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RETURN DIRECTIVE DIALOGUE – REDIAL

REDIAL Electronic Journal on Judicial Interaction and the EU Return Policy Third Edition: Articles 15 to 18 of the Return Directive 2008/115

Madalina Moraru

with the help of Géraldine Renaudiere

and under the supervision of Philippe De Bruycker

REDIAL Research Report 2017/01

MIGRATION POLICY CENTRE

REDIAL

Odysseus Network — ULB

Academic network for legal studies on immigration and asylum in Europe

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REDIAL
REturn Directive DIALogue

Research Report

REDIAL RR 2017/01

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with the help of Géraldine Renaudiere (author of sections IV and V) *

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REDIAL – REturn Directive DIALogue

The project REDIAL **(REturn Directive DIALogue)** 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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I. Introduction

The present Electronic Journal is one of the key products of the project entitled 'Return directive DIALogue' (**REDIAL**). The overall aim of the REDIAL Project is to facilitate horizontal judicial dialogue among EU Member State judges involved in return procedures.[1]

The starting premise of the **REDIAL** Project is that informed horizontal and vertical judicial interactions lead to the effective implementation of the Return Directive, and enhanced protection of the rights conferred by the EU Charter of Fundamental Rights (EU Charter), the European Convention of Human Rights (ECHR) and national constitutions. The **REDIAL** Project includes a toolkit aiming to provide information and solutions to the implementation of the Return Directive for legal practitioners. It includes:

- a national Database comprising landmark national judgments on the interpretation and application of the Return Directive in all Member States. It offers, to date, an efficient search engine for over 1000 cases;
- a European Database comprising the judgments delivered by the CJEU on the interpretation and application of the Return Directive. The database includes, in addition to the preliminary ruling, the preliminary reference addressed by the national court and the judgment delivered by the referring national courts following the preliminary ruling of the CJEU;
- national reports including an overview of the relevant national legislation, administrative practice and jurisprudence for each of the main Chapters of the Return Directive; these Reports are drafted by the academics part of the REDIAL network, in collaboration with the national judges;
- European synthesis reports, one for each of Chapters II-IV of the Return Directive. These offer a comprehensive analysis of the legal provisions of the Return Directive, relevant CJEU judgments and case law of Member States implementing EU law; the various issues in the interpretation and application of the Return Directive, best practices and the contribution of the national judiciaries are assessed;
- an annotated Directive with references to the relevant case law of the Court of Justice and the ECtHR for each provision;
- three editions of a freely accessible Electronic Journal, where the outcome of judicial interactions is revealed;
- and a blog where academics and judges publish comments on recent domestic and European jurisprudence and/or legislative amendments.

From a methodological point of view, the REDIAL Project relies upon close collaboration between judges and academics from the EU Member States. At the national level, judges are in charge of the selection of landmark judgments on the Return Directive. Academics, meanwhile, are responsible for synthesizing their added value in a national report. The jurisprudence is collected in three stages following the structure of the Return Directive. So, the first package covers the provisions of Chapter II of the Return Directive (Articles 7 to 11) dealing successively with the voluntary departure, removal

[1] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally-staying third-country nationals, OJ L 348/98, 24 December 2008 (hereinafter Return Directive). The Directive does not apply in Ireland and the UK. Denmark did not take part in the adoption of the Directive and is not bound by it under EU law, but decided to implement the Directive as a measure building upon the Schengen acquis in its national law. The associated Schengen countries – Norway, Iceland, Switzerland and Liechtenstein – are bound by the Directive, under their Schengen Association Agreements.

and postponement of removal, return and removal of unaccompanied minors, and entry bans. The second package focused on Chapter III of the Return Directive (Articles 12-14) deals with procedural safeguards. The third package is to address Chapter IV (Articles 15-18) on detention for the purpose of removal.

The **REDIAL** Project is run by the Migration Policy Centre (MPC) and the Centre for Judicial Cooperation (CJC) of the European University Institute (EUI), together with the Academic Network for Legal Studies on Immigration and Asylum in Europe known as the 'Odysseus Network' coordinated by the *Université Libre de Bruxelles*. The MPC is in charge of scientific coordination, while the Odysseus Network provides, for the project, national expertise and its network of contacts throughout the EU, including contacts with judges.

The present issue of the **REDIAL Electronic Journal** is the last one that will be published in the course of the REDIAL Project. The **three REDIAL Electronic Journals** deal, in order, with *Chapters II, III and IV of the Return Directive (RD)*. The current, **third edition**, covers, then, Chapter IV of the Return Directive, addressing the most controversial provisions of the Directive: immigration (pre-removal) detention.[2] Article 15 RD allows detention for the return or removal procedure only on strict conditions, practically as a last resort. Its six paragraphs set out rules on: the legal grounds of detention; duration of pre-removal detention; competent bodies, remedies and standards of judicial control for pre-removal detention.

Article 15 RD, third-country nationals (TCNs) subject to return procedures 'may only' be detained so as to prepare for 'return and/or to carry out the removal process' in particular when there is a 'risk of absconding' or if the person concerned 'avoids or hampers' the return or removal process. Detention is justified only if other sufficient but less coercive measures cannot be applied effectively, and only while removal arrangements 'are in process and executed with due diligence'.

Pre-removal detention, as a last resort return measure, can be ordered by administrative or judicial authorities, and must be 'ordered in writing with reasons in fact and law' (*Article 15(2) RD*). If the detention was ordered by administrative authorities, there must be some form of 'speedy' judicial review. The pre-removal detention is to be reviewed at regular periods, either automatically or at the request of the TCN concerned (*Article 15(3) RD*). If there is no 'reasonable prospect of removal' or the conditions for detention no longer exist, the TCN concerned must be released immediately (*Article 15(4) RD*). Pre-removal detention shall be maintained as long as conditions exist; this shall not exceed, however, an initial period of six months (*Article 15(5) RD*). An exception , is where there is a lack of cooperation on the part of the person concerned or where there are delays in obtaining documentation (*Article 15(6) RD*): in these cases national law permits prolongation of this period of up to one extra year because the removal operation is likely to last longer.

The pre-removal detention should, 'as a rule', take place in special facilities for migrants (*Article 16 RD*). These special facilities should be separated from those where ordinary prisoners are detained (*Article 17 RD*). *Article 16 RD* also provides for specific norms on: the right of those detained to contact legal representatives, family members and consular authorities; the situation of vulnerable persons; the possibility for independent bodies to visit detention facilities; and for information to be given to migrants. (*Article 16 RD*) There are more detailed rules on the detention of minors and families (*Article 17 RD*), although Member States may derogate from certain aspects of the rules concerning speedy judicial review and detention conditions in 'exceptional' situations (*Article 18 RD*).

In addition to these detailed norms set out in the Return Directive, additional rules are provided in EU primary law, such as the provisions of the EU Charter, but also the general principles of EU law, such as the principles of primary, direct effect, and the rights of defence. These norms were further interpreted and detailed by the CJEU, while complementary rules are set out by the ECtHR. Primary

[2] Articles 15-18. See also, F. Lutz, *The negotiations on the Return Directive*, WLP, 2010, p. 67.

and secondary EU law, including the case-law of the CJEU and of the ECtHR in relation to Articles 5 and 3 of the ECHR thus provide extensive and detailed standards and rules that should be applied in immigration detention cases. A slow, but gradual integration of these rules has been identified at the national level. However, according to the domestic jurisprudence collected by the REDIAL collaborating judges and academics, the level of implementation of those standards and rules in administrative and judicial practices is still unsatisfactory. Indeed there still are certain national legislative provisions and practices on pre-removal detention which persistently diverge from the provisions of the RD on pre-removal detention.

The **third REDIAL Electronic Journal** aims to offer an overview of the contribution of judicial interactions in ensuring a coherent and uniform implementation of the RD in immigration detention cases. The selection of the cases was based on the criteria of showing successful judicial interaction. This can relate to direct interactions between national courts and the Court of Justice of the European Union (CJEU); indirect interactions – referring to the CJEU and ECtHR jurisprudence; and interaction among national judgments addressing similar issues. The Journal will map out various problems in the implementation of Chapter IV RD at national level and will give some sense of the solutions reached by national judgments inspired by judicial interactions.

After this short introduction (**I**), the Journal offers a concise summary of the relevant preliminary rulings delivered by the CJEU with regard to the interpretation and application of Articles 15-18 RD, which are analysed in their national social and legal context. The impact of these preliminary rulings on the referring Member State, but also on other Member States' legislation and practice is summarised. The relevant preliminary references are discussed here following the chronological path of the issues before the courts: issue(s) before the national courts; preliminary questions addressed to the CJEU; opinion of the Advocate General; follow-up judgment of the referring court; and impact of the preliminary ruling on other domestic judiciaries. These instances of vertical direct and indirect judicial interactions are structured on the following substantive issues: *the criminalisation of irregular migration and the principles of necessity and proportionality of pre-removal detention* (**1**); *interaction between asylum detention and pre-removal detention* (**2**); *the right to an effective judicial protection of pre-removal detention* (**3**); *the use of specialised facilities as a general rule for detaining returnees* (**4**); *separation from ordinary prisoners* (**5**). (**II**)

The following parts (**III-V**) assess landmark national judgments on each of the Articles of Chapter IV RD for the purpose of evaluating: national judicial compliance with the CJEU's preliminary rulings; judicial developments in the implementation of the Return Directive, as well as identifying areas where national courts have different or even divergent approaches on how judicial scrutiny should be carried out over the implementation of the Return Directive. This last section will illustrate the essential role of national courts in the clarification of the scope and meaning of Articles 15-18 of the Return Directive.

In concrete, the third part (**III**) includes a comparative analysis of landmark judgments on the main issues under **Article 15 RD**. It will assess the main outcomes of vertical and horizontal judicial interaction on pre-removal detention. This section aims to discuss, comparatively, national jurisprudence on complex and controversial topics, such as: **(1)** distinguishing immigration detention under the Return Directive from the criminal imprisonment of irregular migrants, which will assess, *inter alia*, the impact of the El Dridi, Sagor and Achugbabian preliminary rulings on domestic jurisprudence; **(2)** the definition and implementation of the EU concept of 'risk of absconding'; **(3)** other legal grounds for pre-removal detention; **(4)** judicial control of pre-removal detention; **(5)** the concept of the reasonable prospect of removal; **(6)** the duration of pre-removal detention**; (7)** prolongation of pre-removal detention; **(8)** re-detention; **(9)** alternative measures to pre-removal detention; **(10)** access to legal aid; (**11)** a summary of the impact of primary and secondary EU legislation and CJEU case law; and **(12)** a short overview of the outcomes of horizontal judicial interactions.

The fourth part (**IV**) focuses on the appropriateness of place and conditions of detention as provided by **Article 16 RD**. It analyses the impact of the main judicial interaction in this field (CJUE) on the jurisprudence of several national courts. In particular, EU law requirements on the material conditions and concrete safeguards in the national courts' assessment of the lawfulness of pre-removal detention.

The fifth part (**V**) reveals the overall lack of 'dialogue' between national and European judges regarding the detention of families and minors (**Article 17 RD**). It argues that further interaction among domestic courts dealing with similar issues would have probably led to a more effective understanding of the Directive and a better compliance with fundamental rights standards.

The **REDIAL** Journal should hopefully be of interest to national and European judges specialised in migration law. However, it is also relevant to: national administrations in charge of return procedures; NGOs defending third-country nationals; specialized lawyers; and the European Commission and the Court of Justice of the EU.

II. European Landmark Cases and their Impact on National Jurisprudence

The CJEU has played a fundamental role in the development of a *corpus iuris* of standards in the application of immigration detention and migrant's human rights and deserves some attention here. The Return Directive has been the object of an increasing number of preliminary references sent by national courts from various Member States: **Belgium, Bulgaria, the Czech Republic, France, Germany, Italy, and the Netherlands**. The majority of these preliminary references touched on pre-removal detention measures,[3] condition of detention,[4] criminalisation of irregular entry/stay,[5] and interaction between asylum and pre-removal detention.[6] Several more cases are pending.[7] The preliminary rulings are clustered in five sections: (1) the *criminalisation of irregular migration and the principles of necessity and proportionality of pre-removal detention*; (2) *interaction between asylum detention and pre-removal detention*; (3) *the right to an effective judicial protection in the case of pre-removal detention*; (4) the *use of specialised facilities as a general rule of detaining returnees*; and (5) *separation from ordinary prisoners*. Each section will summarise the legal, social and factual context of the preliminary reference, the conclusions reached by the CJEU and briefly present the impact of each preliminary ruling on the legislation and jurisprudence of the referring Member State, but also on other Member States. It is important to summarise the CJEU preliminary rulings on pre-removal detention since the Court derived human rights imperatives not clearly found in the RD, which impose new duties on Member States, amounting, in effect, to procedural safeguards for third-country nationals. Disrespect of these standards might result not only in infringement procedures against the Member States, but possibly also in violations found by the ECtHR (see, for instance *Nabil and others v. Hungary*[8]).

