CONTENTION – Judicial CONtrol of Immigration DeTENTION

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I. SETTING THE SCENE

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

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

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

  The detained third country national may submit an appeal against the detention decision with the authority, who issued the decision, within 15 days from the date the detention decision or the decision on the extension of the detention period; the authority, who issued the decision shall deliver the appeal to the court within five days from receiving the appeal, together with the relevant administrative file and the authority's opinion on the appeal; the appeal shall be decided by the regional court within seven working days from receiving it.

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

  Not relevant.

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

  Not relevant.

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

  Not relevant.

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

The judge in principle limits the control only to the arguments raised by the parties (Article 250j of the Code on Civil Procedure). Only if the decision was issued under an invalid act, or decision is not reviewable because of incomplete administrative files or because the files have not been submitted, or if an authority that was not legally entitled to issue a decision issued such decision, the court is not bound by the arguments raised by the parties.

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

From the point of view of the detained person, the disadvantage of Slovak regime is the need to take an action and submit the appeal to the court. If a lawyer is not accessible within the 15 days period for the appeal, a court will probably never review the detention order.
Again, from the point of view of the detained person, the Slovak system is not very favourable and dependent from the lawyer representing the TCN concerned. The detention might be unlawful according to the law, however, if the appeal does not raise the particular reasons for unlawfulness, the courts will not review it.

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

The Centre for Legal Aid (hereinafter the Centre) provides free legal aid in the administrative proceedings before the court.
The Centre was established by Act No. 327/2005 Coll. on Provision of Legal Aid for People in Material Need (hereinafter the Act), and is a state budgetary organization founded by the Ministry of Justice of the Slovak Republic. With the aim to secure effective access to justice the Centre covers provision of legal aid for natural persons whose personal financial situation makes it impossible for them to bear the expenses of legal services in order to assert their rights.
According to the information provided by the Centre, an application for provision of legal submits the applicant in the prescribed written form. The Centre regularly, every two weeks, or more often if needed, visits the detention facilities. On the basis of agreements between the Centre and detention facilities, the detainees are immediately after their arrival informed about the possibility of provision of legal aid by the Centre. There are information brochures and application forms in the detention facilities, and in some detention facilities there is an e - mail communication through which the Centre on a weekly basis receives information on the number detained persons in the facility. If a detainee does not speak Slovak (or English, German), the Centre, when it receives such information from a staff member of the detention facility, provides an interpreter and fills in an application for legal aid with such person.

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

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

Not relevant.

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

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

Not relevant.

- Hearing only immigration law cases?

Not relevant.

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

The relevant judge is in principle hearing wide range of cases from the administrative jurisdiction. The advantage is that he or she has a broader prospective and knowledge about the developments in different areas, the disadvantage could be that he or she will not be able to study the subject matter as deeply as it would be the case, if he or she was more specialised.

Q5. If the detention is ordered **by an administrative authority** and **reviewed on the initiative of the detainee by a judicial authority**, does your Member State's legislation provide for a second level of jurisdiction for the examination of the lawfulness of detention?
YES

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**:

In the first instance, the court is reviewing the administrative decision and the corresponding administrative procedure within the limits set by the appeal. *In the second instance, the court is reviewing the decision of the court of the first instance and the preceding procedure, while reviewing also the administrative decision, especially from the point of view, whether the first instance court dealt with all objections contained in the appeal of the TCN concerned, and whether the first instance court, within the limits of the appeal, correctly assessed the legality and correctness of the administrative decision.*

Q6. If the detention is **ordered/endorsed by a judicial authority**, does your Member State's legislation provide for **a second level of jurisdiction** for the examination of the lawfulness of detention?
YES NO

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

Not relevant.

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

Not relevant.

