions, for the first renewal of 30 days the Justice of the Peace must check whether it is impossible to immediately expel the TCN because of serious difficulties related to ascertaining his/her identity or acquiring travel documents.

After this term, one or more renewals up to a maximum of an additional 30 days can only be asked if concrete facts have been presented to support the probable identification or if it is necessary in order to arrange for removal.

Regarding the TCN held in prison for whatever reason, the direction of the structure
shall have to require the Questore information concerning the identity and nationality of the same. In these cases the Questore will start the identification procedure involving the competent diplomatic authorities.

The judge that validates or extends detention is entitled to a limited control over the expulsion (which is the measure grounding the temporary restriction of personal freedom). This control does not concern the profiles of validity of expulsion (this control pertains to the

judge applying the expulsion measure), but has so far been limited to the verification of the existence and effectiveness of expulsion (Court of Cassation no. 17575 of 2010 and no. 5715 of 2008). **IMPORTANT: Recent Supreme Court's precedents have partially overturned this orientation** (see Q. 26.1 below). This paves the way to significant changes in the way Justices of the Peace will assess the circumstances which ground a detention order.

The assessment of the fact in case of extension is not always carried out in presence of the concerned party. The relevant Consolidated Text provisions do not provide for the TCN's mandatory presence. This point was specifically addressed by the Supreme Court in its decision of 24 February 2010. Applying a Constitution-oriented interpretation (article 3 on the principle of equality and article 24 on the right of the defence), the Supreme Court has extended the right to be personally heard with the assistance of a lawyer to the phase of the decision concerning the extension of the detention, and not only to its initial validation hearing, since in both cases decisions on the conditions and limitations of personal freedom are adopted through council chamber procedures ("camera di consiglio") which provide for the same means of appeal to the Supreme Court for procedural and/or judgment errors.

With the same decision, the Supreme Court also clearly affirmed that renewal must be requested and validated (within 48 hours from the request) before the expiry of the period of detention authorized by the initial detention measure.

The decrees of validation and renewal can be appealed before the Supreme Court. The appeal does not suspend the execution of the measure.

Please refer to the considerations set out at Q6.1 above. The same remarks apply in similar terms to appeal against renewal of detention.

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

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?

Not relevant.

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.

3. Control of facts and law

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

- a control limited to a manifest error of assessment

The Justice of the Peace must verify whether the conditions justifying the detention have persisted, making it impossible to immediately perform the expulsion.
The court should therefore ensure that there are situations that hinder the preparation of return or the performance of removal, or that there is a risk of absconding, the need to provide relief or that it is necessary to conduct further investigations to ascertain the TCN's identity or nationality or to acquire travel documents and the availability of a suitable transport document.

These conditions do not appear adequately and are constantly reflected in practice. As mentioned above, the proceedings of validation (and extension) is characterized by the fact that the hearing is without a public audience and the case is decided with a limited investigation, much more quickly.

The findings contained in the Pisa and Roma reports contain critical reflections on the modalities by which hearings are conducted and facts are assessed.

The hearing is generally held in the morning from 9 a.m. to 2 p.m. in a room at the CIE. There are no computers or internet connection. The chancellor and the judge write the minutes and the decision by hand. Each validation hearing lasts a few minutes and most of the time is usually dedicated to formal introductory speeches. Although the validation should be adopted by ***reasoned order, usually the justification for the validation is very concise, and is filled in by hand on pre-stamped forms, often simply with standard phrases irrespective of the specific case, or simply left blank. The most common reasons for the validation of detention include identification problems and the lack of transport capacity (Pisa Report p. 61).***

Roma 3 report confirms the same modalities. The hearings take place in very short times, in most cases they last between 5 and 10 minutes. The motivation of the measures analysed are often limited or even completely absent. In many measures, the motivation is reduced to the formulas:
- "Given the existence and effectiveness of the measure of expulsion";
- "The XX citizen is not entitled to stay in Italy";
- "There are serious reasons to validate";
- "In view of the legality of acts and the fact that there are no impediments to detention"
- "Nothing precludes detention".

Motivations examined by Roma 3 research did not contain references to housing, income and employment conditions. As to the objections of the defence, they are subject to evaluation in the decree only when referring to formal deficiencies of the underlying acts. Issues of another kind, for example, such as those referring to the existence of family ties or a long-term presence in the country, are considered in the files examined as "not relevant in the validation of the detention measure".

The state of health of the TCN has been taken into account by the Justice of the Peace of Modena in the decree issued on 20.6.2013. The case concerned a third-country national who had shown signs of mental disorder in public and was subsequently detained in a CIE. From the first checks, the person was tested positive for drugs. The day after the entrance in the CIE, a psychiatric consultancy was requested. The doctors assessed that the person was in need of compulsory treatment for mental disorders. At the time of detention validation, the person was recovering in hospital. The doctor in charge of the CIE declared that the TCN was at risk of harming himself and represented a danger to others. It had also been reported that the CIE was not prepared to deal with third country nationals who presented the same psychiatric problems as this person. The Judge held that the extension of the detention would violate Art. 5(c) of the Directive 2008/115/EC.

Please note that the Roma 3 research highlights a practice whose lawfulness is doubtful. In some validation measures, in light of the exceptions of the defence on the precarious state of health of the TCN, the Justice of the Peace Rome validated detention, but ordered at the same time to submit the detainee to medical tests in order to evaluate the compatibility with detention (to be, however, performed at a subsequent time).

In a decree, for instance, after assessing that the reasons grounding detention subsisted, the magistrate in light of the medical certificates submitted made subject detention to further medical tests, but validated the Questore's order. What is striking is the circumstance that the order was in any event validated, while the evaluation of the continuation of the measure was in fact left to the discretion of the police and the doctor on duty at the CIE, without even setting a time limit within which to undertake such investigations.

