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MIGRATION
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III. JUDICIAL CONTROL OF DETENTION UNDER THE RETURN DIRECTIVE

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Necessity of initial detention:

- There is a risk of **absconding**
- Third-country national **avoids** the preparation of return or the removal process
- Third-country national **hampers** the preparation of return or the removal process
- A reasonable (real) **prospect of removal**

Proportionality of detention:

- **Less coercive measures** (alternatives to detention) can be applied effectively in a specific case

Necessity & Proportionality of Detention According to Art. 15 RD

Necessity of the extension of detention beyond 6 months:

- Continuing risk of **absconding**
- A **lack of cooperation** by the third-country national
- **Delays in obtaining the necessary documentation** from third countries

Proportionality of the length of detention :

- As short a period as possible
- A reasonable (real) **prospect of removal**
- **Conduct of the third-country national** concerned
- **Conduct of the third country** concerned
- Removal arrangements **in progress**
- Removal arrangements executed with **due diligence**



Purposes of Detention

Art. 15(1) RD: “Member States may only keep in detention a third-country national who is the subject of return procedures *in order to prepare the return and/or carry out the removal process*”

I. Preparation of the return

☐ Art. 15(5) RD, “detention shall *be maintained* for as long a period as (...) it is *necessary to ensure successful removal*”.

THUS: The ultimate goal has to be ‘removal’.



II. Carrying out the removal process

- ❑ Art. 15(5) + CJEU case-law = successful removal

Thus a **reasonable prospect of removal** from the outset

(Art. 15(4) RD “no longer” + ECtHR *Amie & Others vs. Bulgaria*)

- ❑ **Defining factors** of a **reasonable prospect** of removal:

- Due diligence of competent authorities (6 months)
- The resources (human and material) at the disposal of the authorities (6 months)
- Transport infrastructure (6 months)
- Conduct of the TCN concerned (*Mikolenko*) (18 months)



- Conduct of the country of potential return (18 months)
- Readmission agreement (18 months, cf. *Kadzoev*)
- Strasbourg proceedings (especially when the Rule 39 is applied) (6 months)
- Parallel national judicial proceedings suspending the return (6 months)
- Considerations in accordance with Art. 5 RD (6 months):
 - ✓ *non-refoulement* in the broader sense,
 - ✓ best interest of the child,
 - ✓ family life,
 - ✓ the state of health of a TCN.



❑ **Time-frames** within which a reasonable prospect of removal must exist

Considering **Art. 15(5)-(6) RD**, 18-month prognosis justified only where a prospect of removal depends on:

- i. The cooperation of the TCN concerned
- ii. The receipt of relevant documentation from a country of potential return

❑ **Intensity of the judicial review:** CJEU in *Kadzoev* – A **REAL PR**, i.e.:

- No abstract or theoretical possibility of removal but

- **Clear information** on its timetabling or probability (AG *Mazák*)

i.e. corroborated by relevant statistics and/or previous experience

❑ **Question relating to the profoundness of judicial control w/r/t a RPR:**

Can/must judges substitute their own discretion to that of decision-making authority?



Necessity of Initial Detention

Art. 15(1) RD: “Member States may (...) keep in detention a third-country national (...) *in particular* when:

(a) there is a **risk of absconding** or

(b) the third-country national concerned **avoids** or **hampers** the preparation of return or the removal process.”

❑ “*In particular*” – *travaux préparatoires* to Art. 15 RD: a mere linguistic exercise without any deliberate far-reaching consequences

❑ **No public order grounds.** Purpose of pre-removal detention:

= to ensure that a TCN *does not undermine the execution of the obligation to return*

≠ the protection of society from persons being a threat to public policy or security



I. Avoiding or hampering the preparation of return or the removal process

- ❑ Unlike “risk of absconding”, no objective criteria for avoiding/hampering
- ❑ **Wilsher:** *“assessments of when someone is ‘hampering’ are conducted by executive officers, affording them an extremely large, almost arbitrary, discretion given the lack of definition to the concept.”*
- ❑ Strasbourg: “Quality of law”, i.e. *“precise and foreseeable “ = need for objective criteria further specifying avoiding/hampering?*



- ❑ **Avoiding** the preparation of return or the removal process:
 - i. the failure to appear before competent authorities following summoning or
 - ii. not staying in touch with competent authorities when this is explicitly required.

- ❑ **Hampering** the preparation of return or the removal process:
 - i. false or misleading statements (or simply by silence);
 - ii. intentional damaging of fingerprints;
 - iii. destroying or holding back ID or other documents;
 - iv. not-cooperating during the interview with consular representation;
 - v. refusing to take a photo for the issuance of necessary documentation;
 - vi. refusing to file an application or putting signature on it if these are the necessary requirements for obtaining such documentation.



II. Risk of absconding

Art. 3(7) RD: ‘risk of absconding’ means the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond.

- Without national laws specifying objectively when such a risk exists, Art. 15(1)(a) RD cannot be relied on
- Objectivity of a criteria might be subject to review by the CJEU
- Recital 6 RD: “consideration should go beyond the mere fact of an illegal stay”



- ❑ Some examples of the **objective criteria**:
 - No notification about the change of address during the period of VD (=avoiding)
 - Previous evasion or non-compliance with ATD
 - Explicit statement not to comply with a return decision
 - Existing criminal record or previous expulsion as a criminal sanction
 - Non-respect of an existing entry-ban, etc.
- ❑ **BUT**: general presumption not sufficient, i.e. **individual situation and individual circumstances** must be taken into consideration additionally.