2. SECOND and SUBSEQUENT STAGES of judicial control,

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

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

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

The judicial control made independently from the renewal order is not explicitly laid down in Slovak legislation. However, the Constitutional Court in its decision II ÚS 557/2012 ruled that Slovak legislation in force (Article 90(2)(d) of the Foreigners Act) allows for periodical control of the grounds for detention independently from the renewal order (the detained person should ask the release from the administrative authority first, and if not successful, he or she can challenge the decision of the administrative authority in the court).

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

From the point of view of the detained person, it is a great advantage, if he or she has the possibility to challenge the detention independently from the renewal order. In Slovakia, the detention order is sometimes renewed after 180 days only. During such a long period of time, the circumstances can change several times, and reasons for detention may cease to exist. Therefore, it is necessary to have the chance to challenge the detention at any time.

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

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

- Automatic

Not relevant.

- Possible only on application of the detainee

When the detention is renewed, the administrative authority issues an order on renewal of detention. The detained person can challenge the order in the same way, as it is the case for

initial orders, i.e. the detained third country national may submit an appeal against the decision on extension of the detention period with the authority, who issued the decision, within 15 days from the date the detention decision or the decision on the extension of the detention period; the authority, who issued the decision shall deliver the appeal to the court within five days from receiving the appeal, together with the relevant administrative file and the authority's opinion on the appeal; the appeal shall be decided by the regional court within seven working days from receiving it.

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 in principle limits the control only to the arguments raised by the parties (Article 250j of the Code on Civil Procedure). Only if the decision was issued under an invalid act, or decision is not reviewable because of incomplete administrative files or because the files have not been submitted, or if an authority that was not legally entitled to issue a decision issued such decision, the court is not bound by the arguments raised by the parties.

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

From the point of view of the detained person, the disadvantage of Slovak regime is the need to take an action and submit the appeal to the court. If a lawyer is not accessible within the 15 days period for the appeal, a court will probably never review the detention order.
Again, from the point of view of the detained person, the Slovak system is not very favourable and dependent from the lawyer representing the TCN concerned. The detention might be unlawful according to the law, however, if the appeal does not raise the particular reasons for unlawfulness, the courts will not review it.

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

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:

In the first instance, the court is reviewing the administrative decision and the corresponding administrative procedure within the limits set by the appeal.
In the second instance, the court is reviewing the decision of the court of the first instance and the preceding procedure, while reviewing also the administrative decision, especially from the point of view, whether the first instance court dealt with all objections contained in the appeal of the TCN concerned, and whether the first instance court, within the limits of the appeal, correctly assessed the legality and correctness of the administrative decision.

Q12. If the renewal decision is taken by a judicial authority, is there any **second level of jurisdiction** for the examination of the lawfulness of renewal of detention?
YES NO

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

Not relevant.

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

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

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

Not relevant.

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

According to Article 90(2)(d) of the Foreigners Act, the relevant authority shall be obliged to examine if the reasons for detention exist during the entire time of detention. This provision lays down the obligation for the administrative authorities to examine continuously during the entire time of the detention, whether the grounds for detention still exist. However, no decisions are taken and therefore, before the judicial review could come into play, the detained person has to request the release from the administrative authorities first. *It is always good to have an ex officio review, however, if there are no results of the review (unless the person concerned is released), the action of the detained person is nevertheless needed in order to have a possibility to have the detention further reviewed by a court.*

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

Not relevant.

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

As already mentioned above, the administrative authority shall be obliged to examine if the reasons for detention exist during the entire time of detention. However, in order to have the possibility to challenge the detention in the court, the detained person has to request the administrative authority to be released, and, only if not released, he or she can take an action to the court. *However, this procedure is not explicitly laid down in the legislation; the*

Constitutional Court described it in its decision II ÚS 557/2012.
Disadvantage of this system, from the point of view of the person detained, is that a lawyer with a good knowledge of the subject matter is needed for the detained person to be able to undertake this procedure.

- 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?

From the point of view of the detained person, the disadvantage of Slovak regime is the need to take an action and submit the appeal to the court. If a lawyer is not accessible, a court will probably never review the detention order.