A similar situation occurred also in another case. In validating detention, the Justice of the Peace in fact stated that the legal requirements for detention were met, and subject to the previous negative assessment of health conditions compatible with detention, validated the order issued by the Questore.

- 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

The same considerations set out under Q17 above apply.

The attached case-law provide examples of these critical issues.

The decree no. 32730/2014 is a validation order, based on the existence and validity of administrative acts despite the arguments raised by the defence regarding:

a) the needs of protection of the family unit, including care and education of three

minor children, out of a total of 4 that were born in Italy;

b) the state of statelessness and lack of "reasonable prospect of removal" within the meaning of Art. 15, para. 4 of the Return Directive 2008/115 / EC;

c) the lack of risk of absconding.

No specific response can be found in the reasoning of the decision on these points.

The decree no. 26778/2014 is another validation order issued in spite of defensive precise exceptions in relation to:

a) a breach of procedure (failure to provide notice of hearing and communicate administrative acts grounding the measure);

b) application for international protection (with reference to the judgment of the Court of Justice 30/05/2013 - C. 534/11 and a previous decision on the competence of the Court of Rome in case of application for international protection).

The decree of the Bologna Justice of the Peace no. 40023/12 was issued in the first months following the enactment of the Italian legislation of 2011 transposing the Return Directive. In this case the justice of the peace, albeit with a very short and poor motivation, affirmed that both the decree of detention and the expulsion order are lacking motivation about the requirements set by Directive 2008/115 / EC. (The magistrate generally affirmed that both acts do not mention the elements and assessments required by the return directive, without providing any further clarifications).

The decree n. 24654/2014 of the Justice of the Peace of Rome concerns a case of validation. The reasoning is limited to the reminder of the existence and effectiveness of the expulsion order without answering the main exception of the defence relating to failure to translate the expulsion order grounding the measure of detention.

- 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.

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):

In most cases the orders of detention are not adequately motivated in relation to the exceptional nature and proportionality of detention.

The relevant law provisions do not effectively encode the principle of last resort when regulating the relationship between detention and other less invasive measures provided for in the Consolidated Text. Such alternative measures are in practice configured as subsidiary (and occasional) in relation to detention.

The Consolidated Text should clearly provide that the adoption of alternative and less invasive measures is mandatory and not, as now, purely discretionary. (Of course, under specified requirements that are suitable to ensure the removal's timely enforcement). To this end, the measure adopted by the Questore should also clearly mention the exceptional reasons that ground detention, so that the judge can then properly evaluate these elements. General clauses (eg. referring to the impossibility of finding vehicles and documents for the repatriation of TCNs), that are used in most cases now should be avoided, whereas it should be well-specified because in relation to the captioned case it was not possible to adopt less invasive measures.

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.

X NO

From available case-law it appears that considerations concerning expediency are not taken into consideration.

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**?

YES

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

The Supreme Court (Decision no. 18481/2011) considered no longer applicable, by contrast with art. 7 of Directive 2008/115/EC, a particular form of administrative expulsion, which was applied further to non-compliance with a prior notice, ordering the TCN to leave the country within 5 days. This measure of expulsion was based on a national provision which was deemed not to be compliant with the principles on which the Directive is based, that are intended to facilitate voluntary departure and provide for the gradual adoption of coercive measures, up to detention in a centre for identification and expulsion.

The decision no. 40618/2012 of the Justice of the Peace of Bologna is an example of application on the merits of the Supreme Court case-law according to which the administrative expulsions prior to the entry into force of the Return Directive, adopted on the basis of automatic mechanisms, were no more lawful and therefore could no longer be the basis of measures of detention.
***Decision no. 40089 of 19.2.2013** issued by the Justice of the Peace of Bologna also concerns the relationship between the rules in force before the implementation of the directive and the directive provisions. It is notable in that it affirmed that the provisions contained in the Directive 2008/115/CE should have applied also to return decisions adopted before the end of the period prescribed for transposition of the directive, if the Directive provisions were more favourable and regard ancillary administrative sanctions as still having ongoing legal effects.*
In the case at stake, the detention decision in an Identification and Expulsion Centre was the consequence of a return decision adopted before 24.12.2010, with a prohibition of re-entrance for 10 years.
The TCN had been caught in Italy before the expiration of the ten year ban.
The Court declared the ten-year ban to be unlawful, holding that the act did not provide for any reason to derogate to the 5-year-limit prescribed by art. 11(2), of the Directive.

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.)*

Non-compliance with domestic procedures is a ground of appeal before the Supreme Court (please refer to the first part of this report in relation to the limits of such an appeal). In case such non-compliance is effectively assessed the validation order can be annulled. *The decision no. 40362/2012 issued by the Justice of the Peace of Bologna is an original case. The Justice of the Peace denied validation because of the absence of an interview, in the procedure of removal, for the purpose of submission of the application for voluntary departure.*

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:

In principle, the magistrate is not entitled to examine the legality of the expulsion order.

This is the Supreme Court's consolidated guidance which has been constantly reiterated. To this purpose it is worth mentioning decision no. 27331 of 05.12.2013. The Court stated that on immigration matters, the judge validating the TCN's temporary detention is only competent to check (to be made from the results of the proceeding acts) the existence and effectiveness of the expulsion decree (as well as the conditions of legality of the detention measure), while a duty to officiously inquire as to the validity of the expulsion measure should be excluded. According to the Supreme Court this solution is consistent with the principles of effectiveness of protection delivered by the ECJ and set in the EU directives, since the national system guarantees a double and complete protection to the person to be expelled. In fact the TCN is entitled to appeal proceedings which entail a full judicial review on the expulsion, and an officious (but immediate) review of the conditions of legality of the restrictive measure affecting personal freedom.

