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RETURN DIRECTIVE DIALOGUE – REDIAL

European Synthesis Report on the Judicial Implementation of Chapter IV of the Return Directive Pre-Removal Detention

Madalina Moraru
Géraldine Renaudiere

REDIAL Research Report 2016/05



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REDIAL
REturn Directive DIALogue

Research Report

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**European Synthesis Report on
the Judicial Implementation of Chapter IV of the Return Directive
Pre-Removal Detention**

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REDIAL – REturn Directive DIALogue

The project REDIAL (**RE**turn **D**irective **D**IALogue) is co-funded by the European Union within the framework of the European Return Fund. REDIAL is implemented by the **Migration Policy Centre** (RSCAS, EUI) in partnership with the **Odysseus Network** (ULB – Université Libre de Bruxelles) and the **Centre for Judicial Cooperation** (EUI).

Its main purpose is to enhance the effective implementation of the Return Directive (2008/115/EC) through judicial cooperation among courts from all EU Member States. The starting premise of the Project is that judicial cooperation contributes not only to cross-fertilization of relevant national and European case-law, but also to an increase in legitimacy of judicial review of return decisions. In order to achieve its objective, the REDIAL team of experts will analyse and compare the judicial implementation of the EU Return Directive in the Member States. REDIAL is expected to become an important instrument to assist national judges and legal practitioners in the application of the Return Directive.

Results of the above activities are available for public consultation through the website of the project: <http://euredial.eu>

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Introduction

The third REDIAL European Synthesis Report assesses the domestic judicial implementation of Chapter IV of Directive 2008/115 (hereinafter RD), entitled *Detention for the purpose of Removal*. It offers a comparative overview of how national courts from the Member States interpreted and applied Chapter IV provisions on: the adoption of pre-removal detention decision(s); legality of pre-removal detention; conditions of detention of irregular third-country nationals (TCNs), including for minors and families; and derogations from detention requirements in emergencies situations.

In addition to domestic judicial implementation of EU secondary provisions, the Report will also provide information on the main rules developed by the **Court of Justice of the EU**, in particular as regards: the length of detention;¹ the principles of necessity and proportionality of detention;² the power of the judiciary in reviewing any request for pre-removal detention and prolongation of detention;³ compatibility of domestic criminal measures with the provisions of the Return Directive and the appropriateness of detention conditions.⁴ The Report will briefly highlight the impact of the European jurisprudence on national courts' practice. The extent to which the standards set by these judgments are respected at national level will be assessed more in depth in the **third REDIAL Electronic Journal**.⁵

The Report is structured into four main parts following the Articles of the *Chapter on Pre-Removal Detention*. It starts with **Article 15** (*Detention*), continues with **Article 16** (*Conditions of detention*), **Articles 17** (*Detention of minors and families*) and, lastly **Article 18** (*Emergency situations*). Given the growing tendency of criminalisation of irregular migration and derogations from the application of the Return Directive, the Report will start by briefly addressing the main rules set out by the RD on the permissible derogations from its application. It will then summarise the recent developments in national jurisprudence on the compatibility of criminalisation of irregular entry and stay with the Return Directive; and the judicial understanding of pre-removal detention as a limitation on the right to liberty or to liberty of movement. This aspect is important for understanding the types of safeguards provided at the domestic level. If pre-removal detention is interpreted as a mere limitation on the freedom of movement, and not of the right to liberty⁶, then it seems that TCNs benefit from lesser procedural safeguards.

The Report will then continue by comparatively assessing the main issues under each of the six paragraphs of Article 15 RD. Each of the Articles 16-18 of the Return Directive will, meanwhile, be assessed in a separate section, on the basis of the data provided by the nineteen **REDIAL National Reports** and jurisprudence available in the **REDIAL Database**. The section dedicated to Article 15 builds also on the evidence and results discussed in the **CONTENTION Report on pre-removal detention**.

The **added value of the REDIAL Report** consists in an examination of: 1) the developments in the legislation and practice of the eleven Member States that were party to the CONTENTION Project which ran from July 2014 to September 2016; and 2) data and evaluations of legislation and practice

¹ *Kadzoev* (C-357/09 PPU, ECLI:2009:741); *El Dridi* (C-61/11 PPU 2011:268).

² *El Dridi* (C-61/11, ECLI:EU:C:2011:268).

³ *Mahdi* (C-146/14 PPU, ECLI:2014:1320).

⁴ *El Dridi*, *ibid.*; *Sagor* (C-430/11, ECLI:2012:277); *Achughbabian* (C-329/11, ECLI:2011:807); *Celaj* (C-290/14, ECLI:2015:640).

⁵ For the previous two REDIAL Electronic Journals, see <http://euredial.eu/publications/redial-electronic-journal/>.

⁶ As is the case in Romania, see the section Definition of Pre-Removal Detention.

from the nineteen Member States that were not party to the CONTENTION Project.⁷ There is also 3) a comparative assessment of Articles 16-18 RD, as part of Chapter IV of the Return Directive on detention for the purpose of removal, which were not assessed in the CONTENTION Report. The REDIAL European Synthesis Report will not replicate the conclusions of the CONTENTION Report, but will concentrate on those aspects of Article 15 which have changed, or where it is relevant to make connections with the legislation and jurisprudence of the Member States that did not participate in REDIAL.⁸

As for the present Chapter, the **REDIAL database** currently includes **559** cases on Article 15 RD (450 cases from 2008 until July 2014 and approximately 100 more from July until mid-October 2016); **16** cases on Article 16 RD; **7** cases on Article 17 RD; and **one case** on Article 18 RD.

Differentiating between the criminalisation of irregular stay and pre-removal detention⁹

TCNs staying irregularly on the territory of the Member States have faced the increasing phenomenon of criminalisation of the irregular stay or entry sanctioned with criminal penalties such as: fines, house confinement and imprisonment. The relation between immigration law and criminal law, and the compatibility of national penal measures (imposed as a punishment for illegal migration) with the Return Directive and EU Charter have increasingly been the subject of CJEU jurisprudence. This prolific jurisprudence has been the result of national courts addressing preliminary references to the CJEU concerning the imprisonment of TCNs in return procedures for the crime of irregular entry or stay.¹⁰

According to Article 2(2)(b) RD, Member States may decide not to apply the Return Directive to TCNs who are subject to a criminal law sanction or to an extradition. For the derogation to be valid, the Member States have to provide for this expressly in the national implementing legislation. Should the Member State not publish these norms, clarifying in which instances it makes use of the derogation, they cannot be used by the Member States against individuals.¹¹ In practice, several Member States are using this option even if they did not transpose Article 2(2)(b) RD into their national law. The **Belgian Cour de Cassation**¹² considered that the Return Directive does not apply to a TCN who is illegally staying on the territory, due to a conviction for a criminal offence. As a result, the criminal sanction applicable to the criminal offence would determine the applicable legal regime and ought to be applied in addition to the criminal sanction for irregular stay.¹³ Yet, Belgium has not expressly provided for norms transposing Article 2(2)(b) RD into national law.

It has to be noted that the CJEU has confirmed that Member States are free to lay down penal sanctions, including imprisonment, in relation to infringements of migration rules, provided that such measures do not compromise the application of the Return Directive. However, the same

⁷ Member States party to the CONTENTION Project: Austria, Belgium, Bulgaria, the Czech Republic, France, Germany, Italy, Netherlands, Slovakia, Slovenia, Italy, and the United Kingdom. (<http://contention.eu/people/>)

⁸ For this reason, some of the parts in the current Report are shorter, or missing from the CONTENTION Report. The latter should be read together with the REDIAL Report, as they complement each other.

⁹ Figures on Member States penalising in their legislation irregular entry and/or stay can be found in FRA Report, *Criminalisation of migrants in an irregular situation and of persons engaging with them*, 2014.

¹⁰ CJEU, C-430/11, Criminal proceedings against Md Sagor, 6 December 2012 and CJEU, C-522/11, Order of the Court, Criminal proceedings against Abdoul Khadre Mbaye, 21 March 2013 (concerning the imposition of a fine); CJEU, C-297/12, Criminal proceedings against Gjoko Filev and Adnan Osmani, 19 September 2013 (concerning detention based on violating a pre-existing entry ban).

¹¹ See Return Handbook.

¹² See 5 November 2014, no. P.14.1271.F/3.1.

¹³ Article 75 of the Law on Aliens of 15.12.1980.

jurisprudence (*El Dridi*,¹⁴ *Achughbabian*,¹⁵ *Sagor*¹⁶) prohibited the Member States from imposing criminal sanctions on the sole grounds of illegal stay before or while carrying out return procedures since this would delay the return. The Court confirmed that Member States may adopt national criminal law aimed *inter alia* at dissuading those nationals from remaining illegally or re-entering in breach of previously legally imposed entry bans. This was the case, for instance, in *Celaj*.¹⁷ The Court concluded that the Return Directive does not in principle preclude domestic legislation which provides for a prison sentence for an illegally-staying TCN who unlawfully re-entered the Member State in breach of an entry ban issued against him or her in the context of an earlier return procedure. This was because of the previous return proceedings failure to impede illegal entry.¹⁸

Definition of pre-removal detention

Although the judiciaries of most Member States seem to consider pre-removal detention as a limitation/deprivation of the TCN's right to liberty, certain domestic courts have interpreted it as a limitation on the free movement of the TCN (**Lithuania**,¹⁹ **Romania**²⁰). Certain domestic supreme or constitutional courts have expressly dealt with the issue of the fundamental rights that pre-removal detention impedes. They stressed the necessity of considering pre-removal detention as limiting more than the free movement of the TCN. This kind of detention, they argued, limited the right to liberty itself, and thus it was important to recognise the benefits of safeguards for this fundamental right. For instance, the **Supreme Administrative Court of the Republic of Bulgaria** explicitly stated that “coercive accommodation” in a “Special Home for Temporary Accommodation of Foreigners”²¹ “affects one of the fundamental rights of every human being – the right to liberty, proclaimed in Article 30 (1) of the Bulgarian Constitution, Article 6 of the Charter of Fundamental Rights of the EU and Article 5 of the European Convention on Human Rights” (the case of *Kapinga*, Ruling of 27 May 2010 in case No. 2724/2010 before SAC).²²

The **Supreme Administrative Court of the Czech Republic** has repeatedly emphasised in its case law that while interpreting cited provisions [regarding the detention of the TCN for the purpose of return], it is necessary to bear in mind that the detention of a foreigner is limiting, or even depriving the TCN of his/her personal liberty (depending on the nature, duration, consequences and the method

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ In fact, the Court recently stated, in the same case, that Directive 2008/115 does not exclude such criminal law sanctions against illegally staying third-country nationals “for whom the application of the procedure established by that directive resulted in their being returned and who then re-enter the territory of a Member State in breach of an entry ban, provided that such ban complies with the conditions provided in Article 11 RD [...] a matter which is for the referring court to determine.” C-290/14, *Celaj*, ECLI:EU:C:2015:640, para. 30.

¹⁸ In this regard the Court distinguished the circumstances of the case in the main proceedings from those in the cases that led to the judgments in *El Dridi* (C-61/11 PPU, EU:C:2011:268) and *Achughbabian* (C-329/11, EU:C:2011:807) in which illegally staying third-country nationals of the relevant third countries were subject to a first return procedure in the Member State in question (para. 28).

¹⁹ See the Supreme Administrative Court decisions in administrative cases, e.g.: No. N858-90/2014 (judgment of 15 September 2014; No. A-3078-822/2016 (judgment of 23 February 2016). Lithuanian courts consider pre-removal detention as a measure restricting only free movement, while sometimes restricting the right to liberty. Court practice does not seem to be consistent on this point. For more details, please see the [REDIAL Lithuanian Report on pre-removal detention](#).

²⁰ See, for instance, the Constitutional Court of Romania, Decision No. 419/14.10.2004. However, in judgment 3312 / 04.12.2014, the Court of Appeal of Bucharest recognised that the measure of public custody is a measure restricting the right to liberty on the basis of the ECtHR jurisprudence (*Conka v. Belgium*, *Saadi v. UK*, Case *Chacha v. the United Kingdom* [GC], judgment of 15 November 1996 and *Gebremedhin [Gaberamadine] v. France*).

²¹ These are the terms under Bulgarian law for immigration detention and a detention centres respectively.

²² For more details, please see the [Bulgarian REDIAL Report on pre-removal detention](#).

of detention).²³ The **Supreme Court of Estonia** has not specifically ruled on this issue, but there is a general understanding in constitutional law that any detention exceeding 48 hours is a limitation of the right to liberty.²⁴

A thorough assessment was carried out by the **Slovenian Administrative Court**, which first held that detention (“accommodation”) under standardised regime in the Centre for Aliens means deprivation of personal liberty and not just restriction of freedom of movement (U 392/2015 of 6 March 2015²⁵). Secondly, the Court held that the difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance, and depends on the type, duration, effects and manner of implementation of the measure in question.

Article 15 RD – Detention

Paragraph 1 – Legal grounds and objective of pre-removal detention

“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:

- (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.

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.”

The Return Directive provides a set of limitations on the Member States’ detention powers. According to Article 15(1), detention is allowed only for the purposes of removal and only if other sufficient but less coercive measures cannot be applied effectively in a specific case. Most importantly, 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”.

According to Article 15(1) RD, Member States can detain illegal third-country nationals on only two exhaustive grounds:

1. there is a risk of absconding or
2. the third-country national avoids or hampers the preparation of return or the removal process.

In spite of the fact that Article 15(1) RD refers to “in particular”, the *EC Return Handbook* clarifies that the two legal grounds therein provided are the only possible situations where pre-removal detention can be adopted.²⁶ The exhaustiveness of the list of grounds for pre-removal detention was also confirmed by the CJEU in *Kadzoev*,²⁷ according to which “the possibility of detaining a person on grounds of public order and public safety cannot be based on Directive 2008/115.” (para. 70)

²³ See, in particular, SAC’s judgments: No. 7 Azs 11/2016-30 and 31 No. 4 Azs 262/2015-31; and No. 7 As 79/2010–164

²⁴ For more details, please see the [Estonian REDIAL Report on pre-removal detention](#).

²⁵ In this case, at issue was pre-removal detention in the premises of the Aliens Centre in Postojna. See the [Slovenian REDIAL Report on pre-removal detention](#), p. 4.

²⁶ *Return Handbook*, p. 78.

²⁷ *Ibid.*

1. Risk of absconding

The risk of absconding is one of the two exhaustive grounds for pre-removal detention. Its definition is not provided in Article 15(1)(a) RD, but in Article 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”.

According to Articles 3(7) and 15(1) RD, pre-removal administrative detention could only be justified by a well-established risk of absconding. The RD does not define the concept, but only lays down criteria for national legislators to follow when defining the concept. Accordingly, the “risk of absconding” has to be defined in a clear manner in national legislation, including objective criteria on the basis of which the competent authorities can believe that a TCN who is subject to return proceedings may abscond.

Risk of absconding defined by the law

In the absence of national laws, objectively specifying when a risk of absconding exists, Article 15(1)(a) RD cannot be relied upon as a legal basis for ordering pre-removal detention. (Article 3(7) RD)

Member States that *do not define the risk of absconding in their national legislation*:

- In **Austria** as well as in the **Czech Republic**, **Greece** and **Malta** the pertinent national legislation does not provide for a definition of the notion of “risk of absconding” within the framework of return proceedings.
- In **Hungary** and **Belgium**, “the risk of absconding” is defined by administrative acts instead of a domestic “law”, as Article 3(7) RD seems to require.²⁸ Among the common grounds on the basis of which Belgian courts find that risk of absconding is deemed to exist are the following circumstance: when the applicant does not have an address in Belgium, or when he/she refuses to disclose his/her true identity and/or nationality.²⁹

Austrian law does not directly refer to the risk of absconding, but to the necessity to secure either the procedure or the intended measure (e.g. deportation).³⁰ A list of objective criteria is provided by the law and has been developed in the jurisprudence. The **Spanish Immigration Act 4/2000** (Article 62) does not refer to the risk of “absconding” either. Rather, it refers to the risk of “non appearance”: “non presentation due to lack of residence or of identification documents”. It is possible that this broader definition has led to make pre-removal detention a first rather than a last resort measure.³¹

In the **Czech Republic**, the risk of absconding is not defined by the national legislation implementing the Return Directive. A similar problem exists as regards the definition of the risk of absconding under the Dublin III Regulation. For this reason, the **Czech Supreme Administrative Court** decided to ask the CJEU whether the failure of the Czech legislator to provide objective criteria for the assessment of a “serious risk of absconding” (according to Article 2(n) of Dublin III Regulation) results in the inapplicability of the Dublin III Regulation provision on the detention of asylum seekers pending their transfer by the public authorities under those particular legal provisions (grounds).

²⁸ In Belgium, these criteria are merely listed in the explanatory memorandum to the Law of 19 January 2012. In Hungary, the risk of absconding is provided in a government decree. See the respective [REDIAL National Reports](#).

²⁹ Brussels (Indict. Chamber), [2 December 2015](#).

³⁰ The legal terminology is “Sicherungsbedarf”, which might be translated as “necessity to secure”. See [Austrian REDIAL National Report on pre-removal detention](#), p. 7.

³¹ NGOs (SJM, Pueblos Unidos, Amnistía Internacional, etc) and some judges (Ramiro García de Dios, Control judge at Madrid-Aluche Center of Internment) complain about the application of Article 62 Immigration Act. See the [Spanish REDIAL Report on pre-removal detention](#).

Interestingly, the **Czech first instance court** and the **Supreme Administrative Court** had different opinions on this issue. The **Czech Regional Court** ruled that, though the applicability of Article 28 Dublin III is not subject to transposition since it is provided in an EU Regulation which is not subject to transposition rules, this provision is an exception. It is so since Article 2(n) of this Regulation requires Member States to provide objective criteria for the assessment of the risk of absconding in their national law. The **Regional Court** concluded that following a teleological interpretation of the Czech Alien Act, irregular entry and/or stay would be enough to legitimise detention, which is contrary to Article 28(1) Dublin III Regulation. Since the Czech Aliens Act does not provide, either expressly or implicitly, the objective criteria for the definition of the risk of absconding as required by Dublin III Regulation, then the public authorities cannot order detention based on mere administrative practice. The Regional Court ruled that detention measures adopted by the administration on the basis of Article 2(n) and 28 of Dublin III Regulation is unlawful due to the Member States' failure of a clear legislative definition of the risk of absconding.

The case reached the **Czech Supreme Administrative Court** and this court decided to address a preliminary question to the CJEU:

Does the sole fact that a law has not defined objective criteria for assessment of a significant risk that a foreign national may abscond (Article 2(n) of Regulation No 604/2013) render detention under Article 28(2) of that regulation inapplicable?

The motivation for the preliminary question indicates that the **Czech Supreme Court** has a different opinion than the first instance court. The latter argued that the notion of "law", as required by Article 2(n) of Dublin III Regulation, should be interpreted as including not only legislation but also judicial and administrative practice. According to this broad interpretation of the notion of "law", the Supreme Administrative Court held that the practice of the Czech police, with regard to the detention of foreign nationals under Article 28 of the Dublin III Regulation, was foreseeable, not arbitrary, and that it was based on law. The **Supreme Court** concluded that, first, it would be overly formalistic to require a legislative definition of the "serious risk of absconding", and second, even in the case of a legislative definition of the risk of absconding, in practice, this would not enhance legal certainty. The case is pending before the CJEU. Here, it should be recalled, though, that, in previous case law, the CJEU considered administrative guidelines as inadequate domestic instruments for implementing treaty provisions or measures of EU Law.³²

Important legislative amendments on the definition of the risk of absconding have taken place in **German** jurisdiction. Following two judgments by the **Federal Civil Court**, which had ruled that German legislation did not define objective criteria to guide the decision whether there is a risk of absconding (see **German Federal Civil Court**³³), the legislature introduced objective criteria. These criteria go beyond the mere fact of an illegal stay or entry. Contrary to the opinion of the **Czech Supreme Administrative Court**, the **German Federal Civil Court** interpreted both Article 28(2)(n) Dublin III Regulation and Article 3(7) Return Directive as requiring a definition of the "risk of absconding" to be clearly and concretely set out in legislative norms.³⁴

³² See, inter alia, ECJ's judgements in cases C-159/99, *Commission/Italy*; C-315/98, *Commission/Italy*; C-315/96 *Lopex Export/Hauptzollamt Hamburg-Jonas*.

³³ *Decision of 26/06/2014 – V ZB 31/14 for Dublin cases*; and *ibid. decision of 18/02/2016 – V ZB 23/15 for the return directive*; see also *ibid. Decision of 18 February 2016 – V ZB 23/15*.

³⁴ According to section 2(14) Residence Act:

- prior cases in which the person concerned had evaded public authorities in the context of immigration proceedings, though this person was legally obliged to make themselves available to the authorities;
- The TCN deceived the authorities about their identity, in particular by destroying identity or travel documents or by pretending to be someone else;

Objective criteria

For a full list of objective criteria used by the Member States in defining the risk of absconding, please see **Annex I**. In the following paragraphs legislation and practices which raise issues of conformity with the Return Directive and CJEU jurisprudence will be summarised.

In Spain, the definition of the risk of absconding is particularly worrying, as Art. 62 of the Immigration Act 4/2000 does not provide for objective criteria. This Article refers only to “the risk of non presentation due to lack of residence or of identification documents” (Article 62 Immigration Act 4/2000). **Italy, the Netherlands and Slovenia** provide for a similarly long list of circumstances that qualify as objective reasons for a risk of absconding. However, while in **Italy** any of the listed criteria can be taken to demonstrate a risk of absconding, **Dutch and Slovenian** legislation differentiate between substantial (serious) circumstances, and non-substantial (less serious) circumstances. For instance, while in **Italy** the lack of documents is enough to show a risk of absconding, in the **Netherlands** there has to be also another element to indicate such a risk.