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?

NO

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

As regards the detention order (or its renewal), the decision challenged in the court is not a final one (although effective); single judge decides in these cases. As regards the judicial review independently from the detention and renewal order, the action to the court should be against a final administrative decision, and it is a senate of three judges deciding in such cases.

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

With regard to detention decisions the courts assess, whether the finding of the facts on which the decision was based is in line or contradiction with the content of documents, or whether the finding of the facts is sufficient for the judgment of the matter (Article 250j of the Code of Civil Procedure).
The courts ruled that the finding of facts of the administrative authority was insufficient for the judgment of the matter, when the fact that the TCN concerned applied for asylum was not taken into consideration (Košice Regional Court judgment 4Sp 5/2012), when the expert opinion with regard to age of the TCN concerned was missing at the time of the issuance of the detention decision – the expert opinion submitted at the later stage, in the proceedings before the court, could not be taken into consideration (Supreme Court judgment 10 Sza 7/2012), or when the fact that a TCN provided a proof of accommodation and financial coverage for his stay in the country was not taken into consideration, when assessing the alternatives to detention (Trnava Reginal Court judgment 38Sp 4/2012).

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

Not relevant.

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

- a control limited to a manifest error of assessment

Not relevant.

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

The courts, in this regard, assess whether the administrative decision was from the legal point of view correct or not (Article 250j of the Code of Civil Procedure).
The courts ruled that the administrative decision was from the legal point of view incorrect, when the administrative authority did not take into consideration the fact that the TCN concerned entered the country with the intention to apply for asylum and consequently applied the wrong provision of the Foreigners Act in this case (Supreme Court judgment 1 Sza 3/2013), or when the administrative authority did not consider the alternatives for detention with reasoning that the alternatives are not applicable for the particular type of detention (Supreme Court judgment 1 Sza 5/2012).

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):

According to the established case law, detention is possible only, if other sufficient but less coercive measures cannot be applied effectively in a specific case (e.g. judgments of the Supreme Court 1 Sza 5/2012, 1 Sza 7/2012). In this regard, the courts mainly consider the legality of previous stay of foreigner in the country, his/her previous behaviour (judgment of the Regional Court in Bratislava 9 Sp 99/2013), his/her wealth, and ties with people living in Slovakia (judgment of the Supreme Court 10 Sza 8/2013).

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

According to the established case law, detention is possible only, if other sufficient but less coercive measures cannot be applied effectively in a specific case (e.g. judgments of the Supreme Court 1 Sza 5/2012, 1 Sza 7/2012). The courts also stated that it is not sufficient for the administrative authority to determine the length of the detention with the reference to anticipated time for obtaining a travel document. The administrative authority should state more precisely the envisaged procedures to be taken with regard to effective execution of the administrative expulsion (Trnava Regional Court judgment 44 Sp 29/2012).

NO

Not relevant.

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

No information available.

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**?

NO

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

Not relevant.

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.)*

The courts considered the detention unlawful, when the decision on detention was not delivered to the lawyer of the detainee (judgment of Bratislava Regional Court 5 SP 60/2013), when the legal procedure regarding appointment of an interpreter was not followed (judgment of Košice Regional Court 1 Sp 15/2011). The lawfulness of a detention decision would be questionable, if the right of an individual to see the administrative file and make suggestions with regard to it would not be observed (judgment of Košice Regional Court 4 Sp 5/2012). *The courts also mentioned that among the procedural flaws, which would affect the lawfulness of detention belongs the situation, when, in case of detention with regard to readmission, the readmission agreement would not be specified, or when a person would be detained with regard to return based on an non-existent international agreement (Supreme Court judgement 1 Sza 3/2014).* *Among the procedural flaws, which do not affect the lawfulness of detention belongs the situation, when the expulsion procedure was not specified by its file number (Supreme Court judgement 1 Sza 3/2014).* *On several occasions, courts decided on unlawfulness of a detention decision, because of the fact that the police did not submit the administrative files to the court (judgments of Trnava Regional Court 38 Sp 11/2012; 38 Sp 10/2012).*

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**?