Please note, however, that a very recent judgment (June 2014) issued by the Supreme Court has at least partially overturned this ruling. *In the validation of the measure that decides on detention of TCNs into a centre for identification and expulsion, the national court, even if it has no power to examine the legality of the measure according to national law, is nevertheless obliged to identify, even incidentally, its manifest illegality in line with Article 5 of the European Convention on Human Rights.*

The Supreme Court has pointed out that this is a conventionally-oriented reading of Legislative decree no. 286/98.

The case concerned a Ukrainian citizen in respect of whom a decree of detention in the CIE had been adopted. The decree had been validated by the Justice of the Peace but, among other grounds of appeal, she argued that failure to control the legality of the expulsion measure would be contrary to the European Convention. The Supreme Court took the opportunity to point out that, when validating the decree on detention, the magistrate must ascertain the manifest illegality of the expulsion order, albeit incidentally. This determination is required under Article 5 of the European Convention as interpreted by the Strasbourg Court. Therefore, the Supreme Court observed that, although Article 14 of the Consolidated Text excludes the power to censure the legitimacy of the deportation order when validating detention, in order to overcome the contrast with the ECHR, the magistrate should carry out an interpretation conventionally - and therefore constitutionally – oriented. The ECHR already requires the judge to carry out an assessment on the aspects of manifest illegality, to be identified in accordance with the jurisprudence of the Strasbourg Court. The internal rules, therefore, should be read in these terms, bearing in mind that it is for the

applicant to prove that the principle has not been respected.

(Supreme Court, order no. 12609 filed on June 5, 2014).

This very recent decision could have a positive impact on the assessment of the Justice of the Peace, which has so far been very limited also in view of the above consolidated guidance.

Important!
By decision no.17407 / 2014 (filed on July 30), the Supreme Court issued a ruling on the long-awaited and important case of Ms. Alma Shalabayeva, the wife of an opponent of the regime in Kazakhstan, who had obtained political asylum in the UK and was the subject of an international arrest warrant issued by the authorities of her country. Precisely in order to carry out this action the Italian police made a night time raid on an apartment near Rome finding the opponent's wife and his daughter inside. Within a few hours they were notified the immediate expulsion order and issued orders of detention at the Centre for Identification and Expulsion of Ponte Galeria (Rome), this measure was validated by the competent Justice of the Peace, and finally an air carrier was quickly found and Ms. Shalabayeva was returned together with her daughter.
The case caused controversy in the media and was strongly criticised both domestically and internationally.
The expulsion order was based on the assumption of the illegal entry of the woman.
As to the validation of the detention in the CIE, it was decisive the fact of holding a false diplomatic passport issued by the Central African Republic, because in the name of Alma Ayan and not Shalabayeva. The explanation submitted by Ms. Shalabayeva that she had, used a different surname to protect herself from political enemies of her husband was not deemed to be a valid justification.
In the lawsuit filed by Ms. Shalabayeva against her removal, who had already been deported to Kazakhstan, it appeared that she was in possession of two permits of stay issued by countries of the Schengen area so that the competent administrative authorities revoked the expulsion order and the appellate court declared the dispute terminated, without ruling on the applicant's request to declare the illegality of her original expulsion. Ms. Shalabayeva had also appealed to the Supreme Court against the decision of validation of detention that had restricted her personal freedom.
With a first ground of appeal, the Supreme Court was asked to annul the contested decision because it was issued in violation of Articles 7 and 15 of Directive 115/2008 / EC and based solely (including the denial of a deadline for voluntary return) on an incorrect element (the falsity of diplomatic passports), as it would have been easy to ascertain proper investigation.
With a second plea it was alleged the infringement of the principle of non-refoulement, pursuant to art. 22 of the Geneva Convention on the Status of Refugees, art. 5 of Directive 2008/115 / EC in relation to a failure to take account of the special situation represented by the risk of political persecution in the country of origin.
The Supreme Court upheld the first ground of appeal.
The decision is interesting in two respects.
First it was stated the applicant's interest to a ruling on the validity of detention, despite the revocation of the act of expulsion, because it involved a judgment on the illegality of the original removal, which in the affirmative implied the right to compensation for an unjust restriction of her personal liberty.
Secondly, the Supreme Court, in accordance with the above mentioned other recent

decision n. no. 12609/2014, surpassed the previous interpretation (order no. 27331/2013) which did not allow the judge validating detention to assess the illegality of the expulsion (subject to any separate opposition), and limited their power to verifying the existence and effectiveness of the same.
Referring to the case law of the ECHR in cases involving Italy (Hokic and Hrustic v. Italy, app. no. 3449 2009, and in subsequent Seferovic v. Italy (app. no. 12921 2004) and a previous decision (until then neglected) of the Italian Constitutional Court (judgment no. 105/2001), which required a more effective control and understanding of the lawfulness of the expulsion in the context of the validation of the detention, the Supreme Court considered that at least in cases of manifest illegality of the expulsion, the judge who validated detention should intervene.
The rapidity with which the Shalabayeva case had been dealt, even with the denial of the right to seek asylum, showed how the national system and dual protection system (concerning the expulsion order on the one hand and validation of detention on the other) until then practiced did not provide sufficient guarantees. At least in the cases of more manifest unlawfulness, the Supreme Court has deemed more appropriate a system that allows an immediate check on the legality of the expulsion in its review of the detention order.

In this leading case, the measure of validation has been quashed since it was retained the original illegality of the measure of expulsion.

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

1.1 Preparation of the return

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

Not relevant.