[3] C-146/14 (PPU) *Mahdi*; C-383/13 (PPU) *G. & R*; C-357/09 (PPU) *Kadzoev.*

[4] C-473/13 & C-514/13 *Bero & Bouzalmate*; C-474/13 *Pham.*

[5] CJEU C-290/14 *Celaj* ; C-430/11 *Sagor*; C-329/11 *Achughbabian*; C-61/11 (PPU) *El Dridi.*

[6] CJEU C-47/15 *Affum.*

[7] C-181/16 *Gnandi*; C-184/16 *Petrea*; C-199/16 *Nianga*; C-82/16 *K.*. These preliminary references touch mostly on the scope of application of the Return Directive in combined administrative procedures, entry bans, and right to be heard in combined proceedings (return proceedings following rejected asylum applications).

[8] Due to the lack of a judicial scrutiny by the domestic courts who failed to assess the specific circumstances of the case, concrete assessment of the risk of absconding, alternative measures, and the applicants' personal situation the ECtHR found a violation of Article 5(1) ECHR.

1. Criminalisation of irregular migration and the principles of necessity and proportionality in pre-removal detention

C-61/11, El Dridi*, CJEU Judgment of 28 April 2011, ECLI:EU:C:2011:268*

Compatibility of national legislation providing for a prison sentence for illegally staying third-country nationals in the event of refusal to obey an order to leave the territory of a Member State – prohibition of criminal imprisonment on the sole grounds that the TCN remains in the territory without valid grounds.

National court requesting a preliminary ruling: *Corte d'Appello di Trento* (Italy, Court of Appeal of Trento)

Factual context: proceedings brought against Mr. *El Dridi*, who was sentenced to one year's imprisonment for the offence of having stayed illegally on Italian territory without valid grounds, contrary to a removal order made against him by the Chief of Police (*Questore*). Mr El Dridi stayed illegally in Italy between May 2004 presumably until May 2010, when he was found by the police in Udine without valid documents. As the police could not enforce an immediate coercive deportation (because of lack of transport capacity) and could not place him in an administrative detention centre (because there were no places available), it issued a removal order. Mr El Dridi did not comply with the police order and was prosecuted for this under Article 14(5) letter c of the Aliens Law. In the first phase of the proceeding before the Tribunal of Trento, Mr El Dridi was declared guilty and sentenced to one year in prison. On 2 February 2011, during the phase of appeal, the Appeal Court referred a preliminary ruling to the CJEU and, it asked for application of the urgent procedure under Article 104(b) of the Rules of Procedure of the CJEU as Mr El Dridi was still in detention.

Legal and social background: The preliminary reference is part of a high number of similar preliminary questions addressed by Italian courts in the first half of 2011 (11 other preliminary references).[9] Law 95 of 15 July 2009 amended Italian Aliens law by criminalising any illegal entry and stay, and providing a criminal fine ranging from 5,000 to 10,000 Euros; it extended the maximum period of migrants' administrative detention from 60 days to 180 days; and it introduced, in Article 14(5), a criminal sanction of detention from one to five years for those foreign nationals who, despite having received a removal order from the police, were found on Italian territory without documents.[10] By introducing these criminal sanctions, the Italian government considered the Return Directive to not be applicable, since the derogation provided in Article 2(b) RD would apply. However, first, as pointed out later by the CJEU, the Italian legislation stipulated immediate forced returns as the general rule, without giving precedence to the voluntary return measure; secondly, Italian legislation prohibited the re-entry of the irregular migrant for ten years, while the

[9] Giudice di Pace di Mestre, Asad Abdallah, Case C-144/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Milano, Assane Samb, C-43/11, OJ 2008 L 348, p. 98 (2011); Corte Suprema di Cassazione, Demba Ngagne, C-140/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Treviso, Elena Vermisheva, C-187/11, OJ 2008 L 348, p. 98 (2011); Corte D'Appello Di Trento, Hassen El Dridi, alias Karim Soufi, Case C-61/11, OJ 2008 L 348, p. 98. (2011); Tribunale di Bergamo, Ibrahim Music, C-156/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Rovereto, John Austine, Case C-63/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Ivrea, Lucky Emegor, Case C-50/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Ragusa, Mohamed Ali Cherni, Case C-113/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Ragusa, Mohamed Mrad, C-60/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Frosinone, Patrick Conteh, C-169/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Bergamo, Survival Godwin, C-94/11, OJ 2008 L 348, p. 98 (2011); Tribunale di Santa Maria Capua Vetere, Yeboah Kwadwo, Case C-120/11, OJ 2008 L 348, p. 98 (2011).

[10] See Article 14(5) letter c of the Alien Law: "A foreign national who is the recipient of the expulsion order referred to in paragraph 5b and a new removal order as referred to in paragraph 5a and who remains illegally on the territory of the State shall be liable to a term of imprisonment of between one and five years. In any event, the provisions of the third and last sentences of paragraph 5b shall apply". And Article 14(5) letter d of the same law: "Where the offences referred to in the first sentence of paragraph 5b and paragraph 5c are committed, the *rito direttissimo* [expedited procedure] shall be followed and the arrest of the perpetrator shall be mandatory".

Directive provided for a maximum ban of five years; thirdly, detention of the irregular migrants was the norm rather than the exception.

Legal provision at issue: Articles 15 and 16 read in conjunction with Article 8(1) and (4) RD, and Article 14(5)(c) of the Italian Aliens Law.

Questions addressed by the national court: in the light of the principle of sincere cooperation and proportionality, do Articles 15 and 16 of Directive 2008/115 preclude the possibility that criminal penalties (here prison sentence of up to four years) may be imposed in respect of a breach of an intermediate stage in the administrative return procedure, before that procedure is completed, by having recourse to the most severe administrative measure of constraint which remains available?

Conclusion of the CJEU: The CJEU started by clarifying an issue regarding the applicability of the RD. It recalled that under Article 2(2)(b) RD, Member States may decide not to apply the Directive to third-country nationals subjected to a removal as a criminal sanction. But the court added an important nuance, namely, that the criminal legislation and rules of criminal procedure should not jeopardize the objectives pursued by Union law as that would deprive the Directive of its effectiveness.

Secondly, the Court clarified that Articles 15 and 16 of the RD are clear, precise and unconditional and thus enjoy direct effect. They can thus be invoked by individuals in order to claim the disapplication of national law, especially since the Italian government failed to implement the Directive within the prescribed time. The CJEU continued by addressing the specific issue of the compatibility of Article 14 of the Aliens law with Articles 15 and 16 RD. It held that when Member States refrain from granting a period for voluntary departure or where the obligation to return has not been complied with within the period for voluntary departure, coercive measures can be used. However, in accordance with Articles 8(1) and (4) RD, those provisions require that the Member State must act in a proportionate manner and with due respect for, *inter alia*, fundamental rights, when ensuing effective return procedures.

In a situation where such measures have not led to the expected result being attained, namely, the removal of the third-country national against whom they were issued, Member States remain free to adopt measures, including criminal law measures, aimed *inter alia* at dissuading those nationals from remaining illegally on those States' territory. That being said, Member States may not, in order to remedy the failure of coercive measures adopted in order to carry out forced removal pursuant to Article 8(4) RD, provide for a custodial sentence, on the sole grounds that a third-country national continues to stay illegally on the territory of a Member State after an order to leave the national territory was notified to him and the period granted in that order has expired; rather, they must pursue their efforts to enforce the return decision, which continues to produce its effects. Indeed, such a penalty, due, *inter alia*, to its conditions and the methods of application, risks jeopardising the attainment of the objective pursued by that Directive. The CJEU emphasised that national courts are called upon not to apply such provisions and to "take into account the principle of the retroactive application of more lenient penalties."

The judgment is also important as it establishes a mandatory order of measures to be followed in return proceedings, which should go from the least coercive – granting the individual a period for voluntary departure – to the most coercive, pre-removal detention. Where Member States have not followed this procedure, third-country nationals who are being detained must be released, as that detention is unlawful.

AG Opinion: View of J.Mazàk, 1 April 2011

CJEU Judgment: First Chamber, 28 April 2011

Case Affum (*C-47/15*) – **Clarification of the *El Dridi* rules**

The CJEU extended the application of the *El Dridi* judgment, where it prohibited the application

criminal imprisonment merely on account of illegal entry to a third-country national to whom the return procedure has not been applied, also to illegal entry across an internal border, resulting in illegal stays. That interpretation also applies where the third-country national concerned may be taken back by another Member State pursuant to an agreement or arrangement within the meaning of Article 6(3) RD.

Impact of the CJEU preliminary ruling:

***Impact on the Italian jurisprudence (the referring Member State)*:** On the very same day as the publication of the *El Dridi* judgment, the *Corte di Cassazione* acquitted three undocumented migrants prosecuted under Article 14(5), confirming and reaffirming the principles stated at the supranational level. **As to national legislation the** reaction was also particularly fast in the political sphere: only a couple of months later, in June 2011, the Italian legislator adopted a new Law to ensure that the national return system was compatible with the principles established by the Return Directive and the CJEU.[11]

Impact on national jurisprudence from Member States other than the referring one: *El Dridi* is by far the most commonly cited CJEU ruling by national courts dealing with return related decisions and pre-removal detention. It is usually invoked in order to determine whether an applicant is covered or not by the RD (e.g. **Cyprus**); as norm setting for the maximum duration of the pre-removal detention period (e.g. **Romania**); or for assessing the proportionality of detention and the feasibility of less coercive measures (e.g. **Bulgaria**).

Limited application of the *El Dridi* jurisprudence to assess the legality of pre-removal detention: Some of the national courts appear unwilling to apply the *El Dridi* principles to instances where the facts are not precisely the same as those in the *El Dridi* case. For instance, an applicant who had been convicted of illegal work and illegal stay was found, by the **Cypriot Supreme Court**, to fall outside the scope of the RD because his conviction was not the result of a failure to comply with a deportation order as was the situation in the *El Dridi* case.[12] The Court ordered the applicant's release relying on ECtHR case law (*Quinn v. France* A-311 (1995); *Chachal v. UK* (1996)) rather than on *El Dridi*, which suggests an unwillingness to endorse the principle that immigration should not be criminalized.[13]

[11] Decreto-Legge 89, Disposizioni urgenti per il completamento dell'attuazione della Direttiva 2004/38/CE sulla libera circolazione dei cittadini comunitari e per il recepimento della direttiva 2008/115/CE sul rimpatrio dei cittadini di Paesi terzi irregolari, 23 Giugno 2011, 11G0128. See more in V. Passalacqua, "El Dridi upside down: a case of legal mobilization for undocumented migrants' rights in Italy", paper presented at *The Research Group Government & Law of the University of Antwerp Doctoral Conference on Democratic legitimacy without Parliament: fact or fiction?*

[12] Cyprus, Supreme Court, Re the application of Laal Badh Shah, Civil Application No. *6/2014*, 11 February 2014, available on: http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2014/1-201402-6-14.htm&qstring=Laal%20and%20Badh%20and%20Shah

[13] See more in the Cypriot REDIAL Report on pre-removal detention.

C-329/11, Achughbabian*, CJEU Judgment of 6 December 2011, ECLI:EU:C:2011:807*

Compatibility of national legislation making provisions, in the event of illegal stays, for a sentence of imprisonment and a fine with the Return Directive; the criminal imprisonment of an illegally-staying third-country national is possible only after he or she has been subject to the coercive measures provided for in the directive and after the expiry of the maximum duration of that detention.

National court requesting a preliminary ruling: *Court d'Appel de Paris* (France, Court of Appeal of Paris)

Factual context: dispute between Mr *Achughbabian* and the Prefect of Val-de-Marne concerning Mr *Achughbabian*'s illegal stay on French territory. Being suspected of committing and continuing to commit the offence set out in Article L. 621-1 of Ceseda (i.e. having entered or residing in France without complying with the provisions of Articles L. 211-1 and L. 311-1 and/or remaining in France beyond the period authorised by a previous visa) Mr *Achughbabian* was placed in police custody.

Legal and social background: Similarly to the Italian legislation at issue in the *El Dridi* case, the French system at the time of the *Achugbabian* case punished the irregular stay of aliens on French territory with a criminal prison sentence of at least one year imprisonment.[14] During this period of police custody, the irregular TCNs were placed in detention together with persons convicted as criminals.

