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EQUAL RIGHT TO LIBERTY FOR EVERYONE?

*Horizontal Assessment of the EU Rules
on the Detention of Third-Country Nationals*

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OUTLINE

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2. Principle of proportionality
3. Purposes of detention
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1. Quantitative Trajectory

- **Article 18 PD:**

“1. Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.

2. Where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of *speedy judicial review*. “

- Replaced by Art. 26 rPD

- **Art. 7(3) RCD:** “When it proves *necessary*, for example *for legal reasons or reasons of public order*, Member States may confine an applicant to a particular place in accordance with their national law.”

- New Arts. 2(h) and 8-11 rRCD

- **Art. 17(2) Dublin II:** “The requesting Member State *may ask for an urgent reply* in cases (...) where the asylum seeker is held in detention.”

- New Art. 28 Dublin III



2. Principle of Proportionality

- ❑ **Recital 16 RD:** “The use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and **objectives pursued.**”
 - ❑ **Recital 15 rRCD:** “Applicants may be detained (...) subject to the principle of necessity and proportionality with regard to both to the manner and the **purpose of such detention.**”
 - ❑ **Recital 20 of Dublin III:** “Detention should be for as short a period as possible and subject to the principles of necessity and proportionality.”
1. Legitimate purpose
 2. **Suitability** = means serve the purpose
 3. **Necessity** = best possible option for the same degree of satisfaction of the purpose
 4. **Proportionality *stricto sensu*** = weighing between competing values in order to assess which value should prevail + no excessive burden.



3. Purposes of Detention

Return Directive	rRCD	Dublin III
<p>Successful removal</p> <ul style="list-style-type: none"> <input type="checkbox"/> Prepare the return <input type="checkbox"/> Carry out the removal process 	<p><u>Rec. 16:</u> Complete relevant procedures</p> <p><u>Art.8(3):</u> (a)-(b): ascertaining essential elements of the application</p> <p>(c) controlling the entry of TCNs</p> <p>(d) Successful removal (purpose of RD)</p> <p>(e) Protection of national security and public order</p> <p>(f) Successful Dublin transfer</p>	<p>Successful transfer</p>



3.1 Protection of national security and public order?

- ❑ Surprising that it is one of the purposes of detention in rRCD.

WHY?

- ✓ No public order grounds in Art. 15 RD thanks to COM:
 - i. Inclusion of those grounds would serve **criminal law-related purposes outside the scope of the RD**, THEREFORE,
 - The need to address threats to public order or security through other legislative means than those based on Art. 63 TEC
 - ii Possibility to use pre-removal detention as a form of “light imprisonment”
- ✓ ECtHR, *A. and Others v. UK*: *“The Court does not accept the Government’s argument that Article 5 § 1 permits a **balance to be struck between the individual’s right to liberty and the State’s interest in protecting its population from terrorist threat.**”*



4. Grounds of detention

Return Directive	rRCD	Dublin III
<p>1. Risk of absconding</p> <p>2. Obstructive conduct:</p> <ul style="list-style-type: none"> • Avoiding return procedures • Hampering return procedures <p><i>However: “in particular”</i></p> <p>3. Delays with documentation + risk of absconding</p>	<p><i>Art. 8(3) – exhaustive list:</i></p> <ol style="list-style-type: none"> 1. Determination of identity (a) 2. Verification of identity (a) 3. Determination of nationality (a) 4. Verification of nationality (a) 5. Determination of application-related elements + <u>risk of absconding</u> (b) 6. Taking decision on the right to entry (c) 7. Hampering return procedures (d) 8. Threat to nat. security or public order (e) 9. <u>Risk of absconding</u> in Dublin procedures (f) 	<p>1. Significant risk of absconding (<u>only ground</u>)</p>



4.1 Risk of absconding

- ❑ No “objective criteria” in rRCD unlike RD/Dublin III, however, possible cross-fertilization
- ❑ Absent from **8(3)(a)**, **8(3)(c)**, **8(3)(d)** and **8(3)(e)** rRCD:

CONSEQUENCE:

- ✓ Difficulty to justify detention relying only on 8(3)(a) and 8(3)(c).
In *Arslan* CJ added to 8(3)(d) a risk of evasion

A good news for applicants?