In spite of established CJEU case law whereby pre-removal detention cannot be adopted on the basis of mere illegal entry/stay, these circumstances are still used as objective criteria and justify actions based on a risk of absconding.³⁵ **Illegal stay or residence** is applied in **France and Slovenia**, and in the case of **Estonia**,³⁶ **France and Romania** even **illegal entry** with subsequent failure to apply for a residence permit, are listed among “objective criteria”. In **Spain**, though irregular stay is not expressly provided as an objective criteria, in practice a high number of detention measures are adopted on the basis of this criterion.³⁷ All this contradicts Recital 6 of the Return Directive, which, by stating that “consideration should go beyond the mere fact of an illegal stay”, excludes illegal stay or even illegal entry alone³⁸ from the list of “objective criteria”.³⁹

The lack of a residence permit is given as an objective criterion defining a risk of absconding in **Slovakia**. The negative effects of these deficient domestic provisions are, to a certain extent, countered by the judiciary’s practice. The **Slovakian courts** seem not to rely solely on the lack of a residence permit but consider in addition other individual circumstances to justify that there is a risk of absconding.⁴⁰ For instance, in one case the **Supreme Court** confirmed a detention decision and argued that the TCN concerned, who entered illegally, did not report himself to the police despite having seen a police patrol from which he tried to escape.⁴¹ Similarly, the **Regional Court of Bratislava** when establishing whether there was a risk of absconding, not only invoked the lack of a residence permit and a reasonable possibility that the TCN would be subject to an entry ban for a period of more than

(Contd.) _____

- the foreign national refuses to participate in administrative proceedings to identify him/herself despite a legal obligation to do so – provided that it is established that he/she wants to fight deportation given the circumstances of the individual case;
- the TCN paid considerable amounts of money for human trafficking provided that the circumstances of the individual case indicate that he/she will abscond in order not to frustrate their financial “investment”;
- whenever a person declared expressly that he/she will abscond;
- he/she has undertaken considerable preparatory action to frustrate deportation provided that these actions cannot be overcome by the police. See more in the [REDIAL German Report on pre-removal detention](#), p. 12.

³⁵ *El Dridi*, *ibid.*; *Sagor* (C-430/11, ECLI:2012:277); *Achughbabian* (C-329/11, ECLI:2011:807); *Celaj* (C-290/14, ECLI:2015:640).

³⁶ “The alien has been detained due to illegally crossing the external border of Estonia and he or she has not been issued the permit or right to stay in Estonia.” [REDIAL Estonian Report on pre-removal detention](#), p. 7.

³⁷ In 2015, 3.075 detentions on grounds of irregularly irregularly staying. See [REDIAL Spanish Report on pre-removal detention](#).

³⁸ See also the Return Handbook.

³⁹ See further: *FRA Report, Detention of third-country nationals in return procedures*, 2010, p. 27.

⁴⁰ Skamla, Q43 of the [CONTENTION Report](#).

⁴¹ Skamla, Q43with reference to Supreme Court judgement 1 SZa 3/2014.

three years. The court also took into account the nature of criminal offences committed in the past; the fact that the TCN concerned left the asylum facility in violation of the law; and that he went to another country after having applied for asylum in Slovakia.⁴²

German courts do not consider mere **illegal entry as indication of a risk of absconding**. However, they do consider the payment of large amounts of money to smugglers for the purpose of illegally entering the territory of Member States as a valid indication that the person concerned might abscond.⁴³ The **German Federal Court** considers, in this respect, that 5,000 EUR paid to smugglers are sufficient grounds for believing that a TCN might abscond.⁴⁴ Other circumstances which may be taken by German courts as factors showing that there is a real risk of absconding are: multiple changes of domicile, which have not been communicated to the alien authorities in spite of warnings and a subsequent attempt to hide, as well as a flight attempt on police arrest.

In *Mahdi*, the CJEU held that **lack of identity documents** cannot, of itself, justify the renewal of detention. However, **Bulgarian, Romanian and Spanish**⁴⁵ legislation still provide the lack of identity documents as grounds for indicating a risk of absconding. Furthermore, most of the **Administrative Court of Sofia** judgments confirmed detention orders on the basis of the fact that the identity of the foreigner was not established.⁴⁶ Most worrying is the fact that, the new draft of a Bulgarian law, amending present legislation maintains these grounds. It does so by way of introducing an additional type of immigration detention lasting for up to 30 days, whose purpose is “to conduct the initial identification and establishment of identity and to assess the subsequent administrative measures that should be imposed or taken”.⁴⁷

Other domestic courts have taken a firmer position rejecting reliance on the absence of established identity and documents. The **Lithuanian Supreme Administrative Court** has consistently held that this alone cannot be the basis for detention without carrying out an individual assessment. (*No. A-3219-858/2015, judgment of 22 July 2015*)⁴⁸

Similarly worrying is the fact that **refusal of voluntary departure** is an objective criteria in **Bulgaria and Romania**. Although refusal of voluntary departure is still an objective criteria provided by the Bulgarian legislation, the courts are carrying out an individual assessment to establish whether detention measure is necessary and whether alternatives are possible. Reference should be made to a ground-breaking judgment of the **Administrative Court of Sofia** in the follow-up to the preliminary ruling of the CJEU in *Mahdi*. In that case, the TCN refused to voluntarily return to his country of origin, whereupon that country declined to issue him with identity documents. The competent authority did not list any specific actions that it intended to take and which required the presence of the TCN. The **Administrative Court of Sofia**, therefore, declared the detention unlawful and replaced it by weekly reporting.⁴⁹ The **Swedish Supreme Migration Court** refused to consider refusal of voluntary departure (objective grounds in Swedish legislation) as indicating a risk of absconding sufficient to justify a detention order. The justification of the Court was that, on the basis of this logic,

⁴² Ibid., with reference to judgment 9 Sp 99/2013.

⁴³ U. Drews, Die aktuelle Rechtsprechung des BGH zur Sicherungshaft nach dem Aufenthaltsgesetz, *NVwZ*, 2013, p. 259.

⁴⁴ BGH, Beschl. V. 03.05.2012 – V ZB 244/11, BeckRS 2012, 14183.

⁴⁵ Article 62 Immigration Act 4/2000, see [REDIAL Report on Spain](#), p. 7.

⁴⁶ [REDIAL Report on Bulgaria](#), p. 9.

⁴⁷ Ibid.

⁴⁸ As of 1 March 2015, (Art. 113 (5) of the Aliens' Law introduced objective criteria for the definition of the risk of absconding, among which also: 1) The foreign national does not have a document confirming his identity and is not cooperating in establishing identity or nationality (refuses to provide information about himself/herself, submits misleading information, etc.). Therefore, a lack of identity documents is, in itself, not sufficient grounds indicating risk of absconding.

⁴⁹ See [CONTENTION Report on Bulgaria](#), Ilareva, Q32 with reference to the judgment from 6 June 2014 in the case no. 1535/2014.

the detention order would no longer be a last resort measure, but it would be ordered in the majority of cases.

In **Romania** the mere withdrawal of an asylum application constitutes an objective reason for assuming a risk of absconding, while in **Hungary** being returned from another EU country under the Dublin regime is commonly considered by courts an objective reason for the same. In **Slovakia**⁵⁰ and **Finland**,⁵¹ introduction of an asylum application during pre-removal detention, if made with the intention of hampering the removal process, can indicate a risk of absconding which in turn justifies a detention order.

In **Austria**, the courts consider the following conduct as indicating a risk of absconding: false statements in the asylum or aliens law procedure; previous attempts to avoid the preparation of return; previous attempts to abscond and thus hamper a return; violation of reporting obligations; no interest in the procedure documented by not attending a hearing; not appearing before the competent authority; and use of various names and identity documents (UVS-01/45/4456/2011, 22.4.2011). Usually various reasons are mentioned in the decisions.⁵² The list of objective criteria provided in the administrative acts is not exhaustive, but provide only guidelines, the judge can also find other circumstances as justifying a risk of absconding.⁵³

In **Italy** the list of objective criteria is very broad, making pre-removal detention the rule rather than a last resort measure. Generally the lack of a passport, especially when associated to previous non-compliance with expulsion orders, is considered a sufficient proof of the TCN's unreliability. When the TCN is in possession of documents, attention is focused on the lack of an accommodation or the lack of income. Previous criminal records are also relevant in the cases of TCNs who have references in Italy (work, family, household).⁵⁴

Individual assessment of the objective criteria

Article 3(7) RD read in conjunction with recital 6, require that “*decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria*”. This implies that even when such “objective criteria” are set in national legislation, the general presumption of the existence of the risk of absconding is not sufficient and **individual situations and individual circumstances** must additionally be taken into consideration.⁵⁵

The individual assessment obligation is not included in all domestic legislation of the EU Member States. Competent administrative and judicial bodies usually find a risk of absconding once one of the circumstances provided by this legislation as objective criteria has been found. For instance, the definition of the “risk of absconding” in **French** legislation currently leaves no margin of appreciation to the competent administrative and judicial bodies. If one of the six (6) circumstances provided by L 511-1 CESEDA II is met, the authorities are bound to establish a risk of absconding. This definition which does not also include a requirement for the individual assessment of the objective criteria was criticised by the European Commission as being incompatible with Article 3(7) RD.⁵⁶ Law 274/7.03.2016 has remedied, to a certain extent, the current incompatibility by providing that a risk of absconding could be established if one of the enumerated circumstances is found to exist. Consequently, the amended legislation recognises a margin of discretion for the competent

⁵⁰ See the [Slovakian REDIAL Report on pre-removal detention](#).

⁵¹ See the [Finnish REDIAL Report on pre-removal detention](#).

⁵² See the [Austrian National Report](#).

⁵³ Clarification provided during the REDIAL Final Conference by the REDIAL judge.

⁵⁴ See the [Italian REDIAL Report on pre-removal detention](#).

⁵⁵ Case C-61/11 PPU, *El Dridi*, ECR I-3015, 2011, para. 39. *Mahdi*, para. 70.

⁵⁶ See [REDIAL French Report on pre-removal detention](#), p. 15.

administrative and judicial authority, and this margin is no longer imperatively bound to one of the six circumstances indicating a risk of absconding. However, it should be noted that even the amended Law does not expressly impose a case by case or an individual assessment of the circumstances.⁵⁷

While in the majority of the Member States a criminal record or the suspicion of having committed a crime is still provided by the legislation as grounds indicating a risk of absconding. This can of itself justify detention, and courts continue to confirm detention based on these grounds in **Belgium, Greece, Hungary and Slovakia**. On the other hand, in **Germany** a **criminal record** alone is not in itself sufficient grounds for the necessity of detention: other individual circumstances have to be taken into account.⁵⁸

As regards the use of individual assessment by the judiciary, an important change occurred in **Bulgaria**, starting with the judgment of the **Supreme Administrative Court** from August 2011, which set a precedent.⁵⁹ In that case, the Court concluded that Recitals 6 and 13 of the Preamble of the Return Directive require the authorities to take into account several factors, when establishing a risk of absconding. Among these, the Court mentioned: the **duration of the TCN's residence** in the Republic of Bulgaria; the categories of **vulnerable persons**; the existence of proceedings under the Law on Asylum and Refugees or **proceedings for the renewal of a residence permit** or of another authorisation offering a right to stay; the **family situation**; and the existence of the **TCN's family, cultural and social ties** with his/her country of origin.⁶⁰ This individual assessment approach was confirmed in a judgment of the **Sofia City Administrative Court**, delivered after the CJEU preliminary ruling in case of *Mahdi*.⁶¹ When assessing whether there was still a risk of absconding, the Court took into account the fact that a Bulgarian citizen provided accommodation and means of subsistence to the TCN concerned.⁶² In the same vein, in **Austria**, even if Austrian legislation does not provide objective criteria, the relevant decisions usually also mention that the person is not integrated in Austria, does not work and does not have family ties there.⁶³ Such a lack of integration is taken to indicate a higher risk of absconding.⁶⁴

In **Italy** the problem consists not only in a very long list of objective criteria, but also in the limited judicial review exercised by the *Giudice di Pace (Justice of Peace)*. In most cases the Justices of the Peace limit themselves to check whether one of the situations set by the law exist, without carrying out a deeper evaluation of the case. They very often use standard formulas or forms. It is almost impossible that a TCN does not fall at least under one of the criteria listed by national legislation.

Some of the national courts refer to the principle of individual assessment⁶⁵ when assessing the existence of a risk of absconding. However, they consider that once a criteria provided by the legislation has been found to exist in a case, regardless of how general the criteria, the will of the legislator should be given priority, and courts are not required to further substantiate why and to what extent the risk of absconding exists. (*Slovenian Administrative Court, I U 799/2012*)

⁵⁷ For more details, see the [French REDIAL Report on pre-removal detention](#).

⁵⁸ U. Drews, Die aktuelle Rechtsprechung des BGH zur Sicherungshaft nach dem Aufenthaltsgesetz, NVwZ 2012, p. 396, referring to the decision of the German Federal Court from 14.7.2011 – V ZB 50/11, BeckRS 2011, 21191.

⁵⁹ [Case No. 13868/2010](#).

⁶⁰ See [CONTENTION Report](#), Ilareva, Q41.1.

⁶¹ [Case No.1535](#).

⁶² See Ilareva, Q41.1.

⁶³ Brandl, Q42.1, [CONTENTION Report](#).

⁶⁴ *Ibid*, with reference to UVS-01/55/13313/2013-20: income comes from a boyfriend, whose name and identity has not been stated; living with a “friend” for a couple of days does not mean that there are family ties.

⁶⁵ Several courts refer to the principle of proportionality instead of the principle of individual assessment. This terminology has often been found in the jurisprudence of the Lithuanian and Slovenian administrative courts.

Sweden offers another model. Although Swedish legislation allows detention based on the declaration of the TCN that he or she does not wish to return voluntarily, previous criminal convictions and other criteria similar to those provided by **Italian** legislation, they exercise a careful individual assessment. Unlike the common practice of the Justices of Peace, the **Swedish courts**, carry out a careful individual assessment of whether these criteria are sufficient and necessary to confirm the detention order. The **Swedish Supreme Migration Court** stressed that a simple declaration of unwillingness to return voluntarily by an alien about to be removed would not suffice to justify a detention decision:

*Analysing the risk of absconding in such a manner could result in placing the majority of refused asylum seekers in detention.*⁶⁶

Contrary to the opinion of the Swedish Court, the **Court of Appeal of Marseille** considered the TCN's refusal to return voluntarily as a risk of absconding justifying a detention measure. (*CAA Marseille, 1^{er} juillet 2016, req. n°15MA04751*)

Although **Finnish** legislation provides for a list of individual criteria to be taken into account when assessing each detention case,⁶⁷ decisions by the Courts tend to be rather brief. It is, therefore, difficult to analyse the extent to which such individual circumstances, though brought up in the hearing, actually have a bearing on the outcome of the case.

The Austrian judiciary⁶⁸ seems to take into account many circumstances, situations in the individual assessment of the proportionality of the detention measure:

- The previous behaviour of the person, attempts to abscond, violation of registration obligations (see UVS-01/55/13313/2013, 27.11.2013);
- Past attempts to obtain a passport, false statements in the asylum procedure, express interest in asylum proceedings (see UVS-01/55/13313/2013, 27.11.2013);
- Violations of cooperation duties with the authorities and intensity of the violation of cooperation duties (UVS-01/51/13223/2013, 20.11.2013);
- Violation of cooperation duties regarding the establishment of identity. Hunger strikes are taken as proof of a lack of cooperation with the authorities (UVS-01/20/4392/2013, 22.5.2013, UVS-01/46/158/2013, 21.2.2013);
- A general lack of cooperation with the authorities (UVS-01/20/4392/2013, 22.5.2013 this was held to justify pre-removal detention);
- The level of integration of the person in Austria: which is assessed on the basis of work carried out in Austria; family ties (UVS-01/55/13313/2013-20 for a detailed look at this question). The lack of integration is seen as an element of a higher risk of absconding.

In **Austria**, legislation and administrative acts do not provide an exhaustive list of objective criteria. Some of them have, therefore, developed via jurisprudential practice. The **Belgian supreme court (Belgian Cour de Cassation)** has, meanwhile, requested that Article 15(1) RD requires a narrow interpretation of the objective criteria (see, Decision No. P.14.0005.N/1, 21 January 2014). In addition, the Court of cassation ruled that the two grounds for detention enshrined in Article 15,§1 of the Return Directive are exhaustive.

⁶⁶ Supreme Migration Court (Sweden), case no MIG 2008:23 UM1610-08. See more details in the [REDIAL Swedish Report on pre-removal detention](#).

⁶⁷ Namely: his/her age, medical condition, vulnerability, stable accommodation, employment in Finland, and family and other such connections to a person residing in Finland. See the [REDIAL Finnish Report on pre-removal detention](#), p. 7.

⁶⁸ For more details, see the [REDIAL Austrian Report on pre-removal detention](#), p. 6.

In circumstances where there is evidence of family life and/or the good behaviour of the irregular TCN, but where there are also criteria held by legislation to show a risk of absconding, courts must make a difficult assessment. There is no general consistent judicial approach across the Member States as regards the weight of the family situation in the individual assessment process. Furthermore, even inside the same Member State, courts sometimes have different opinions. For instance, confirmed residence with partner (having permanent residence in France) and children (enrolled in school) is held by certain French courts to be insufficient to dispel the risk of absconding (*CAA Paris, 1 ch., 31 mai 2013, req. n° 12PA03883*; *CAA Marseille, 1^{er} juillet 2016, req.n° 15MA04751*; *CAA Nantes, 1e mars 2016, req. n°15NT01873*). Previous non-execution of removal orders is held to weigh more in the individual assessment (*CAA Paris, 1 ch., 31 mai 2013, req. n° 12PA03883*). Opposition to removal could legitimately be considered an indication of the risk of absconding. It is not clear, though, how detention would ensure effective removal in such situations, and could be considered a legitimate limitation of the TCN's right to family. These considerations have determined another French court to reject a request to confirm a detention measure. (*CAA Nancy, 16 juin 2016, 16NC00311*)

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

Member States' whose legislation does not provide for the grounds of "avoiding or hampering the preparation of the return or the removal process" or which do not differentiate between the risk of absconding and avoiding /removal procedures:

- **Estonian** legislation does not include avoiding or hampering preparation for return as grounds for pre-removal detention.⁶⁹ **Bulgarian**⁷⁰ and **Czech**⁷¹ legislation do not differentiate between a "risk of absconding" and "avoiding return procedures".⁷² In **France** and **Slovenia**, meanwhile, avoiding/hampering return proceedings are not separate grounds for detention.⁷³ All this leads to case-law where the two notions are used interchangeably to justify initial detention and there are only a few instances where "hampering" has been invoked as grounds for detention. The [judgment I 1130U /2011](#) of the **Administrative Court of Slovenia** is a good example of such case law. According to the Court, the following facts were cumulatively considered as arguments legitimising pre-removal detention. First that a TCN did not cooperate in the return procedure; second, that he or she hampered the preparation of return by giving false information on their identity and by concealing documents; and third, that his or her identity has not been established yet and that he or she made it clear that they wanted to go to another country as soon as possible because Slovenia had rejected asylum applications.⁷⁴

⁶⁹ **Estonian** legislation provides instead for the following two grounds, additional to the risk of absconding: "the alien does not comply with the obligation to co-operate or the alien does not have documents necessary for the return or the obtaining thereof from the receiving state or transit state is delayed." According to [REDIAL Estonian Report on pre-removal detention](#), p. 3. The following obligations are set out as incumbent upon the TCN, and should they not be fulfilled then the detention is justified: 1) to provide governmental authorities enforcing expulsion with oral and written information and explanations; 2) to submit all information and documents and other evidence in his or her possession which are relevant to the proceedings relating to expulsion; 3) to co-operate in obtaining the documents necessary for expulsion; 4) to co-operate in the collection of information needed for identification of his or her person, and for verification purposes. Failure to comply with this obligation is, generally, sufficient to justify detention.

⁷⁰ In **Bulgaria**, the two grounds for an initial detention measure are interrelated: risk of absconding and avoiding/hampering the return or removal procedure. The risk of absconding encompasses avoiding the removal process, while Article 44(6) of the Law on Foreign Nationals in the Republic of Bulgaria states as a ground for detention, additional to the risk of absconding, "hampering of the removal process". See the [REDIAL Bulgarian Report on pre-removal detention](#), Ilareva, p. 7.

⁷¹ The Czech legislation and jurisprudence does not clearly distinguish between risk of absconding, avoiding or hampering the return process, and avoiding or hampering the removal process. See the [REDIAL Czech Report on pre-removal detention](#), Kosar, p. 11.

⁷² See [REDIAL Bulgarian Report on pre-removal detention](#); [REDIAL Czech Report on pre-removal detention](#).

⁷³ [REDIAL Slovenian Report on pre-removal detention](#).

⁷⁴ See the [CONTENTION Slovenian Report](#).

Member States clearly differentiating between the “risk of absconding” and “avoiding or hampering the preparation of return or the removal process”:

- In **Belgium**, the refusal of the TCN to board the plane on which he or she will be sent back;
- In the **Netherlands**, though the Aliens Decree (in Article 5.1a) differentiates between the two grounds mentioned in Article 15(1) RD, the “objective criteria” are fixed (in Article 5.1b) in such a way that the existence of at least two of them can justify both grounds of detention, i.e. “a risk of absconding” and the “avoiding/hampering of return procedures”. According to the **Council of State**, the judge may use both grounds interchangeably to assess the specific grounds for detention, regardless of the grounds that the administration have brought forward.⁷⁵ Also, even if a judge concludes that there is no risk of absconding, for example on account of a TCN’s family situation, the judge still has to review whether the detention would be necessary due to the TCN “avoiding or hampering the return procedure”.⁷⁶

In most of jurisdictions, the “risk of absconding” is the commonly used grounds for ordering pre-removal detention. In **Finland**, “avoiding or hampering the removal procedure” are common grounds. The threshold for applying this is very low. The removal decision is often sufficient grounds for indicating a risk of avoiding or hampering removal. Therefore the criteria is not avoiding or hampering return proceedings, which would require some sort of previous proof of absconding from the return proceedings. Rather, it is a risk of hampering or avoiding return proceedings: which has a lower threshold of proof. Therefore the two grounds (risk of absconding and avoiding or hampering removal) are confusingly merged into one single category.

Further examples of situations qualifying as “avoiding or hampering return or removal process”

A TCN in the Czech Republic voluntarily reported to the Police every week. But his previous failure to depart despite being subject to several return and removal orders and his ending communications with the IOM, together with the lack of sufficient financial resources meant that the **Czech Supreme Administrative Court** upheld the detention measure. (*Judgment No. 1 As 72/2013*)

In **Lithuania**, one of the main situations that the courts takes into account is the TCN’s ability to support themselves, the courts apply the presumption that TCNs will try to escape if they do not have sufficient financial resources.

- **Austria**: Violation of cooperation duties during the procedure or the removal process (*UVS-01/51/13223/2013*). Obstructing a police officer in the course of his duty (*UVS-01/51/13223/2013*). Hunger strikes are, also, qualified as a violation of cooperation duties (*UVS-01/46/158/2013, 21.2.2013*), as are any other obstructing actions taken by the TCN against removal: e.g. violent acts against the police or the authorities in general.
- **Germany**: The intention to avoid the removal process can be based upon various factors such as criminal convictions. But there must be a pattern of behaviour where the TCN does not comply with court orders for criminal offenses and where it can be reasonably suggested that he or she is unlikely to do for removal This was spelled out more clearly by the **Federal High Court** (Bundesgerichtshof, *Decision of 28.04.2011, V ZB 14/10*): “The reasonable suspicion that the third country national would seek to evade the enforcement of the obligation to leave can be based on convictions of the person and multiple specifications of incorrect personal data”.⁷⁷

⁷⁵ Cornelisse, *Dutch CONTENTION Report*, Q39.2 with reference to Council of State, 3 December 2012, 201207844/1.