Questions addressed by the national court: Taking into account its scope, does Directive 2008/115/EC preclude national legislation, such as Article L.621-1 of the French Code on the entry and stay of foreign nationals and on the right to asylum, which provides for the imposition of a sentence of imprisonment on a third-country national on the sole grounds of his illegal entry or residence in national territory?

Legal provision at issue: Article 8 RD

Conclusion of the CJEU: As a principle, Directive 2008/115 does not preclude national legislation which classifies an illegal stay by a third-country national as an offence and provides for penal sanctions, such as: a term of imprisonment, to prevent such a stay, or the detention of a third-country national in order to determine whether or not his stay is legal. Nevertheless, during the course of the procedure provided for by the Directive, the imposition and enforcement of a sentence of imprisonment appears more problematic as it is likely to "delay the removal'' and to infringe the requirements of effectiveness referred to, for example, in recital 4 of Directive 2008/115.

The CJEU recalls that criminal sentences "do not contribute to the carrying through of the removal which that procedure is intended to achieve, namely, the physical transportation of the person concerned out of the Member State concerned. Such a sentence does not therefore constitute a 'measure' or a 'coercive measure' within the meaning of Article 8 of Directive 2008/115." Therefore, it precludes criminal penalties for illegal stays, in so far as that legislation permits the imprisonment of a third-country national who, "though staying illegally in the territory of the said Member State and not being willing to leave that territory voluntarily, has not been subject to the coercive measures referred to in Article 8 of that Directive and has not, being placed in detention with a view to the preparation and carrying out of his removal, yet reached the end of the maximum term of that detention." This finding does not apply to the imprisonment of a third-country national to whom the return procedure established by the said directive has been applied and who is staying illegally in that territory with no justified grounds for non-return.

[14] Article 63 French Code of Criminal Procedure.

AG Opinion: **View of AG Mazak**

CJEU Judgment: **Grand Chamber, 6 December 2011**

Impact of the CJEU preliminary ruling:

Impact on French jurisprudence (the referring Member State): The **French Court of Cassation**[15] decided, in July of the year following the CJEU preliminary ruling that aliens cannot be placed in police custody for the sole reason that they are suspected of staying irregularly in French territory. The highest French court expressly referred to the preliminary rulings of the CJEU in *El Dridi* and *Achugbabian*.

Impact on the administrative practice and French legislation (the referring Member State): following the judgment of the French Court of Cassation, the Ministry of Interior issued a Circular providing instructions on the placements of aliens in public custody solely for being in the country illegally. On 31 December 2012, a Law (2012-1560) was adopted reforming the regime of detention of aliens in France. Namely, the detention could last for up to sixteen hours. At the end of this specific period, third-country nationals can be either released (if they are found to be staying legally in France) or placed in an administrative detention centre to await expulsion or deportation.[16]

Impact on national jurisprudence from other Member States than the referring one: the judgment is commonly referred to for establishing an obligation of carrying out an individual assessment in cases of irregular stay or entry; and of taking into account the individual behaviour of the TCN (e.g. **Bulgaria**).

C-430/11, Sagor*, CJEU Judgment of 6 December 2012, ECLI:EU:C:2012:777*

Compatibility of national legislation providing for a fine which may be replaced by an order for expulsion or home detention with the Return Directive; An illegal stay by a third-country national in a Member State: (1) can be penalised by means of a fine, which may be replaced by an expulsion order; (2) cannot be penalised by means of a home detention order unless that order is terminated as soon as the physical transportation of the TCN out of that MS is possible.

National court requesting a preliminary ruling: *Tribunale di Rovigo* (Italy, Tribunal of Rovigo)

Factual context: proceedings brought against Mr *Sagor* concerning his illegal stay in Italy. In 2010, Mr *Sagor* was summoned before the Tribunale di Rovigo (District Court, Rovigo) for the offence of illegal entry or stay, as referred to in Italian legislation. That Court found that the offence of illegal stay had been duly proven. This offence is according to the Law punishable by a "fine of between EUR 5,000 and EUR 10,000".

Legal provision at issue: Article 8(1) and (4) RD

Questions addressed by the national court: in the light of the principles of sincere cooperation and effectiveness, do Articles 2, 4, 6, 7 and 8 of Directive 2008/115 preclude the possibility that a third-country national who is considered by the Member State to be illegally staying there may be liable to a fine for which home detention is substituted by way of criminal law sanction, solely as a consequence of that person's illegal entry and stay? What is the impact of Articles 2, 15 and 16 RD on the possibility for Member States to enact legislation which provides that a third-country national

[15] Cass. 1re civ., 5 July 2012, n° 11.30-530: JurisData n° 2012-014965.

[16] For a detailed commentary of the legislation reform, see A. Beduschi, "Detention of Undocumented and the Judicial Impact of the CJEU's Decisions in France", available on: https://ore.exeter.ac.uk/repository/bitstream/handle/10871/16750/Detention%20of%20Undocumented%20Immigrants%20and%20the%20Judicial%20Impact%20of%20the%20CJEUs%20Decisions%20in%20France%20FINAL%20FOR%20SUBMISSION.pdf?sequence=3&isAllowed=y.

who is considered to be illegally staying there, may be liable for a fine for which an enforceable order for expulsion with immediate effect is substituted by way of criminal-law sanction?

Legal and social background: After the *El Dridi* preliminary ruling, the reformed Italian Aliens Law maintained illegal stay as a criminal offence punished by pecuniary penalties.

Conclusion of the CJEU: The Court has already had occasion to state that common standards and procedures established by the RD would be undermined if, after establishing that a TCN is staying illegally, the Member State were to preface the implementation of the return decision, or even the adoption of that decision, with a criminal prosecution which could lead to a term of imprisonment during the course of the return procedure. Such a step would risk delaying the removal. However, legislation which provides for a criminal prosecution, which can lead to a fine for which an expulsion order may be substituted, has markedly different effects from legislation providing for a criminal prosecution: criminal prosecution may lead to a term of imprisonment during the course of the return procedure. The possibility that that criminal prosecution leads to a fine will hardly impede the return procedure established by the RD and, so, is not in itself, prohibited EU Law.

As for a fine, for which a home detention order may be substituted, the RD precludes Member State legislation which allows illegal stays by TCNs to be penalised by means of a home detention order without guaranteeing that the enforcement of that order must come to an end as soon as the physical transportation of the individual concerned out of that Member State is possible.

AG Opinion: /

CJEU Judgment: **First Chamber, 6 December 2012**

Impact of the CJEU preliminary ruling:

***Impact on the Italian legislation (the referring Member State)*:** reform of the Italian Aliens Law in 2014, making illegal entry or stay an administrative offence. Law No. 67/2014 delegated to the government to repeal the criminal offense for illegal entry/stay (before 17 November 2015), turning it into an administrative offense, and preserving criminal charges to the conduct of violation of administrative measures adopted on the matter. In practice, only the first entry will be de-penalized.[17]

***Impact on national jurisprudence from other Member States than the referring one*:** in relation to the individual approach in assessing the risk of absconding (e.g. Bulgaria).

C-522/11, Mbaye*, CJEU Judgment of 21 March 2013, ECLI:EU:C:2013:190*

Compatibility of national legislation penalising illegal residence with criminal fine with the Return Directive

National court requesting a preliminary ruling: *Giudice di pace di Lecce* (Italy, Justice of the Peace of Lecce)

Factual context: proceedings brought against Mr *Mbaye* concerning his illegal stay in Italy. This case, among others, has been referred to the CJEU concerning the imprisonment of third-country nationals in return procedures for the crime of irregular entry or stay.

Legal provision at issue: Article 2(2)(b) and 8 RD

Questions addressed by the national court: Does the Directive 2008/115 preclude the application of the present legislation – Article 10bis of legislative Decree286/1998 – punishing irregular entry and stay by immediate expulsion? Additionally, are penal sanctions solely for the irregular presence

[17] See Italian REDIAL country Report on the judicial implementation of Chapter II RD, p. 2.

of the third-country national in the territory, admissible in the meaning of the Return Directive, regardless of a fully achieved return procedure established by the said directive?

Conclusion: The Directive 2008/115 does not preclude Member State legislation, such as that at issue in the main proceedings, sanctioning the illegal residence of third-country nationals by a fine which can be replaced by a penalty of expulsion, provided that such a replacement is only used when the applicant's situation corresponds to one of those referred to in Article 7, paragraph 4, of this Directive

AG Opinion: /

CJEU Judgment: (Third Chamber) of 21 March 2013, FR – unpublished decision

2. Interaction between asylum detention and pre-removal detention

C-357/09, PPU Kadzoev*, CJEU Judgment of 30 November 2009, ECLI:EU:C:2009:741*

Period of detention; taking into account the period during which the execution of a removal decision was suspended; concept of 'reasonable prospect of removal': Only a real prospect that removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6), corresponds to a reasonable prospect of removal, no reasonable prospect exists where it appears unlikely that the person concerned will be admitted to a third country, within those periods.

National court requesting a preliminary ruling: Administrativen sad Sofia-grad

Factual context: This judgment concerns the detention pending removal by Bulgarian authorities of a third-country national, whose name, birthplace and nationality were disputed. Detention began on 3 November 2006. Bulgarian authorities corresponded with Russian authorities over a Russian birth certificate and a Chechen temporary identity card. The Russian authorities disputed the authenticity of the evidence and refused to accept his Russian nationality, hence preventing the removal. Between 31 May 2007 and 10 July 2009, the third-country national applied for refugee status three times and was rejected each time. In June and October 2008, he applied for his detention to be converted into a less coercive alternative, namely regular reporting to the police authorities, but these requests were rejected as he had no actual address in Bulgaria. The proceedings culminated in the Supreme Administrative Court declaring him 'stateless' as his identity and nationality could not be determined. UNHCR and Amnesty found it credible that the man was a victim of ill-treatment in his country of origin. None of the attempts to obtain travel documents and get a safe third country to accept him were successful and, at the time of the Grand Chamber's judgment, the individual was still in detention. The proceedings in which the preliminary reference arose concerned the continued detention of a third-country national which continued after the transposition of the Return Directive in Bulgaria, which amended national legislation governing time limits on and specific grounds for immigration detention.

Legal provision at issue: Article 15 RD

Questions addressed by the national court: '1. Must Article 15(5) and (6) of Directive 2008/115 … be interpreted as meaning that:

(a) where the national law of the Member State did not provide for a maximum period of detention or grounds for extending such detention before the transposition of the requirements of that directive and, on transposition of the directive, no provision was made for conferring a retroactive effect on the new provisions, the requirements of the directive only apply and cause the period to start to run from their transposition into the national law of the Member State?

(b) within the periods laid down for detention in a specialised facility with a view to removal within

the meaning of the directive, no account is to be taken of the period during which the execution of a removal decision from the Member State under an express provision was suspended owing to a pending request for asylum by a third-country national, where during that procedure he continued to remain in that specialised detention facility, if the national law of the Member State so permits?

2. Must Article 15(5) and (6) of Directive 2008/115 … be interpreted as meaning that, within the periods laid down for detention in a specialised facility with a view to removal within the meaning of that directive, no account is to be taken of the period during which execution of a decision of removal from the Member State was suspended under an express provision on the grounds that an appeal against that decision is pending? This is despite the fact that during the period of that procedure the third-country national has continued to stay in that specialised detention facility, where he did not have valid identity documents and there is therefore some doubt as to his identity or where he does not have any means of supporting himself or where he has demonstrated aggressive conduct.

3. Must Article 15(4) of Directive 2008/115… be interpreted as meaning that removal is not reasonably possible where:

(a) at the time when a judicial review of the detention is conducted, the State of which the person is a national has refused to issue him with a travel document for his return and there had been no agreement with a third country in order to secure the person's entry there even though the administrative bodies of the Member State are continuing to make endeavours to that end?

(b) at the time when a judicial review of the detention is conducted there was an agreement for readmission between the European Union and the State of which the person is a national, but, owing to the existence of new evidence, namely the person's birth certificate, the Member State did not refer to the provisions of that agreement, if the person concerned does not wish to return?

(c) the possibilities of extending the detention periods provided for in Article 15(6) of the directive have been exhausted in a situation where no agreement for readmission has been reached with the third country at the time when a judicial review of his detention is conducted, with regard to Article 15(6)(b) of the directive?

4. Must Article 15(4) and (6) of Directive 2008/115 … be interpreted as meaning that if, at the time when the detention with a view to removal of the third-country national is reviewed, there is found to be no reasonable grounds for removing him and the grounds for extending his detention have been exhausted, in such a case:

(a) it is none the less not appropriate to order his immediate release if the following conditions are all met: the person concerned does not have valid identity documents, whatever the duration of their validity, with the result that there is a doubt as to his identity; he is aggressive in his conduct; he has no means of supporting himself; and there is no third person who has undertaken to provide for his subsistence?