Q29. Does the judicial control of the cases where the purpose of detention is "the preparation of the return" differ from the cases where the purpose of detention is "carrying out the removal process"?
YES NO 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":

Based upon a literal interpretation of the relevant law provisions, the extension of detention after the first thirty days is only possible if one of two conditions exist (establishing the identity or nationality or acquisition of travel documents) of the four initial conditions that must be present, so that the detention cannot be extended in cases where the expelling TCN has been identified and has the necessary documents for the trip, but still needs to be rescued or transport means for his/her return are not available.

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:

The new provisions set by Law no. 161/2014 has provided that renewal of detention after the first 60 days is possible for an additional term up to 30 days only if concrete evidence is shown that such renewal will allow identification or if this supplementary time is needed in order to prepare the TCN's return.

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**?

YES NO X

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:

The principle of reasonable prospect of removal does not seem to have been implemented in

the national legislation of transposition either for initial detention, nor for subsequent renewals before the Law no. 161/2014.

As a result the scant reasoning of detention (and renewal) orders have not normally dealt with this point and the Giudice di Pace did not generally extend control over it.

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.

X **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)*

Not relevant.

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

Not relevant.

- 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)

Not relevant.

- Else

Not relevant.

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

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

Not relevant.

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

Lack of available information.

Q35. When deciding on the existence of a reasonable prospect of removal, the courts:
- X 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 scarce motivations set out in the available decisions refer to the impossibility of removing the TCN in very general terms. O*nly a few cases make broader reference to the actions actually undertaken for the purpose of removal.* *Very useful information can be inferred from Roma 3 research. Out of 61 renewals decision examined in their report (and which are referred to the last quarter of 2013), only 1 decree issued by the Justice of the Peace of Roma decided not to extend the detention, accepting the defence's arguments about the lack of a reasonable prospect of return, given the numerous*

unsuccessful attempts made by the police in order to obtain the cooperation, for identification purposes, from the consular authorities of the country of origin of the person detained. In all other cases analysed, the length of detention, and the prospect of likely success of identification and repatriation, have never been taken into account in motivation as a factor to be considered in order to assess the reasonable prospect of removal, as referred in the Return Directive.

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

X 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:

The implementation of the Directive has not brought any changes in adjudicating the issue of a reasonable prospect of removal.

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:

Law no. 161/2014 recently enacted has introduced the reference to the reasonable prospect of removal.

In fact, the law also amended Article. 14, paragraph 5-bis of the Single Text on Immigration, providing that the Questore should order the foreigner to leave Italy within 7 days in the place of detention where "from the specific circumstances it can no longer be inferred any reasonable prospect that removal can be carried out and that the foreigner will be readmitted by the State of origin or provenance".

Although the defining factors for assuming that there is not a reasonable prospect of removal have not been set out, this new provision is likely to have a significant impact on future case-law.

2. Necessity grounds of detention

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

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

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

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

Not relevant.

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

Avoiding the preparation of return is not well defined in the legislation. *The rule refers to the fact that it is not possible to remove the TCN due to their lack of cooperation.* *This ground is specifically indicated with relation to the renewal of detention after 180 days. This paves the way to any interpretation.*

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

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

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

Not relevant.

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

The relevant law makes a general reference to the TCN's lack of cooperation. This may also include hampering the preparation of return, but for the moment no precise interpretation can be inferred from available case-law.

2.2 Risk of absconding

Q41. Does your Member State's legislation define ***objective criteria*** based on which the existence of a risk of absconding can be assumed?

YES

Pursuant to art. 13(4), Consolidated Text, there is a risk of absconding if **at least one of** the following circumstances occurs (these circumstances are indicated in relation to voluntary enforcement of the expulsion, but are referred to as the parameters also in relation to detention). It has to be noted, therefore, that every single circumstance can *per se* be a ground for the risk of absconding.

The risk of absconding can be assumed if the TCN:
(1) does not have valid passport or equivalent document;
(2) does not have adequate documents proving accommodation where he/she can be easily found;
(3) has previously made false declarations with respect to his or her identity;
(4) has breached reporting obligations during the voluntary departure period;
(5) has not left during that period or re-entered despite the ban on re-entry.
e) breach of a measure alternative to detention.

This broad definition of the risk of absconding has raised criticism by scholars. In particular criticism was pinned on the fact that the lack of passport (or other equivalent valid document) or the lack of documents showing that he/she does not have adequate accommodation where he/she can be easily found, are alone circumstances that ground the existence of a risk of absconding. Referring to this latter case, scholars have emphasized the need to interpret this requirement in broad terms, thus not requiring that the TCN has accommodation in his/her name, but also accepting that relatives or friends are available to host them.

More generally, a list of criteria on which to assess the existence of the risk of absconding in an individual case does not exist, but rather a list of circumstances that operate as a presumption of such a risk is provided.

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***):

In the decision of the 29th of June 2012, the Justice of the Peace of Caltanissetta rejected the request to extend the detention period. The magistrate considered that the risk of absconding was unsubstantiated, since the TCN provided evidence of an accommodation and, additionally, he did not have any criminal records. The Justice of the Peace's refusal to extend detention was therefore grounded on the absence of the elements that justify the risk of absconding based on the above mentioned provision.

In similar terms, in the decision of the 20th of June 2003, the Justice of the Peace of Modena rejected the request to validate the TCN's detention. The remarks focused on the inadequacy and the contradictions of the reasoning concerning the risk of absconding. The request submitted by the Questore made reference to a generic element mentioned by the Prefect's expulsion decree, i.e. the TCN's alleged unwillingness to return to his country, as well as

the need to better assess his identity, without even mentioning that he held a valid passport.

Both decisions highlight the need that the reasons given to justify the risk of absconding contain an adequate assessment of the elements required by law. Both decisions, moreover, dwell also on the need to graduate the most suitable instrument for the purposes of removal, opting for more suitable modalities, such as voluntary departure, in case concrete elements reduce the extent of the risk of absconding.