⁷⁶ Cornelisse, *Dutch CONTENTION Report*, Q45 with reference Council of State, 3 December 2012, 201207844/1/V3.

⁷⁷ See more in *REDIAL German Report on pre-removal detention*, p. 10.

3. Additional grounds for initial pre-removal detention

Though Article 15(1)(a) RD provides only two exhaustive grounds for detention (risk of absconding and/or the third-country national avoids or hampers the preparation of return or the removal process), certain Member States provide additional grounds for pre-removal detention.

The CJEU has clearly prohibited detention on public order grounds (*Kadzoev*), or of automatically considering a criminal conviction or the suspicion of having committed a criminal offence as a risk to public policy. However, most Member States' legislation and jurisprudence still confirm detention requests based on these kinds of considerations.⁷⁸ In **Greece**, it seems that national courts have a divided opinion on whether national security can be considered a legitimate grounds for pre-removal detention.⁷⁹

In **Sweden**, there are additional detention grounds:

- Identity verification, in particular if the persons have no or false documents (this is considered a separate grounds from the risk of absconding),⁸⁰
- Public health;
- Identity matters, investigative reasons, if it is probable that the alien will be refused, will receive refusal-of entry.⁸¹

Estonian legislation does not provide for “avoiding or hampering the return or removal process” as grounds for detention. It does provide, however, for three other grounds, two of which are those provided by Article 15 (6) RD for the prolongation of detention, while one is “the alien does not have documents necessary for the return”. This particular grounds has been challenged by detained TCNs. They argued that it is prohibited by the CJEU judgment in the *Mahdi* case, and, therefore, it should not constitute legal grounds for detention under the RD. The **Court of Appeal of Tallin** rejected these complaints given that “the lack of necessary documents for return of the aliens” is different from the lack of identity documents which was the grounds prohibited by the CJEU in *Mahdi*.⁸²

In **Slovenia**, the Aliens Act provides as grounds for pre-removal detention, in addition to the “risk of absconding” for: *unknown identity* and *failure to depart by the deadline*. However, “unknown identity” combined with the implicit unwillingness of a TCN to provide data about his/her identity may be loosely considered as falling under “hampering the preparation of return or the removal process”.⁸³

⁷⁸ Belgium: [Brussels \(Indict. Chamber\)](#), 13 May 2015; Brussels (Indict. Chamber), 12 June 2015; Greece; Hungary, see the [REDIAL Hungarian Report on pre-removal detention](#), p. 9; Slovakia; Sweden.

⁷⁹ [REDIAL Greek Report on pre-removal detention](#), p. 5.

⁸⁰ If an alien: 1) has already absconded before; 2) has stated that he / she will not return voluntarily; 3) has at some point acted under a false identity; 4) has not assisted the authorities in establishing his/her identity; 5) has given false information or withheld significant information; 6) has previously violated a prohibition of re-entering Sweden; 7) has been convicted of a crime, or; 8) has been expelled by a court due to criminal activity.

⁸¹ Chapter 10 of the Swedish Aliens Act.

⁸² [REDIAL Estonian Report on pre-removal detention](#), pp. 3-4.

⁸³ See [REDIAL Slovenian Report on pre-removal detention](#).

4. The due diligence obligations of the administration

According to Article 15(1) 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 judgments in *Conka v. Belgium* and *Saadi v. UK*, held that detention will be “arbitrary” when, despite complying with national law, there was an element of bad faith or fraud on the part of the authorities or if such procedures are not undertaken with due diligence (Case *Chacha v. the United Kingdom* [GC], judgment of 15 November 1996 and *Gebremedhin [Gaberamadine] v. France*, application no. 25389/05, §74).

The European Court of Human Rights (ECtHR) found a violation of Article 5(4) of the European Convention of Human Rights (ECHR) against **Bulgaria** and the **Czech Republic** due to a lack of diligent activity on the part of the administration which did not justify the prolongation of pre-removal detention. In *Djalti v. Bulgaria*, despite the lack of cooperation on the part of the detained TCN, the mere fact that the authorities had written to the Algerian consulate to request travel documents was held by the Court as not being sufficient to hold that the authorities had fulfilled their due diligence obligations. It therefore held that the detention of one year and three months was unlawful.

Similarly, in the case of *Singh v. The Czech Republic*, a five to seven month period of inactivity on the part of the returning country’s competent authorities was also declared by the ECtHR as breaching the due diligence obligation under Article 5(1)(f) ECHR.⁸⁴ This was despite the fact that the embassy in question was refusing to cooperate with the Czech authorities.

The case-law on the due diligence criterion shows that in the majority of the Member States there is only a **superficial assessment of the administration’s duties** (at most an assessment of manifest errors): this is true, for example, of **Belgium, Greece, Italy, Poland, Romania, Slovakia and Spain**. In a minority of the Member States, meanwhile, a **vigorous assessment** of this criterion can be observed: e.g. **France, Germany and the Netherlands**. The possible reasons for the superficial application of a due diligence test might be, at least in certain Member States, the absence of this kind of a requirement from the national legislation (e.g. **Czech Republic**),⁸⁵ or the specific legal culture of the Member State, whereby the administrative judiciary has traditionally showed a certain deference towards the exercise of powers by the administration (e.g. Poland).

Despite the general trend in the formal assessment of the due diligence criterion, isolated best practice examples were reported.

The **Czech Supreme Administrative Court (SAC)** explicitly rejected the deferential review exercised by the **Municipal Court in Prague**, which held that it is up to the police to decide how to proceed with removal arrangements. The SAC held that such limited judicial control is not in line with the standards developed by the ECtHR as regards the prohibition on arbitrariness (paras. 22-31). Following this 2011 judgment, Czech administrative courts were not satisfied with the basic information that the police made some progress in removal arrangements. Instead, they require the

⁸⁴ *Singh v. République Tchèque*, Appl. No. 60538/00, 25 janvier 2005, § 62.

⁸⁵ While the English version clearly stipulates that “Any detention shall be ... only maintained as long as removal arrangements are in progress and executed with due diligence” (emphasis added), the Czech version reads as follows “Jakékoli zajištění musí trvat ... pouze dokud jsou s náležitou pečlivostí činěny úkony směřující k vyhoštění”, which means “Any detention shall be ... only maintained as long as actions towards expulsion are taken with due diligence”. This means that the “as-long-as-removal-arrangements-are-in-progress” criterion and the due diligence requirement were merged together and thus the due diligence criterion is not explicitly considered a separate criterion for review of actions taken by the Police. See [REDIAL Czech Report on pre-removal detention](#), p. 16.

police to show concrete steps taken in order to remove a TCN. Moreover, these steps must be included in the case file; otherwise they cannot be used as evidence before the courts.⁸⁶

Another example of change in judicial practice meant to make the administration more accountable comes from the **Romanian Court of Appeal of Bucharest**. This Court delivered a landmark judgment, breaking the chain of judgments where prolongations of pre-removal detention with five months were usually automatically admitted. The Court established a shorter prolongation period of three weeks detention. The Court held that the public authorities would thus be required to fulfil expeditiously and in an optimal manner the obligations to proceed with the TCN's removal. This meant in particular procuring identity documents for the TCN and identifying the means of transport. In this way the competent authority would be forced to expedite the enforcement of a return decision issued some six years before (!). (*decision no. 3312 / 04.12.2014*)

In **Belgium**, for detention periods beyond two months, Courts are supposed to verify that: the necessary steps to remove the TCN were taken within seven working days following the detention of the TCN; that these steps have been pursued with due diligence; and that it is still possible to carry out the removal of the TCN in an effective way and within a reasonable period of time.

In **Bulgaria**, the **Supreme Administrative Court** stated that “the competent authority must prove concrete actions taken for the organisation of deportation (removal). The only evidence presented was the verbal note to the Embassy of the Islamic Republic of Afghanistan for common cooperation between two countries, which the Court held it has no relation to the removal of the detained TCN. In the absence of concrete evidence, the prerequisites of Article 15 Directive 2008/115 are not met.” (*case No.8041/2015*)

Several changes can be observed in the practice of national courts that used to have a limited application of the proportionality assessment of detention measures. For instance, certain local **Hungarian** courts started to explicitly recall the duty of courts to check whether based on the EU law and ECtHR jurisprudence, the authority has proceeded with due diligence when ordering detention. The **REDIAL Database** contains a judgment whereby a Hungarian court struck down a request for the extension of the detention order. The request had not designated the time and place of removal and had not given any concrete steps for removal, but it had consisted of a series of generalities. The authority had not made it clear – in the eyes of the court – why it expected removal during the next 60 days. However, a research work carried out by the **Hungarian Supreme Court** suggested that judicial control is generally limited. It was reported that Hungarian courts do not carry out adequate scrutiny of the steps the authority has taken in order to implement the return decision and do not ask whether there is a realistic chance of its successful implementation.⁸⁷

When administrative authorities fail to provide any specific actions for the removal of the TCN, often national courts from all Member States do not approve the prolongation of detention on the basis of the lack of due diligence of the competent administrative authorities (e.g. *Court of Piraeus judgment no. 1059/2012*).

As regards the Member States who commonly carry out a more indepth assessment of the due diligence criterion, the following practices are worth reporting:

The **Swedish Aliens Act** provides for an effective mechanism for the supervision of the administrative authority's due diligence obligation. It provides that detention orders must be re-examined within two weeks of their enforcement, unless there are exceptional grounds for an

⁸⁶ [REDIAL Czech Report on pre-removal detention](#), p. 17.

⁸⁷ Summary views of the case-law Analysing Working Group on Migration Affairs set up by the Hungarian Supreme Court (Kúria) and, adopted by the Administrative and Labour Law College of the Kúria, on 23 September 2014, p. 48. See the [REDIAL Hungarian Report on pre-removal detention](#), p. 12.

extension. If the detention was not re-examined by the administrative body, within this time limit, the TCN will have to be released.⁸⁸

The **French Cour de Cassation** held that the due diligence obligation of the administration to take all actions necessary to ensure removal, though not subject to a strict deadline, is an obligation of both result and means. For instance, seventeen days of delay before the administration sent a repeat request to the consulate was held to have deprived the administration's request for prolongation of detention of all legal basis. (*C. Cass., 1er Civ., 18 novembre 2015, req. n°15-14.560*). In its due diligence test, the **French Cour de Cassation** carefully takes into account the conduct of the TCN, and asks whether the delay is incumbent only on the part of the TCN or also on the embassy of the country of return. In cases where the TCN provides two false identities which require supplementary activity by the administration, the Court de Cassation has refused to find an absence of diligence on the part of the administration. (*Cass. Civ. 1ère 23 juin 2010 09-14065*) On the other hand, booking a return flight without providing the travel documents, or with missing identity documents were both considered as a lack of diligence justifying a rejection of the prolongation of detention, and also of the initial detention measure. (*CAA Lyon, 30 juin 2015, req. n°13LY03047; C. Cass., 1er Civ., 23 septembre 2015, req. n°14-14.685; C. Cass., 1er Civ., 4 novembre 2015, req. n°14-20.757*)

Although formal or standard motivation still persists among the judiciaries of certain Member States, the judicial approach has changed in others, under the influence of the CJEU (*Mahdi* case) and the supreme Courts. For instance, the **Dutch Council of State** requires that clear, reasoned and complete decision-making is included by the competent administrative authorities in the decision for pre-removal detention or prolongation of the same.⁸⁹

The **Dutch Council of State** does not set time limits for precise administrative actions. However, it can be deduced, from its jurisprudence, that within fourteen days after the detention has begun, at least one “real action” has to be taken by the competent authorities. If not the authorities must show a valid reason for acting within that period. One example: a mentally-ill TCN could not be heard for three weeks during which medication was given to improve his mental state (*Council of State, 200708271/1*).

On the other hand, there are situations in which the **Dutch Council of State** expects the competent authorities to take “real actions” with more than “due diligence”. That may be the case when the TCN is in possession of authentic and valid identity documents. In a case where the TCN had a valid passport and had a residence permit in Spain, the Council of State found that, as the authorities had taken the first “real action” on the tenth day after the beginning of detention, they had not acted with due diligence (*Council of State, 200905432/1*). In another case where the TCN had a valid passport and the first “real action” was taken on the seventh day, the Council of State held that the authorities did, instead, act with due diligence (*Council of State, 200906877/1*).⁹⁰

⁸⁸ REDIAL Swedish Report on pre-removal detention, p. 14.

⁸⁹ The Dutch Council of State added that the clear and reasoned decision-making has to be laid down in the detention order itself – not in a later document following on from the detention order (Council of State, 14 July 2016, 201602722/1/V3, ECLI:NL:RVS:2016:2071). Similarly, in the decision in which extension of detention after 6 months is ordered, clear and reasoned decision-making is required. Thus, a mere referral to the order of detention is not sufficient – all the requirements for lawful extension have to be addressed by the minister, as well as all the requirements for an initial lawful detention, as put down in paras 1 and 4 of Article 15 (Council of State, 23 January 2015 201408655/1/V3, ECLI:NL:RVS:2015:232; and Council of State, 23 February 2015, 201408880/1/V3, ECLI:NL:RVS:2015:674). See the REDIAL Dutch Report on pre-removal detention.

⁹⁰ See more on these cases in the REDIAL Dutch Report on pre-removal detention.

5. Alternative measures

Article 15(1) RD starts by requiring that detention measures are taken only if “other sufficient but less coercive measures cannot be applied effectively in a specific case”. This requirement for the legality of detention measures has been reinforced by the CJEU, by way of establishing the principle of gradation of return-related measures.⁹¹ Accordingly, return measures should be chosen in an order starting from the measure which allows the person concerned the most liberty, namely granting a period for voluntary departure, to measures which most restrict liberty, such as detention measures. The principle of gradation is a specific form of the principle of proportionality which must be observed throughout each of the stages of the return proceedings. **This means that prior to imposing the heaviest measure (detention), the administrative body should hear the immigrant regarding the feasibility of alternatives to detention. If the administrative body has not taken the requirement of assessing the efficiency of alternative measures into consideration, then the judicial authorities should carry out this assessment within the framework of the judicial control of the pre-removal detention.**

In spite of the express obligation of Article 15(1) RD, the domestic legislation of several Member States lack an equivalent obligation: e.g. **Italy**,⁹² **Lithuania**, **Slovenia**⁹³ and **Spain**. In cases where domestic legislation does not require a mandatory assessment of the feasibility of alternative measures before adopting a detention measure, the judicial authorities of different Member States seem to have opposite approaches towards administrative practice. In **Italy**, the *Justices of Peace* (“giudici di pace”) usually strictly apply the legislation, confirming the administrative practice which commonly prefers the adoption of detention orders. In **Slovenia**, in spite of a lack of express obligations to assess the feasibility of alternative measures before adopting a detention order, the **Administrative Court** deduced from the constitutional principle of proportionality, an obligation for the Police to consider a more lenient measure before issuing a detention order. (*I U 799/2012*). More recently, the **Slovenian Administrative Court**⁹⁴ imposed an obligation upon the Police to verify, first, whether alternatives to detention might be carried out instead of detention. The Court described in detail a checklist on how administrative authorities should proceed with imposing restrictive measures (*judgment I U 392/2015 of 6 March 2015*). The Court referred to the *Arslan* case to highlight “the objective necessity” of a detention measure and to the *Mahdi* case as a basis for the competence of the court deciding on the proportionality of the initial detention, but also the prolongation of pre-removal detention (*judgment I U 392/2015 of 6 March 2015*). Similarly, the **Lithuanian Supreme Administrative Court** requires the courts to consider that the issue of granting or the refusal to grant an alternative measure belongs to the discretion recognised to the courts, and they may examine it without such a request addressed by the competent administrative authorities.⁹⁵ Lithuanian courts have also assigned other alternative measures than the one requested by the authorities.⁹⁶

Even among those providing such an express obligation, the initial proportionality assessment is not always applied in practice. This practice, reported also by the [CONTENTION SYNTHESIS](#)

⁹¹ See *El Dridi*, para. 41.

⁹² [REDIAL Italian Report on pre-removal detention](#), p. 14: “It is only a faculty (the Questore “can apply”) for the administrative authority to adopt an alternative measure to detention. Being a mere faculty of the administration, subsidiary to the main option of detention, a particular motivation regarding the non-application of alternative measures is not requested.”

⁹³ The Aliens Act provides that the police may, *ex officio* or at the request of a TCN, replace the detention measure with more lenient measures (Article 81 of the Aliens Act). See the [REDIAL Slovenian Report on pre-removal detention](#).

⁹⁴ See. judgment II U 132/2015 of 15 April 2015.

⁹⁵ Decision of the **Supreme Administrative Court of Lithuania** case No. N143-3565/2008 of 21.07.2008.

⁹⁶ See the [REDIAL Lithuanian Report on pre-removal detention](#), p. 8.

REPORT, seems to have persisted. For instance, in **Belgium, Finland, Hungary, Romania, and Poland**, courts usually reproduce the motivation given by the administrative authorities without considering the possibility of alternative measures. Although **French** courts have the competence to assess whether the administration considered the opportunity of ordering an alternative measure to a detention measure, and have annulled administrative decisions on these grounds (e.g. *CAA Douai, 16 mai 2013, req; n° 12DA01727*), the proportion of alternative measures compared to that of detention measures in France is considerably lower (1258 of assigned residence measures compared to 24,176 detention measures in 2013).⁹⁷ Although **Austrian courts** can establish alternatives other than those expressly provided by the legislation in practice only the mentioned measures are applied: alternatives include reporting obligations, the obligation to reside in an especially allocated place of accommodation and financial deposits.

An exception to this practice comes in **Swedish** courts which seem to go beyond an *ad litteram* application of the legislation in endorsing the police requests. The **Swedish Migration Court** in Gothenburg⁹⁸ decided that an attempt to escape from the detention facility by the detainee was not proof enough to assume that the TNC would engage into criminal activities in the future, and decided to order supervision⁹⁹ instead of detention.

Despite the persistent general trend of minimal conferral of alternative measures, certain salient changes have occurred in legislation and practice since the CONTENTION Report:

For instance a new **French Law** (274/7.03.2016) will enter into force on 1 November, making the assignment of residence the principle measure for monitoring the enforcement of the removal order. Pre-removal detention is, meanwhile, left as an exceptional measure, applicable primarily to TCNs who do not present effective guarantees against the flight risks.¹⁰⁰

Ground-breaking jurisprudential changes were also reported in Belgium. In 2016, the **Brussels Indictment Chamber** declared unlawful a detention measure because the possibility of other less coercive measures was not examined, contradicting thus Article 15(1) of the Return Directive.¹⁰¹ This approach is in line with the most recent judgment of the **Belgian Court of Cassation**.¹⁰² Surprisingly though, the **Belgian Council and Indictment Chambers** continue to prefer an older judgment from the **Court of Cassation** (2009) which rejects the necessity to consider alternatives to detention.¹⁰³

While the detention measure is subject to strict time limits, alternative measure are not always subject to these kinds of limited periods. For instance, in **Sweden** there is no time limit for the “supervision” measure.

A proportionality assessment should be carried out for alternative measures. The **Administrative Court of Appeal of Nancy** concluded that the alternative measure for daily reporting to the police at 8.30 am, except holidays, in the circumstances of a single TCN female with three children was

⁹⁷ A similar situation was reported to exist in Bulgaria, where in spite of the judiciary’s efforts, detention measure is not a last resort measure. 11902 detained persons in 2015, while only 755 were removed. [REDIAL Bulgarian Report on pre-removal detention](#), p. 8.

⁹⁸ The Swedish Migration Court, case No. MIG 2010: 15.

⁹⁹ Swedish legislation provides for only one alternative measure entitled, “supervision”, which contains the following duties: to report to the local police or to the Migration Board and, it may also contain a duty to surrender one’s documents. For further details, please see the [REDIAL Swedish Report on pre-removal detention](#), p. 12.

¹⁰⁰ See [REDIAL French Report on pre-removal detention](#), p. 2.

¹⁰¹ See: SAROLEA, S., *Le rappel du principe de subsidiarité*. Note sous Bruxelles, Ch. mis. en acc., 1er juillet 2016, Newsletter EDEM, juin 2016.

¹⁰² Article 7, al. 3, L. 15.12.1980 prescribes not to take detention measure unless failing to effectively implement other measures, less coercive but sufficient to remove the foreigner at the border” (n° P.12.1028.F, 27 June 2012). See [Council Chamber \(Brussels\)](#), 14 october 2016.

¹⁰³ [REDIAL Belgian Report on pre-removal detention](#), p. 10.

disproportionate, and that the prefect committed an error of appreciation. (*CAA Nancy, 16 June 2016, 16NC00311*)

Special attention should be given to the issue of alternative measures for **vulnerable groups**: unaccompanied minors; families with children; TCNs with health issues and the elderly. In this regard, the **Administrative Court of first Instance of Athens**, taking into account the health condition of the applicant, decided that a further extension of his detention was not justified and accepted his request under the following conditions: to appear twice per month, in days and hours to be appointed by the police authority, at the nearest police station to his place of residence.¹⁰⁴

The **Lithuanian Supreme Administrative Court** concluded that the detention measure was not proportionate on the basis that the applicant needs to take care of his pregnant wife who is vulnerable; and that detention of vulnerable persons is possible only in very exceptional circumstances, which were not established in that case (*case No. A-3855-822/2016, judgment of 18 May 2016*).

Therefore, family ties are not always considered a sufficient reason justifying an alternative measure. For instance, the **Administrative Court of Douai** held that the presence of a child on French territory does not justify an assigned residence as an alternative to a detention measure, if the father does not leave with the child and he is not effectively involved in his education. (*CAA Douai, 17 novembre 2015, req. n°14DA01560*) On the other hand, the **Administrative Court of Lyon** held that a TCN, who was married and the father of two minor children with whom he resides, should be given assigned residence. (*CAA Lyon, 25 juin 2015, req. n°14LY01825*)

Commonly used alternatives measures

- Regular reporting to the competent authorities;
- Compulsory residence in a specific place;
- Withdrawal of passport or documents of nationality upon detention.

Specific alternative measures

- **Spain**: Preventive detention by the police authority or their agents, for a maximum period of seventy-two hours (!); the obligation to hand over passport and documents is practised when an irregular has already been detained for 60 days; (!)
- **Belgium**: return houses for families with children; foreigners have the right to propose an alternative measure to detention, however courts seems not to take them into consideration.
- **Sweden**: the legislation provides for only one alternative measure entitled “supervision”, which contains the following duties: to report to the local police or to the Migration Board and, it may also contain a duty to surrender one’s documents. The “supervision” measure can be applied for longer periods than the maximum permissible period of detention. The Migration Agency states that supervision has advantages for both migrants and the Government. Reporting involves minimal costs and fewer administrative burdens.
- **Finland**: obligation to give collateral.