(b) as to the decision on release it must be asked whether, under the provisions of the national law of the Member State, the third-country national has the resources necessary to stay in the Member State as well as an address at which he may reside?'

Conclusion of the CJEU: As to the calculation of the period of detention, the CJEU recalls that the detention of asylum seekers is governed by Directive 2003/9/EC and that, as a rule, they should not be detained. If a third-country national were to be detained as an asylum seeker, this should have happened on the basis of a new decision and in accordance with that Directive. If this were not the case, meaning that the third-country national was being kept in detention on the basis of the same decision, then the period of examination of the asylum application must be included in the calculation of pre-removal detention (paras. 41-48). As to the extension of the period of detention, the Court recalled that the suspension of removal for judicial review is not mentioned as grounds for extension

of detention by the RD. The period of judicial review should be taken into account. (paras. 51-54).

On the concept of the reasonable prospect of removal, the CJEU concluded that only a real prospect that the removal can be carried out successfully, for the periods laid down in Article 15(5) and (6) RD, corresponds to a reasonable prospect of removal, and that that reasonable prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods. When the maximum period of detention has already expired, the individual has to be released immediately, and it is considered as if there is no reasonable prospect of removal. The CJEU clarified that the period of eighteen months provided by the RD is a maximum period which cannot be exceeded by the Member States. The TCN can no longer be detained after eighteen months. (paras. 60-62).

The Court also clarified that detention on the basis of the Directive is not possible on the grounds of public order considerations. (para. 70)

AG Opinion: View of AG Mazak

CJEU Judgment: Grand Chamber, Judgment of 30 November 2009

Impact of the preliminary ruling:

***Impact on national legislation of Bulgaria (the referring Member State)*:** The most fundamental change is the introduction of a time limit to the length of detention (see, e.g., the *Kadzoev* case, C-357/09 PPU, following a preliminary ruling request by the Sofia City Administrative Court). Previously no time limit to immigration detention existed in Bulgaria and detention could last for years. Before the adoption of the RD, Bulgarian law provided that immigration detention lasted "until the obstacles for the execution of the removal order ceased to exist".[18]

***Impact on national jurisprudence of Bulgaria (the referring Member State)*:** the *Kadzoev* judgment is taken into consideration in cases on differentiation between the legal regimes of detention of irregular TCN under the Return Directive and detention of asylum seekers under the Reception Conditions Directive.

Impact on the national jurisprudence of Member States other than the referring one*:** the *Kadzoev* judgment is invoked in relation to calculating the starting point for the pre-removal detention period, when asylum detention also occurred (e.g. Swedish Migration Court of Appeal, ***UM10615-12); or as norm setting for the maximum ceiling of detention foreseen in the RD (18 months), which would require that the detainee must be released (e.g. Cypriot Supreme Court, ***Laal Badh Shah case***).

C-534/11, Arslan*, CJEU Judgment of 30 May 2013, ECLI:EU:C:2013:343*

Applicability to asylum seekers; possibility of keeping a third-country national in detention after an application for asylum has been made; the RD does not apply from the submission of an asylum application until the end of this procedure.

National court requesting a preliminary ruling: Nejvyšší správní soud **(***Supreme Administrative Court of the Czech Republic)*

Factual context: Mr Arslan is a Turkish national who was arrested and detained in the Czech Republic with a view to removal. He lodged an asylum application while in detention under the domestic legislation implementing the Return Directive. His detention was extended to 60 days due to a presumption that he will obstruct the enforcement of removal. This presumption was based on past conduct: irregular entry, evading border controls, irregular stay in Austria and the Czech Republic, and the fact that, in spite of having been already returned by Greece to Turkey, he had

[18] According to the Bulgarian CONTENTION country Report.

come back to the EU. Although he lodged an asylum application, Mr Arslan's detention was extended to a further 120 days on the grounds of the removal procedure. He challenged this extension as unlawful, since he argued there was no reasonable prospect of enforcing his removal due to the fact that he would take advantage of all available remedies. In support of his claim he relied on Article 15(1) and (4) RD and ECtHR jurisprudence.

Legal context: The 'pre-Arslan' practice in the Czech Republic was as follows: if a TCN applied for international protection while being in pre-removal detention, there was no automatic immediate review of the prospect of his removal; this review took place only when the initial detention decision expired and the Police had to decide whether to prolong the detention or not.

Legal provision at issue: Art. 15 RD

Questions addressed by the national court: The referring court sought an answer first, on whether the Return Directive applies to an illegally staying third-country national who makes an application for asylum within the meaning of Directive 2005/85 and, second, whether such an application necessarily puts an end to his detention for the purpose of removal on the basis of the Return Directive.

According to the AG, the questions addressed by the referring court **raise the issue that the asylum provisions might be used as a tool to render application of the Return Directive ineffective**

1. Should Article 2(1), in conjunction with recital 9 of the preamble, of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals be interpreted to mean that this Directive does not apply to a third-country national who has applied for international protection within the meaning of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status?

2. If the answer to the first question is in the affirmative, must the detention of a foreign national for the purpose of return be terminated if he applies for international protection within the meaning of Directive 2005/85/EC when there are no other reasons for keeping him in detention?

Advocate General: AG Wathelet Opinion

Conclusion of the CJEU: In its ruling, the CJEU clarified that an asylum seeker ceases to come within the scope of the Return Directive, until a final negative decision has been made on his application for asylum. The Court recalled that in *Kadzoev* it had already established that detention for the purpose of the removal and detention of asylum seekers falls under different legal rules.

As regards the second question addressed by the referring court raising the issue of abuse of asylum application for the purpose of evading pre-removal detention, the Court held that the submission of an asylum application, at a time the individual is subject to a return decision and is being detained on the basis of Article 15 RD, "does not allow it to be presumed, without an assessment on a case-by-case basis of all the relevant circumstances, that he has made that application solely to delay or jeopardise the enforcement of the return decision and that it is objectively necessary and proportionate to maintain detention." If a third-country national who is detained on the basis of the Return Directive submits an application for asylum, detention ordered on the basis of that directive must be terminated. He can however be detained under the asylum rules, "after an assessment on a case-by-case basis of all the relevant circumstances, that the application was made solely to delay or jeopardise the enforcement of the return decision and that it is objectively necessary to maintain detention to prevent the person concerned from permanently evading his return." The Court did not provide examples or further criteria to help in distinguishing between situations where the third-country national is merely exercising his rights from those where he is abusing EU derived rights. The AG, on the other hand, provided helpful guidelines for national courts on how to identify situations of abuse of rights:

77. "[…] the individual and specific circumstances of each case must be carefully examined in detail by the national courts in order to draw a distinction between 'taking advantage of a possibility conferred by law and an abuse of rights'.

78. As part of that examination, the referring court could take into consideration, *inter alia*, the following evidence in the present case:

– Mr Arslan's previous illegal entries into the territories of several Member States without any mention of an application for asylum;

– the fact that Mr Arslan clearly stated that in seeking asylum his intention was to bring about an end to his detention through demonstrating that, by using all the remedies having suspensive effect that the procedure of applying for asylum could offer him, his detention would necessarily extend beyond the maximum period allowed by national law, which removed from the outset any reasonable prospect of the removal process succeeding; and

– the fact that Mr Arslan immediately disappeared following his release and, as may be inferred from the observations made at the hearing by the Czech Government, did not continue the procedure of applying for asylum."

CJEU Judgment: (Third Chamber) of 30 May 2013

The J.N. case (*C-601/15)* – Clarification of the CJEU reasoning in *Kadzoev* and *Arslan* cases

The Court concluded that in instances where an asylum application is filed by a third-country national subject to pre-removal detention, the removal procedure should be "resumed at the stage at which it was interrupted." (para. 75) This was deduced from the obligation of Member States to carry out the removal as soon as possible. (para. 76)

Impact of the preliminary ruling:

Impact on national legislation/policy of the referring Member State: 30 days before the CJEU delivered its judgment in *Arslan*, the Czech legislator adopted Law No. 103/2013, whereby if a third-country national – who is detained under Aliens Act – lodges an application for international protection, the Police must issue a new detention order within five days if they intend to prolong the detention measure. Once this new 'asylum detention' order is issued, the initial 'pre-return detention' order becomes automatically void. *Further analysis of the legislative amendments following the Arslan preliminary ruling can be found in the **Czech REDIAL Report on pre-removal detention**, p. 5.*

Impact on the jurisprudence from the referring Member State: In spite of the aforementioned legislative amendment, the problem in practice was that the reasons for the detention of a third-country national under the Asylum Act did not cover all situations under the Alien's Act. Hence the Supreme Administrative Court had to decide whether in the cases, when Art. 46a Asylum Act is not applicable, a new detention decision under the Aliens Act must be issued or whether it is enough to review the initial detention decision internally without issuing a new decision. The Supreme Administrative Court eventually opted for the former and held that, despite the fact the Aliens Act does not stipulate such a process, a new decision on detention must be issued; other interpretations would be inconsistent with the CJEU's Arslan judgment (see e.g. ***Judgment No. 1 As 90/2011-124***).

Impact on national jurisprudence from other Member States than the referring one: the CJEU ruling in *Arslan* has also had an important impact on national case law beyond the referring country of origin:

(**Bulgaria**) – the *Arslan* ruling is the referring judgment in cases concerning differentiation between the legal regimes of detention of irregular TCN under the Return Directive and the detention of asylum seekers under the Reception Conditions Directive (see for instance the case of **Geyan Syudits**).

(Italy) – In this sense, the Court of Rome adopted a noteworthy judgment giving effect to the principles set out in the *Arslan* case. In this case, the TCN, who came from Nigeria, was rescued at sea when trying to reach Italian territory without a travel document or visa. He was immediately issued a return decision based on Article 10(2)(b) of the Consolidated Text on Immigration and was subsequently detained in an Identification and Expulsion Centre, even though he had asked for international protection at the very moment of the entry. Due to his asylum application, he was not supposed to be detained in an Identification and Expulsion Centre, but in an Accommodation Centre for asylum seekers (so-called CARA, under Art. 20 (2)(d), d.lgs. no. 25/2008 of transposition of Directive 2005/85/EC). The Justice of the Peace, however, validated his detention. As a result of his asylum application, the Civil Court became competent for deciding on the extension of his detention, which led to a more rigorous examination of the lawfulness of continuing detention. The Civil Court thus decided – with reference to Arslan – that the detention could not be prolonged. The judge based the decision on two main arguments: first, the application for international protection had not been made after the detention order but at the moment of entry and therefore, it could not be considered as having been made to delay the enforcement of the return decision; and second, the request for renewal submitted by the Questore (the Police Commissioner) lacked any of the criteria set out by the CJEU in Arslan.

(**Slovenia**) – The Slovenian Administrative Court referred to the CJEU ruling in the *Arslan* case in order to justify its rejection of the administrative authorities' practice of detaining TCNs based solely on submission of multiple asylum applications. The Court inferred from *Arslan* and *Mahdi* that the fact of multiple asylum applications is not sufficient in itself to justify immigration detention. The Court underlines that there needs to be an individual assessment of the circumstances, and proof of an asylum application having been lodged solely to delay or jeopardise the enforcement of the RD. (I **U 392/2015**) The approach of the Slovenian Administrative Court is not equally shared throughout the European courts. In spite of the CJEU judgment, the distinction between detention in the context of asylum and detention in the context of pre-removal procedures is often blurred in practice (e.g. **Hungary, Cyprus**).

(**Estonia**)[19] – The Arslan judgment led to an extension of the judicial control powers of administrative courts when assessing the lawfulness of immigration detention in Estonia, following the judgment of the **Supreme Court**, which held that the administrative courts can rely on the circumstances of the application and other materials examined at the court hearing, in such cases. The **Supreme Court** held that administrative courts are not bound solely by the facts mentioned in a request to detain a person. The courts are competent to confirm detention on another legal basis than those indicated in the request. (The Circuit Court had a different opinion and found that courts cannot arbitrarily add to the reasons in the application for detaining a person.)

Similarly to the **AG Opinion** in *Arslan*, the **Supreme Court** pointed out that it is difficult to distinguish whether the application for asylum is filed with the aim of delaying or frustrating the removal of a third-country national. The Court indicated several circumstances that should be assessed in order to establish whether the submission of the asylum application while the third-country national is under pre-removal detention is or is not an abuse of rights:

- the circumstances of his/her arrival in the country;
- circumstances of filing an application, also the time of filing an application;
- earlier statements about his/her country of origin;
- the actual credibility of his/her statements, which give grounds to the suspicion that the person may not be available in the case of the rejection of his/her application.