The decision n. 40303/2012 of Justice of the Peace of Bologna also concerns the lack of the risk of absconding. The expulsion order with immediate accompaniment at the border was motivated on the basis of the lack of a passport. The document (even if expired) was submitted at the hearing validation. The magistrate did not validate the detention because the main motivation of removal proved to be unfounded. The reasoning pointed out that the risk of absconding was founded on uncertain grounds.

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?

The individual condition of the TCN appears to be considered in very general terms. Even in the above decrees, which do not have validated the decrees of the Questore, the absence of the conditions concerning the risk of absconding are not clearly stated.

In the aforementioned decree issued by the Justice of the peace of Caltanissetta, where the risk of absconding is considered non-existent, because the TCN has provided proof of availability of housing, it is not clear whether such an accommodation is in his name or if it is provided by others, nor do other references to the individual position, if not to the fact that the person has no criminal records.

The research conducted by Roma 3 provides further interesting elements, highlighting how the formulas used are extremely repetitive so as to give the impression that the police authorities are using pre-drafted forms only to tick.

The reasons which ground the identification of the risk of absconding are the following:
- He/she said that he/she did not want to go back to his country of origin;
- He/she has not provided, nor is able to provide financial guarantees from legitimate sources;
- He/she has not provided a useful travel document;

- He/she does not have the availability of a stable housing where he/she can be found without difficulty;
- He/she does not have a regular work or demonstrated social integration;
- He/she has previously provided false identification;
- He/she did not request the granting of the period for voluntary departure.

In this context, it stands the decree of the Justice of the Peace of Modena no. 2496 of 06.20.2013. In this case, the Questore had justified the risk of absconding because of "the manifest opposition of the person to return to their country of origin or provenance", but the request lacked any reference to the assessment of the position of the TCN, and no importance had been given to the fact that the person in question was in possession of a valid passport.

The only "objective" parameter that could be used was the lack of housing. But again in this case, the Questore had not considered that although not possessing an accommodation in his name, the TCN could live in the home of his brother who was an Italian citizen.

The magistrate had then deemed infringed the principle of gradualism in the choice of measures to be taken in respect of return, in accordance with the provisions of art. 5 and 7 of Directive 2008/115. The evaluation of the detention of the person concerned and, thus, on the protraction of the restriction of personal freedom, must be based on a careful assessment of the individual case, and should have paid particular attention to the best interest of the family life, in light of the relationship with relatives within the second degree of Italian nationality, all the more so as in this case there were not recognizable elements of social dangerousness. The request for extension of detention was therefore not validated.

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:

Not relevant.

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 ground**s which are excluded from Art. 15(1) RD*)?

YES

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 reasons that justify the detention are set in the Law and precisely under art. 14(1), of the Consolidated Text. They are related to:
- the need to provide relief to the TCN;
- to carry out further investigations regarding their identity or nationality;
- to acquire travel documents or the availability of a suitable means of transport.

Please note that while the text previously in force of article. 14(1) exhaustively indicated detention situations, today this measure can be placed in all the situations in which the competent authority considers that there are "temporary situations which may impede return." This paves the way to a broader margin of discretion. In essence, when the directive was implemented the cases of administrative detention were extended.

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**:

Further to the implementation of the Return directive, a new paragraph was added to article 13 of the Consolidated Text on Immigration. Para. 4 bis is therefore the implementation of the aforementioned European standard, defining the statutory concept of "risk of absconding".
Therefore, the existence of the risk of absconding is now assumed once ascertained, - with reference to each individual case - the existence of at least one of the circumstances set under this new provision, which are the elements symptomatic of the risk, with the result that the TCN is immediately expelled, without the recognition of a period for voluntary departure.

Pursuant to the new provisions judges must check whether such specific circumstances occur in the individual cases. As it has been mentioned above, this amendment has caused much criticism.

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.

3. Alternatives to detention

Q48. Does your Member State's legislation oblige administrative or judicial authorities taking detention decisions to consider alternatives to detention?

NO X

Alternative measures may be applied to TCNs who are not dangerous instead of detention in CIEs. The violation of these measures is to be sanctioned by a fine from 3,000 to 18,000 euros.

It's only a faculty (the Questore "can apply") for the administrative authority to adopt an alternative measure to detention.

Both in the law and in practice, detention is not intended to be exceptional, but it is basically the preferred option in all cases where it is not possible to carry out the expulsion immediately. In fact, the relevant provision (article 14, para. 1, Consolidated Text) is drafted

so as to identify the detention as the preferred option. In cases where it has not been granted a deadline for voluntary departure and expulsion cannot be immediately enforced, the competent authority shall proceed to detention in a centre for identification and expulsion.

It is therefore a reversal in comparison to the logic pursued by the Directive: the residual measure (i.e. detention) is mentioned in the first rank and only in the subsequent paragraph are the instruments to avoid resorting to detention indicated.

Being a mere faculty of the administration, subsidiary to the main option of detention, a particular motivation regarding the non-application of alternative measures does not appear to be requested.

Consistently with the features of a system which focuses on detention, the research carried out on the application of an alternative to detention show a general lack of application of these measures.

"Based on available data, there has been no case in which alternative measures in a CIE were adopted. Additionally, no circulars regarding the application of these measures seem to have been sent to the Questore or Justices of the Peace… Detention is not used as a measure of last resort, but as a measure of first resort – alternative measures are hardly ever, if ever, applied, and in some cases public officers we have spoken with seemed to be quite unaware of their possibility. Moreover, it is difficult to say that detention is used "to prepare the return" of an immigrant whenever he has already been detained, albeit in an ordinary prison, before being brought to the CIE: in these cases, the spirit of the returns directive is completely circumvented, and its *effet utile* is not ensured" (Pisa report).