NO

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

Usually, the return decision is not final, when the judge is controlling the lawfulness of the decision on detention. The judge is not able to go into details of the reasons for return decision, and assess whether the reasons are justified by the law. The fact that there is a return decision (enforceable, although not final) has to be accepted, and the judge can only examine, whether it is possible to return the person concerned under the circumstances of the case. The courts in this regard stated that the administrative authority is obliged to take into consideration possible obstacles of expulsion, and assess them in order to see, whether the expulsion is at least potentially possible. In cases, where it is clear at the time, when the administrative authority decides about the detention, that it will not be possible to execute expulsion, detention will not be justified (Supreme Court judgment 1 Sza 7/2012).

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

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:

There is only one instance, where preparation of return is mentioned in the Foreigners Act – the implementation of Article 15 (1) (b) of the Return Directive. The exact wording in Slovak legislation is "preparation of the execution of (his/her) administrative expulsion". There is nothing else in the Foreigners Act regarding the "preparation of return", the case-law does not elaborate on this either.

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"?

NO

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":

There is a time limit of 48 hours – if a decision on administrative expulsion is not issued within this time limit, the TCN has to be released from detention (with some exceptions specifically mentioned in the act, e.g. when the TCN applies for asylum within this time limit, and the expulsion procedure is interrupted).

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**:

Before implementation of the Return Directive, administrative detention without a decision on expulsion or extradition was not legally possible. After the implementation, the courts confirmed in their decisions (Supreme Court judgements 1 Sza 2/2014, 1 Sza 3/2014) that detention is possible without issuance of decision on administrative expulsion in cases, where TCN is detained for the purposes of the administrative expulsion procedure, but before the decision on administrative expulsion is issued (within 48 hours time limit), the TCN concerned applies for asylum, and, as a consequence, the administrative expulsion procedure is interrupted.

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

Not relevant.

1.2 Successful removal and its reasonable prospect

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

YES

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

Not relevant.

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

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

Not relevant with regard to initial detention. No information with regard to renewal of detention.

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

No information.

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

No information.

- **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)*

If the detained person does not cooperate, and his/her cooperation is indispensable for the issuance of relevant documentation by the Member State of return, the courts consider the detention lawful (Supreme Court judgment 10 Sza 1/2012).

- **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))*

Lack of cooperation from the embassy of the country of origin of the detained person is a relevant factor for assuming that there is no reasonable prospect of removal (9 Sp 33/2013).

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

No information.

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

No information.

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

No information.

- 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)

Asylum procedure might be a relevant factor for assuming that there is no reasonable prospect of removal (Košice Regional Court judgment 4 Sp 5/2012), however, if it is considered that the person concerned applied for asylum only to avoid return, the detention should not be affected by the asylum application (Supreme Court judgment 10 Sza 2/2014).

- Else

The courts, in this regard, stated that the administrative authority is obliged to take into consideration possible obstacles of expulsion, and assess them in order to see, whether the expulsion is at least potentially possible. In cases, where it is clear at the time, when the administrative authority decides about the detention, that it will not be possible to execute expulsion, detention will not be justified (Supreme Court judgment 1 Sza 7/2012).

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?

NO

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):

The time frames are set by the national legislation, i.e. six months for initial detention, and twelve months for renewal of the detention. The known case law does not elaborate on shorter specific time-frames with regard to above listed factors, the time-frames used just need to be sufficiently reasoned.

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

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

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

If there is statistics or previous experience available, the courts use it, when the issue is raised by the detained person or his/her lawyer (Košice Regional Court judgment 9Sp 33/2013). Otherwise, the assessment is mainly limited to a theoretical possibility of removal.