[19] See the commentary of the Supreme Court of Estonia Judgment of 29 January 2015, registration no. 3-3-1-52-14 by R. Kitsing, in the ACTIONES database.

3. The right to an effective judicial protection in pre-removal detention cases

C-146/14, PPU Mahdi, *CJEU Judgment of 5 June 2014, ECLI:EU:C:2014:1320*

Extension of detention — Obligations of the administrative or judicial authority — Extent of judicial control by a court — Third-country national without identity documents — Obstacles to implementation of a removal decision — Refusal of relevant embassy to issue an identity document enabling the third-country national to be returned — Risk of absconding — Reasonable prospect of removal — Lack of cooperation — Whether the Member State concerned is under an obligation to issue a temporary document relating to the status of the person concerned.

National court requesting a preliminary ruling: Administrativen sad Sofia-grad

Factual and legal context: the preliminary reference request was preceded by internal jurisprudential debates in Bulgaria. They concerned the issue whether the judicial authority has the competence to renew the detention order as a first-instance decision-maker (see, for example, the Ruling of 12 July 2011 of the Supreme Administrative Court in case No. 8799/2011). Under the general legal system in Bulgaria the judicial authority acts as a decision-making body only when the procedure is not an adversarial one. However, the Law on Foreign Nationals in the Republic of Bulgaria, in its Article 46a, Para. 4, introduces an exception to the general system and stipulates that it is the court, which following the elapse of the initial six months of detention, shall decide whether to renew or discontinue it. The uncertainty regarding the power of national courts to ask for an adversarial proceedings in relation to the prolongation of pre-removal detention determined a Bulgarian court to address preliminary questions to the CJEU.

Legal provision at issue: Article 15 RD

Questions addressed by the national court: The referring court asked a series of procedure and substance questions concerning the interpretation of Article 15 RD. In short the referring court wished to know:

● Whether the national administrative authority carrying out the periodic review of the legality of the detention has to issue a written decision each time they carry out this review;

● The nature and scope of the mandatory review carried out by a court in respect of the extension of the detention measure, when the maximum detention period initially imposed has expired;

● Whether Article 15(1) and (6) RD precludes a national practice whereby an initial period of six months' detention may be extended solely on the grounds that the third-country national concerned has no identity documents and whether, where the facts are as in the main proceedings, there is a risk of absconding, as referred to in Article 15(1) and (6) of the directive;

● Whether, in the circumstances of the case before it, for the purposes of determining whether the Bulgarian authorities may extend the detention of the third-country national, the latter has demonstrated "a lack of cooperation" and/or whether there were "delays in obtaining the necessary documentation from [the] third country";

● If the third-country national is released and the authorities of that State still do not issue an identity document, the Member State must issue a temporary document relating to the status of that person.

Conclusion of the CJEU: The authorities which carry out the review of a third-country national's detention at regular intervals pursuant to the first sentence of Article 15(3) RD are not obliged, at the time of each review, to adopt an express measure in writing that states the factual and legal reasons for that measure. Nevertheless, any decision adopted by a competent authority, on the expiry of the maximum period allowed for the initial detention of a TCN, concerning the prolongation of the detention must be in the form of a written measure that includes the reasons in fact and in law for that decision.

The Court also concluded that the "judicial authority which is deciding on the possibility of extending an initial period of detention must carry out an examination of the detention even if the authority which brought the matter before it has not expressly requested it to do so and even if the detention of the third-country national concerned has already been reviewed by the authority which made the initial detention order." The judicial authority deciding upon an application for the extension of detention "must be able to rule on all relevant matters of fact and of law in order to determine, in the light of the requirements set out in paragraphs 58 to 61 of this judgment, whether an extension of detention is justified, which requires an in-depth examination of the matters of fact specific to each individual case. Where the detention that was initially ordered is no longer justified in the light of those requirements, the judicial authority having jurisdiction must be able to substitute its own decision for that of the administrative authority or, as the case may be, the judicial authority which ordered the initial detention and to take a decision on whether to order an alternative measure or the release of the third-country national concerned. To that end, the judicial authority ruling on an application for extension of detention must be able to take into account both the facts stated and the evidence adduced by the administrative authority and any observations that may be submitted by the third-country national. Furthermore, that authority must be able to consider any other element that is relevant for its decision should it so deem necessary. Accordingly, the powers of the judicial authority in the context of an examination can under no circumstances be confined just to the matters adduced by the administrative authority concerned." (para. 62)

The RD precludes that an initial six-month period of detention may be extended solely because the third-country national concerned has no identity document.

Article 15(6)(a) RD must be interpreted as meaning that a third-country national who, in circumstances such as those at issue in the main proceedings, has not obtained an identity document which would have made it possible for him to be removed from the Member State concerned may be regarded as having demonstrated a 'lack of cooperation' within the meaning of that provision only if an examination of his conduct during the period of detention shows that he has not cooperated in the implementation of the removal operation and that it is likely that that operation lasts longer than anticipated because of that conduct (causal relation between prolongation of removal and the TCN's conduct), a matter which is to be determined by the referring court.

The Court also concluded that the Member States do not have an obligation, but retain freedom to decide whether to regularise the stay of the TCN who cannot be removed (Art. 6(4) RD).

AG: View of AG Szpunar

CJEU Judgment: Third Chamber, Judgment of 5 June 2015

Impact on the jurisprudence from the referring Member State: The main effect of the CJEU Judgment of 05 June 2014 in the Mahdi Case has been that the administrative authority began to issue decisions on extending the length of detention giving the factual and legal grounds, which are automatically submitted to the court for review. Thus detainees now are not in a disadvantaged position with regard to the right to effective remedies. As noted above, the second level judicial authority in Bulgaria has a limited scope of judicial review, that is, it establishes only the conformity of the judgment of the first level jurisdiction with the law and does not carry out fact-finding work.

As regards the CJEU conclusion that Article 15 (1) and (6) RD do not allow for national regulations like the Bulgarian one, according to which renewal of detention could be done solely on the ground that the TCN has no identity documents, the domestic jurisprudence is divergent. The Bulgarian Supreme Administrative Court gives preference to the CJEU conclusion, while other national courts follow a strict application of Article 44, Para. 6 of the Law on Foreign Nationals in the Republic of Bulgaria, which provides for the lack of identity documents of the TCN as a separate (autonomous) ground of detention.

The CJEU pronouncement that the sole fact of refusing to sign a declaration for voluntary return by the TCN does not amount to a 'lack of cooperation' within the meaning of Article 15 (6) of the Return Directive also has a similar divergent judicial implementation in Bulgaria.

Last, but not least, in relation to the preliminary ruling that Member States must provide the third country national with written confirmation of his situation in cases when the TCN has no identity documents and has not obtained such documentation from his country of origin, the Bulgarian authorities started to provide TCNs, upon release from detention, with a written confirmation as to the grounds on which they have been released. (See more in the **Bulgarian REDIAL Report on pre-removal detention**)

Impact on the jurisprudence from other Member States than the referring one: This preliminary ruling had also affected the Dutch judiciary in regard to the requirements of judicial motivation. 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 – **REDIAL Dutch Report on pre-removal detention**).

4. Use of specialised facilities as a general rule in detaining returnees

C-473/13 and C-514/13, Bero & Bouzalmate*, CJEU Judgment of 17 July 2014, ECLI:EU:C:2014:2095*

Detention for the purpose of removal – Detention in prison accommodation – Not possible to provide accommodation for third-country nationals in a specialised detention facility – No such facility in the Land where the third-country national is detained.

National court requesting a preliminary ruling: *the Bundesgerichtshof* (German Federal Court of Justice) and *Landgericht München I* (Regional Court Munich I, Germany).

Factual context: In Germany, each *Land* (federated state) is responsible for carrying out the detention of illegally-staying third-country nationals. Since the Land of Hesse had no specialised detention facility that could accommodate women, Ms. BERO was detained almost one month in Frankfurt prison. Mr. Bouzalmate, for his part, was detained in a separate section of the prison of the city of Munich, due to the absence of specialised detention facilities in the Land of Bavaria.

Legal provision at issue: Article 16 RD.

Questions addressed by the national court: the German Courts requested the Court of Justice to determine whether a Member State is required to detain illegally-staying third-country nationals in a specialised detention facility when the federated state competent to decide upon and carry out such detention does not have such a detention facility.

Conclusion: according to the wording of the Return Directive, detention for the purpose of removal of illegally-staying third-country nationals must, as a rule, take place in specialised detention facilities. It follows that the national authorities responsible for applying that requirement must be able to detain the third-country nationals in specialised detention facilities, regardless of the administrative or constitutional structure of the Member State under which those authorities fall. Thus, the fact that, in certain regions of a federal Member State, the competent authorities have provided for this kind of detention facility, while other regions failed to offer similar conditions, cannot amount to sufficient transposition of the Return Directive.

While the Court acknowledges that a Member State which has a federal structure is not obliged to set up specialised detention facilities in each federated state, that Member State must nevertheless

ensure that the competent authorities of the regions of the federal State without such facilities can provide accommodation for third-country nationals in specialised detention facilities located in other regions.

AG Opinion: AG BOT, 30 April 2014

CJEU judgment: Grand Chamber, 17 July 2014

Impact of the CJEU judgment:

Impact of the national jurisprudence of the referring Member State: Implementing the decision of the CJEU, the Federal High Court decided that the detention of foreigners under the Return Directive must be executed in special detention facilities in accordance with Article 16(1) of the Return Directive (Bundesgerichtshof [Federal High Court]: BGH, *judgment of 12 February 2015, V ZB 185/14; judgment of 29 October 2010, 5 ZB 233/10*). This means that a particular building for the detention under the Return Directive within the compound of an ordinary prison cannot be considered as a special detention facility in the sense of the Return Directive (ibid.) *judgment of 25 July 2014, V ZB 137/14*, para. 9). A detention order cannot be applied if the execution of a detention order in specialised detention facilities cannot be ensured due to the lack of sufficient facilities (*judgment of 12 February 2015, V ZB 185/14*). It should be noted that the case law resulted in the release of many detainees and that the regions went to considerable efforts to establish detention facilities complying with the Return Directive.[20]

***Impact on the national legislation of the referring Member State*:** Section 62a Residence Act enshrined the case law of the Federal High Court into positive law. In exceptional cases they may be detained together with regular prisoners, though they will have to be separated within the facility.

5. Separation from ordinary prisoners

C-474/13, Pham, *CJEU Judgment of 17 July 2014, ECLI:EU:C:2014:2096*

Detention for the purpose of removal — Detention in prison accommodation — Possibility of detaining a third-country national with ordinary prisoners where he or she has given his or her consent

National court requesting a preliminary ruling: *Bundesgerichtshof* (Federal Court of Justice, Germany).

Factual context: Ms. Pham, a Vietnamese national, was detained in a prison in Bavaria. She consented to be detained together with ordinary prisoners**.**

Legal provision at issue: Recital 17, Article 16 RD.

Questions addressed by the national court: Is it consistent with Article 16(1) of the Directive to place a pre-deportation detainee in accommodation together with ordinary prisoners if the person consents to such accommodation?

Conclusion: according to Article 16 RD, detention for the purpose of the removal of illegally-staying third-country nationals must take place, as a rule, in specialised detention facilities. A Member State cannot take account of the wish of the third-country national concerned to be detained in prison accommodation. The Court observes that under the Return Directive the obligation requiring illegally-staying third-country nationals to be kept separated from ordinary prisoners is not coupled with any exception and thereby guarantees the observance of the foreign

[20] Information provided by the German REDIAL Report on pre-removal detention.

nationals' rights in relation to detention. More specifically, the separation requirement is more than just a specific procedural rule for carrying out the detention in prison accommodation and constitutes a substantive condition for that detention, without observance of which the latter would, in principle, not be consistent with the directive (paras. 21 and 22).

AG Opinion: AG BOT, 30 April 2014

CJEU judgment: Grand Chamber, 17 July 2014

German Federal High Court: BGH, Judgment of 12 February 2015, V ZB 185/14

After the CJEU ruling in the above joined cases, the **German Federal High Court** declared that detention of foreigners under the Return Directive must be carried out in special detention facilities in accordance with Article 16(1) of the Return Directive. This notably means that a particular building for the detention under the Return Directive within the compound of an ordinary prison cannot be considered as a special detention facility in the sense of the Directive. (**BGH, judgment of 25 July 2014, V ZB 137/14, para. 9**). In practice, a lack of sufficient "specialised" facilities is not likely to justify the use of prison accommodation. In such cases, the detention order cannot be applied and detainees must be immediately released. The Courts have followed this line in their subsequent jurisprudence and federated states undertook considerable efforts to establish detention facilities complying with the Return Directive. Upon the applicant's request, national courts have to assess the proportionality of the measures considered. The Judge must reject the detention if it was foreseeable that the foreigner would be accommodated contrary to the requirements of EU law: *e.g.* when it was clear that pre-removal detention would be carried out in the Büren prison instead of a specialised premise, and thus would be in violation of Article 16(1) of Directive 2008/115/EC (**German Federal Civil Court, Decision of 18 February 2016, V ZB 74/15**).