¹⁰⁴ See, in particular, decision no. 406/2015, in [REDIAL Greek Report on pre-removal detention](#).

6. Objectives of detention: return or preparation for removal

Austrian and **Hungarian** legislation differentiates between two objectives: return and preparation for removal. A recent attempt of the competent **Dutch** authorities to invoke the preparation for voluntary return with the assistance of the IOM as a legitimate purpose for detention has been rejected by the **Dutch Council of State**. The Council noted that reason for detention is not present in Dutch legislation. It cannot be relied upon by the government against an individual.

Paragraph 2 – Authorities that can order pre-removal detention and remedies for unlawful detention

Detention shall be ordered by administrative or judicial authorities. Detention shall be ordered in writing with reasons being given in fact and in law. When detention has been ordered by administrative authorities, Member States shall: (a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention; (b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings. The third-country national concerned shall be released immediately if the detention is not lawful.

1. Body(ies) authorising pre-removal detention

According to Article 15(2) RD, detention can be ordered by either an administrative or a judicial authority. Should detention be by order of an administrative authority, the Member States are required to subject the detention order to either an automatic judicial review or grant the TCN the right to ask for judicial review.

Pre-removal detention is usually ordered by the police, prosecutor, prefect or another type of administrative body, and is usually subject to confirmation/approval by the judicial authority. An exception is in **Hungary**, where the initial detention order is not subject to judicial control, but only the extension is. In **Germany**, the detention measure is ordered by the judicial authority (civil court).¹⁰⁵ In **Estonia**, the initial detention of 48 hours can be order by the Police without subsequent approval by the judicial authority.¹⁰⁶ Any detention that is longer than 48 hours has to be authorised by the judicial authority. However¹⁰⁷ in most Member States, the initial judicial review is automatic: exceptions are **Bulgaria, Belgium, Greece**, where the judicial review is subject to the TCN's application.

The judicial authority competent to authorise pre-removal detention is usually an administrative court/chamber, with the following exceptions:

- In **Belgium** and **Spain** it is a *criminal judge* who approves pre-removal detention. Starting from 1 November 2016, the *judge of liberties and detention (Juge des libertés et de la détention)* in France will have the competence to review initial detention orders (he is part of the criminal jurisdiction);¹⁰⁸ from the same date, the judge of liberties and detention will have

¹⁰⁵ See, [REDIAL German Report on pre-removal detention](#), p. 3.

¹⁰⁶ This administrative order is subject to appeal before the administrative court.

¹⁰⁷ The [REDIAL Estonian Report on pre-removal detention](#), p. 1.

¹⁰⁸ Until 1 November, in France two different jurisdictional controls coexist, in a successive order, both being subject to appeal. The control of the initial detention order is done by an administrative judge, while the prolongation of detention

the sole power to authorise the prolongation of detention, and to decide on an assigned residence or order for immediate release, while the administrative authorities will only have implementing power.

- **Germany**, where it is a *civil judge*.
- **Italy**, where a “*Justice of the Peace*” makes the decision. The fact that this is not a professional judge raises an issue, especially in relation to the constitutional guarantees of the independence of the judiciary. This system has been criticized by the UN special rapporteur on the Human Rights of Migrants because it lacks a real control over detention orders.
- **Hungary, Finland, and Lithuania**: the initial judicial review of detention is not reserved to a specialised judge, but to a local general court, any of its judges, regardless of specialisation, is competent. In Finland, there is no appeal before a superior court. The district court, the same that assessed the first request for detention of the Police, will re-hear *ex officio* the case after fourteen days from the previous hearing.¹⁰⁹ These countries, the lawfulness of the return decision remains subject to administrative courts.

Administrative judges are generally not specialised in immigration or asylum law. The **Netherlands** and **Sweden** are exceptions with specialised chambers for immigration law in the district Courts (**Netherlands**) or specialised courts on migration (**Sweden**¹¹⁰). Finally, specialised decision-making is practiced in **Austria** and at the level of the **Supreme Administrative Court in Bulgaria**.

The judicial decision assessing the detention order (second instance) can, in most Member States, be appealed with the exception of **Finland** and **Hungary**. However, the second instance is limited to a strictly legal examination in all Member States.

2. Judicial control – formal or real

Many of the REDIAL National Reports mentioned that judicial control is very often formal, in the sense of being limited to endorsing the decision on detention taken by the competent administrative authorities: this is true, for example, of **Belgium**,¹¹¹ **Italy, Finland, Hungary, Slovenia and Slovakia**. The reasoning in detention decisions tends to be very brief, and it is thus difficult to assess the thoroughness of the judicial assessment. The **Belgian Cour de Cassation** confirmed that a detention order is to be decided by the administration, not the judiciary and that this was a widespread practice there.¹¹²

The **UN Special Rapporteur on the Human Rights of Migrants** expressed concerns on the practice of the Justices of Peace (**Giudici di Pace**) of confirming almost automatically the detention

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beyond five days is done by the judge of liberties and detention. According to the [REDIAL French Report on pre-removal detention](#), p. 4.

¹⁰⁹ This mechanism is under review. The Parliament has proposed a bill that will maintain only an initial automatic judicial hearing of the case. See the [REDIAL Finnish Report on pre-removal detention](#), p. 3.

¹¹⁰ Migration Courts in Gothenburg, Malmö and Stockholm, the Migration Court of Appeal. See more in the [REDIAL Swedish Report on pre-removal detention](#), p. 2.

¹¹¹ Judicial authorities controlling the lawfulness of the detention order can control the legality of the removal order since the detention is legal only insofar as the removal order is legal as well. Thus judicial review includes a control of the removal order with human rights most notably Articles 3 and 8 ECHR. However criminal courts competent over the detention order cannot annul the removal order (the aliens litigation council only has jurisdiction), they can only annul the detention order. (in this case because the removal order is unlawful).

¹¹² The Indictment Chamber first ruled that the detention order was disproportionate and that the administration should not have issued such order ([Brussels \(Indict. Chamber\)](#), 18 May 2015). However, that decision was overruled by the Court of cassation (10 June 2015 (n° P.15.0716.F/2)).

order sent by the administration: the confirmation of the orders appears to be limited to formal checks, resulting in a lack of real judicial control over the order.¹¹³

A sort of formal assessment of the risk of absconding can be said to exist in the **Netherlands**, since Art. 5.1b of the Aliens Decree, divides the objective criteria into “substantial”¹¹⁴ and “non-substantial”¹¹⁵ grounds. According to the Dutch **Council of State**, the existence of “substantial grounds” justifies the conclusion that there is a risk of absconding or that the TCN concerned is avoiding or hampering return procedures. The administration is not obliged to give any further explanation, unless the TCN shows that the grounds invoked are factually incorrect or that, in his/her specific case, individual circumstances would point against the assumption that s/he is avoiding or hampering return procedures.¹¹⁶ If such grounds are invoked, it seems to be difficult to argue against detention.¹¹⁷ The relevant case-law shows that, in such cases, even the previous fulfilment of the reporting obligations cannot refute the lawfulness of detention.¹¹⁸ Such a reversal of the burden of proof does not apply if only “non-substantial grounds” are invoked. In such a case, the administration must take into account an individual’s situation and circumstances: e.g. a lack of sufficient resources, no permanent residence or a criminal record. It must then ask whether there is either a risk of absconding or whether the TCN is avoiding or hampering return procedures.¹¹⁹

French administrative courts consider stereotypical, formal, or abstract reasoning provided by the competent administrative authorities to be a manifest error of appreciation. However, not all

¹¹³ A/HRC/23/46/Add.3, p. 17. See also the [REDIAL Italian Report on pre-removal detention](#), p. 2.

¹¹⁴ Cornelisse, [CONTENTION Report on Netherlands](#), Q39.2: Substantial grounds are:

- the TCN has not entered the country lawfully, or has tried to do so;
- the TCN has evaded supervision for some time;
- the TCN has received in the past a visa, decision, notification, or notice, imposing the obligation to leave the country within a specific period, and has not done so voluntarily;
- the TCN does not cooperate in assessing his or her identity or nationality;
- the TCN has, when applying for permission to stay in the country, given false or contradictory statements regarding his identity, nationality or his journey to the Netherlands or any other Member State;
- the TCN has gotten rid of travel- or identifying documents, without any need to do so;
- the TCN has in the Netherlands made use of false or falsified documents;
- the TCN has been declared as an unwanted alien according to the law in the Netherlands, or an entry ban has been issued against him according to the law;
- the TCN has declared that he will not fulfil his obligation to return (as defined in the RD) or his departure to a responsible MS under the Dublin regulation.

¹¹⁵ Cornelisse, [CONTENTION Report on Netherlands](#), Q39.2: Non-substantial grounds are:

- the TCN does not fulfil one or more obligations, laid down in chapter 4 of the Aliens act (e.g. the obligation to report to the authorities on a regular basis);
- the TCN has unsuccessfully applied more than once for a residence permit;
- the TCN has no permanent residence;
- the TCN has no sufficient resources;
- the TCN is suspected of or convicted for a crime;
- the TCN has worked although he was not allowed to do so according to the Law.

¹¹⁶ Council of State 13 May 2011, 201101548/1/V3; Council of State, 27 April 2012, 201201182/1/V3; Council of State 14 November 2011, 201107762/1/V3.

¹¹⁷ Ibid.

¹¹⁸ Council of State, 23 September 2011, 201104448/1/V3.

¹¹⁹ Council of State 13 mei 2011, 201101548/1/V3, Council of State, 19 March, 2012 201103323/1/V3 and 21 March 2011, 201100555/1/V3.

administrative courts require the same level of precision and details in the motivation provided by the administration.¹²⁰ (*CAA Nancy, 02 août 2012; CAA Marseille 19 décembre 2013*)

3. Extent of judicial control

In many member States (**Belgium, Greece, Finland, France,**¹²¹ **Poland and Spain**), the judicial authority assessing the lawfulness of the detention order is not competent to assess *ex officio* the lawfulness of the return/removal order; or, at least, it cannot do so during the same judicial proceedings (**Estonia, Romania**). This used to be the case in the **Netherlands**. However the **Dutch Council of State** held that the separateness of the procedures concerning an appeal against a mere return decision and an appeal against pre-removal detention, could result in the situation in which the rights guaranteed in Article 6 of the Charter would be violated; as well as the rights contained in Article 5 para 4 ECHR¹²² and Article 15 para 2 of the RD. It considered that the circumstances on which a mere return decision is based are in most cases the same as the circumstances on which detention would be based. However, the separateness of the procedures appealing these measures could result in a situation in which the court controlling the detention would not be able to order the release of the detained TCN if the return decision was unlawful. The Dutch **Council of State** thus ordered that appeals against mere return decisions and detention would have to be dealt with simultaneously by the courts from that moment onwards (*Council of State, Decision, No, 201209288/1/V3*).

In addition the lawfulness of the detention order is often limited to redressing manifest errors committed by the public authorities, excluding an assessment of the necessity of the detention order. This is mostly due to the limited judicial control recognised by the legislation to the competent national courts. For instance, in **Belgium** the limited scope of control operated by the criminal courts may also be explained by the fact that, unlike administrative courts, they do not have access to the TCN's entire file. In **France**, national courts have divided opinions on the extent of judicial control over the administration as regards removal and detention measures. A certain number of administrative courts limit themselves to an assessment of the manifest error of appreciation of the administration, which includes a control of: competence, vices of procedure, errors of law and facts and manifest errors of appreciation. (e.g. *CAA Douai, 26 septembre 2013*¹²³). **Other French courts** have departed from this type of limited judicial control, and exercise a control of “error of appreciation” over the administration. (*CAA Nancy, 18.02.2013*).¹²⁴ The extent of judicial control on the part of the French judiciary changes during the appeal to a prolongation of detention measures, where the judge of liberties and detention also has the power to assess the necessity of the detention measure. However, the judge accepts that he or she does not have the power to assess the lawfulness of the removal order. (*C.Cass, Civ., 6 juin 2012, req. n° 11-30185*). This limited power of the French judge of liberties and detention coupled with the lack of suspensive effect of the appeal lodged by the detained TCN have been the subject of a conformity review before the ECtHR.

On 12 July 2016, the ECtHR found France to be in violation of Article 5(4) ECHR for lack of an effective remedy. In appeal proceedings, French courts could examine only the competence of the authority issuing the order of detention, its reasons and necessity.¹²⁵ They could not, though, review

¹²⁰ See the [REDIAL French Report on pre-removal detention](#), p. 8.

¹²¹ The judiciary does not have either the power to assess the lawfulness of the removal order save in the framework of the appeal proceedings against the prolongation of the detention measure, see the [REDIAL French Report on pre-removal detention](#), p. 5.

¹²² Namely, requirement of a speedy decision, and that the detainee be released in the case of unlawful detention.

¹²³ See also *CAA, Versailles 13 novembre 2012*.

¹²⁴ See also, *CAA Bordeaux, 16 décembre 2011, 19 février 2013; CAA Nancy, 19.03.2012; 25.10.2012*.

¹²⁵ See case *A.M. v. France* (Appl. no. 56324/13).

the lawfulness of the measures which have been taken prior to the administrative detention. In this case, the detained TCN contested the lawfulness of his detention order, but two days later he was expelled and so was unable to attend the hearing. While the administrative court set aside the detention order, the Conseil d'Etat rejected the appeal. The ECtHR held that the applicant was deprived of any effective access to a court with jurisdiction to assess the lawfulness of his detention in violation of Article 5(4) ECHR. The solution found by the French legislator was to transfer the competence of review from administrative judges to the judge of liberties and detention (*Juge des libertés et de la détention*). These when confronted with a complaint against a detention order under the return proceedings, are obliged to issue a decision in 48 hours. Furthermore the judge will also have the power to assess the lawfulness of the removal order.¹²⁶

A positive change as regards the extent of the power of national courts occurred in **Slovakia**, where since the entry into force of the new administrative code, judges have an *ex officio* obligation to control all elements of the lawfulness of detention irrespective of the arguments of the parties.¹²⁷ However the judge is still not competent to assess the lawfulness of the return decision when assessing the lawfulness of the detention order. The judge is not able to assess the necessity of the reasons of return or, rather, only if they are provided for by the law.

Another exemption from the rule of limited power of the administrative judges in detention of returnees cases is the **Netherlands**. The judges there have broad powers, being competent even to find other ground(s) for the detention than the ones invoked by the administration. In addition, following the *Mahdi* preliminary ruling in the CJEU, the **Dutch Council of State** has changed its view on the deference of the court controlling the lawfulness of detention. Now, according to the Council of State, the question as to whether less coercive measures can be applied is to be judged in full by the court (*Dutch Council of State*, Decision No. 201408655/1/V3).¹²⁸ Similarly, in **Finland**, courts have wide powers of judicial control. They can also substitute the decision of the police on the necessity of the detention order with that of their own. However, in practice, courts automatically accept the decision of the police, and only rarely decide differently. **Estonian** administrative courts have, too, wide judicial control power, as they are not bound by the facts or reasons given by the authority (e.g. when assessing the risk of absconding). They must independently establish all relevant facts and give reasons. In **Lithuania**, meanwhile, both first instance and appeal (Supreme Administrative Court) have full control of both facts and legal arguments.

Recent jurisprudential change have taken place in **Italy**, where the supreme court (**Corte di Cassazione**) established that the relevant domestic provisions should be read as requiring the Justice of Peace (*Giudice di Pace*) to assess the manifest unlawfulness of the expulsion order, including circumstances that prohibit expulsion of the TCN. It might be noted that, while in Italy the requirement to assess the lawfulness of the initial return decision in addition to the detention order came via the judgments of the supreme court, in **France**, the supreme court refused to operate such a change. This was, in the end, introduced by the legislator, following a negative judgment from the ECtHR.¹²⁹

¹²⁶ Law 274/07.03.2016 which will enter into force on 1.11.2016.

¹²⁷ See [REDIAL Slovakian Report on pre-removal detention](#), p. 2.

¹²⁸ However, according to the [REDIAL Dutch Report on pre-removal detention](#), this judgment had changed little in terms of judicial practice.

¹²⁹ See *A.M. and others v. France*, see the current Law No. 126/2016, and the [REDIAL French Report on pre-removal detention](#).

As regards the judicial supervision of the prolongation of the detention order, the CJEU held in *Mahdi* that the judicial authority must have the power to decide, on a case-by-case basis, on the merits of:

- whether the detention of the third-country national concerned should be extended;
- whether detention may be replaced with a less coercive measure; or
- whether the person concerned should be released,

that authority thus has power to take into account the facts stated and evidence adduced by the administrative authority which has brought the matter before it. This includes any facts, evidence and observations which may be submitted to the judicial authority in the course of the proceedings.

Although **Bulgarian** legislation was not amended to reflect this requirement of judicial control in cases of prolongation of immigration detention, the Bulgarian judiciary has disapplied Law on Foreign Nationals in the Republic of Bulgaria, Article 46a, Para.4 which says that judicial renewal of detention following the elapse of the first six months takes place in a closed hearing without the participation of the TCN. With few exceptions, the practice of convening an open hearing with the participation of the detained TCN has become stable case law in Bulgaria. This follows the two precedent-setting judgments of the **Supreme Administrative Court** in the cases of *Kapinga* (Decision of 27 May 2010, in case No. 2724/2010) and *Tsiganov* (Decision of 8 February 2011 in case No. 14883/2010). In those cases the Supreme Administrative Court invoked *inter alia* Article 47 EU Charter (the right to a public hearing in particular), together with Article 15 RD, Article 5 (4) and Article 13 ECHR.¹³⁰

4. The form of the detention order and decision

The requirement that detention should be in writing with reasons in fact and in law has been the subject of a preliminary ruling from the CJEU. In *Mahdi*, the **Bulgarian administration** was not required to issue an express decision when reviewing the detention and its extension. The CJEU held that a written decision with reasons in fact and in law is not required for every review done at regular times. However, it is insisted that the administrative body is required to issue a written decision before the expiry of the initial detention order. This is when a decision is taken on the ending or prolongation of detention.

The main effect of the CJEU *Mahdi* Judgment of 5 June 2014 has been that administrative authorities in Bulgaria started to issue decisions on extending the length of detention. In doing so they stated factual and legal grounds, which are automatically submitted to the court for review. Currently, detainees in Bulgaria are no longer in a disadvantaged position with regard to the right to effective remedies.¹³¹

5. Remedies against unlawful detention and lack of reasonable prospect of removal

Immediate release

When detention ceases to be lawful (Article 15(2) RD) or when there is no reasonable prospect of removal (Article 15(4) RD), the detained TCN should be immediately released. In certain jurisdictions, the nullifying of the detention order does not automatically lead to the release of the detained TCN. For instance, until recently, in **France** the annulment of the administrative detention measure for violation of the legal requirements did not inevitably result in the immediate release of the TCN. This happened only if there was proof of the fact that the detention measure had affected the

¹³⁰ REDIAL Bulgarian Report on pre-removal detention.

¹³¹ According to the REDIAL Bulgarian Report on pre-removal detention.

rights of the detained TCN.¹³² Following judgments from the **Tribunal des conflits**¹³³ and the **French Conseil d'Etat**,¹³⁴ the judge of liberties and detention has now an obligation to pronounce the immediate release of the detained TCN under its own initiative or following the request of the TCN, if the factual or legal circumstances no longer justify detention. In *M.H.*, the *Tribunal des conflits* decided to release the TCN before the expiry of the maximum period of detention based on the lack of a reasonable prospect for removal. *In casu*, the incapacity of the Egyptian consulate to justify the Egyptian nationality of the detained TCN: this then impeded the issuing of documents necessary for travel.¹³⁵

Compensation

In addition to the remedy of immediate release, most jurisdictions also provide for the possibility of compensation for pre-trial detention. However, in practice, compensation is rarely granted: it is not granted automatically, but it has to be requested by the TCN. Interesting cases have been reported from **Poland** and **Sweden**.

In one case a regional Polish court quashed the decision of a district court on the prolongation of a foreigner's detention in a guarded centre, due to the lack of a relevant order. However, the foreigner had already spent three months in detention though there had been no legal basis for this. The TCN received the relevant compensation, but the Minister of Justice and the National Council of the Judiciary of Poland submitted a claim in the disciplinary procedure against the judge. The Supreme Court stated, among other things, that the situation of the TCN placed in a guarded centre had been similar to a person in a pre-trial detention. The judge should, therefore, have submitted a similar order to the Border Guard supervising the guarded centre. In criminal procedures such orders are addressed to the management of pre-trial detentions.¹³⁶

Wrongful detention also occurs in **Sweden**, over 10% of pre-trial detainees in 2011 were financially compensated for their unlawful arrest and detention.¹³⁷

The Dutch Aliens Act (Article 106) also provides for the possibility of compensation in the case of unlawful detention. The amount of compensation is 105 euros per day for unlawful detention in a police cell, and 80 euro per day for unlawful detention in a detention centre. However, it is possible for the court can lessen the amount of compensation, taking into account the behaviour of the TCN concerned, in particular a refusal to cooperate in his or her return (*Council of State 19 June 2013, 201211655/1*). Thus, in the case of unlawful detention, as a return decision was lacking, the **Dutch Council of State** held that the TCN concerned had not done enough to limit the damage done. This was due to the fact that the TCN had refused to hand over his passport to the relevant authorities, and thus the Court limited the compensation to 50% (*Council of State, 1 September 2016*).

Access to (free) legal aid

According to Article 13(3) RD, the TCN concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance. Furthermore, Article 16(2) RD provides that TCN in detention shall be allowed on request to establish contact with legal representatives.

¹³² See the [REDIAL French Report on pre-removal detention](#), p. 3.

¹³³ Trib.Confl., 9 février 2015, M.H.

¹³⁴ CE, 14 décembre 2015, req. n° 393591; CE, 15 avril 2016, req. n°398550.

¹³⁵ Trib.Confl., 9 février 2015, M.H.

¹³⁶ Polish Supreme Court, case No. 5/16.

¹³⁷ [REDIAL Swedish Report on pre-removal detention](#), p. 15.

Free legal aid is commonly recognised for detainees, especially for unaccompanied minors. Some jurisdictions differentiate the type of legal aid the returnees can receive. This depends on the level of jurisdiction. For instance, in **Belgium**, detainees have a right to primary legal aid – advice given by a lawyer, and secondary legal aid – representation before courts. They have to apply for it, but it is an obligation for every lawyer to verify whether his client meets the conditions for legal aid.