According to Roma 3 findings, in the period under review, there has never been any request submitted to the Justice of the peace of Rome by the Questore and requesting the application of an alternative to detention measure.

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

- Registration obligation

Not relevant.

X Deposit of (travel) documents

The delivery of the passport or other equivalent document valid, to be returned upon departure.

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

Not relevant.

X Regular reporting to the authorities

An obligation to report, on established days and times, in the local police station.

- Community release/supervision

Not relevant.

X Designated residence

Obligation to stay in a place previously identified, where he/she can be easily found.

- 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**?

Alternatives to detention are not applicable if the TCN fails to provide a passport or other equivalent valid document. Please also note that the lack of a passport or valid document is one of the elements that are deemed to be an index of the risk of absconding.

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**?

This case is not specifically dealt with in the legislation.

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 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*):

Please refer to the remarks set out on Q48 above.

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.

The decision no. 40337/2013 (inserted in the database) is a (rare) case of non-validation of detention based on lack of motivation of the possibility of applying sufficient but less coercive measures pursuant to art. 15(1) of the Return Directive. The magistrate notes that it was proved that the TCN should have married an Italian citizen, had a valid passport and an accommodation. Although the reasoning is very limited, it can be assumed that these elements were considered as clues of a lack of the risk of absconding.

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*):

Based upon the research currently available, it appears that detention orders generally consist of standardised forms in which the presence of all indexes of the risk of absconding are mentioned; thus detention is generally automatically applied and no case-by-case evaluation is carried out.

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

The possibility to apply measures alternative to detention has been added by Law no. 129/2011 upon implementation of the Directive. This has introduced the faculty to apply these measures, if specific circumstances occur, but as mentioned above this is only a faculty and it does not appear that the competent authorities have effectively had recourse to such alternative measures.

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.

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

Art. 14(1), Consolidated Text states that "the foreigner is held for the time strictly necessary in the centre". It is a generic formula, which is made concrete by the indication of the timing of each extension. However, it fails to provide a more precise indication, such as to impose a careful weighting of the actual need for a further extension, suitable to fall within the concept of time strictly necessary.

Length of each period of detention is determined by the law.

Initial period of 30 days
Renewal for another 30 days + another 60 days + 60 days up to a maximum of 180 days in total. IMPORTANT! This point has just been amended significantly. Please refer to Q. 60.

If it has not been possible to carry out the removal, even though every reasonable effort has been made, the Questore may request the Justice of the Peace to extend detention, from time to time, for periods not exceeding sixty days, up to a maximum of a further twelve months.

The Questore, in any case, can perform the expulsion and refoulement even before the expiry of the extended deadline. In this event, he/she shall inform the Justice of the Peace without delay.

Length of detention is therefore fixed by the law, but this could be shorter if the obstacles are removed and expulsion can be carried out before the expiry.

- 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 starting date is not expressly established by law. Since these measures affect personal liberty, that period must, however, be interpreted restrictively, referring to when the measure is adopted and not at the time of entry into the CIE.

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

This point has been clearly defined by the Supreme Court ("Corte di Cassazione") in its decision of 15 May 2013, no. 11451. The Court affirmed that the administrative authority is devoid of any discretion by virtue of the constitutional and inviolable nature of the affected right (personal freedom), whose feature and practical limitation is guaranteed by the circumstance that it can only be regulated by the law according to Article 13 of the Constitution. It follows that the time limit set by the law for each fraction of time cannot be exceeded even when the total duration is within the legal time limits, and any violation results in the complete invalidity of the measure.

In any case, the Questore can perform the expulsion even before the expiry of the extended deadline, informing, without delay, the Justice of the Peace.

- 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

Judicial control on the requirement that detention is as short as possible is very limited, since the time limit is fixed by the law and the judge cannot order a shorter period.

Control will therefore be limited to assess that the conditions for renewal are present.

- 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:

The implementation of the directive has extended the maximum detention period from 6 to 18 months.

This extension was justified, on the one hand, by the need to discourage the calculation of convenience often made by TCNs detained, who, in a perspective of a short time to stay, were induced to hinder their identification (Ministry of the Interior, Documento programmatico, 2013).

On the other hand this choice was based on the need to ensure that the immigrants are effectively identified before being released, thus permitting their forcible repatriation to their country of origin. An extension of the maximum detention period does not necessarily

lead to the identification of the immigrants concerned. On the contrary there is a risk that individuals who cannot be identified will be detained for longer periods and will eventually be released after an average of six months detention.

Please note that the non-identification of immigrants during their detention cannot be considered to be a theoretical problem which affects a limited percentage of them. The Pisa report, for instance, found out that in the CIEs of Turin and Trapani, 50% of the detainees are immigrants who had already been sentenced to detention as a punishment for previous crimes but had not been identified while in prison and, consequently, they had to undergo another undetermined period of detention in order to be identified.

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:

Law no. 161/2014 (entered into force on 25 November 2014) has profoundly changed on this point, dramatically reducing the maximum period of detention, from 18 months to 90 days

The new formula is now 30+30+an additional 30 days under limited circumstances (a total of 30 days in case of people who have already been held in prison under any ground).

As to the first renewal in the presence of "serious difficulties" in relation to the establishment of identity and nationality, or the acquisition of travel documents, the magistrate at the request of the Questore, may extend the period of detention for a further 30 days. (term pre-defined by law). In light of the above, reference to "serious difficult" a generic and a vague reference to difficulties should not be allowed in renewal decisions anymore.

There is a substantial difference between the first renewal, which as mentioned above presupposes the existence of serious difficulties in the ascertainment of the identity and nationality of the TCN or the acquisition of travel documents and that is fixed at 30 days. The subsequent renewal(s), which may last less than 30 days, and require concrete evidence that identification is likely (so that the procedures are already in an advanced state), or that return operations are coming (and therefore the TCN has been fully identified and the police authority has actually worked to overcome - successfully- the serious difficulties for the acquisition of travel documents which justified the first extension).