From a legal perspective, Section 62a Residence Act enshrined the case law of the Federal High Court into positive law. When exceptional circumstances require so, third-country nationals may be detained together with ordinary prisoners, as long as both categories are physically and "locally" separated.[21]

[21] See German REDIAL Report on pre-removal detention, pp. 18-19.

III. Main Outcomes of Judicial Dialogue on pre-removal detention (Article 15 RD): a comparative analysis

1. Distinguishing immigration detention under the Return Directive from criminal imprisonment of irregular migrants – the impact of the CJEU jurisprudence

Immigration detention has been a controversial issue in particular due to the difficulty of solving the legal paradox it creates. Notably, immigration detention under the Return Directive is an administrative measure which lacks the safeguards of criminal proceedings, though its effects on the right to liberty are similar. At the same time, qualifying immigration detention as a criminal measure has been considered to be a disproportionate sanction for an offence, consisting of only illegal entries or stays. As highlighted by several Advocate Generals of the CJEU, "*detention for removal purposes is neither punitive nor penal and does not constitute a prison sentence.*"[22] It is thus important to distinguish between the various situations that can legitimise the criminalisation of irregular entry, stay or residence, given that in such situations, the norm is the application of the procedures set out by the RD.

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 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, then they cannot be used by the Member States against individuals.[23] The **Belgian Cour de Cassation**[24] considered that the Return Directive does not apply to a third-country national 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.[25] Yet, **Belgium** has not expressly provided for norms transposing Article 2(2)(b) RD into national law.

In practice, migration-related offences are quite often criminalised by Member State legislation, punishable either by a fine (**Italy**, **Spain**), a prison sentence (**Cyprus**, the **Czech Republic**, and the **Netherlands**) or even immediate expulsion (**Italy**). Some issues have been referred to the CJEU in the context of preliminary rulings, and the Court has clarified the following standards:[26]

- The RD precludes Member States from imposing imprisonment under national criminal law on the sole grounds of illegal stay 'before or during carrying out return procedures', since this would delay return. Furthermore, Member States must follow a mandatory order of measures in return proceedings, which should go from the least coercive – granting the individual a period for voluntary departure – to the most coercive – pre-removal detention. Where Member States have not followed this procedure, third-country nationals who are being detained must be released, as their detention is unlawful. (El Dridi[27])

[22] View of Advocate General Mazák in *El Dridi* (C-61/11 PPU, EU:C:2011:205, point 35), and View of Advocate General Wathelet in *G. and R.* (C-383/13 PPU, EU:C:2013:553, point 54); View of AG Szpunar, in *Mahdi* (Case C-146/14 PPU, ECLI:EU:C:2014:1936, point 47).

[23] See Return Handbook.

[24] See the judgment of *5 November 2014, no. P.14.1271.F/3.1*.

[25] Article 75 of the Law on Aliens of 15 December 1980.

[26] For more details see Section I of this Electronic Journal.

[27] See para. 59.

- The RD precludes the imprisonment of an illegally-staying TCN who is not ready to leave voluntarily and who has not been subject to the coercive measures detailed in Article 8. (Achughbabian**)**
- The RD does not preclude criminalising illegal stays by a fine but precludes criminalisation by home detention without guaranteeing that its enforcement must end as soon the physical transportation is possible. (Sagor)
- The RD precludes legislation providing, in the event of TCNs staying illegally, for either a fine or removal, since the two measures are mutually exclusive. (Zaizoune)
- The RD does not preclude a prison sentence on an illegally-staying TCN who, after having been returned, unlawfully re-enters a Member State in breach of an entry ban. (Celaj)

The complexities of intertwined administrative pre-removal detention and criminal proceedings are illustrative in the case of *Aarrassi, Ababsa and Dhifalli* decided by the **Tribunal of Crotone**, Italy.[28] Here the Tribunal had to assess whether the detained third-country nationals should be prosecuted for the criminal offence of demolition of state property and resistance to police officers, due to their protests against unnecessary detentions orders and the conditions in the Crotone detention center pending removal. Relying heavily on the *El Dridi* judgment, the Tribunal deduced several obligations which it applied *in casu*: 1) the direct effect of Article 15 RD, which can be invoked by individuals in order to disapply national legislation or annul administrative measure; 2) the mandatory order of measures and stages in the RD, ranging from the least coercive to the most restrictive measure; 3) the public administration's obligation to issue detention orders "in writing with reasons being given in fact and law"; 4) the obligation to consider less restrictive alternatives to detention; 5) the obligation to immediate release if the detention is unlawful. The procedural and substantive safeguards developed by the CJEU in the *El Dridi* judgment were the center point in the Tribunal reasoning deciding that the detained TCNs acted out of necessity and self-defense. Their acts were legitimate given the unlawful detention orders and the sub-ECHR standards of detention conditions.

In spite of this jurisprudence, problematic national provisions, and divergent judicial practice persist at the national level. For instance, in **Cyprus**, if TCNs are convicted for the offence of being illegal immigrants under the catch-all list of Article 6 of Aliens Law,[29] they are removed from the ambit of the RD and must serve their prison sentence together with ordinary prisoners. In theory, those provisions of the national law which transpose the RD take priority over other provisions they may be in conflict with, but, in practice, Cypriot courts do not dispute the validity and operation of Article 6 as being contrary to the RD. An example of this is a case of a TCN who was detained for the purpose of her deportation because she was HIV positive, under Article 6(1)(c) of the national immigration law which defines carriers of contagious diseases as 'illegal immigrants'. Although in that case, the Court rejected criminal imprisonment, since it found that HIV did not fit the description of a contagious disease as found in Article 6 of the immigration law and ruled that discrimination on the grounds of HIV status was unlawful, unfortunately, it did not dispute the validity of the national provision declaring a person to be an illegal immigrant.[30]

In conclusion, the CJEU case law on the criminalisation of irregular immigration has drastically reduced the Member States practices of criminalising illegal entry, stay and thus of evading the application of strict rules provided by the RD. The public administration's arguments in favour of criminalisation, such as: matters of public order or national security (e.g. **Italy**) have been rejected by

[28] Tribunal of Crotone, judgment of 12 December 2012.

[29] Such as those persons who have previously been deported, persons whose entry in the Republic is prohibited by virtue of any legislation in force and persons considered illegal immigrants by virtue of the provisions of the immigration law. See more in Cypriot REDIAL Report on pre-removal detention, p. 9.

[30] Cyprus, Supreme Court, *Leonie Marlyse Yombia Ngassam v. Republic of Cyprus*, No. 493/2010, 20 August 2010, available on: www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2010/4-201008-493-10.htm&qstring=marlyse.

national courts relying heavily on CJEU case law. However, the aforementioned cases reported from **Belgium** and **Cyprus** reveal that national courts still have erred in understanding the scope of application of Article 2(2) (b) RD, and continue to accept the argument according to which a TCN subject to a return order, as a result of a criminal sanction, is not entitled to avail him or herself of the protection conferred by the Directive. However, for this derogation to be lawful, the strict rules developed by the CJEU as regards the criminalisation of immigration should be respected even if the Member States preserve competences over criminal matters.

2. The risk of absconding

The most commonly invoked reason for pre-removal detention is the risk of absconding. The risk of absconding is one of the two exhaustive grounds for pre-removal detention (Article 15(1) RD). However, the definition of this concept is provided in general and abstract terms in Article 3(7) RD, which defines it as 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". This definition is quite abstract and elusive and has led in practice to various problems, such as: replacing these grounds with similar concepts which were broader than the risk of absconding (**Spain**[31] and **Austria**[32]); lack of domestic legal definition (e.g. **Austria**, **Greece, Malta** and the **Czech Republic**); definition given in administrative acts (**Hungary** and **Belgium**),[33] which have raised issues related to the transparency of norms and arbitrary administrative practice; and a wide list of objective criteria defined by the national legislator (e.g. **Italy**, the **Netherlands, Slovenia**), making pre-removal detention on the grounds of a risk of absconding the norm rather than the exception. Furthermore, citing the risk of absconding has become part of an automated and standardised process by administrative authorities. The REDIAL national Reports often mentioned that there is no prior examination of the facts of each case before detention orders are issued.

Therefore, national courts across the Member States were confronted with key questions related to: the nature of the legal act where the risk of absconding should be defined; and the content of the risk of absconding, in particular, the definition of objective criteria, its assessment in concrete cases and remedies against inadequate definition and/or application.

2.1 "Defined by law" requirement – Divergent domestic implementation and vertical and horizontal dialogue in action

According to Article 3(7) RD, there are two important elements which the definition of the risk of absconding should fulfil, that of including "objective criteria" that are "defined by law."

There is a wide diversity of types of instruments adopted by the Member States for the purpose of implementing the EU notion of 'risk of absconding' in return proceedings. This ranges from: *absence of a domestic legal definition of the risk of absconding*, for instance in Greece, Malta, and the Czech Republic; *definition provided in administrative acts* in Hungary and Belgium; legislation which refers to a broader notion in Spain (see the *Spanish Immigration Act 4/2000* (Article 62), which refers to the risk of "non appearance"); similarly in Austria, the law does not directly refer to the risk of absconding, and objective criteria are additionally developed by jurisprudence; while other Member

[31] **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 helped make pre-removal detention a first rather than a last resort measure. See the Spanish REDIAL Report on pre-removal detention.

[32] **Austrian** law does not directly refer to the risk of absconding, but to the need to secure either the procedure or the intended measure (e.g. deportation). See the Austrian REDIAL country Report on pre-removal detention.

[33] 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 defined in a government decree. See the respective REDIAL National Reports.

States adopted legislative acts/provisions transposing the EU Directive's notion of 'risk of absconding'.

Germany used to be one of these countries, but this gap was remedied following a fruitful dialogue between the judiciary and the legislator. In spite of its reticence to refer to EU secondary law and relevant CJEU jurisprudence,[34] the **Federal Civil Court** held that the legislature had failed to fulfil the requirements set out by the RD, namely to expressly provide for objective criteria in domestic legislation (*Decision of 18 February 2016 – V ZB 23/15*). Following this judgment, the legislature amended section 2(14) of the Residence Act,[35] which now includes concrete objective criteria (see REDIAL German Report on pre-removal detention, p. 5). A similar judgment was decided by the **Federal Civil Court** in relation to the legislator's failure to define expressly and by law the risk of absconding in the framework of Dublin-based detention measures. (*Decision of 26/06/2014 – V ZB 31/14 for Dublin cases*)

These judgments affected the reasoning of domestic courts in other jurisdictions. A regional court from the **Czech Republic** referred to these judgments of the **German Federal Civil Court** in its reasoning, finding the detention of an Iraqi male and his two children (both minors) waiting to be transferred under the Dublin III Regulation to be unlawful, and ordered their release due to the absence of a legislative definition of the risk of absconding. On appeal, the **Czech Supreme Administrative Court**, being of a different opinion than the lower court, decided to address a preliminary reference to the CJEU asking for clarification of the required legal nature of the act that should provide the definition of the risk of absconding (C-528/15, *Al Chodor*, ECLI:EU:C:2017:213). The CJEU confirmed the interpretation of the first instance court. It recalled that, although "the provisions of regulations generally have immediate effect in the national legal systems without its being necessary for the national authorities to adopt measures of application, some of those provisions may necessitate, for their implementation, the adoption of measures of application by the Member States." (para. 27) This is also the case with Article 2(n) of Dublin III Regulation, which does not have immediate direct effect, but necessitates transposition into national legislation. The CJEU continue to assess whether the notion of 'law' referred to in Article 2(n) of Dublin III Regulation "must be understood as including settled case-law which confirms, as the case may be, a consistent administrative practice." (para. 29) Textual interpretation of the various translations in national languages of Article 2(n) Dublin III Regulation does not clarify whether the term 'law' is used in its general sense, or a more restricted meaning of 'legislation'. The Court recalled that "where the various language versions differ, the scope of the provision in question cannot be determined on the basis of an interpretation which is exclusively textual, but must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (judgment of 26 May 2016, *Envirotec Denmark*, C-550/14, EU:C:2016:354, paragraph 28 and the case-law cited)." (para. 32)

[34] The *El Dridi* judgment as grounds for the direct effect of Article 15 RD.