In spite of legal aid being granted to detained returnees in most of the Member States (an exception is **Slovenia**), criticisms regarding access to lawyers and the quality of legal representation have been raised in several Member States.¹³⁸ In **Finland**, little notice is given to the detainee for the hearing. There is, therefore, no time to arrange for a lawyer. In **Italy**, the need to resort to a lawyer qualified to practice before the Supreme Court, i.e. a senior lawyer who is presumably more expensive and less accessible for a TCN on the verge of being expelled, is probably one of the reasons for the limited number of cases challenged by the Supreme Court. It could thus be argued that effective access to appeal proceedings is hindered. Furthermore, the quality of legal representation/argumentation has been criticised in many Member States.¹³⁹

Solutions to these shortcomings are perhaps suggested by other countries' approaches to these problems.

For instance, as regards the shortcoming of legal representation of quality, in **Estonia**, the solution was to organise an internal tender between law firms. One law firm was, then, selected to specialize in the representation of clients in asylum and detention cases.

In the **Czech Republic**, a ground-breaking judgment of the **Supreme Administrative Court** has contributed to enhancing the effective access to legal representatives. A detained TCN initially lodged an appeal in French, following the visit of a French interpreter. He then failed to lodge an appeal in Czech due to a limited visits of lawyers in the detention facility: the one who visited refused to formulate an appeal based on a lack of sufficient time. His appeal was rejected as inadmissible by the first and by the appeal courts, in spite of requesting an exception from the prescription period for lodging an appeal. In a ground-breaking judgment, the SAC quashed the judgments of both first and appeal courts on the basis of Article 13(3) RD requirements. The **Czech Supreme Administrative Court** pointed to the fact that while transposing Article 13(3) of the Return Directive into Czech law, the legislator failed to sufficiently ensure the effective access of TCNs to legal aid or representation. Access to legal representation was secured when possible by NGOs. The SAC highlighted that the Czech Alien's Act does not oblige administrative authorities to ensure the TCNs legal aid. There is, therefore, no guarantee that every TCNs subjected to return would get legal aid in due time. This deficiency is particularly worrying, especially in the case of third-country nationals detained in closed facilities.

The SAC urged the authorities to do as much as possible to achieve the aim expressed in the Return Directive at Article 13(3). They were, especially, to make sure that detention facilities are visited weekly by lawyers so all third-country nationals have effectively the chance to make their appeals on time. Because the competent administrative authorities did not show that the detention facilities effectively guaranteed the right to legal assistance, the SAC decided that the applicant (the TCN) was entitled to an exception to the obligation to make an appeal within five days. For this reason, the SAC also quashed the appellate decision of the defendant and obliged the defendant to deal with the appeal on its merits. (*judgment of the SAC of 30 June 2015, No. 4 Azs 122/2015*)

The SAC judgment remedies to a certain extent the shortcomings in the national systems of access to free legal aid. However the following issues still persist: 1) lawyers from non-governmental

¹³⁸ Hungary.

¹³⁹ For instance, Finland (in certain areas of the country it is difficult to find a lawyer who would have sufficient expertise in immigration issues), Hungary, Romania and Slovenia.

organizations, in contrast to appointed advocates, do not have their expenses covered for legal representation before courts; 2) free legal aid is provided only to those without sufficient resources.

Suspensive effect of the appeal against the detention order

Within the **French** system, the detained TCN have 48 hours to challenge the detention measure from notification of the detention measure, the removal order and its corollaries (decision to establish the third country of return, extension of the removal period, entry ban). The administrative judge has to deliver his or her decision on this action of annulment (*recours en annulation*) within 72 hours. However the action of annulment (appeal) does not have suspensive effect on the removal procedure. Therefore, in practice it can be that the TCN has already been removed, even if the court decided to annul the detention or removal order. The **French Conseil d'Etat** refused to recognise a suspensive effect of the appeal against the removal order or detention measure on the basis of Article 5(4) ECHR. In 2013, the **Conseil d'Etat** annulled a judgment of an administrative court of appeal which held that detained TCNs cannot be removed before the court has decided on the action of annulment. This system has been assessed by the ECtHR (*A.M. v. France, July 2016*), and was held to be contrary to Article 5(4) ECHR.¹⁴⁰ The limited powers of the administrative judge *vis à vis* the assessment of the detention measure was, likewise, held to be contrary to this article.

Contrary to the reserved approach adopted by the **French Conseil d'Etat**, the **French Cour de Cassation** has helped ensure effective access to justice as provided under the RD through its judgments. This Court held that the president of an administrative court of appeal violated Article 15(2) RD due to his decision that he was incapable of hearing a complaint lodged by the detained TCN as regards the TCN's right to being informed of his right to lodge an appeal and the conditions for the exercise of this right. (*C. Cass., 1^{re} Civ., 7 octobre 2015, req. n°14-20.370*)

Paragraph 3 – Review of detention at reasonable intervals

In every case, detention shall be reviewed at reasonable intervals of time either on application by the relevant third-country national or *ex officio*. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

In most of the Member States, the administrative authority must review, *ex officio*, the detention measure and there is afterwards the possibility for the TCN to ask for a judicial review of this decision. This administrative obligation disappeared in 2004 in the **Netherlands**, effectively a decrease of the legal protection of TCNs in detention.

This *ex officio* administrative review must be done every fourteen days since the first hearing in **Finland**,¹⁴¹ every four weeks in **Austria**; every month in **Bulgaria** and **Germany**; within two months and then at six months from the detention order in **Sweden**; every three months in **Slovenia**; and whenever the detainees introduces a request in **Slovakia**. In **Bulgaria** and **Slovakia**, the review does not lead to a new written decision that could create a problem to appeal it, but this practice has been accepted by the CJEU in the case of *Mahdi*.

Judicial review is carried out *ex officio* by the civil judge in **France** after five days, knowing that an appeal to the administrative judge can also be introduced within forty-eight hours of the initial detention decision. After 11 November 2016, the appeal will be lodged before the judge of liberties and detention (Juge des libertés et de la détention) in **France**, within, though, the same short time

¹⁴⁰ See the [REDIAL French Report on pre-removal detention](#), p. 4.

¹⁴¹ This automatic re-hearing procedure is subject to a pending bill, which proposes that the re-hearing will be done at the request of the individual, and not automatically. See the [REDIAL Finnish Report on pre-removal detention](#), p. 2.

frame. An appeal can be lodged every month by the TCN in **Belgium**, while the review of the appeal in **Bulgaria** takes a long time (from several months to a year).

Paragraph 4 – Reasonable prospect of removal

1. The notion of reasonable prospect of removal

Some Member States, do not include the reasonable prospect of removal (RPR) as a criterion for a legality assessment of the detention order: this is true of **Bulgaria, the Czech Republic, Poland, and Spain**. **Polish** courts do not seem to take the RPR into account as a criterion for legality assessment.¹⁴² Similarly, in **Spain**, the RPR is not used as grounds for the legality assessment of detention order. According to the Spanish REDIAL Report, detention is used even when there are no reasonable prospects for deportation. In other Member States “assessing the RPR” remained only a theoretical possibility: e.g. **Finland**,¹⁴³ and **Slovenia**. Other national courts carry out a formal assessment. For instance, in **Belgium and Estonia**, the RPR is usually assessed in such an abstract manner that its relevance is, in practice, limited, or it is presumed to exist.¹⁴⁴ No case law, where the lack of a reasonable prospect of removal served as a justification to release the applicant, was reported for these countries. The Belgian authorities seem to have uneasy relations with their Algerian counterparts, delaying the return procedure. But this is not considered sufficient to rule out a reasonable prospect of removal.¹⁴⁵ **Romanian** courts on the other hand, though they carry out individual assessment of the cases based, *inter alia*, on the RPR, rarely annul the detention order on these grounds (no case law reported, similarly for **France**).

On the other hand, **Czech and Bulgarian** courts, in spite of the absence of legislative provisions, have included the criterion of the RPR into their legality check of detention measures. The **Czech Supreme Administrative Court (SAC)**¹⁴⁶ highlighted the close links between the detention of a TCN and the possibility of carrying out her expulsion. The SAC rejected the position of the **Municipal Court in Prague**, according to which detention and administrative expulsion are two completely different acts with different conditions and with different provisions governing their adoption and application. The SAC held that it is necessary that authorities, when deciding about the detention of a TCN, must also consider whether the enforcement of administrative expulsion is at least possible. In contrast, **Czech administrative courts** usually do not consider whether the RPR exists or not. They tend to examine matters only if the existence of a reasonable prospect is sufficiently justified by the Police. According to an established administrative practice, all return decisions have a section written by the Ministry of Interior providing reasons for the possible return or reasons for *non-refoulement* of the TCN. Administrative courts usually endorse the reasons provided by the Police. On the other hand, the SAC carries out an indepth assessment of the reasons provided by the Police for the existence or persistence of RPR. In a judgment from April 2016, the **SAC** quashed the judgment of the first instance court approving the prolongation with 90 days of the detention ordered by the Police on account that the Police did not show that the removal was indeed possible and it did not specify where in Iraq the TCN should be safe, if returned.¹⁴⁷

¹⁴² REDIAL Polish Report on pre-removal detention, pp. 6-7.

¹⁴³ According to the REDIAL Finnish Report on pre-removal detention.

¹⁴⁴ The Belgian legislation provides for the RPR as a criterion for legality assessment, but courts reviewing the legality of the detention order usually assume that a reasonable prospect of removal exists. See the REDIAL Belgian Report on pre-removal detention.

¹⁴⁵ Brussels (Indict. Chamber), 13 May 2015.

¹⁴⁶ See judgment No. 1 As 12/2009-61 of 15 April 2009.

¹⁴⁷ Judgments No. 9 Azs 28/2016–31 or 9 Azs 2/2016–71, both dated 14 April 2016.

Most of the domestic legislation implementing RD expressly refer to the “reasonable prospect of removal” as a criteria for a legality assessment for both the initial detention order and the prolongation of detention. However, in **Bulgaria**, the legislation refers to the RPR as a grounds for the legality review of the detention only as regards the prolongation of detention.¹⁴⁸ Some Bulgarian courts extrapolate the scope of application of Art. 44(8) to the initial detention order on the basis of Art. 15 RD.¹⁴⁹ For example, in its judgment from 2 September 2013, the **Bulgarian Supreme Administrative Court** quashed the decision of the **Sofia City Administrative Court** that had invoked the test of the reasonable prospect of removal when reviewing the initial detention order.¹⁵⁰ The **Supreme Administrative Court** stated that the detention order had to be confirmed as the TCN was undocumented and had entered the country illegally. All of this, the court argued, indicated that there was a risk of absconding.¹⁵¹ It seems that while in the Czech Republic, it is the **Supreme Administrative Court** that inserted the RPR as a ground for the legality review of detention of irregular TCNs, in Bulgaria, the **ordinary administrative courts** are those promoting the RPR as a legality grounds.

As regards the intensity of the assessment regarding the possibility of removal, Advocate General Mazák in *Kadzoev* summarised the relevant standards to be applied in this regard:

*as is clear from the wording of Article 15(4) of the Return Directive, the existence of an abstract or theoretical possibility of removal, without any clear information on its timetabling or probability, cannot suffice in that regard. There must be a “reasonable”, in other words realistic, prospect of being able to carry out the removal of the person detained within a reasonable period.*¹⁵²

As evident from the previously cited dictum of the CJEU, the Court shares this view in that it requires the existence of “a real prospect” of removal.¹⁵³ Thus, it can be safely assumed that clear information on timetabling or the probability of the prospect of removal needs to be corroborated at least with the relevant statistics and previous experience in handling similar cases.¹⁵⁴ German courts seem to follow a close application of these CJEU rules, carrying out a strict assessment of the Aliens Authorities arguments as regards the existence of a prospect of removal.¹⁵⁵ The **courts of appeal in Germany** have frequently challenged a general assumption of a prospect of removal made by the Aliens Authorities if the latter have not provided specific facts on the different steps to be taken in order to carry out a deportation order and an assessment of the potential barriers to a removal.¹⁵⁶ According to the case-law of the **German Constitutional Court**, the prognosis has to be made by the judge on the basis of a sufficiently complete factual view of the case.¹⁵⁷ Similarly, the **German Federal Court of Justice** requires that the judicial decisions ordering or renewing detention must be

¹⁴⁸ See Art. 44(8) of the Law on Foreign Nationals; for details see the [REDIAL Bulgarian Report on pre-removal detention](#).

¹⁴⁹ Ibid.

¹⁵⁰ Case No.11595/2012.

¹⁵¹ Ibid.

¹⁵² View of A.G. Mazák, Case *Kadzoev*, para. 35.

¹⁵³ Case C-357 PPU, *Kadzoev*, para. 65.

¹⁵⁴ Cf. U. Drews, J. Fritsche, “Die aktuelle Rechtsprechung des BGH zur Sicherungshaft”, *NVwZ* 2011, p. 531, referring to the relevant case-law of the German Federal Court of Justice.

¹⁵⁵ This jurisprudence has perhaps developed following the express obligation provided in § 62(3) sentence 4 of the German Residence Act, which explicitly prescribes that initial pre-removal detention is not permissible if it is established that it will be impossible to carry out deportation within the next three months as a result of circumstances for which the third-country national is not responsible. See [CONTENTION Report on Germany](#), Q35.1.

¹⁵⁶ Ibid.

¹⁵⁷ Federal Constitutional Court, BVerfG of 27.2.2009, 2 BvR 538/07; Federal Constitutional Court, BVerfG of 15.12.2000, 2 BvR 347/00.

corroborated with specific information about the procedures and the time-frame within which particular measures can be taken under normal circumstances.¹⁵⁸

A good example of a national court establishing clear requirements that have to be fulfilled by the competent administrative authority's request for detention can be found in a judgment of the German Supreme Administrative Court (Judgment of 10/12/2014 – 1 C 11.14). The Court ruled that the detention request made by the authorities before a court must comprise explanations concerning:

- the obligation to leave the country;
- the conditions for removal or forcible return;
- the necessity of detention;
- the feasibility of deportation and the necessary period of detention;
- the prescribed reasoning of the detention request must be related to the specific case; empty formulas and text modules are not enough;
- with regard to the feasibility of the intended deportation, explanations are necessary with regard to the country to which the person concerned shall be deported. It is necessary to specify whether and in what timeframe returns to the relevant country are normally possible. Concrete information is needed on the unwinding of the process and an illustration must be given as to which period is normally needed to execute the individual steps for removal under normal conditions.

The refusal of cooperation on the part of the country of potential return will generally exclude the prospect of return unless an alternative country of return can be found. The same is true with regard to the lack of a readmission agreement unless there is a concrete likelihood that, even in the absence of a readmission agreement, a person may be returned. For instance, **a refusal on the side of the receiving state to grant someone travel documents, will usually render detention illegal: unless the authorities submit new evidence that the receiving state may now, on the basis of new documents, consent.** This last conclusion will be not automatic, however, since there always has to be a full assessment of all relevant facts (for the example, see the Regional Appeals Court of Munich, Decision of 17 May 2006, 34 Wx 025/06).¹⁵⁹

Previous experience in handling similar cases is relevant in **Austria**,¹⁶⁰ as well as in **Slovenia**, where the Administrative Court verifies the usual practice of the consular representation in a given case: *i.e.* how long does the process of obtaining the documents normally take; and whether there is a reasonable prospect that the TCN will obtain the documents within the next six months.¹⁶¹ Previous experiences and statistics are used in **Slovakia** too, provided that the issue is raised by the TCN concerned or his/her legal representative.¹⁶² Furthermore, as mentioned above, the **Dutch** Courts also pay attention to previous experience in dealing with the authorities of a given country of return. The **Council of State** requires specific information with regard to the probability of a successful removal within a certain period that must be corroborated with evidence.¹⁶³ However, the **Council** is quite easily convinced that the scarce evidence provided by the Minister justifies the conclusion that such a prospect still exists.¹⁶⁴ Even if the lack of collaboration with a given country led to no (or only a few)

¹⁵⁸ Bundesgerichtshof (Federal Court of Justice), 27.10.2011, V ZB 311/10.

¹⁵⁹ See more in the [REDIAL German Report on pre-removal detention](#), p. 9.

¹⁶⁰ See [CONTENTION Report on Austria Q35.1](#).

¹⁶¹ See Zagorc, [CONTENTION Country Report, Slovenia, Q35.1](#).

¹⁶² See Skamla, [CONTENTION Report on Slovakia, Q35.1](#) with reference to Košice Regional Court judgment 9Sp 33/2013.

¹⁶³ Cornelisse, [CONTENTION Report on Netherlands, Q35.1](#)

¹⁶⁴ *Ibid.*, with reference to Council of State, 13 May 2011, [201101548/1/V3](#).

expulsions in the past, the fact that negotiations are still ongoing (even if there are no obvious results) is sufficient for the Council of State to conclude that the RPR is not lacking.¹⁶⁵ Similarly, two recent successful removals to a given country, even though the country in question had not collaborated in the past, might justify the existence of a reasonable prospect of removal for the Council of State.¹⁶⁶ Such a stance might be attributable to the fact that unlike *Kadzoev*, where the CJEU seems to demand that “a reasonable prospect exists”, the case-law of the Council of State (only) requires that “a reasonable prospect is not lacking”.¹⁶⁷

On the other hand, the **Italian** courts **have changed their practice since the CONTENTION Report in 2014**. The Italian Aliens Law was amended at the end of 2014 to introduce, *inter alia*, a reference to a reasonable prospect of removal as a criteria for the legality assessment of both the initial order of detention and for the prolongation of detention (Law no. 161/2014). Following the entry into force of these amendments, Italian courts have started to make use of this provision. In this respect, reference can be made to **Supreme Court’s** decision **no. 19201/2015**, concerning the appeal against the validation of a pre-removal detention delivered by the competent justice of the peace of Rome.

The appellant (a Macedonian citizen) complained of the absolute lack of motivation on the issue raised by the defence at the hearing on the validation of detention: i.e. absence of reasonable prospects of removal pursuant to Article 15(4) RD, claiming that the concerned person was *de facto* stateless.

The **Italian Supreme Court (Corte di Cassazione)** considered the grounds invoked by the complainant as valid. It quashed the decision and condemned the administration to pay litigation costs. The criterion of reasonable prospect of removal was applied by the Supreme Court as a legality assessment for the first validation of detention (but not for its possible extension).

Another example of jurisdiction where the RPR is actually used as a concrete grounds for a legality review of detention order is **Lithuania**. With regard to the lack of cooperation from the embassy in issuing a return certificate for more than a year, the **Supreme Administrative Court of Lithuania** held that this cannot be a grounds to re-detain the foreigner (*case No. A-3078-822/2016, judgment of 23 February 2016*). Unlike the **Belgian** courts, the **Lithuanian** courts, especially the **Supreme Administrative Court of Lithuania**, carry out an in-depth assessment of the RPR in corroboration with the assessment of the due diligence obligation of the administration. The courts require documents to be available and if there is no prospect to get them in the near future, it considers detention unreasonable (e.g., *case No. A-3078-822/2016, judgment of 23 February 2016*); or when the absence of documents from the embassy is the only reason for extension of detention period, such an extension has been held to not be proportionate and necessary (*case No. A-3219-858/2015, judgment of 22 July 2015*). Similarly, the lack of cooperation on the part of the embassy of the country of origin is a relevant factor for assuming that there is no reasonable prospect of removal, according to the **Slovakian** courts (see *Supreme Court, judgment 9 Sp 33/2013*).

2. Legal or other considerations interpreted by the courts as making removal unlikely

Article 15(4) RD provides that the RPR can be assessed on the basis of “legal or other considerations”, without providing further details of these considerations. According to the ECtHR, any assessment of the realistic prospect of removal should be based on the following elements: *due diligence of the expelling country, financial resources at its disposal the conduct of a country of potential return and the conduct of the person concerned as well*.¹⁶⁸

¹⁶⁵ Ibid., with reference to Council of State, 6 August 2008, [200805059/1](#) and Council of State, 6 September 2013, [201306297/1/V3](#).

¹⁶⁶ Ibid., with reference to Council of State 24 June 2008, [200802518/1](#).

¹⁶⁷ Ibid., with reference to Council of State, 13 May 2011, [201101548/1/V3](#).

¹⁶⁸ *Mikolenko v. Estonia*, Appl. No. 10664/05, 8 October 2009.

Considerations commonly mentioned

- *Lack of due diligence*

The due diligence of the competent authorities of the returning Member State is usually assessed by national courts within the assessment of the lawfulness of the detention measure.

Interesting case law originated from **Czech administrative courts**, which require the Police to provide evidence of removal arrangements that go beyond formal acts (such as notices), showing that reasons for detention still persist (*Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39*). In this case, the Police made an inquiry regarding the expulsion of a Chinese national, but this inquiry took place only two months after his detention and the Police was not able to provide any further evidence regarding other steps taken in order to prepare the expulsion of this foreigner (*Judgment of the SAC of 2 November 2011, No. 1 As 119/2001-39, §§ 37-38*): such as contacting the embassy of the Chinese Republic, verifying his identity etc.¹⁶⁹

- *Lack of transport*

The lack of transport capacities has been taken into account by certain public administrations when considering the adoption of detention measures: for instance, the Police did not detain Syrian nationals due to the lack of flights to Syria.

Collected case-law does not indicate that the absence of general (human and material) resources at the disposal of the authorities (as was the case in *Alim v. Russia*), is a defining factor in the RPR assessment. At the same time, the absence of transport infrastructure or of the route of return can affect the prospect of removal in Austria, Germany and the Netherlands. In Germany, the unavailability of transport is assessed within the time-limits for detention. The provisional postponement of flights, meanwhile, due to fog or a strike, say, does not hinder detention so long as the flight will take place later.¹⁷⁰

- *Conduct of the country of potential return*: e.g. an embassy generally refuses 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 of third-countries' embassies, clear refusal to accept the person.

In **Austria**, for instance, the **High Administrative Court** generally requires from the administration clear indications, sufficient inquiries and reasoning that the country of return will issue a travel document. Otherwise detention is no longer justified.¹⁷¹ **German** courts also consider that in cases of a refusal by the country of potential return to issue a travel document, detention becomes unlawful: save if the Aliens Authority submits new evidence that the state of return may now consent.¹⁷² The **Lithuanian Supreme Court** requires identity or travel documents to be available and if there is no prospect of getting them in the near future, it considers detention unreasonable (e.g., *case No. A-3078-822/2016, judgment of 23 February 2016*). Likewise, if the absence of documents from the embassy is the only reason for an extension of the detention period, such an extension would not be proportionate and necessary (*No. A-3219-858/2015, judgment of 22 July 2015*).

On the other hand, certain national courts seem to be reluctant to find that there is no RPR based on past evidence of unsuccessful removals in certain countries (e.g. **Belgium, the Czech Republic, Netherlands**), even when there are clear refusals from embassies to identify an individual or issue travel documents (e.g. **the Czech Republic, Netherlands**).

¹⁶⁹ See the REDIAL Czech Report on pre-removal detention, p. 9.

¹⁷⁰ See CONTENTION Report on Germany, See Thym/Hailbronner, Q32.

¹⁷¹ Brandl, CONTENTION Country Report on Austria, Q32 with reference to VwGH 2010/21/0517, 28.8.2012.