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

- a control limited to a manifest error of assessment

With regard to reasonability of the prospects of removal the courts assess, whether the finding of the facts on which the decision was based is in line or contradiction with the content of documents, or whether the finding of the facts is sufficient for the judgment of the matter (Article 250j of the Code of Civil Procedure).
The courts, in this regard, stated that the administrative authority is obliged to take into consideration possible obstacles of expulsion, and assess them in order to see, whether the expulsion is at least potentially possible. In cases, where it is clear at the time, when the administrative authority decides about the detention, that it will not be possible to execute expulsion, detention will not be justified (Supreme Court judgment 1 Sza 7/2012).

- 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:

Information not available.

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

Not relevant.

2. Necessity grounds of detention

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

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

NO

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:

This concept was not interpreted in available case-law.

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

NO

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 Supreme Court affirmed in its judgement (10 Sza 1/2012) the decision of the Regional Court in Trnava, where the Regional Court considered the behaviour of the detained TCN as hampering preparation of return process. The TCN concerned did not cooperate with the police and several times refused to fill in a form necessary for starting of the process for obtaining travel documents for the TCN.

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

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***):

A definition of the risk of absconding can be found in Article 88(2) of the Foreigners Act - the risk of absconding of the third country national shall mean the condition when it can be anticipated, based on the reasonable apprehension or direct threat, that the third country national will abscond or hide especially if it is impossible to identify him/her immediately, if he/she has no residence permit in the country or if there is a reasonable possibility that he/she will be exposed to entry prohibition for a period of more than three years.

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
Not relevant.

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 Supreme Court in its judgment 1 Sza 3/2014 affirmed a decision of the police on detention of a TCN, because of risk of absconding. The risk of absconding was reasoned by the fact that the TCN concerned, after he crossed the border illegally, did not report himself to the authorities and did not justify his illegal entry, on a contrary, he tried to abscond, and hide himself from the police guards.
Similarly, the Regional Court in Bratislava in its judgment 9 Sp 99/2013 affirmed a decision of the police on detention of a TCN, because of risk of absconding. When doing so, aside from the grounds mentioned specifically in the Foreigners Act (no residence permit in the country and a reasonable possibility that he will be exposed to entry prohibition for a period of more than three years), the police, and subsequently the court, took into consideration the nature of criminal offences committed in the past, the fact that the TCN concerned left the asylum facility in breach of the law, and the fact that he went to another country after applying for asylum.

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 grounds** 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:*

Following grounds for detention are provided in the Slovak Foreigners Act:
- *execution of decision on administrative expulsion or decision on criminal punishment of expulsion,*
- *readmission, if the TCN concerned crossed the border illegally, or is staying illegally in the country.*

The fact that the grounds "risk of absconding" or "avoiding/hampering return" do not have to be fulfilled with regard to readmission was confirmed by decisions of courts (e.g. judgment of the Regional Court in Košice No 4 Sp 5/2012).

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**:

Those terms were introduced with the implementation of the Return Directive.

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?
YES

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

- Registration obligation

  This obligation shall be imposed together with the obligation of regular reporting at the police station or with the obligation of depositing of an adequate financial guarantee.

- Deposit of (travel) documents

  Not relevant.

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

The TCN shall be obliged to give a bail in the amount and within the period as specified by the police department, reside at the place specified and report the change in the place of residence. Another person that is in close relationship to the third country national may also give the bail.

- Regular reporting to the authorities

The person concerned shall be obliged to reside at the specified address and report regularly in person at the police department.

- Community release/supervision

Not relevant.

- Designated residence

Not relevant.

- Electronic tagging

Not relevant.

- Home curfew

Not relevant.

- Else

Not relevant.