[35] German legislature amended section 2(14) Residence Act, which now includes the following objective criteria:

- prior cases in which the person concerned had evaded public authorities in the context of immigration proceedings, though it was legally obliged to make him-/ herself available to the authorities;
- The foreign national deceived the authorities about his identity, in particular by destroying identity or travel documents or by pretending to be someone else;
- the foreign national refuses to participate in administrative proceedings to identify him/her despite a legal obligation to do so – provided that it is established that he/she wants to abstract deportation given the circumstances of the individual case;
- the foreign national 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 her financial 'investment';
- whenever a person declared expressly that he/she will abscond;
- he/she has undertaken a considerable degree of preparatory actions to frustrate deportation provided that these actions cannot be overcome by the police.

The meaning and requirements of the EU notion of 'law' were found by the CJEU in the jurisprudence of the ECtHR on limitations to the right to liberty. Court underlined that since Article 2(n) in conjunction with Article 28 of Dublin III Regulation introduce a limitation to the right to liberty of individuals, the notion of 'law' should be interpreted in line with both Article 6 Charter and Article 5 ECHR. The Court borrowed the legal requirements that a limitation to the right to liberty has to fulfill under the Charter, from the ECtHR jurisprudence. Thus, "the detention of applicants, constituting a serious interference with those applicants' right to liberty, is subject to compliance with strict safeguards, namely *the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness*." (para. 40) In line with the Advocate General Opinion, the CJEU held that "only a provision of general application could meet the requirements of clarity, predictability, accessibility and, in particular, protection against arbitrariness." It concluded that: "settled case-law confirming a consistent administrative practice on the part of the Foreigners Police Section, such as in the main proceedings in the present case, cannot suffice." The consequence being that detention on the basis of a risk of absconding, where the objective criteria are not set in a provision of general application, cannot be based on Article 28(2) of Dublin III Regulation.

Although the *Al Chodor* case concerned the implementation of a regulation, parallels can be drawn with the implementation of the 'risk of absconding' under the Return Directive. Notably, the safeguards of *clarity, predictability, accessibility and protection against arbitrariness* have to be fulfilled by the domestic provision transposing the notion of the risk of absconding within the framework of pre-removal detention. The CJEU clarified that administrative practice, even if consistent (such as administrative acts) do not fulfill these requirements. Therefore Member States which adopt pre-removal detention in the absence of a legal provision of general application, are acting against EU law.

2.2 'Objective criteria' requirement: Variety of national lists providing for such criteria

From the definition of the 'risk of absconding' provided by Article 3 (7) RD, we can infer that the concept of 'objective criteria' refers to the "existence of reasons in **an individual case** […] to believe that a third-country national who is the subject of return procedures **may abscond**." It should be noted that Member States essentially retain the freedom to determine the precise list of objective criteria.

In implementing this rule, the Member States have followed diverse approaches to the type and number of objective criteria. Some Member State legislation and administrative practices do not include objective criteria. They just refer to the risk of absconding (Cyprus); others foresee illegal entry or stay (e.g. Estonia, France, Romania, Slovenia, Spain); lack of residence permits (Slovakia); lack of passport or other equivalent identification documents (Bulgaria); and refusal of voluntary departure (Bulgaria, Italy, Sweden, France and Romania) as objective criteria. They can, most of the time, act as sole legal grounds for pre-removal detention, in spite of established CJEU case law which prohibits pre-removal detention based solely on these grounds (*El Dridi*; *Sagor*; *Achughbabian*; *Celaj*; *Mahdi*) (see REDIAL Research Report 2016/05 for the national lists of objective criteria). Other Member States have significantly expanded the scope of the risk of absconding, by including a long list encompassing all possible objective criteria: this includes the above mentioned circumstances, see for instance Italy, and the Netherlands. In this way they have transformed pre-removal detention from a last resort measure, which should be adopted only in exceptional situations, into the norm in return proceedings (e.g. Italy). All this contradicts Recital 6 RD, which excludes, for instance, illegal stays or even illegal entries, on their own, from the list of 'objective criteria' ("consideration should go beyond the mere fact of an illegal stay"). It also contradicts the jurisprudence of the CJEU which clearly describes pre-removal detention as a measure to be adopted only after all the other return related measures (voluntary departure, removal, alternative measures) have failed to achieve the objective of effective return (see *El Dridi*, paras. 37-40).

2.3 Examples of 'objective criteria'

This section will not provide an exhaustive list of circumstances that are set out at national level as 'objective criteria', since a comparative assessment of the domestic implementation of the 'objective criteria' requirement can be found in the REDIAL Research Report 2016/05. The purpose of this section is, first, to raise awareness of problematic legislative provisions, administrative practices, and divergent judicial approaches to the application of the 'objective criteria' requirement; and second, to offer solutions to the interpretation and application of this abstract EU concept inspired from landmark national judgments.

a. Illegal entry, stay or residence

In spite of established CJEU case law whereby pre-removal detention cannot be adopted on the basis of mere illegal entry/stay,36 these circumstances are still used as objective criteria which justify adoption of immigration detention based on the grounds of 'risk of absconding' in certain Member States. Illegal stay or residence is provided as an 'objective criterion' in Croatia, France, Slovenia, and in the case of Estonia, France and Romania even illegal entry with subsequent failure to apply for a residence permit, is 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 RD, which, by stating that "consideration should go beyond the mere fact of an illegal stay", excludes illegal stay and even illegal entry alone38 from the list of 'objective criteria'.39 A positive reaction to the CJEU judgment comes from German courts, which do not consider mere illegal entry as an 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.40 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.41

b. Lack of a residence permit

The lack of a residence permit is provided as an objective criterion defining a risk of absconding in Slovakia. The negative effects of these deficient domestic provisions are, to a certain extent, remedied 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.[42] 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 previously to being caught by a police patrol.[43] 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 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. CJEU case law played a salient role in the individual

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

[37] In 2015, 3,075 detentions on grounds of irregularly staying. See REDIAL Report on Spain.

[38] See also the Return Handbook.

[39] See further: FRA Report, 2010, op. cit., p. 27.

[40] U. Drews, "Die aktuelle Rechtsprechung des BGH zur Sicherungshaft nach dem Aufenthaltsgesetz, *NVwZ*, 2013, p. 259.

[41] BGH, Beschl. V. 03.05.2012 – V ZB 244/11, BeckRS 2012, 14183.

[42] Skamla, Q43 of the CONTENTION Report.

[43] Skamla, Q43 with reference to Supreme Court judgement 1 SZa 3/2014.

assessment test and in the rejection of the administration practice of the formal application of the 'lack of residence permit' criterion.[44]

c. Lack of identity documents

A common objective criteria mentioned in several national legislations and used in administrative practice has been the lack of identity documents. This criterion has been used as grounds not only for initial detention, but also for the prolongation of pre-removal detention. In the *Mahdi* case, the CJEU firmly rejected the possibility of prolonging the pre-removal detention because of a lack of identity documents alone (para. 73). As regards the possibility of the lack of identity documents being taken into consideration as criterion indicating a risk of absconding, the CJEU emphasised that national courts are required to carry out an assessment of facts surrounding the TCNs. As has already been stated by the Court, "any assessment relating to the risk of the person concerned absconding must be based on an individual examination of that person's case" (*Sagor*, para. 41). Furthermore, as stated in recital 6 in the preamble to Directive 2008/115, "decisions taken under the directive should be adopted on a case-by-case basis and based on objective criteria." (*Mahdi*, para. 70).

Other domestic courts have taken a firmer position rejecting reliance on the absence of established identity and documents as the sole grounds for both initial detention measures and for the prolongation of detention. The **Lithuanian Supreme Administrative Court** has consistently held that this alone cannot be the basis for detention without also carrying out an individual assessment. (*No. A-3219-858/2015, judgment of 22 July 2015*).[45]

However, **Bulgarian**, **Romanian and Spanish**[46] legislation still take this criterion as being indicative of a risk of absconding. Furthermore, most of the **Administrative Court of Sofia's** judgments confirming detention orders had, as a legal reason, the fact that the identity of the foreigner was not established.[47] Most worrying is the fact that, the new draft of a Bulgarian law, amending the 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".[48] In addition, there is divergent domestic jurisprudence in Bulgaria on whether lack of identity documents can or not constitute an objective criteria for finding a risk of absconding.[49]

d. Refusal of voluntary departure

Refusal of voluntary departure is an objective criteria in **Bulgaria**, **Italy**, **Sweden**, **France** and Romania. However the judicial approaches in the these countries diverge. Italian,[50] French[51] and Romanian courts generally uphold refusal as a strong enough indication of a risk of absconding. The

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[44] Ibid., with reference to judgment 9 Sp 99/2013.

[45] 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.

[46] Article 62 Immigration Act 4/2000, see REDIAL Report on Spain, p. 7.

[47] REDIAL Report on Bulgaria, p. 9.

[48] Ibid.

[49] As regards the inability of the TCN to present identity documents and its consequences: see, for example, the differing practice in this regard of the Sofia City Administrative Court, e.g., Ruling in case No. 12187/2013, and the Haskovo Administrative Court, e.g., Ruling in case No. 219/2013.

[50] See the Italian REDIAL country Report on pre-removal detention.

[51] **Court of Appeal of Marseille** considered the TCN's refusal to return voluntarily to be a risk of absconding justifying a detention measure. (*CAA Marseille, 1e juillet 2016, req. n°15MA04751*)

Swedish Court of Appeal and the Administrative Court of Sofia, relying on the RD and its case law, only come to this conclusion, on the other hand, after a careful individual assessment.

For instance, the Administrative Court of Sofia in the follow-up to the preliminary ruling of the CJEU in *Mahdi* refused to continue detaining a TCN on the basis of his refusal to voluntarily return to his country of origin, The Administrative Court of Sofia, therefore, declared the detention unlawful and replaced it with weekly reporting.[52] The Swedish Supreme Migration Court did not consider refusal of voluntary departure (objective grounds in Swedish legislation) as indicating a risk of absconding sufficient enough to justify a detention order. The justification of the Court was that, on the basis of this logic, the detention order would no longer be a last resort measure, but it would be ordered in the majority of cases. 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 for a detention decision:

> "Analysing the risk of absconding in such a manner could result in placing the majority of refused asylum seekers in detention".[53]

e. Submission or withdrawal of an asylum application

In *Arslan*, the CJEU clearly said that "a third country national who is, at the time of the making of his asylum application, the subject of a return decision and is being detained on the basis of Article 15 RD does not allow it to be presumed, without an assessment on a case-by-case basis of all the relevant circumstances, that he has made that application solely to delay or jeopardise the enforcement of the return decision and that it is objectively necessary and proportionate to maintain detention." (para. 62). In spite of this preliminary ruling, the national legislation of several Member States still preserves the submission or withdrawal of an asylum application as an objective criterion sufficient to assume the risk of absconding (e.g. **Romania**, **Cyprus, Slovakia, and Finland**). In certain of these jurisdictions, the courts have remedied the effects of these national provisions by endorsing the individual assessment test required by the CJEU. In **Slovakia** and **Finland**, the introduction of an asylum application during pre-removal detention is not sufficient for holding a risk of absconding. There has to be also the intention of hampering the removal process, which indicates a risk of absconding, which in turn justifies a detention order.

On the other hand, the fact that a TCN's asylum application is still pending, which renders the prospect of removal impossible, is not, generally, seen by the **Cypriot** courts as justifying the TCN's release from immigration detention.[54]

In *Hazaka*, a Syrian asylum applicant filed for *habeas corpus* and asked to be released since there is no realistic prospect for his removal, given the ongoing war in Syria. Relying on *Arslan*,[55] the applicant argued that he ought to be released from detention because there is no presumption that he filed an asylum application for the sole reason of delaying or averting his return to his country of origin. The Court rejected the aplication for *habeas corpus* on the ground that the applicant is not covered by the Return Directive since his detention and deportation resulted from his criminal conviction which led to his classification as a 'prohibited immigrant'.[56] The Cypriot REDIAL Report mentioned that asylum seekers are routinely detained for the purpose of removal immediately upon

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

[53] Supreme Migration Court (Sweden), case no MIG 2008:23 UM1610-08.

[54] Cyprus, Supreme Court, Appeal jurisdiction, *Habibi Pour Ali Faysel v. Republic of Cyprus through the Chief of Police and the Minister of the Interior*, Civil appeal No. 236/15, 31 March 2016.

[55] CJEU,C-543/11, dated 30 May 2013.