¹⁷² See CONTENTION SYNTHESIS REPORT, p. 12.

A less stringent standard of proof is set in the **Netherlands**. The **Dutch Courts** consider that there is a reasonable prospect of removal, as long as the negotiations will possibly yield a result: except when negotiations have been ongoing for a prolonged period.¹⁷³ More specifically, according to Dutch case-law, there should be three pre-conditions to consider removal as being reasonably possible:

- the Dutch authorities request the country of potential return to issue a *laissez passer*;
- the authorities accept the request and promises to start investigations about the nationality of the TCN concerned, and;
- it has in the past issued *laissez-passers* (even if only one or two per year) or the Dutch authorities discuss (at a high level with the aim of concluding Memoranda of Understanding on Readmission) the general willingness of the third-country authorities to issue *laissez-passers*.¹⁷⁴

Recent interesting judicial assessment of the RPR requirement originated in the **Czech Supreme Administrative Court** (SAC). In a case concerning the return of an Iraqi national, the SAC dealt with the issue. They asked whether statistics that show that, in the past, there were no removals to Iraq are proof that removal will not be possible in the future. The Court stressed that just because no removals took place in the past, it does not automatically follow that no removals will take place in the future. The very fact that removals failed in the past should not mean that the Czech state should give up any future attempts at removal, and thus a RPR was held to still exist. (*Judgment No. 9 Azs 2/2016–71*)

In **Estonia**, the clear refusal of the third country to accept the TCN is considered as ending the prospect of removal justifying initial detention or the prolongation of detention.

- *Conduct of the TCN concerned*, especially if the TCN refuses the cooperation which is indispensable for the issuance of relevant documentation by the Member State of return (cf. ECtHR, Mikolenko).

In *Mikolenko*¹⁷⁵ the ECtHR clarified that the conduct of the TCN can have a direct impact on the realistic prospect of removal. It stated, then, that this willingness has to be considered in the assessment of the lawfulness of the detention. In particular, unwillingness to cooperate when such cooperation is indispensable for the execution of expulsion (e.g. when a country of return requires it in order to issue relevant documentation) can justify the conclusion that the realistic prospect of removal no longer exists.

According to the preliminary *Mahdi* ruling, the declaration of not returning voluntarily should not be interpreted as lack of cooperation. However, the legislation of certain Member States does not comply with this rule (e.g. **Bulgaria, Romania**).

The TCN's unwillingness to cooperate, which can translate into a refusal(s) to sign a declaration of voluntarily return or to present themselves before the consulate of the country of return, usually results in longer periods of detention. In cases where the country of origin does not issue travel documents to their nationals who are to be forcibly returned, the detainees might be required by the **Dutch** authorities to lie and say that they are returning voluntarily.¹⁷⁶ If they refuse to do so, instead of concluding that there is no reasonable prospect of removal, a longer period of detention is justified due to the obstructive conduct of the TCN concerned.¹⁷⁷ Similarly, in **Slovakia**, if the TCN concerned does

¹⁷³ See [CONTENTION Report on Netherlands](#), Cornelisse, Q32.

¹⁷⁴ See Council of State 6 August 2008, 200805059/1 and 24 June 2008, 200802518/1.

¹⁷⁵ *Mikolenko v. Estonia*, Appl. No. 10664/05, 8 October 2009.

¹⁷⁶ [CONTENTION Report on the Netherlands](#), Q32.

¹⁷⁷ *Ibid.*, with reference to Council of State, 4 September 2008, 200805361/1, and Council of State 23 April 2009, 200901771/1. According to Cornelisse, "in another case, the visit of the TCN to the authorities of the country of origin (Afghanistan) in order to get documents had been planned for a time more than 6 months after the detention had been

not cooperate and his or her cooperation is indispensable in securing the relevant documentation by the country of return, detention does not cease to be lawful.¹⁷⁸ The **German** courts have frequently decided that detention cannot be used in order to enforce cooperation.¹⁷⁹

Recently, the **Dutch Council of State** judged that forced return is not possible to Iraq, which means that a reasonable prospect of removal is lacking, and thus pre-removal detention is not lawful, *independently of the behaviour of the third-country national* (Council of State, Decision No. 201600363/1/V3).

- non-refoulement in a broad sense; best interests of the child; family life; the state of health of the third Member State national concerned¹⁸⁰ and individual considerations in accordance with Article 5 RD

Family life issues:

An important jurisprudential change occurred in 2010 in the **Czech Republic**: the **SAC** held that family life should be taken into consideration in detention decisions, and not only in relation to expulsion decisions. However, due to time constraints, the authorities do not have to conduct a full-fledged proportionality test at this stage (see in particular paras.27-31 of *Decision of the Grand Chamber No. 7 As 79/2010–150*).

Principle of non-refoulement:

Until 1 November 2016 (when Law 274/2016 will enter into force), if the detained TCN did not request the annulment of the return decision in **France**, he or she would be unable to invoke the situation in the country of origin in the framework of the review of the lawfulness of detention.

In the **Czech Republic** the Ministry of Interior issues a binding opinion of whether the TCN's return is possible, which also includes reasons on threats to life and/or the health of the TCN. National courts were usually satisfied with whether the binding opinion of the Ministry of the Interior provides that there are no reasons preventing the departure of the TCN concerned. Recently, however, this position was remedied by the Supreme Court. The **SAC** quashed both the judgment of the regional court and the decision of the Police to extend detention. The case concerned an Iraqi national, who did not ask for asylum. The Police prolonged the decision to detain him for an additional ninety days. The SAC criticized the Police that it did not justify in detail that removal is indeed possible and that it did not specify where in Iraq the TCN could be safe. Then the SAC stressed that if TCN does not ask for asylum the proceedings to remove him or her are virtually the only possibility where the principle of *non-refoulement* can be assessed. (*No. 9 Azs 28/2016–31 or 9 Azs 2/2016–71, both dated 14 April 2016*)

(Contd.)

ordered. The Council of State considered that a reasonable prospect of removal in this case did not cease to exist, because the TCN could have requested to reschedule the meeting at an earlier date – which could have made a difference. This, in addition to the fact that the TCN concerned did not cooperate at all in the removal process, meant that a longer period spent in detention was to be blamed on the TCN, and that it could not be said that a reasonable prospect of removal had ceased to exist (Council of State, 20 February 2012, 201112568/1/V3.”

¹⁷⁸ See [CONTENTION Country Report – Slovakia](#), Q32 with reference to Supreme Court judgment 10 Sza 1/2012.

¹⁷⁹ See [German REDIAL country Report on pre-removal detention](#), p. 9.

¹⁸⁰ Czech legislation provides an interesting case for prohibition of detention in cases of hospitalization: As regards the health issues, note that the Art. 126b(2) ALA provides that if a TCN is in such a state of health that they have to stay in hospital longer than the remaining period until 180 days (or a lower number of days stipulated in detention decision), he or she must be released; this provision does not apply if a TCN intentionally caused harm to themselves with the intention of evading detention [Art. 126b(3) ALA]. One can thus infer that if a TCN is hospitalized before being detained, detention is not possible because a reasonable prospect of removal would be missing (however, there is no case law that would confirm this position so far). For more details, see the [Czech REDIAL National Report on the pre-removal detention](#).

Other considerations

- *Statelessness of the irregular migrant*: following an amendment of the Italian Aliens Law at the end of 2015, the Italian supreme court expressly required the judiciary to use RPR as a criterion for any legality assessment of the pre-removal detention of TCNs ([decision no. 19201/2015](#))¹⁸¹

According to Article 15(4) as soon as the authorities realise that there is no realistic prospect of removal, they have to release the person concerned immediately and not detain him or her any longer.

Paragraph 5 – Duration of the initial detention period

The Return Directive is the first supranational legal instrument expressly prohibiting indefinite pre-removal detention, and establishing a concrete time period for detention: an initial six months period, and exceptionally it can be prolonged to a maximum of eighteen months. In spite of the added value of ensuring the clarity of the maximum time period of detention, the Return Directive has also led to an increase in the maximum time limit of detention. For instance, eleven Member States applied the maximum time limit of detention of 18 months and ten Member States extended the maximum legal time limits of detention in comparison with legislation in place before the transposition of the Return Directive.¹⁸² The initial period of detention is, however, usually ordered for a period shorter than six months. On the other hand, the standard “as short as possible” is not explicitly mentioned in all Member States’ legislation (e.g. the **Czech Republic**), and it is also not explicitly applied by the competent administrative authorities.

1. Influence of asylum detention on the calculation of the pre-removal detention

As highlighted by the CJEU in *Kadzoev* and *Arslan*, when a TCN applies for asylum from pre-removal detention, the detention no longer falls under the scope of the Return Directive. Rather it is regulated under the *Reception Conditions and Asylum Procedures Directives*.¹⁸³ As a result, the period when asylum proceedings are pending should not be taken into account when calculating the maximum length of detention. However, if, despite the application for asylum, the TCN concerned is kept in detention based on the previous removal detention order, the period during which asylum proceedings are pending will have to be taken into account when calculating the period of pre-removal detention: this at least according to Article 15(5) and (6) RD.¹⁸⁴ In line with this reasoning, in its final judgment in the *Arslan* main proceedings, the **Czech Supreme Administrative Court** decided that the period of detention under the Asylum Act had to be taken into account when calculating the maximum length of detention under the Aliens Act.¹⁸⁵ Moreover, according to the Court, after the expiration of the maximum detention period under the Asylum Act, the TCN concerned could not be re-detained again under the Aliens Act.¹⁸⁶

In the follow-up procedure in the *Arslan* case before the SAC, the SAC held that detention under ASA counts towards the maximum length of detention stipulated by ALA. Moreover, if the maximum

¹⁸¹ This approach is in line with the ECtHR judgment in *Tabesh v. Greece*, Appl. No 8256/07, 26 November 2009, § 62. It is also in line with *FRA Report, Detention of third-country nationals in return procedures*, 2010.

¹⁸² See [PICUM Position Paper on the Return Directive](#), April 2015.

¹⁸³ Case C-357/09 PPU, *Kadzoev*, para. 41 et seq., Case C-534/11, *Arslan*, judgement of 30 May 2013, paras. 52 et seq.

¹⁸⁴ Case C-357/09 PPU, *Kadzoev*, § 47.

¹⁸⁵ Kosar, Q69.1 with reference to Judgment of the SAC of 02.04.2014, No. 6 As 146/2013 – 44.

¹⁸⁶ *Ibid.*, with reference to Judgment of the SAC of 02.04.2014, No. 6 As 146/2013 – 44.

detention limit under ASA expires, the TCN who lodged an application for international protection cannot be re-detained again under ALA.¹⁸⁷

As of 18 December 2015, legislative amendments were introduced into the relevant legislation.¹⁸⁸ As a result of this amendment, the period of detention adopted under the asylum proceedings are not taken into account in the pre-removal detention period, at least if the latter was adopted subsequently to asylum detention. Similarly, Art. 46a ASA provides that if the decision on detention of asylum seeker is adopted after detention under ALA was terminated, the period of detention under ALA shall be disregarded. According to the explanatory memorandum to Law No. 314/2015, these changes reflect CJEU's judgment in *Kadzoev*.

2. Important changes since the CONTENTION Report

- A recent amendment to **French** legislation¹⁸⁹ provides for the shortening of the initial period of detention from five days to 48 hours, though the total period for detention has remained the same.
- The opinion of **Greek State Legal Council** (no 44/2014) that accepted the legality of “indefinite detention” beyond the eighteen month maximum time-limit until the TCN cooperates for his or her “voluntary repatriation”, is no longer applied by Greek authorities and Greek courts.
- A more careful judicial assessment seems to have been carried out in Greece in relation to new return decision and detention orders issued after the expiry of the maximum of the eighteen months period of initial pre-removal detention. For instance, the **Administrative Court of first Instance of Corinth** took into account that the applicant's detention lasted eighteen months, surpassing the maximum permissible time limit without his removal taking place. It concluded that the renewed detention of the TCN in execution of a new return decision, based on the same grounds, without any change to the facts, and without indication of considering the absolute feasibility of his immediate removal from the country, would be unlawful. It, therefore, ordered the lifting of his detention.¹⁹⁰

After the end of the maximum period of detention, in certain Member States it is still possible to order the TCN to respect other alternative measures such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place. (e.g. **Sweden**)

¹⁸⁷ See Judgment of the SAC of 02.04.2014, No. 6 As 146/2013–44.

¹⁸⁸ ALA and ASA were amended by Law No. 314/2015.

¹⁸⁹ Law 274/7.03.2016.

¹⁹⁰ [Greek REDIAL country Report on pre-removal detention](#), p. 5.

Paragraph 6 – Prolongation of detention

Article 15(6) RD provides that the extension of detention beyond a six-month period is possible for a further twelve months only if despite all the reasonable efforts of the Member State concerned, the removal operation is likely to last longer owing to:

- a) a lack of cooperation by the third-country national concerned, or
- b) delays in obtaining the necessary documentation from third countries.

More detailed rules on Article 15(6) RD requirements were developed by the CJEU in *Mahdi*,¹⁹¹ when reviewing the extension of detention beyond the 6-month period, the detention judge must:

- verify whether there is still a **reasonable prospect of removal** (para. 59);
- **re-examine** the substantive conditions of initial detention according to **Article 15(1) RD**, i.e. that there is still a risk of absconding or that the TCN concerned is still avoiding or hampering the return procedures (para. 61, 69);
- after an in-depth examination of the facts specific to each individual case, be able, where the detention is no longer justified in the light of Article 15(1) requirements, to substitute its own decision for that of the competent administrative or judicial authority and order either alternatives to detention or release from detention (para. 62);
- **not limit him/herself to the matters adduced by the administrative authority** concerned and consider any other elements that are relevant for his decision (paras. 62-64);
- **not extend** detention **based solely on the lack of identity documents**, since this is not provided by Article 15(6) as a ground for prolongation, while the lack of documents can be one of the factors indicating a risk of absconding according to Art. 15(1) RD. It cannot, however, be the sole one (paras. 66-74);
- if the prolongation is based on Article 15(6)(a) ground then, a **causal link** between the **conduct of the TCN concerned** and the fact that **the removal operation takes longer must be established**; whereas if the removal operation lasts longer for other reasons and there is no causal link, the prolongation of detention cannot be justified on the basis of a lack of cooperation in the sense of Art. 15(6)(a) (para. 82);
- if prolongation of detention is based on Article 15(6)(b) then the judge has to establish that the removal operation is lasting longer than anticipated despite **all reasonable efforts on the part of the administration** and that the administration had actively sought to secure identity documents for the TCN concerned (para. 83).

This last legality requirement has also been pronounced by the ECtHR, according to which **the lack of cooperation** by the TCN concerned does not release competent authorities of the returning state from their obligation to pursue return proceedings with **due diligence**, and, if the competent authorities do not fulfill the **due diligence criteria**, they will not be able to rely on this criterion to justify the extension of detention.¹⁹²

¹⁹¹ ECLI:EU:C:2014:1320.

¹⁹² *Djalti v. Bulgarie*, Appl. No. 31206/05, 12 mars 2013, § 53.

1. Grounds for prolongation of detention

In spite of Article 15(6) RD clearly provides **two exhaustive grounds for the prolongation of detention**,¹⁹³ and the CJEU unequivocally rejecting additional criteria as grounds for the extension of detention,¹⁹⁴ national legislation or judicial practices still allow for additional grounds of prolongation of detention. For instance, **Belgian** law provides that in case of national security or public order considerations, detention can be extended beyond the maximum initial period on a monthly basis.

In spite of the clear prohibition on the renewal of detention based solely on the grounds that the TCN has no identity document (*Mahdi*), **Bulgarian** law¹⁹⁵ has not been amended to reflect the jurisprudence of the CJEU. It still provides, as a separate (autonomous) ground of detention, the fact that the personal identity of the TCN is unknown. Additionally, national case law continued to be contradictory in this regard.¹⁹⁶ However, the follow-up judgment to the *Mahdi* case closely followed the rules set out by the CJEU and can be seen as a useful best practice example. The **Sofia Administrative Court** did not approve the extension of detention beyond the initial six month-period and instead ordered an alternative measure to detention, namely weekly reporting.¹⁹⁷ The Court considered the conduct of the TCN: he had cooperated with the authorities with regard to the disclosure of his identity and the removal process but had withdrawn the statement that he would return voluntarily, which was a pre-condition for the embassy to issue a travel document.¹⁹⁸ It looked, too, at the actions needed to be taken for the enforcement of the removal. Taking these two into account it decided that there was no further reasonable need for detention.¹⁹⁹ The Court also stated that the administration did not provide any information on specific actions which it intended to take and which required the presence of the TCN concerned.²⁰⁰

According to *Rheinmühlen*, national courts are bound to apply the preliminary rulings. According to the *Simmenthal* doctrine,²⁰¹ national courts are obliged to disapply any conflicting provisions of national law.²⁰² This is only necessary if the consistent interpretation of internal law proves impossible.²⁰³ EU law obliges judges to look for the “consistent interpretation” of domestic law that does not contravene EU law.²⁰⁴ When this kind of interpretation is not possible and when the EU norm satisfies the requirements for direct effect (i.e., it creates an obligation that is clear, precise and unconditional), the judge must set aside the domestic norm and apply the EU one instead, in order to ensure its efficacy.

¹⁹³ A lack of cooperation by the third-country national concerned or delays in obtaining the necessary documentation from third countries.

¹⁹⁴ In *Mahdi* (para. 73), the CJEU has unequivocally held that the fact that the third-country national concerned has no identity documents cannot, on its own, be grounds for extending detention under Article 15(6) of Directive 2008/115.

¹⁹⁵ Article 44, Para.6 of the Law on Foreign Nationals in the Republic of Bulgaria.

¹⁹⁶ See the [REDIAL Bulgarian Report on pre-removal detention](#), p. 4.

¹⁹⁷ *Ibid.*

¹⁹⁸ See *Mahdi*, para. 81.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.* With regard to the “due diligence” criterion applied in the context of extension of initial detention see above.

²⁰¹ Case C-106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, para. 22.

²⁰² A more updated judgment of the CJEU restating the disapplication obligation in case of conflict between domestic provisions and rights guaranteed by the Charter can be found in Case C-617/10, *Åkerberg Fransson*, para. 45: “As regards, next, the conclusions to be drawn by a national court from a conflict between provisions of domestic law and rights guaranteed by the Charter, it is settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means.”

²⁰³ Case C-282/10, *Dominguez*, judgment of 24 January 2012, para. 23.

²⁰⁴ Joined Cases C-397/01 to C-403/01, *Pfeiffer and Others*, judgment of 5 October 2004, par. 27.

Article 15(6)(a) RD is held as legitimate grounds for the prolongation of detention even in cases of aggressive or disruptive behaviour on the part of the TCN, who makes his/her removal difficult and thus requires the booking of a special flight.²⁰⁵ (*Dutch Council of State practice*)

Article 15(6)(b) RD has not been transposed by all member States. For instance, the **Czech Republic** considered that prolongation of detention based on these ground would constitute an unnecessary limitation on the TCN's right to liberty, given the very few cases in the country. When administrative authorities requested the prolongation of detention beyond 180 days due to the Vietnamese authorities refusing to cooperate with the Czech Police and did not issue the travel document to the TCN concerned, the SAC eventually quashed the decision of the Police. They did so on the grounds that the police had detained the TCN pursuant to grounds not provided by Czech legislation.²⁰⁶ The fact that the TCN concerned had given untrue information about his identity was secondary (as his identity was already known, when the request was made to the Vietnamese authorities). (see in particular Judgment of the SAC of 31.08.2012, [No. 8 As 67/2012-54](#), §§ 39-43).

The CJEU clarified in *Mahdi*, that Article 15(6) RD (b) can be legitimate grounds for the prolongation of detention only if the administration carried out its activity diligently. This criterion is not always respected in the practice of the Member States. Prolongation of detention is often the result of a lack of a reply from the embassies of the states of return, though the public authorities of the returning state had also contributed, to a certain extent, to the delay. For instance the **Romanian Court of Appeal of Timisoara** confirmed the prolongation of detention, without considering alternative measures, though the administration began enquiries only four months after the start of the detention measure. (*case 931/06.03.2013*)

The positive impact of the Mahdi preliminary ruling was reported from the **Netherlands**. As mentioned by the **Dutch REDIAL Report**, the *Mahdi* judgement has brought about significant changes with regard to the requirement that the order for extension of detention has to give clear reasons for the extension, conforming to paragraph 6 of Article 15, and address the elements of lawful detention as laid down by paragraphs 1 and 4 of Article 15.

The two grounds of prolongation are usually interrelated (e.g., *Administrative Court of Sofia, cases No.12187/2013, 4514/2013, 6950/2013 and No.7928/2013*²⁰⁷)

Furthermore the judicial courts rarely exercise an assessment of whether the circumstances of Article 15 (1) continue to exist, except for cases, in which the TCN has changed administrative status from an irregular migrant to an asylum seeker.

As regards the duration of the maximum prolongation of pre-removal detention, a positive legislative change originated from Estonia. Following the *Mikolenko* case, **Estonian** legislation was amended so as to provide expressly the maximum period of pre-removal detention. *In another case (No. A-3078-822/2016, judgment of 23 February 2016, concerning repeated detention of the person beyond the maximum of eighteen months allowed by the Directive following his release) the same Court applied Article 41 of the EU Charter. It considered that the circumstance that documents from the embassy of the person are not received for more than a year may not be a basis for repeated detention of the foreigner upon expiration of the maximum of the eighteen months period.*

²⁰⁵ See the [Dutch CONTENTION Report](#), Q72, with reference to Council of State 29 April 2008, ECLI:NL:RVS:2008:BD1541.

²⁰⁶ Only Art. 15(6)(a) RD was transposed, even though the factual situation fell within Art. 15(6)(b) RD [it was the Vietnamese authorities that were the reason for the impossibility to expel the TCN concerned], which was not transposed by the Czech Republic.

²⁰⁷ See commentary of this case in the [REDIAL Greek Report on pre-removal detention](#).

2. Re-detention

If the detention measure ended for various reasons, such as: there is no RPR; the detention was not lawful, the maximum time period elapsed, re-detention is possible in the Member States when either **new grounds** for detention are invoked or when the **facts and circumstances** which were present for unlawful detention **have changed**.²⁰⁸

In the **Czech Republic** it used to be possible to issue a new decision on detention within three days from the date of the annulling judgment of the administrative court. This subsequent re-detention was found to be inconsistent with Art. 15(2) RD and inapplicable.²⁰⁹ The Czech legislature eventually abolished this re-detention system.