III. Intensity of judicial review - ECtHR to Art. 5(1)(c) ECHR:

- Burden of proof on authorities +
- “The national judicial authorities must examine **all the facts arguing for or against** the existence of a genuine requirement of public interest justifying (...) a departure from the rule of respect for individual liberty” *Vasilkoski*



Proportionality of Initial Detention – ATD

Recital 16 of the RD: “the use of detention for purpose of removal should be limited”

Art. 15(1) RD: “unless other sufficient but less coercive measures can be applied effectively in a specific case”

- Detention might be possible when – even in the absence of a risk of absconding – it better remedies an obstructive conduct of a TCN than an ATD.
- Detentions as a means of **exerting pressure** on a TCN?
- Unlike the recast RCD **no explicit obligation to provide ATD in MS’ legislation**

BUT: RD obliges MSs that there is some ATD

- Rec. 16 + Art. 15(1) RD + *El Dridi* = an **individual**, case-by-case evaluation



Intensity of judicial review w/r/t ATD

- ❑ Are judicial authorities required to assess every available ATD?

The principle of proportionality = yes

- ❑ In **which order** should they proceed?

✓ CJEU in *El Dridi*: RD introduces a system of **GRADATION**

Suggested hierarchy:

- Registration obligation
- Deposit of (travel) documents (Art. 7(3) RD - however in AT ≠ ATD)
- Bond/bail, i.e. deposit of an adequate financial guarantee (Art. 7(3) RD)
- Regular reporting to the authorities (Art. 7(3) RD)
- Community release/supervision
- Designated residence (Art. 7(3) RD)
- Electronic tagging
- Home curfew



Proportionality of the Length of Detention

Art. 15(1) 2nd indent RD: “any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.”

ECtHR: the length of the detention under Article 5(1)(f) ECHR should not exceed that reasonably required for the purpose pursued.

- ❑ **No wholesale application** of the **time-limits** fixed by the RD and national law
- ❑ **Exact determination of the length of detention**, which is strictly necessary for successful removal = considerations similar to “reasonable prospect of removal”

Intensity of judicial review: *how far can a judge go w/r/t the control expediency when deciding on the exact length of detention?*



I. Due Diligence

- ❑ The related Strasbourg case-law is not very instructive:
majority of the cases = written requests to embassies without any follow-up
 - ✓ 1 year and 8 months - 4 requests (*Amie & Others vs. BG*)
 - ✓ 1 year and 3 months - 1 request (*Djalti vs. BG*)
 - ✓ 5 to 7 month inactivity of the competent authority (*Singh vs. CZ*)
- ❑ **ECtHR:** Due diligence = obligation to **pursue the matter vigorously** and endeavour to **enter into negotiations** with the relevant authorities with a view to expediting the delivery of the travel document (*Amie*)
- ❑ Question for the **judicial review**: Can the reviewing court take initiative and search for new elements in order to prove that the action taken by the competent authorities could have taken less time than that claimed by the latter?



II. Removal arrangements in progress

❑ **Art. 15(1) 2nd indent RD = ECtHR case-law**

❑ **In progress:**

- i. Strasbourg proceedings under the application of Rule 39, **BUT:**
 - ✓ Time-limits of detention under national law must be respected,
 - ✓ ATD when it is evident that the detention will last long,
 - ✓ Alternative solutions such as expulsion in another country must be sought.

NB. Can raise the question of a reasonable prospect of removal

ii. Internal judicial proceedings suspending the return

Obligation of the reviewing judges to inquire with their peers?

iii. Asylum proceedings: ECtHR = yes, RD/CJEU = no BUT *Kadzoev*



Necessity of the Extension of Detention Beyond 6 Months

- ❑ **Art. 15(6) RD** – an exhaustive list:
 - i. **A lack of cooperation** by the TCN concerned = hampering the removal process + due diligence acc. to ECtHR
 - ii. **Delays in obtaining the necessary documentation** + DD acc. to ECtHR
- ❑ When deciding on the extension of detention, **a new assessment** of a risk of **absconding** and **ATD**

Intensity of judicial review of proportionality with the lapse of time

- ❑ Proportionality *stricto sensu* + 2nd law of balancing = Difference of the intensity of judicial review with the lapse of time spent in detention?



Suggested QUESTIONS FOR THE DEBATE:

1. Which judicial control is exercised in your country by national judges over the administration's evaluation of the following elements required by the Return Directive:

- Detention “as short a period as possible”
- “Due diligence” of the administration
- “Reasonable prospect of removal”

Will it be a control restricted to the “**manifest error**” (or a similar notion?) or a full control allowing a **judge to substitute his/her own discretion** to the discretion of the administration or a control in between?

Article 15(1) 2nd indent : “Any detention shall be for **as short a period as possible** and only maintained as long as removal arrangements are in progress and executed **with due diligence**”

Article 15(4) : “When it appears that a **reasonable prospect of removal** no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately”.



2. How will the judge control whether the administration has or has not taken into consideration **effective alternative measures** before deciding in favour of detention of the TCN concerned?

Article 15(1): “*Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when*”

3. Can the notion “**judicial review of lawfulness**” of detention, used in the RD, be given an **autonomous meaning in European law**?

4. What is the role of the principle of **proportionality *stricto sensu*** in the judicial control of pre-removal detention?