Therefore there are two important novelties:

1) After the first renewal, the duration of detention is no longer predetermined, and relies on the evaluation of the Questore and the Justice of the Peace as to the time that is absolutely necessary in order to carry out the removal; this change appears to comply with the EU return directive relating to detention which requires a case by case evaluation of the actual needs of the return procedure.

2) "Concrete evidence" that will make possible the identification is required. This should prevent the Justice of the Peace from validating renewals in the absence of any concrete

evidence that makes the identification and return more likely.

4.2 Due diligence

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

In general terms, there are not many decisions regarding the lack of due diligence.

The decision of the Justice of the Peace of Bologna no. 40295 of 4 May 2012 deserves special mention in this regard.

The case concerned a second request of renewal (after expiry of the first 30 days, the Questore had requested the judge to further renew the detention). The Justice of the Peace refused to extend the detention period due to absence of due diligence shown by the competent authorities in carrying out the identification of the TCN.

In this case, the magistrate held that the lack of due diligence was demonstrated by the fact that the demand to the Consulate, in order to identify the detained person, was only reiterated after submitting the request of renewal.

The decision no. 40205/2012 issued by the Justice of the Peace of Bologna relates to an interesting case (quite a rare case) of the denial of the request for an extension of detention motivated by an obvious lack of diligence in the sense that, after an initial period of 60 days, the new identification request to the Consulate had been submitted by the Police after the extension of the detention.

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

  As mentioned above, based upon available case-law it does not appear that due diligence is examined in detail.

- 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.

4.3 Removal arrangements in progress

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

Available case-law does not highlight how these aspects are assessed by the Courts.

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

Scholars have emphasised that in order to comply with the provision of art. 13 of the Constitution, the Questore should not make generic allegations that it is not possible to arrange for removal, but should on the contrary demonstrate in a precise and concrete manner in what way the lack of cooperation of the TCN or the delay in obtaining the necessary documentation from third countries has impacted upon the case.

Nevertheless, the practice seems different. As pointed out by the Roma 3 report, except in one case, in all the measures analysed, the length of detention, and the prospect of likely success of the identification and repatriation, are never taken into account in motivation as a factor to consider for the purpose of evaluating the "reasonable prospect of repatriation."

- 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*):

Not relevant.

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

The decision issued on the 6th of December 2012 by the Court of Turin refused to extend detention in light of the circumstance that the presupposed return decision had been suspended.

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

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

Not relevant.

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

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

The decision issued by the Court of Rome on the 10th of April 2014 no. 5107/2014 specifically applies the principles set in the case Arslan. The TCN, who came from Nigeria, was rescued at sea while trying to reach Italian territory without a travel document or visa. The TCN was immediately issued with a return decision based on Art. 10(2)(b) of the Consolidated Text on Immigration and was subsequently detained in an Identification and Expulsion Centre. The TCN had claimed for international protection at the very moment of the entry. As a consequence of the asylum application, based on Art. 20 (2)(d), d.lgs. n° 25/2008 of transposition of Directive 2005/85/EC, he should not have been detained in an Identification and Expulsion Centre, but in a "CARA" (Accommodation Centres for asylum seekers). In spite of the above circumstances, the Justice of the Peace had validated the TCN's detention.

As an effect of the asylum application, the competence to decide on the extension of detention passed, however, to the Civil Court instead of the Justice of the Peace. As the decision demonstrates, ***the change of judge permitted a deeper control on the lawfulness of the continuing detention****. The Judge harboured doubts as to whether the extension of the detention in the CIE would be compatible with the principles established by the Court of Justice in the Arslan Case of 30 May 2013 and in particular, as to how to harmonize Arts. 15 and 2(1) of Directive 2008/115/EC with Directive 2005/85/EC on minimum standards on procedures for granting and withdrawing refugee status and Directive 2003/9/EC on minimum standards for the reception of asylum seekers.*

The Judge decided that Art. 28 D.lgs. no. 25/2008 should be interpreted in light of Art. 11 and 117(1) of the Constitution (concerning respect of obligations arising from the European order) and in accordance with EU law, as interpreted in the Arslan case and dismissed the request to extend detention. The decision was based on two arguments: 1) the application for international protection had not been made after the detention order, but at the moment of entry and consequently, it could not be considered as made only to delay the enforcement of the return decision; 2) the request of renewal submitted by the Questore lacked any motivation as to whether the conditions provided for by the Court of Justice in the Arslan case were integrated. A motivation in a case like this was especially needed since the person concerned came from a country, like Nigeria, affected by a situation of conflict and

generalized violence.

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:

Law no. 161/2014 has specified that after the first renewal, detention can only be prolonged for an additional time up to 30 days if that are concrete elements showing either that it will be possible to identify the foreigner or that a further period is needed in order to arrange for their removal. Although no further specified, it can be assumed that in the future renewal decisions will indicate what arrangements for removal have been undertaken or are in progress.

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

IMPORTANT! The description below refers to the law and practice applicable until the end of November 2014. Extension beyond 6 months is no more possible. Please refer to Q. 76 below.

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**

  due to the lack of cooperation in the repatriation of the concerned third-country national

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

  Due to delays in obtaining the necessary documentation from third countries

- Else

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:

- X 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?
YES NO X

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

As far as substantive conditions of the initial detention are concerned, renewal is based on the assumption that they still persist. As a consequence, in order to decide on the extension of detention the judge has to check whether they still exist, but not the lawfulness of the initial detention.