Re-detention on the basis of previous return/removal decision(s)

The **German** case-law provides an interesting example for the calculation of the period of re-detention. If a new detention is part of the same removal proceedings as the previous one, the time spent in the previous detention is taken into account when calculating the maximum length of the new detention, unless there is a long time gap (of several years) between the two detention orders.²¹⁰

In **France**, new detention orders based on a removal order issued a year before, were held to be lawful if an entry ban for two years, which was still pending, was issued at the same time. (*CAA Douai, 20 février 2014, req. n° 13DA01703*).

A landmark judgment on the possibility of re-detaining on the basis of the same reasons as for the first pre-removal detention was delivered by the **Spanish Supreme Court**. In a judgment on appeal against the Royal Decree 162/2014,²¹¹ the applicant requested the Supreme Court to declare the illegality of several articles of Royal Decree 162/2014. Among others, Article 21.3 of Royal Decree 162/2014, ruling the possibility of a new internment based on the same reasons as for the first internment. The Supreme Court held that once a pre-removal detention based on particular reasons for a period of less than 60 days was adopted, a new decision on internment cannot be adopted on the basis of the same reasons (to fulfill the maximum period of 60 days). The Supreme Court decided that the provisions should be amended as follows: “a new internment is only possible (to reach the maximum of 60 days) if it obeys to different causes.”²¹² Currently this paragraph has been introduced at Article 62, 2 of Immigration Act 4/2000.

Re-detention after the expiry of the maximum time limit of detention

Concerning **re-detention after the expiration of the maximum length of detention**, this option seems to be possible in most Member States. The reasons for such re-detention differ, however, from state to state. In **Germany** – as mentioned above – the launch of a new removal procedure or a long time gap²¹³ between two detention orders are preconditions for re-detention. In **Austria**, meanwhile, it is sufficient to invoke a new reason or changed circumstances (however, not new legal grounds).²¹⁴

²⁰⁸ See, for instance, [Austrian CONTENTION Report](#), Q79.1.

²⁰⁹ See SAC of 01.11.2012, [No. 9 As 111/2012–34](#). This judgment was also heavily influenced by the ECtHR’s judgment in *Buishvili v. the Czech Republic*, Judgment of 25. 10. 2012, Appl. No. 30241/11.

²¹⁰ See the [German CONTENTION Report](#), Q80 with reference to Bundesgerichtshof, Decision of 13.2.2012, V ZB 46/12.

²¹¹ Royal Decree 162/2014 of 14 March on operating rules on the functioning of Immigration Centers of Internment is approved (CIES Regulation) (published in RCL 2014, 395).

²¹² Translation provided by the REDIAL national academic, Cristina J. Gortázar Rotaeché.

²¹³ Lapse of time is also important in the NL; see [Dutch CONTENTION Report](#), Q80.1.

²¹⁴ [Austrian CONTENTION Report](#), Q80.1.

This does not seem to be the case in **Bulgaria**,²¹⁵ **Belgium**²¹⁶ and **France**. The case of **France** is particularly interesting as the relevant legal framework, namely Art. L.551-1(8), provides explicitly for the possibility of re-detention based on the same removal decision if the TCN concerned does not leave French territory within seven days after his/her release or if he/she comes back to France and the expulsion measure is still enforceable.²¹⁷ Despite the fact that the **French Constitutional Council** has limited its application to a single re-detention²¹⁸ and the Courts seem to largely observe that limitation,²¹⁹ there are still cases in which judges do not follow the Constitutional Council's interpretation.²²⁰

The **Lithuanian Supreme Administrative Court** ruled that re-detention after the expiry of eighteen months of detention cannot be based on the same grounds as for the initial detention measure (lack of identity and travel documents), especially when the lack of documents was not incumbent upon the TCN, but depended on the country issuing said documents. The Court referred to its case-law, pointing out that a detention grounds – the necessity of establishing or checking the true identity of a TCN – may be used by authorities only for a certain period of time. In that period the authorities have the obligation to take all necessary steps in order to establish the true identity of the TCN. Thus, the fact that the Lithuanian authorities did not receive an answer to their request from the embassy of the country of origin regarding the identity of the applicant for more than one year could not serve as a sufficient basis for a further detention. For those reasons the decision of the first instance court was overturned and the application of the Migration Office for the applicant's detention rejected. (*case A-3078-822/2016*)

²¹⁵ [Bulgarian CONTENTION Report](#), Q80.1.

²¹⁶ [Belgian CONTENTION Report](#), Q80.1. In practice re-detention occurs only when the TCN refuses to board the plane. The Court of cassation considers that in this case the detention order is a new measure, not extending the initial detention order (Cass., 21 August 2012, P.12.1394.F).

²¹⁷ [French CONTENTION Report](#), Q80.1.

²¹⁸ *Ibid.*, with reference to Cons. Const., décision n° 97-389 DC, 22 avril 97 point 52.

²¹⁹ *Ibid.*, with reference to Cass. Civ. 2ème 12 octobre 2000 n°99-50056; Cass. Civ. 1ère 20 mai 2009, n°08-14638.

²²⁰ *Ibid.*, with reference to CA Douai, ord., 26 janv. 2008, n° 08/00033; ord., 23 févr. 2008, n° 08/00062; CA Rouen, ord., 21 sept. 2009, n° 09/04280.

Article 16 RD – Places and conditions

Besides the above lawful grounds and modalities, the Return Directive requires that detention for the purpose of removal takes place, as a rule, in “specialised detention facilities”. This is without prejudice to prior police custody for identification purposes which is covered by national law.²²¹ However, already at this stage, EU Member States are strongly encouraged to make sure that irregular migrants are granted some safeguards in order to prevent the objective of the Directive from being undermined: national authorities should keep TCNs separate from ordinary prisoners and people convicted of crimes. Deprivation of liberty should be carried out with diligence, be limited to a brief and reasonable period of time, to take up a position without delay on the legality or otherwise of the stay of the person concerned.²²² Once the return decision is issued and detention is used for carrying out the removal process, this obligation of separation from prisoners persists in the exceptional cases where Member States are constrained to resort to prison accommodation.²²³ Besides the place of detention, the Return Directive also provides for a certain number of safeguards with regard to the detention conditions: para. 2 to 5 enumerate the rights of the detainee (information, health care, contacts and visits), as well as the possibility for external bodies and organisations to access and visit the detention facilities.

Paragraph 1 – Use of specialised detention facilities and separation from prisoners

1. Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.

The underlying idea of this requirement is that returnees, though staying irregularly in EU Member States, are not criminals and they do not deserve to be treated like ordinary prisoners.²²⁴ Member States are, therefore, required to provide sufficient places available in “specialised detention facilities” in order to tackle foreseeable irregular migration challenges in a specific way.

In all the countries studied, the law explicitly provides for specific facilities and premises tailored for TCNs subject to return and expulsion procedures: **Austria, Belgium, Bulgaria, Cyprus,**²²⁵ **Czech Republic, Estonia, Greece, France, Germany,**²²⁶ **Hungary, Italy, Lithuania, Finland, Poland, Sweden, Slovenia, Slovakia.**²²⁷ The infrastructures provided by Member States vary greatly across the EU. In **SI**, the Aliens Centre of *Postojna* has an official capacity of between 180 and 246 people. The six Centres for identification and expulsions (CIEs) have, in **Italy**, 720 places available. **Belgium**

²²¹ See also Recital 17 of the Return Directive.

²²² See EC, *Return Handbook*, C (2015) 6250 final, p. 89.

²²³ CJEU, *El Dridi*, C-61/11 PPU, para. 40.

²²⁴ Even if authorities are not precluded by EU law from detaining in prisons foreigners who committed a criminal offence, including in the preparation and carrying out the removal process, the same does not apply when the prison sentence comes to an end: from that moment, as the person should normally be released, rules for detention for the purpose of removal, in accordance with Article 15 RD, start applying. See EC, *Return Handbook*, 2015.

²²⁵ Before, returnees were detained, along with other TCNs in a special wing of the central prison, as well as in detention cells in police stations. In February 2013, a detention centre was opened up in the rural area of Menoyia in order to exclusively host returnees.

²²⁶ See German “Bundesgerichtshof” (Federal High Court): BGH, judgment of 12 February 2015, V ZB 185/14; judgment of 29 October 2010, 5 ZB 233/10).

²²⁷ In Slovakia, foreign nationals are detained in specific facilities depending on their legal status (governed by the Act on Residence of foreigners) though these centres are not explicitly established by law.

counts five specific detention facilities that can accommodate, in theory, up to 452 people. The three facilities for the detention of TCNs in the **Czech Republic** have a capacity of around 1000 places. In **Finland**, the two detention facilities can accommodate up to 70 individuals.²²⁸

As mentioned above, the general rule foreseen by the Directive to use specific centres or facilities can be derogated in exceptional circumstances: “*where a Member State cannot provide accommodation in such specialised detention facilities*”, resorting to prison accommodation might be an option. However, the CJEU interprets this derogation strictly. When making use of this possibility, due consideration must always be given to the fundamental rights and wellbeing of the returnee.²²⁹ Among admissible circumstances, “unpredictable peaks in the number of detainees” might lead to the exceptional use of prison facilities. The CJEU ruled, however, that the absence of special detention facilities in a regional part of a Member State is not, in itself, a sufficient justification for the detention of aliens in an ordinary prison.²³⁰ Similarly, neither the aggressive conduct of a detainee, nor the short duration of detention orders are likely to justify the use of prison accommodation instead of the specific detention facility.²³¹

- In **France**,²³² **Belgium, Italy, Spain and Poland**, making use of this kind of possibility is not permitted. In other countries, exceptional circumstances may lead to immigrants being detained in police custody (**Finland**) or in prisons (**Cyprus, Greece**) instead of the specific detention facilities provided by law.
- In **Estonia**, detaining TCNs in ordinary prisons is prohibited but the use of “prison hospitals” » is allowed: here sick foreigners are held together with ill prisoners.
- In the **Czech Republic**, only foreign nationals to be expelled as the result of a criminal law sanction are placed in an expulsion custody.²³³
- In **Cyprus**, only TCNs convicted for the offence of being “prohibited immigrants” (Art. 6 of the Immigration law) serve their sentence in prison together with ordinary prisoners. This includes, persons who have been deported from Cyprus; whose entry in the Republic is prohibited by virtue of any legislation in force; or people considered as illegal immigrants by virtue of the provisions of the immigration law.²³⁴
- In **Sweden**, though returnees are in principle held in special premises, some of them can be held in detention either in a correctional institution, a remand centre or in a police arrest facilities, if: 1) the person is expelled due to a criminal offence; 2) the alien is held in isolation but cannot, for security grounds, be kept in social premises; 3) when particular and exceptional grounds might be invoked.
- Pursuant to **Lithuanian** law, foreign nationals are held in “foreigners’ registration centres (FRCs)”. In practice, however, few of them have already been placed in regular prisons.²³⁵

²²⁸ One in Helsinki, the other in the Eastern part of the country.

²²⁹ See EC, Return Handbook and CJEU, *Bero* (C-473/13) and *Bouzalmate* (C- 514/13), EU:C:2014:2095. Having notably regard to “*overcrowding; the need to avoid repeated transfers and possible detrimental effects on the returnee’s wellbeing, particularly in the case of vulnerable persons etc.*”.

²³⁰ CJEU, *Bero*, C-473/1, and *Bouzalmate*, C-514/13, para 32.

²³¹ EC, Return Handbook.

²³² Article L. 553-1, al. 1^o of the French CESEDA prevents from detaining returnees in premises controlled by the penitentiary administration.

²³³ If there is a risk of absconding or hampering the expulsion. In that case, foreign nationals are held together with Czech citizens accused of having committed criminal offences and other people serving a prison term.

²³⁴ Cyprus, Aliens and Immigration Law (*Ο περί Αλλοδαπών και Μετανάστευσης Νόμος*) Cap 105, Article 6(1)(m), available at http://www.cylaw.org/nomoi/enop/non-ind/0_105/index.html.

²³⁵ See REDIAL Lithuanian Report on pre-removal detention.

Nevertheless, in practice, the formal boundaries between detention centres (of an administrative nature) and prison accomodation are not always clear.

- In **Lithuania**, for instance, illegally staying TCNs and asylum-seekers subject to a detention measures are held in the same closed area of the FRC. The building contains a dormitory, which is guarded and locked; movements of people are highly restricted, staff wear uniforms and carry arms, mobile phones are forbidden and disciplinary measures can be imposed for non-compliance with the Centre's internal rules.
- The same “criminal dimension” is in evidence in **Spanish** facilities: irregularly-staying TCNs are held together with categories of aliens who: 1) either participated in activities seriously harming Spanish national security, public order and policy; or 2) encouraged, promoted or facilitated with profit the entrance of illegal immigration into Spanish territory; or 3) aliens convicted, inside or outside Spain, with offences punishable by imprisonment of more than one year.
- Finally, in **Belgium, the Czech Republic** some of the “centres fermés”, before being restructured used to be penitential centres and were built for this purpose.²³⁶

Even when detention takes place in ordinary prisons, Directive 2008/115 provides for an unconditional obligation to keep illegally staying TCNs separate from ordinary prisoners,²³⁷ regardless of the returnee's explicit consent.²³⁸ While in **Sweden**, TCNs detained in correctional institutions are kept separated from ordinary prisoners, TCNs who are exceptionally detained in “police detention facilities” in **Finland** are, meanwhile, held on the same premises as prisoners, but in different cells.

Paragraphs 2 to 5 – Concrete conditions and material safeguards

The Return Directive itself provides for a number of concrete safeguards. Member States are obliged:

- to provide emergency health care and essential treatment of illnesses.
- to pay attention to the situation of vulnerable persons, which also implies ensuring, more generally, due consideration of elements such as the age, the disability, the health and mental health conditions of the persons concerned;
- to provide detainees with information which explains the rules applied in the facility and sets out their rights and obligations. It is recommended that this information should be given as soon as possible and not later than 24 hours after arrival;
- to allow detainees to establish contact with legal representatives, family members and competent consular authorities;
- to provide relevant and competent national, international and non-governmental organisations and bodies the possibility of visiting detention facilities. This right must be granted directly to the concerned bodies, independently of a concrete invitation from the detainee.

Those issues are expressly regulated by the Return Directive. Member States are required to ensure a certain number of concrete safeguards to the detained TCNs. The competent authorities must pay particular attention to the situation of vulnerable persons and to foreigners in need of medical care and assistance (Article 16(3)); provide the detainees with systematic information about their rights and

²³⁶ E.g. the facility for the detention of foreigners in *Drahonice* (CZ) is a former prison. The building remained virtually unchanged (e.g. iron bars, cells etc.): building appears, then, to be a prison.

²³⁷ In line with the Guideline 10, § 4 (20 Guidelines Forced Return, CoE, 2005), the notion “ordinary prisoners” covers both convicted prisoners and prisoners on remand.

²³⁸ CJEU, *Pham*, C-474/13, para. 21-22.

obligations; as well as the list of authorised bodies and organisations that can be contacted.²³⁹ They must enable the TCN, who requests it, to establish, in due time, contact with legal representatives, family members and competent consular authorities (Article 16(2)). Finally, in addition to the safeguards provided by the Directive, Member States must comply with relevant Council of Europe’s standards regulating the “conditions of detention pending removal”.²⁴⁰ As recalled in Recital 17 of the Directive, third-country nationals held in detention should be treated “in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law”.²⁴¹

Most of these safeguards have been transposed in Member States’ legislation.²⁴² In **Bulgaria**, the material detention conditions are provided in an *Ordinance* adopted by the Minister of Interior. On 7 January 2016, the **Supreme Administrative Court** declared unlawful and contrary to the Constitution the provisions on solitary confinement. This issue should have been, the Court said, regulated by the Law after approval from Parliament.²⁴³

Examples of legal standards guaranteed in some EU Member States are listed in the table annexed to the present report.

In addition, the legislation of several Member States provide further requirements or indications regarding: the size and the equipment of the rooms and common spaces (**France, Slovenia, Czech Republic, Hungary**); hygiene and nutrition (**Belgium, France**); free linguistic assistance to detainees (**France, Spain**); limited access to outdoor areas (**Slovenia, Czech Republic**); restricted access to visitors (**Finland, Czech Republic**); access to cultural goods and the regulated reception of external packages (money, food, personal items) (**Czech Republic**).

Overall, deficiencies and problems resulting from the conditions in detention facilities are mainly pointed out by independent monitoring authorities.²⁴⁴ These include the Parliamentary Ombudsman (**Lithuania**); the Ombudsman office in **Czech** or in **Cyprus**; the Commissioner for Fundamental Rights (**Hungary**); or the extraordinary Commission of the Senate in **Italy**. In **Austria**, complaints can even be lodged to the “commander” of the detention facility, but this does not amount to a legal remedy. Promiscuity and heterogeneity are frequently denounced (as causing tensions and conflicts between persons coming from different places and detained for different purposes); difficulties in accessing health care and legal assistance seem to be a wide-spread concern: e.g. the **Czech Republic, Cyprus, Italy, Belgium, and Hungary**. The “prison-like” environment in the facility – reinforced by uniformed staffs, violence, police dogs, isolated cells, handcuffs, fences etc. – also seem to contradict the spirit of the Directive: e.g. the **Czech Republic, Cyprus, Spain and Belgium**.

²³⁹ Article 16(4)(5) RD: information should be given as soon as possible and not later than 24 hours after arrival.

²⁴⁰ See the CoE Guideline on forced return No 10; the “CPT” standards established by the CoE Committee on the prevention of torture; the 2006 European Prison Rules (Recommendation Rec(2006)2 of the Committee of Ministers to Member States) as basic minimum standards; the UN Standard Minimum Rules for the Treatment of Prisoners (approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977). These standards represent a generally recognised description of the detention-related obligations which should be complied with by Member States in any detention as an absolute minimum, in order to ensure compliance with ECHR obligations and obligations resulting from the CFR when applying EU law.

²⁴¹ E.g. accommodation adequately furnished and clean; bedrooms that respect, as far as possible, privacy, and meet the requirements of health and hygiene, due regard being paid to: climatic conditions and especially to floor space; cubic content of air; lighting; heating and ventilation; adapted clothing and nutritious diet; respect of freedom of thought, conscience and religion etc.

²⁴² See the table annexed to the present report.

²⁴³ SAC, Judgment No. 164/07, January 2016, (in case No. 973/2015).

²⁴⁴ In Malta, there is no legal remedy available to challenge detention conditions. In Cyprus, there are, but TCNs go rarely to courts, presumably because they would rather use whatever resources are available to them to secure their release rather than to improve their detention conditions. See [Cypriot Report on pre-removal detention](#).

As for judicial control, national courts in **Lithuania, Slovenia, Cyprus, the Czech Republic, Belgium, France, and Germany** do not deal with this issue without an explicit individual application. Some national judges may be competent to control detention conditions for one detention facility only; this is notably the case in **Spain**, where the “Judges of control” are appointed for each “Centres of Internment” and whose orders are applicable only in the centre under their supervision.

In **Slovenia**,²⁴⁵ **Greece, Bulgaria, and the Czech Republic**, judges are fully competent to examine the material conditions in detention facilities.

- In **Bulgaria**, for instance, the Supreme Administrative Court has had to deal with the adequacy of detention conditions with regard to the person’s vulnerability. It ruled that unless detention measures themselves endangered the person’s health, the detention order (or its extension) could not be annulled on the sole fact that the room assigned to the detainee was not adapted to his or her physical or mental health.²⁴⁶
- In **Greece** and the **Czech Republic**, administrative Judges dismissed several claims that invoked material detention conditions contrary to Article 3 ECHR: the Court of first instance of Thessaloniki disregarded a report from Amnesty International that was not updated ([Judgment 6/2013](#)); the Court of first instance of Corinth ruled, based on a report which had been explicitly demanded, that the detention conditions described therein were compatible with human dignity and did not exceed the “*unavoidable level of discomfort inherent in any custodial measure*” ([Judgment 92/2013](#)). Similarly, the Czech SAC rejected the applicant’s claim that the detention conditions did not meet the ECHR’s standards in the present case.²⁴⁷ While acknowledging that inadequate material conditions are likely to impact the lawfulness of a detention decision, the Court considers that aliens cannot expect an “average living standard” as in the Czech Republic or of an average hotel in administrative detention. In the Court’s opinion, without going as far as prison conditions: “*aliens must accept (in detention facilities) a certain discomfort, the absence of privacy and the fact that their centre would not be full of entertainment and fun.*”

By contrast, in **France**, the control of detention conditions is ensured by judicial and non-judicial authorities: besides individual requests to the courts, the French public prosecutor can visit the places of detention “every time he deems it necessary” and in any case, once a year. Deputies, humanitarian NGOs, the Ombudsman and the “*Contrôleur général des lieux de privation de liberté*” are also empowered to control the living conditions in the administrative detention centres (CRA). The *Conseil d’Etat* also played a major role in controlling these material conditions at the time of the construction of the CRAs: relying on a person’s dignity, it emphasised the need for limited hosting capacities provided by law. It also recalled ECtHR case law relating to the exposure to noise and to the adverse effect that it could have, when repeated, on individuals, particularly on minor children.²⁴⁸ In **Germany**, the courts ensure the appropriateness of the material conditions as part of their proportionality assessment of the detention measures. As pointed out by the Federal Civil Court, detentions must be declared unlawful if it was foreseeable that the foreign national concerned would be accommodated in breach of the requirements of EU law.²⁴⁹

²⁴⁵ But in practice, the lack of access to courts explains why there is such little case law on material conditions. The extent of the judicial control overall varies according to the (single) judge in charge.

²⁴⁶ BG SAC, C-8/2016. See [REDIAL Bulgarian Report on pre-removal detention](#), p. 14.

²⁴⁷ CZ SAC, 2 Azs 300/2015, 21 January 2016.

²⁴⁸ CE, 18 November 2011, n° 335532.

²⁴⁹ See e.g. the German Federal Civil Court, [decision n° V ZB 74/15, 18 February 2016](#).

Article 17 RD – detention of minors and families

The Return Directive does not preclude *per se* the detention of minors and families.²⁵⁰ However, the requirements provided by Article 15 RD must be scrupulously applied: *e.g.* only as a measure of last resort and for the shortest appropriate period of time. Families detained should be accommodated in a separate area, while unaccompanied minors should be placed in institutions and facilities adapted to the needs of persons of their age.²⁵¹

1. Unaccompanied minors: detention adapted to vulnerability

“1. Unaccompanied minors (...) shall only be detained as a measure of last resort and for the shortest appropriate period of time;
4. Unaccompanied minors shall as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age;
5. The best interests of the child shall be a primary consideration in the context of the detention of minors pending removal.”