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

According to relevant provisions of the Foreigners Act (Article 89 (2)(3)), the police department shall take into account the third country national as a personality, his/her background, and the level of risk regarding the purpose of the detention. The police department may impose the alternatives to detention only if the third country national provides the proof of accommodation and financial coverage of the residence. *As regards the known case-law, the Supreme Court decided (judgment 10 Sza 8/2013) that the detention is justified, and alternatives to it should not be imposed, if there are doubts about the nationality of the TCN, and he does not have any identification documents, has no financial means, and no family ties in Slovakia.*

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

There are no specific considerations, in this regard, in the national legislation (aside from those mentioned above), and no known case law.

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

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

Not relevant.

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

- a control limited to a manifest error of assessment

  The Supreme Court affirmed decisions of Regional Court, where the courts stated that the police did consider the alternatives of detention, however, came to the conclusion that it is not possible to apply alternatives to detention because of the personal situation of the TCN (1 Sza 3/2014, 1 Sza 2/2014).

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

  Not relevant.

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

According to available case law, the courts do not go into detail with regard to individual evaluation in a particular case; when the police considered the alternatives for detention, the courts did not present different views on the matter. In a case, where the Supreme Court went into more details with this respect, the Supreme Court decided (judgment 10 Sza 8/2013) that the detention is justified, and alternatives to it should not be imposed, if there are doubts about the nationality of the TCN, and he does not have any identification documents, has no financial means, and no family ties in Slovakia.

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

Alternatives to detention were introduced with the implementation of the Return Directive.

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

Not relevant.

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

According to Article 88 (4) of the Foreigners Act, the third country national may be detained for the time as reasonably necessary, however, not more than for six months. Courts decide on legality of an administrative decision on detention, they cannot decide about the exact length of detention. The courts decide only, whether the time period set by the administrative authority can be considered, based on the justification of the administrative authority in its decision on detention, as a reasonably necessary time, and whether the justification is satisfactory. *In this regard, the courts ruled that it is not sufficient for the administrative authority to determine the length of the detention with the reference to anticipated time for obtaining a travel document. The administrative authority should state more precisely the envisaged procedures to be taken with regard to effective execution of the administrative expulsion (Trnava Regional Court judgment 44 Sp 29/2012).*

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 detention starts on a date, when the freedom of a TCN was restricted for the first time (the Supreme Court judgment 10 Sza 4/2012). However, according to another decision (Regional Court judgment 43 Sp 1/2012) the detention should start at the date, when the decision on detention is enforceable (i.e. when a TCN does have a lawyer, and the decision was not delivered to the lawyer yet, the TCN cannot be detained). Nevertheless, since 1

January 2014, new legal provision applies to this, and according to this provision (new wording of Article 88 (4) of the Foreigners Act), the detention starts at the day of the issuance of the decision. Therefore, even if the decision was not delivered to the lawyer, the detention is valid.

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

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

Not relevant.

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

According to Article 88 (4) of the Foreigners Act, the police department has right to prolong repeatedly the detention of the third country national, while the total time of detention shall not be more than six months.
Then, the police department may decide, also repeatedly, to extend the period of detention, while the total time of the extension of detention shall not be more than 12 months.
Courts decide on legality of an administrative decision on detention, they cannot decide about the exact length of detention.

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

- a control limited to a manifest error of assessment

The courts decide only, whether the time period set by the administrative authority can be considered, based on the justification of the administrative authority in its decision on detention, as a reasonably necessary time, and whether the justification is satisfactory. For the case-law on this issue, see answers to questions above.

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

Not relevant.

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

Not relevant.

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

Not relevant.

4.2 Due diligence

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

As regards due diligence, the courts stated that the detention cannot be arbitrary. It is limited by fulfilment of its purpose, i.e. expulsion of a TCN, while the procedure must be executed with due diligence (Decision of the Constitutional Court II. US 264/09-81).

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

  The courts decide only, whether the time period set by the administrative authority can be considered, based on the justification of the administrative authority in its decision on detention, as a reasonably necessary time, and whether the justification is satisfactory. For the case-law on this issue, see answers to questions above.

- 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**:

No information available.

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:

There is no known case law in this regard.