YES: If only 8(3)(a) and 8(3)(c) are invoked, acc. to the principle of proport., the same purpose can be achieved by ATD.

BUT: Administration can change the legal ground to 8(3)(b), i.e. a risk of absconding remains a crucial element, therefore, cross-fertilization with RD important



5. Alternatives to Detention

Return Directive	rRCD	Dublin III
<p>Art. 15(1): “Unless other less coercive measures can be applied effectively in a specific case”</p> <p><input type="checkbox"/> <i>Using RD experience in RCD/Dublin cases</i></p>	<p>Art. 8(2): “if other less coercive alternative measures cannot be applied effectively”</p> <p>Art. 8(4): “Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are <u>laid down in national law.</u>”</p> <p><input type="checkbox"/> <i>Cross-fertilization through Art. 8(4) RCD</i></p>	<p>Art. 28(2): “only in so far as (...) other less coercive alternative measures cannot be applied effectively”</p>



6. Possible LENGTH of Detention

RD	rRCD	Dublin III
<p>6 months + 12 months</p> <p>Maximum: 18 m.</p>	<p><input type="checkbox"/> No explicit time-limits – “as short as possible” HOWEVER, might be linked to:</p> <ol style="list-style-type: none"> 1. Border procedures/Right to entry: 4 weeks (Art. 43(2) PD) 2. Procedures at first instance (Art. 31 PD): <ul style="list-style-type: none"> <input type="checkbox"/> Maximum: 21 months (+ Dublin): <ul style="list-style-type: none"> ▪ 6 months + ▪ 9 months (compl. issues, large numbers of simult. appl., blame attrib. to applicant) + ▪ 3 months (necessary for adequate and complete examination) + ▪ Further possible postponement 3. Appeals procedures (undetermined period) 	<p><input type="checkbox"/> No explicit time-limits – “as short as possible”</p> <p>HOWEVER :</p> <ul style="list-style-type: none"> <input type="checkbox"/> 3 months (in a best-case scenario): <ul style="list-style-type: none"> ▪ 1 month: take charge/take back request + ▪ 2 weeks: reply + ▪ 6 weeks: from acceptance or when appeal no longer suspensory

Guarantees	Return Directive	rRCD/Dublin III
Motivation of Orders	Order of detention in writing with reasons given in fact and law	Order of detention in writing with reasons given in fact and law
Notification	Art. 5(2) ECHR applies: “Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest.”	Immediate written communic. of reasons of detention and procedures of appeal (in a language which they understand or <u>are reasonably supposed to understand</u>)
Judicial Review of Lawfulness	<p><i>Ex officio</i>/at the request of TCN</p> <p><i>Ex officio</i>/request-based in case of continuing detention by <u>administration or judiciary.</u></p> <p>In case of prolonged detention: judicial supervision of review</p>	<p><i>Ex officio</i>/at the request of TCN</p> <p><i>Ex officio</i>/request-based in case of continuing detention by <u>judicial authorities:</u></p> <ul style="list-style-type: none"> ▪ Whenever it is of a prolonged duration ▪ Relevant circumstances arise ▪ New information affecting lawfulness becomes available
Access to Legal Aid	No provision on legal aid BUT Strasbourg standard applies: <i>SUSO MUSA v. MALTA</i>	Obligation of MSs to provide free legal assistance and representation BUT only for initial judicial review (further restrictions possible)



7. Conclusions

- ❑ Inclusion of public order grounds in rRCD is problematic
- ❑ **Imprecise grounds for detention** coupled with the possibility of very long detention periods can lead to a **risk of arbitrariness**, THEREFORE:
 - as in case of RD, the way of **implementation**, especially **through judicial control**, becomes very important
 - need to avoid prolonged periods of detention in cases of Dublin+rRCD+RD:
Concept of “due diligence” can play a crucial role.
- ❑ Potential of cross-fertilization, esp. wrt “risk of absconding” and ATD between RD/rRCD/Dublin III makes the proper interpretation of the RD all the more important.
- ❑ Stronger procedural and judicial guarantees under rRCD raise questions about why TCNs do not enjoy the same guarantees under RD.