Among the Member States surveyed, several legal systems formally prohibit the detention of unaccompanied minors: namely, **Italy**,²⁵² **France**, **Spain**, **Belgium**, **the Czech Republic** and **Hungary**. Others admit this possibility for minors who have reached the age of fourteen (**Austria**) or fifteen (**Poland**) as long as they are held in separate facilities or in a part of the accommodation provided for by families (**Slovenia**, **Estonia**). In **Cyprus**, until 2014, unaccompanied children were detained either in detention centres or in police stations, but the policy has changed.²⁵³ In any event, this measure should not affect the minor’s interests. In such cases, leisure activities adapted to their age must be provided and access to education is ensured by law.²⁵⁴ In practice, the main concern is perhaps the lack of proper legal representation granted to unaccompanied children: in the absence of “emergency lawyers” or a designated guardian, challenging detention measures to courts seems very unlikely.

²⁵⁰ While one might question the lawfulness of detaining minor children with regard to International norms. In this regard, the UN Committee on the Rights of the Child and the Council of Europe have both recently clarified that children should never be detained for immigration purposes and detention can never be justified as being in a child’s best interests.

²⁵¹ Member States are also required to comply with the corresponding CoE guidelines (n°11) and the “CPT standards” related to the detention of minors.

²⁵² Unless they are identified as adults by the Italian authorities upon arrival.

²⁵³ But in October 2016, new legislation empowered the authorities to detain unaccompanied minors seeking asylum on the same grounds as for adults (for ascertaining their identity or nationality or the invoked grounds of persecution etc). The Commissioner for the rights of the Child expressed concerns and objections in relation to this provision, while being consulted before the adoption of law, but these concerns were essentially ignored.

²⁵⁴ No case law has been found by the reporting Member States on this particular aspect.

2. Families with minors: family rights and personal considerations

“1. (...) Families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time.

2. Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy.

3. Minors in detention shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education.

4. (...)

5. The best interests of the child shall be a primary consideration in the context of the detention of minors pending removal.”

Most judicial issues reported by Member States are related to the detention of families with minors and children accompanying their parent(s).

- In **Austria**, single adults with children and families with children are not detained in practice. In order to enforce deportation, families can only be confined in a special area for a maximum 24 hours before departure.
- In 2014, there was a change of policy in **Cyprus**.²⁵⁵ Children and/or families are no longer detained, either in the context of asylum or of immigration. No specialised detention facilities are used for carrying out the removal of minors and families.
- Similarly, the **German** practice shows that detention of minors and/or families is extremely rare. There have been very few cases, zero in many regions.
- In **Spain** and **Belgium**, the High Courts reiterated the principle that detention of families and children, if applied, shall take place in separate accommodation that comply with their needs.²⁵⁶
- In **France**, the *Conseil d'Etat* ruled, in 2011, that the construction of a separate facility accommodating families in a detention centre did not amount to the deprivation of liberty of minors. It thus confirmed that the administration complied with its legal obligations deriving from national law and Article 17 of the Directive.²⁵⁷ Accordingly, the Administrative Tribunal of Toulouse declared that it lacked jurisdiction to assess the lawfulness of the detention of a minor in the light of the “best interests of the child” as the measure only impacted the personal situation of the parents and not the child.²⁵⁸
- The same reasoning was previously followed by **Czech** administrative Courts. Judges considered that minors under fifteen years of age were, under law, never detained. They were only “accommodated” in detention centres with their parents or family members. It resulted from this “legal fiction” an impossibility for children to challenge their detention to the Courts, deemed as “formally non-detained” and free to go. In 2011, the CZ Supreme Administrative Court (SAC) departed from this case-law: the Court quashed a decision from a regional court arguing that the minor was not deprived of his liberty *in casu*. The SAC noted that even in the absence of an official detention order, the minor has generally no other option

²⁵⁵ See REDIAL Cypriot report on pre-removal detention.

²⁵⁶ Belgian *Conseil d'Etat*, 28 April 2016, n° 234.577; Spanish *Tribunalo Supremo*, 14 March 2014 (RCL 2014, 395).

²⁵⁷ CE, 18 November 2011, n° 352232.

²⁵⁸ Administrative Tribunal of Toulouse, 21 February 2012.

than that of following his parents and staying with them in the detention centre. Therefore, before deciding on a detention measure against the parent, the administrative authority has to consider first and foremost the best interest of the child. In the Court’s view, this right should be read in conjunction with the right to family life, guaranteed by Article 8 ECHR.

- However, in **France**, the law has changed since March 2016: the administrative detention of an alien accompanied by a minor is no longer admitted. But in practice Art. L. 551-I of CESEDA derogates from this principle in several circumstances: when the alien does not comply with a previous house arrest; absconds or hampers the execution of a previous measure; to secure an imminent departure or when the best interest of the child requires so. In such cases, the person can be detained and the family is accommodated in separated facilities.²⁵⁹
- In **Poland**, families and children can be held in “guarded centres”: the Judge deciding on the measure must take the “best interest of the child” into consideration. In one case, the court of *Slubice* opted for a placement in guarded centre of a single pregnant woman and her six children to provide the family with *better* protection (order of 12 June 2014, II.1. Ko 1172/14). Another Polish court excluded this possibility for a family whose children attended public school (a placement in a guarded centre would have greatly limited their access to education).
- In **Lithuania**, the “best interest of the child” has been considered primarily to exclude a placement in detention of a family with two minors of five and eight years old.²⁶⁰
- Finally, in **Germany**, the **Federal Court** declared the extension of a detention measure against a TCN who provided support to his (legally residing) pregnant partner, and to her children aged under 18 to be illegal. According to the Court, the Court of Appeal should have carefully assessed the proportionality of this extreme measure and have only detained the applicant for “the shortest duration possible”.²⁶¹ While not concerning the pre-removal detention of the whole family directly, this example shows that wider family considerations (e.g. with family members not being detained) have to be considered in the context of detention cases.

²⁵⁹ But in any case, before detaining the TCNs, the competent authorities must pay particular attention to the foreigner’s personal situation and detain only as a last resort, for a short period, and after having examined whether any other sufficient alternative measures could apply instead (CAA Nancy, 1st October 2015; CAA Bordeaux, 1st Chamber, 15 November 2012)

²⁶⁰ **Regional Court of Svencionys**, March 2015.

²⁶¹ **German Federal Civil Court**, V ZB 218/11, 6 December 2012.

3. Impact of the ECtHR's case-law with regard to the detention of minors

Especially in **France** and **Belgium**, the repeated condemnations by the ECtHR impacted the administrative practice and the judicial control of the detention of minors. After the case *Popov v. France*,²⁶² some **French** Courts of Appeal seemed to misinterpret the findings of the ECtHR. They did so either by admitting the detention of minors as a rule, without prejudice to a possible violation of Article 3 ECHR (CAA Douai, 31 December 2012, 12DA00734); or by quashing a judgment in first instance which had annulled a detention measures against children, adopted without a proper legal basis in national law (CAA Paris, 31 December 2012, 11PA04917). However, after five cases rendered by the Court of Strasbourg in July 2016, French jurisprudence changed as follows:

- the inherent environment of a detention centre may be perceived as “anxiety-provoking” for the minors and reach the threshold of gravity laid down in Article 3 ECHR.²⁶³
- Authorities are first required to assess whether other alternatives and less coercive measures (e.g. house arrest) can be applied, taking into account the best interests of the child and the rights guaranteed by the Convention.²⁶⁴
- the argument of the CAA of Toulouse, that the right to family life and family unity justified the continued detention of a mother with her two-years old child, and that their separation would have led to a violation of Article 8 ECHR, was not upheld by the ECtHR.²⁶⁵ Etc.

The current administrative and judicial practice in **Belgium** results from the successive condemnations from the ECtHR in cases *Mubilanzila Mayeka and Kaniki Mitunga* (2006), *Muskhadzhiyeva and others* (2010) *Kanagaratnam and others* (2011). The consideration for the best interest of the child reinforces the judicial control's intensity.

Article 18 RD – Emergency situations

“1. In situations where an exceptionally large number of third-country nationals to be returned places an **unforeseen heavy burden on the capacity of the detention facilities** of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide to allow for periods for judicial review longer than those provided for under the third subparagraph of Article 15(2) and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles 16(1) and 17(2).

2. When resorting to such exceptional measures, the Member State concerned shall inform the Commission. It shall also inform the Commission as soon as the reasons for applying these exceptional measures have ceased to exist.

3. Nothing in this Article shall be interpreted as allowing Member States to derogate from their general obligation to take all appropriate measures, whether general or particular, to ensure fulfillment of their obligations under this Directive”

In emergency situations involving the sudden arrival of large numbers of irregular migrants, leading to overcrowding in detention facilities, Member States have the possibility of not applying the

²⁶² ECtHR, Appl. nos. 39472/07 and 39474/07.

²⁶³ CE, 18 November 2011, n° 335532 (e.g. a child was four years old subject to repeated noises during a detention of eighteen days in a centre located close to an airport). See also *Popov v. France*, Appl. 39472/07 39474/07, 19 January 2012, §§ 93-96.

²⁶⁴ E.g. [CAA Nancy, 1 October 2015](#).

²⁶⁵ See “*R.C. and V.C.*” (n° 76491/14).

three detention-related provisions of the Directive: 1) the obligation to provide for a speedy initial judicial review of detention; 2) the obligation to detain only in specialised facilities; and 3) the obligation to provide separate accommodation guaranteeing adequate privacy to families. Transposition into national law is a precondition for a possible application of the emergency clause.

- In **Hungary**, the law provides that in situations “*where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of hostels of restricted access, or on the immigration authority itself*”, immigration authorities may decide ask the district court, within five days from the date when the detention was ordered (instead of 24 hours), to extend the period of detention past seven days and to carry out the detention at a place other than the specific detention centers normally required by law.²⁶⁶
- Similarly, in **Cyprus**, national law has transposed the option with regard to the conditions of detention, providing that in these situations Cyprus may take urgent measures derogating from those set out in the national law. The type or nature of emergency detention measures which can be adopted are not specified in the law.
- In **Spain**, the Supreme Court had to rule on the legality of several provisions of the Royal Decree 162/2014 approving the operating rules on the functioning of Immigration *Centres of Internement*. Article 5(2) was among the provisions contested: it enables authorities to detain foreigners in other facilities than CIEs when these are saturated or due to emergency situations. The Court declared that it was neither incompatible with the Spanish Immigration Act, nor with the Return Directive. Relying on Articles 16(1) and 18 RD, the Court concluded that placement in non-specialized centers, including prisons, was admitted by the Directive and that urgent measures could be taken in case an exceptionally large number of TCNs involved an unforeseen burden on the Member State concerned.²⁶⁷

²⁶⁶ See Article 61/A of the Hungarian Law.

²⁶⁷ Tribunal Supremo (Sala de lo Contencioso-Administrativo, Sección Especial) Sentencia de 10 febrero 2015 (RJ\2015\1383).

Conclusion

The main grounds on which Member States adopt pre-removal detention measures is the “risk of absconding”. However, the Return Directive provides a vague formulation of these grounds, leaving a considerable margin of interpretation to the Member States when defining objective criteria. The jurisprudence submitted by the national judges and academics point to the continuing difficulty that national legislators have in providing an objective definition of the “risk of absconding” and the difficulty of the national judiciary in filling the gaps in the legislative definitions, or in correcting administrative practices. This has, effectively, created four major and persistent problems:

- lack of legislative definition (still the case in **Austria, Belgium, Czech Republic, Greece, Hungary, and Malta**);
- broad, encompassing all legislative definitions of the risk of absconding (**Italy, the Netherlands, Spain**);
- based on objective criteria prohibited by the CJEU, such as: illegal stay or residence (**France, Estonia, Spain**); illegal entry (**France, Romania, Spain**); lack of identity documents as the sole grounds for detention (**Bulgaria,²⁶⁸ Estonia,²⁶⁹ Romania, Spain**); lack of residence permit (**Slovakia**); criminal record *per se* can justify finding for a risk of absconding (**Belgium, Greece, Hungary, Slovakia**); refusal of voluntary departure (**Bulgaria, Romania, Sweden, France²⁷⁰**);
- limited individual assessment, existence of one of the objective criteria is held to be sufficient (e.g. **Italy, Malta, Spain**).

Another concern is that national courts apply a sort of presumption that the foreigner will avoid the return procedure and will disappear **if he/she does not have income or residence**: as persons in return procedures do not satisfy these requirements in most cases, they are detained. Even more problematic is the jurisprudence of the Member States where more than one of the above mentioned circumstance is met. For instance, on top of the risk of absconding being broadly defined by legislation, or broadly interpreted and applied by the administration, the judiciary does not carry out careful individual assessment, or they confirm pre-removal detentions based on objective criteria prohibited by the CJEU. This leads, in practice, to a risk of absconding being typically found (e.g. **Belgium, Italy, Spain, Romania**), for almost all undocumented TCNs issued with a return decision. This, of course, contradicts the RD, which has pre-removal detention as a last resort measure.

If only one of the circumstances mentioned above is found, the practice is less worrying. As an example, while in **Italy** the lack of documents is held to show a risk of absconding, in the **Netherlands** there has also to be another element to indicate a clear risk of absconding.

It is also worrying that prohibited objective criteria are still cited by domestic courts as reasons for the confirmation of pre-removal detention. For instance, most of the **Administrative Court of Sofia’s** judgments confirm detention orders if the identity of the foreigner has not been established.

Unfortunately, this administrative and judicial practice, is carried out even though the **supreme Courts** of some of these Member States (e.g. **Belgium, Italy**) have confirmed that, according to

²⁶⁸ Worryingly the recently amended Bulgarian legislation maintains these grounds by introducing a new type of detention.

²⁶⁹ The validity of these grounds has been confirmed by the **Court of Appeal of Tallin, which** rejected complaints regarding the compatibility of this with the *Mahdi* preliminary ruling of the CJEU. The Court held that the “the lack of necessary documents for return of the aliens” is different from the lack of identity documents which was the ground found to be prohibited by the CJEU in *Mahdi*. [REDIAL Estonian Report on pre-removal detention](#), pp. 3-4.

²⁷⁰ See, in particular the judgments of the Appeal Court of Marseille from 2016.

Article 15(1) RD, pre-removal detention, ought to be interpreted narrowly and an individual assessment always carried out.²⁷¹

The Return Directive stipulates that pre-removal detention shall be ordered by legal or administrative authorities with appropriate motivation in fact and in law. However detention orders and judicial validations of pre-removal detention often lack a specific motivation and fail to take into account the individual circumstances and potential protection needs or vulnerability factors of the TCNs involved. Formal or standard motivations persist among most of the judiciary in certain Member States. However, the judicial approach has changed in other Member States, under the impact of the CJEU (especially the *Mahdi* case) and of the supreme Courts. For instance, the **Dutch Council of State** requires that clear, reasoned and complete decision-making is included by the competent administrative authorities in the decision of the (prolongation of) pre-removal detention.

A lack of clarity regarding differentiation between the two legal grounds provided by the Return Directive for pre-removal detention: “risk of absconding” and “avoiding or hampering the preparation of the return or the removal process” still persists (e.g. **France and Slovenia**).

Although the Return Directive prohibits pre-removal detention on the basis of grounds other than those legal grounds mentioned above, **the legislation of certain Member States provides for additional grounds (Sweden and Estonia)**. It is also worrying that public or national security is still taken as grounds for pre-removal detention in most Member States’ administrative and judicial practices.

Positive legislative and jurisprudential changes have occurred as regards the **reasonable prospect of removal as a legality criteria for pre-removal detention**. For instance, the current **Bulgarian** Law on Foreign Nationals was amended for the purpose of implementing the CJEU preliminary ruling in *Kadzoev*.²⁷² Furthermore, administrative courts take into account the RPR in their legality assessment of detention orders, both at the beginning and for any prolongation, on the basis of a broad interpretation of Art. 44(8) LF in light of Art. 15 RD. Similarly, the Italian Aliens Law was amended at the end of 2014 to introduce, *inter alia*, the reference to the reasonable prospect of removal as criteria for a legality assessment of both the initial order of detention and of the prolongation of detention (Law no. 161/2014). Following the entry into force of these amendments, Italian courts have started to make use of this provision. In addition, French and Czech courts assess conformity with the principle of *non-refoulement* for the purpose of finding out whether there is still a RPR.

As regards **alternatives to detention**, **French** and **Czech** legislation have been amended to include an assessment of the proportionality of the pre-removal detention when deciding on the adequacy of this measure (**France**), and including a list of possible alternative measures (**Czech Republic**).

Access to effective legal aid has been criticised as being deficient in many Member States: e.g. the **Czech Republic, Italy, Spain, Slovenia and Finland**. A landmark judgment has been delivered by the **Supreme Administrative Court of the Czech Republic**. The Court urged the authorities to do as much as possible to achieve the aim expressed in the Return Directive with Article 13(3),²⁷³

²⁷¹ For instance, see the **Belgium Cour de Cassation**, Decision No. P.14.0005.N/1, 21 January 2014. The **Italian Supreme Court** (Corte di Cassazione) made reference to *El Dridi* when referring to the previous legislation in force, that was declared contrary to the RD by the CJEU. It clarified that the risk of absconding cannot be assessed only because the foreigner failed to comply with an expulsion order. Such an assessment would not be valid, failing an individual evaluation of the foreigner’s personal situation, in light of all the criteria currently set forth by the law (see Supreme Court no. 437 of 10.1.2014). For more details, see the **Belgian** and **Italian** REDIAL Reports on pre-removal detention.

²⁷² Art 44(8) of the Law on Foreigners states that “When in the light of the particular circumstances of the case it is established that there is no reasonable possibility for legal or technical reasons for the forced removal of the foreigner, the person shall be released immediately”.

²⁷³ Article 13(3) RD reads as follows: “The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.”

especially in making sure that detention facilities are visited weekly by lawyers so all third-country nationals have effectively the chance to make their appeals on time.

The early analysis of Articles 16 to 18 RD shows interesting results in terms of the Member States' legal and judicial protection towards those TCNs held in detention facilities. Yes, in all the EU countries studied, the law explicitly provides for specific premises used for removal purposes. However, practice shows a clear lack of differentiation, in several Member States, *either* between detention facilities and criminal custody *or* between TCNs subject to administrative return procedures and those facing criminal expulsion. The effective control of the material conditions and concrete safeguards, to be complied with in detention, is mainly ensured by independent monitoring bodies, usually without an explicit complaint from the TCNs and in the form of general reports. The assessment of national courts is by contrast rarely based on in-depth analysis or factual investigations. As illustrated by the above-mentioned **Czech, Greek and Bulgarian** case-law, national courts seem rather reluctant to strike down detention measures based on the sole fact that place and conditions are not "appropriate" to a foreigner's physical or mental health. As for the detention of the most vulnerable categories, *i.e.* unaccompanied minors and families with children, administrative judges tend to combine, when applicable, the best interests of the child with considerations for family life and family unity: **Belgium, France, Poland, Spain, Lithuania** etc. That being said, the legal prohibition to detain children in some countries (e.g. **France, the Czech Republic**) led to paradoxical situations where national judges considered that minors accompanying adults detainees were not formally detained themselves, hence *de facto* depriving them of judicial protection with regard to their placement in specialised facilities. Finally, it seems that, despite the current "migration crisis" only a few Member States have transposed Article 18 RD into their domestic law. In **Spain**, the Supreme Court validated the Royal Decree implementing this provision, stating that resorting to prison accommodations in exceptional circumstances was an extraordinary measure provided for by Article 18, read in conjunction with Article 16(1) RD.

ANNEX I. Example of objective criteria used at national level for establishing a risk of absconding

Objective Criteria	BE	BG	FR	IT	SK	SI	HU	CZ	AT	ES
No application for a residence permit after an illegal entry			X							
Over-staying a visa or in case of visa-free, remaining beyond three-month period without applying for a residence permit			X							X
Remaining for more than one month after the expiration of a residence permit , of an acknowledgment of receipt of the application for a residence card or of a temporary permission to reside, without asking for their renewal	X		X							
Previous illegal residence						X				X
No residence permit					X					
No documents at all		X								X
No valid ID or travel documents			X ¹	X						X
Impossibility to immediately identify the TCN concerned					X					
False information on identity	X		X	X			X			X
Providing false information (in general)	X	X				X	X			
Denying communication and not signing the minutes of the hearing							X			X
Having forged , falsified or used another name for, a residence permit or an ID or travel document	X	X	X			X				X
Use of false or misleading information or false or falsified documents when applying for a residence permit (except when this is done within the asylum procedure), or recourse to fraud or other illegal means to obtain the right to stay	X									X
Failing repeatedly to respond to an invitation from the municipal administration to appear in person and receive notice of the decision on the residence or stay application	X									X
No documents proving accommodation where s/he can be easily found	X			X						X
No effective or permanent place of residence			X ²							
Impossibility to find the TCN at his/her place of residence		X								
Showing a lack of cooperation in the return procedures						X				
	BE	BG	FR	IT	SK	SI	HU	CZ	AT	ES

(cont.)

¹ Linked with the failure to provide sufficient guarantees for reappearing before the competent authorities.

² Linked with the failure to provide sufficient guarantees for reappearing before the competent authorities.

(continues)

Objective Criteria	BE	BG	FR	IT	SK	SI	HU	CZ	AT	ES
Non-compliance with Voluntary Departure	X ³	X	X ⁴	X		X ⁵				
Violation of the obligations (reporting, etc.) imposed with the aim of avoiding the risk of absconding during the VD period	X ⁶		X ⁷	X						
Previous absconding		X								
Non-compliance with an alternative measure to detention			X ⁸	X						
Clear unwillingness to comply with the imposed measure		X								
The statements made indicate the likelihood of absconding							X			
Previous criminal conviction		X ⁹				X				
Previous infringement of the public order		X								
Violation of an entry ban	X	X		X		X				
There is a reasonable possibility that the TCN will be subject to an entry ban exceeding three years					X					
	BE	BG	FR	IT	SK	SI	HU	CZ	AT	ES

³ Remaining on the territory beyond the period stipulated in the expulsion decision

⁴ Having avoided a previous expulsion measure.

⁵ Conduct indicating the unwillingness to voluntarily depart within the period granted by the authorities.

⁶ Also change of place of residence without notification of the Immigration Service

⁷ Linked with the failure to provide sufficient guarantees for reappearing before the competent authorities.

⁸ Linked with the failure to provide sufficient guarantees for reappearing before the competent authorities.

⁹ Regardless rehabilitation.

ANNEX II. Examples of legal standards guaranteed in EU Member States in accordance with Article 16 RD

	BE	BG	CZ	EE	EL	ES	FI	FR	IT	LT	PL	SI	SK	HU
Health care and Medical assistance	X		X	X		X	X		X	X		X	X	X
Access to common spaces (indoor/outdoor)	X		X				X	X			X	X		
Access to education for children				X	X								X	X
Leisure activities	X			X			X				X	X	X	
Contact with family members	X		X	X			X		X				X	
Information (internal rule, rights and duties, contact NGOs and bodies)			X	X	X	X		X		X		X		
Access to legal assistance	X	X	X	X	X	X		X				X	X	
Disciplinary and security measures	X		X											
Consideration for cultural and religious traditions	X		X								X			X