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

  The courts decide only, whether the time period set by the administrative authority can be considered, based on the justification of the administrative authority in its

decision on detention, as a reasonably necessary time, and whether the justification is satisfactory.

- 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*):

There is no information about such case.

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

There is no information in this regard.

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?

NO

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

Not relevant.

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

YES

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*):

According to Article 88a of the Foreigners Act, the total time of detention of an asylum seeker must not exceed six months. An exception to this is a case, where detention of an asylum seeker for the purpose of his/her return is based on the grounds of public order or public safety – in such case, the asylum seeker can be detained for maximum 18 months.

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**:

No information available in this regard.

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

Not relevant.

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

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

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

Yes, the police department may decide to extend the period of detention, if it can be anticipated that in spite of necessary steps taken to execute the administrative expulsion of the third country national, the execution will be prolonged due to poor cooperation of the third country national.
If the detained person does not cooperate, and his/her cooperation is indispensable for the issuance of relevant documentation by the Member State of return, the courts consider the detention lawful (Supreme Court judgment 10 Sza 1/2012).

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

Yes, the police department may decide to extend the period of detention, if it can be anticipated that in spite of necessary steps taken to execute the administrative expulsion of the third country national, the execution will be prolonged because the embassy concerned fails to issue a travel document within the 6 months period of detention.

- Else

An asylum seeker can be detained beyond 6 months, if it is necessary on the grounds of public order or public safety.

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

- a control limited to a manifest error of assessment

The courts examine the discretion of an administrative authority only in order to determine whether it complies with the rules of logical thinking and whether the basis for its judgment was identified completely and in a proper procedure. Is not for the court to supplement factual or legal argumentation of the administrative authority

decision.

- 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

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

The obligation to make a new assessment of a risk of absconding while renewing the detention is not provided explicitly in the Foreigners Act, however, courts might require such assessment. The issue was brought to the courts, when the detained person complained that there was no assessment of a risk of absconding, and the court did not state that such assessment is not necessary, they stated that the administrative authority actually conducted the assessment (Supreme Court judgment 1 Sza 2/2013).

Q74. When deciding on the extension of detention, is **a new assessment of alternatives to detention** conducted?

YES

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

The obligation to make a new assessment of alternatives to detention while renewing the detention is not provided explicitly in the Foreigners Act, however, courts might require such assessment. The issue was brought to the courts, when the detained person complained that there was no assessment of alternatives to detention, and the court did not state that such assessment is not necessary, they stated that the administrative authority actually conducted the assessment (Supreme Court judgment 1 Sza 2/2013).

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**:

Extension of detention was not possible before implementation of the Return Directive.

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

Not relevant.

6. Different intensity of review with the lapse of time

Q77. Does your Member State's legislation, case-law or any other written or unwritten judicial practice indicate **any difference of the intensity** of the lawfulness review of detention **depending on the time spent in detention** (i.e. does the intensity of review increase with the lapse of time spent in detention)?

NO

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

Not relevant.

7. Consequences of unlawful detention and re-detention

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

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

According to Article 250sa of the Code of civil procedure, the court, in its decision on unlawfulness of the detention, orders an immediate release of the TCN from the detention.

- 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

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:

The reasons in the law are the same as for the initial detention. In practice, the administrative authorities, with regard to duration of the detention, consider initial detention and re-detention as one detention, i.e. both detentions together do not exceed six months.

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?

NO (no such case is known)

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

Not relevant.

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

YES

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:

According to the Act No 514/2003 Coll., the government is responsible for damages caused by the authorities with unlawful deprivation of liberty. The persons concerned shall receive damages, loss of profit, and non-pecuniary loss, if applicable. Firstly, preliminary negotiations with the relevant ministry have to take place. If the preliminary negotiations are unsuccessful (as they usually are), the person concerned can lodge a complaint to the court, and sue the government for damages. The case-law in this regard was not found.

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

No information about it.

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**:

The information will be provided in the future.

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.