Judgment no. 7257/2014 of the Supreme Court concerns the renewal of detention in a Centre for Identification and Expulsion (CIE) for an international protection seeker. The Court has affirmed, with a reasoning applicable also to "ordinary" detention measures, that only through an appeal before the Supreme Court it is possible to raise the flaws of the initial decision, which are not recoverable in the procedure of renewal. When deciding on renewal, the judge can thus only check the existence and validity of the detention decision and not its lawfulness.

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*:

An alternative to detention should be requested by the Questore. As mentioned above the practice shows that they usually ask for a renewal of detention.

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**:

The implementation of the directive has implied an amendment to the legislation in force bringing the maximum detention length from 6 months to a maximum period of 18 months.

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:

*At the end of 2013 the so-called svuotacarceri ("empty prison") decree (Law Decree no. 146 of 23 December 2013, converted into Law no. 10 of 21 February 2014) was adopted. It is an Italian government's response to the complaints raised by the European Court of Human Rights in its judgment Torreggiani (Torreggiani and Others v. Italy**,** app. no. 43517/09), where the Court had called on Italy to resolve the structural problem of overcrowding in prisons.*

The new rules set by the Decree amended Article 16 of the Consolidated Text providing that upon entry into prison of a TCN, the prison authorities shall promptly ask the Questore for information on the identity and nationality of the TCN. This latter shall initiate the identification procedure involving the competent diplomatic authorities and proceed to the possible expulsion of TCNs identified. The decree also provided for more streamlined and timely identification procedures, promoting better coordination between the various bodies involved in the investigation process (in particular the Ministries of Interior and Justice). Information on the identity and nationality of the TCN are collected in a personal folder (in case of transfer, the folder follows the TCN in the new detention place, while it remains preserved even when the TCN is discharged).

It is a tool to facilitate the investigation of the judiciary, aimed at reducing transits from prisons to identification centres, often justified by the need to proceed to the identification of TCNs for the purpose of expulsion, not implemented during their stay in prison. Anticipating the investigations should allow to carry out the expulsion immediately upon the resignation from prison, thus avoiding that TCNs are detained again later for identification purposes, as very often occurs at the moment or at least to reduce the length of detention for identification purposes.

VERY IMPORTANT. Law no. 161/2014 has reduced the maximum length of detention to 90 days (30 days for people who have already been detained in prison for such a period of 90 days for whatever reason).

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:

X 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

Not relevant.

- 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?

Yes X 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:

It depends on the reasons which grounded the decision on unlawful detention. It cannot be excluded that detention could be ordered again based on different reasons.

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 X 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:

This occurs especially if the person was released because it was not possible to identify him/her.

The Decree no. 1044 of 21.2.2012 issued by the Court of Turin specifically deals with this issue. The case concerned an alleged Serbian citizen (the concerned person had always declared themselves to be a Serbian citizen, but the Serbian authorities had denied the circumstance). The Court assessed that in the course of other proceedings of expulsion the administrative authority had failed to fully identify her for the purpose of return in spite of the fact that she had remained in the CIE for the entire period allowed. This situation did not appear changed so that it appeared highly unlikely that the same could be fully identified for repatriation within the deadline established for the detention. In light of these circumstances the Court did not validate the extension of detention for another 30 days.

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

YES X 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:

A recent case-law is emerging that leads to the recognition of the right to compensation in the case of unlawful pre-removal detention.

It should first be mentioned the decision issued by the United Chambers of the Court of Cassation no. 9596 of 22.5/13.6.2012. The United Chambers of the Supreme Court have established the jurisdiction of the ordinary courts in respect of claims of compensation for damages which may arise from the violation of an individual right such as unlawfully restricted personal freedom.

In a decision issued in 2013 the Court of Rome (decision of 15.3.2013, no. 5764) acknowledged the right to compensation for non-pecuniary damage resulting from unlawful detention, in analogous application of the criteria for compensation for wrongful imprisonment.

The right of compensation in case of unlawful pre-removal detention has been affirmed more sharply in the case Shalabayeva in July 2014. In particular the Court stated that unlawful detention determines the right to compensation for the material deprivation of personal liberty and is not justified by the existence of legal conditions (see Q. 26.1)

This recent case-law is thus overturning the prior orientation. The European Court of Human Rights had in fact noticed the absence, in the Italian legal system, of provision allowing immigrants to request reparation for having been wrongfully detained in a CIE. (Please refer to case Seferovic v. Italy, Judgement of 11/2/2011, application no.

12921/04.The Court observed that no provision existed in Italian law enabling Ms Seferovic to apply to the domestic authorities for compensation in respect of her unlawful detention in a CIE, see in particular §§ 25-28).

In the past the Supreme Court had denied the direct applicability of art. 5, para. 5, ECHR, which recognizes the right to compensation to any person who suffered arrest or detention in violation of article 5 ECHR (Supreme Court, judgement of 20 May 1991, no. 2823).

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

No data available.

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**:

A comprehensive statistical overview of TCNs detained in the CIE is provided by MEDU report. The 2013 report shows the figures related to 2012. It appears that out of a total of 7,944 foreigners detained in a CIE, 948 were released because the detention order (or renewal) was not validated by the Justices of the Peace. These figures could be examined in more in detail as the range of non-validation varies from place to place. In some CIE almost 80% of the measures are validated (Roma), while in others 100% of the measures are validated (Brindisi, Trapani S. Vulpitta).

The Pisa report shows that the number of detention orders that have not been confirmed ranged from 5,21% (503 people) in 2007 to 10% (704) in 2010; again in 2011, the judicial authorities did not confirm 6,75% of the detention orders that have been issued. The authors stress that this data highlights that many decisions to detain irregular migrants had been taken in violation of existing legislation, and thus did not survive the judicial review.

The research conducted by Roma 3 indicates that 82% of the decisions adopted by the Questore, under their review, were confirmed by the Justice of the Peace.

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:

Not relevant.