[56] Cyprus, Supreme Court, Writs jurisdiction, Re the application of Antoan Hazaka, asylum seeker from Syria and now at the police detention centre in Menoyia over a *habeas corpus* writ, Case No. 110/2013, 19 July 2013.

rejection of their asylum claim and very often even before rejection. Furthermore, it was argued that the new asylum law adopted in 2016 grants the authorities wider powers of detaining asylum seekers prior to the determination of their asylum claim, essentially to address the risk of absconding and in circumstances which are similar to those of TCNs in an irregular situation. This has the potential of further blurring the distinction between asylum and immigration detention.

f. Criminal record

A criminal record or the suspicion of having committed a crime is still provided by 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.[57]

In the case of *Farak Nessim*, the national court, citing a UK Court decision,[58] concluded that the risk of absconding *may* be deduced by a person's refusal to cooperate, but not necessarily and that the tendency to commit serious crime is also relevant.[59] This judgment is important, too, because it attempted to establish objective criteria on the basis of which the risk of absconding can be identified. In **Cyprus** the implementing legislation does not provide for a list of objective criteria. The TCN's tendency to commit a crime was referred as a criterion for determining whether there is a real risk of absconding.[60]

2.4 The individual judicial assessment requirement

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.[61] Not all of the Member States legislation include the obligation for an individual assessment. On the contrary certain legislation requires the competent authorities to establish a risk of absconding when at least one of the circumstances provided by the legislation exists in practice. This is, for instance, the case in **Italy**, and it also used to be the case in **France**. However following actions by the European Commission, French legislation was amended in November 2016, and Law 274/7.03.2016 leaves a certain margin of discretion in establishing the risk of absconding, by providing that a risk of absconding could be established if one of the listed circumstances is found to exist.[62]

Relying on the RD and the relevant CJEU jurisprudence, national courts from several Member States have reversed the practice of their administrative authorities, and re-interpreted flawed national legislation in line with the EU law. For instance, the **Regional Court of Bratislava** when establishing whether there was a risk of absconding, did not limit itself to an automatic consideration of criteria,

[57] 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 July 2011 – V ZB 50/11, BeckRS 2011, 21191.

[58] *Walumba Lumba and Kadian Mighty v. Secretary of State for the Home Department [2011] UKSC12*.

[59] Cyprus, Supreme Court, Re the application of Malak Shawki Farak Nessim, Civil application No. 66/2016, 24 August 2016, available on: http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2016/1-201608-66-16.htm&qstring=%EA%F1%E1%F4%E7%F3%2A%20and%202016.

[60] Cyprus, Supreme Court, Re the application of Malak Shawki Farak Nessim, Civil application No. 66/2016, 24 August 2016, available on: http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2016/1-201608-66-16.htm&qstring=%EA%F1%E1%F4%E7%F3%2A%20and%202016.

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

[62] See, REDIAL Research Report 2016/05, p. 12, and French REDIAL Report on pre-removal detention.

such as a 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 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 (with reference to judgment 9 Sp 99/2013, see also REDIAL Slovakian Report on pre-removal detention). 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*)

The CJEU judgment in the *El Dridi* case led to an important change in the jurisprudence of the **Italian Supreme Court** (Corte di Cassazione) which emphasised the importance of the principle of individual assessment. When referring to the previous legislation in force, that had been declared contrary to the RD by the CJEU, the Court clarified that the risk of absconding cannot be assessed only on the grounds that the foreigner failed to comply with an order of expulsion placed under the previous legal regime, which was considered contrary to the Directive. Such an assessment would not be valid, failing an individual evaluation of the TCN's personal situation, in light of all the criteria currently set forth by the law (see Supreme Court *no. 437 of 10 January 2014*).

German courts generally require concrete facts. In particular, the German courts request from the administration proof of statements or behaviour on the part of the TCN which point, with a certain likelihood, to an attempt to abscond or hamper the deportation in a way which cannot be simply overcome by the application of ordinary enforcement measures, which do not require a deprivation of liberty. A multiple change of domicile which has not been communicated to the alien authorities in spite of repeated warnings and the TCN subsequently going into hiding, as well as a flight attempt at the occasion of a police arrest may be taken as a factor justifying a risk of absconding. The mere fact of an illegal stay or entry does not justify, though, the court in deciding that there is a risk of absconding.

As regards the use of individual assessment by the judiciary, reference should be made to a ground-breaking judgment of the **Supreme Administrative Court** from August 2011, which triggered an important jurisprudential change in **Bulgaria** (Case No. 13868/2010). The Court concluded that Recitals 6 and 13 of the Preamble to the RD 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. 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* (Case No. 1535). When assessing whether there was still a risk of absconding, the Court refused to confirm pre-removal detention solely based on the lack of identity documents of the third-country national and took into account the fact that a Bulgarian citizen provided accommodation and means of subsistence to the TCN concerned (see CONTENTION Report on Bulgaria).

2.5 Judicial assessment of collective expulsion and pre-removal detention

The EU Charter and the ECHR and its case law have recently been used by the lawyers of detained third-country nationals in order to claim for immediate release following the administration practice of

collective expulsions. In the case of *Falak Shad*,[63] the applicant argued that there was a violation of Article 19(1) of the EU Charter and of Article 4(1) of the Fourth Protocol to the ECHR, both of which prohibit mass deportations, as the authorities deported all persons involved in the incident in which the applicant was also involved and which formed the basis for his detention and deportation. The applicant claimed that the authorities ordered the deportation of all persons involved, without examining each case separately. To this end, the applicant's lawyer also cited the definition of collective expulsions given by the ECHR in *Becker v. Denmark* (Appl. 7011/75). Unfortunately, **the Supreme Court of Cyprus** rejected the argument of collective expulsions, concluding that simultaneous deportation of several persons does not necessarily mean a collective expulsion; nor, continued the court, was there any evidence that each case was not examined separately. The court did not, however, carefully assessing whether the administration carried out a proper individual and case-by-case assessment providing, in writing, the necessary facts for their decisions.

3. Other legal grounds for pre-removal detention

The *Kadzoev* judgment has had a salient impact on domestic judiciaries as regards the grounds for pre-removal detention. First of all it has been used by national courts to strike as unlawful, pre-removal detention based on small crimes or public-order offences. For instance, petty thefts, commonly used as a basis for immigration detention in the **Netherlands**, before the Return Directive became applicable, are no longer accepted as legitimate grounds for detention.[64] These can be put forward as a justification for detention only if these grounds can justify the conclusion that someone avoids or hampers removal or if a risk of absconding exists given the individual circumstances.

The CJEU's restrictive interpretation of the grounds for pre-removal detention has also affected the jurisprudence of the **Belgian Court of Cassation**.[65] This court has taken a clear stance, holding that Article 15(1) RD requires a narrow interpretation of the objective criteria and that the two grounds (risk of absconding and avoiding/hampering removal) for immigration detention are exhaustive. Unfortunately, first instance Belgian courts are not uniformily following the approach of the supreme court.[66]

When issues of security are at stake, even Supreme courts seem to disregard the CJEU ruling in *Kadzoev*. In the case of *Falak Shad* the **Cypriot Supreme Court** found that the administration's discretion as regards issues of the entry, stay and work of third-country nationals is wide and there is no duty to justify its actions when issues of security are invoked. The Court concluded that the administration is not obliged to give reasons for the deportation or refusal of entry of any person and the Court will not look into reasons of state security, as this is purely a matter for the executive and not the judiciary.[67]

[63] Cyprus, Supreme Court, Falak Shad v. the Republic, Case No. 763 /2011, 26 July 2013, available on http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2013/4-201307-763-11.htm&qstring=Falak%20and%20Shad.

[64] Council of State, 21 March 2011, ECLI:NL:RVS:2011:BP9284.

[65] Decision No. P.14.0005.N/1, 21 January 2014.

[66] Brussels (Indict. Chamber), judgment of 13 May 2015; Brussels (Indict. Chamber), judgment of 12 June 2015.

[67] Supreme Court, Falak Shad v. the Republic, Case No. 763 /2011, 26 July 2013, available on http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2013/4-201307-763-11.htm&qstring=Falak%20and%20Shad.

4. Judicial control of pre-removal detention

4.1 Mapping out the problems resulting from varied configurations of judicial competences, scope and intensity of judicial scrutiny

According to Article 15(2) RD, detention can be ordered by either an administrative or a judicial authority. In most of the Member States, judicial authorities are not involved at the initial stage of ordering the detention measure, as this usually falls under the competences of the police, prosecutor, prefect or other civil servants of the national Ministries of Interior: an important exception is Germany where detention measures are ordered by the judicial authority (the civil court).

Should detention be ordered by order an administrative authority, the Member States are required to subject the detention order to either a speedy automatic judicial review or to grant the third-country national the right to ask for a speedy judicial review (Article 15(2) RD). However, not all the Member States have secured judicial scrutiny of pre-removal detention: for example, Hungary where the initial detention order is not subject to judicial control, but only the extension is. And even when the Member States provide for judicial scrutiny, there is a varied configuration of judicial competences among the Member States:

- *Criminal judge*, in Belgium, Spain and recently also in France, Poland (criminal chambers in common courts are competent only in cases of apprehension);
- *Civil judge* in Germany;
- *Specialised administrative courts*: *specialised chambers* on immigration law (e.g. the Netherlands, Austria, Bulgaria only within the Supreme Administrative Court) or *specialised* administrative courts (Sweden);
- *General administrative courts* competent to judge *all matters falling under administrative law*; (this is the case in most Member States);
- *General courts* competent to judge all matters (civil, criminal, etc.) (Hungary);
- "*Justice of the Peace*" in Italy (a non-professional judge).[68]

The nature of the competence affects the scope and intensity of judicial control of pre-removal detention measures. The widest powers of control are perhaps held by civil and criminal judges/courts who order pre-removal detention, unlike administrative courts who only control the detention order taken by the administration. Civil and criminal courts can decide on all aspects of the pre-removal detention cases, including: weighing the principle of proportionality; establishing alternative measures; and replacing the decision of the administration with that of their own. On the other hand, administrative judges cannot decide the adoption of pre-removal detention, they only control the detention order proposed by the administration. They also have more limited powers of control, for instance, they can usually assess only manifest errors committed by the administrative authorities, they can annul their decisions, if such errors are found, but cannot substitute the decision of the administration with that of their own.

In addition to the problems resulting from the different allocation of judicial review of pre-removal detention among the Member States, problems arise also from the division of judicial control of return related measures within the same Member State. For instance, though civil and criminal courts have more extensive powers of judicial control of pre-removal detention, they cannot assess the lawfulness of the return/removal order, as these measures fall under the competences of administrative courts. An

[68] The fact that this is not a professional judge raises issues, especially in relation to the constitutional guarantees of independence of the judiciary. This system has been criticized by the UN special rapporteur on the Human Rights of Migrants because it lacks any real control over detention orders.

unusual judicial configuration exists in **Belgium**, where criminal courts can assess the legality of the removal orders, but they cannot annul them, as this falls under the competences of the administrative court (Aliens Litigation Court). Unlike criminal courts in other countries, they do not make decisions on the adoption of the detention order, but only control it, since the detention order is interpreted in Belgium as an accessory to the removal order, which falls under the competences of the Aliens Litigation Court. In Cyprus[69] the division of tasks between courts is furthermore complicated since the judicial control is divided on the basis of whether the lawfulness or the length of pre-removal detention is requested, and not depending on the stage in return proceedings, as is the case for instance in other domestic jurisdictions.[70] Divergent jurisprudence also occurs in practice due to the fact that the risk of absconding might be interpreted differently by the various national courts involved in the different stages of the return proceedings. Another consequence is that the third-country national has often already been removed by the time the judge in charge of detention examines the legality of that detention.

The problems resulting from the varied allocation of judicial competences among the Member States and within the same Member States are amplified by the formal judicial review of pre-removal detention which is still pursued by national courts. Several of the REDIAL national Reports argued that many national courts carry out a formal judicial review, lack meaningful reviews of the substantial merits of the administrative decisions on immigration detention: e.g. **Bulgaria**, **Croatia**, **Cyprus**, **Finland**, **Hungary**, **Italy**, and **Spain**.

The diverse scope and intensity of domestic judicial scrutiny existing among the Member States, but also within the same Member State adds inconsistency to the varied national regimes implementing the confusing EU concept of 'risk of absconding'. The consequence is a fragmented European framework on pre-removal detention, with different standards of fundamental rights protection. In this context, a certain uniform interpretation and implementation of the risk of absconding, and respect of fundamental rights have been infused by national courts influenced in their decisions by CJEU, ECtHR or other foreign domestic courts. In the following paragraphs we comment upon a few national landmark cases achieving this outcome (for a full analysis, see the REDIAL Research Report 2016/05).

4.2 A developing trend of more unified and intensive judicial review – the contribution of national courts and judicial interactions

In spite of counter-productive divisions of judicial competences among national courts and limitations on the domestic judicial review of pre-removal detention, a trend of unification of judicial competences and extending judicial scrutiny powers over return related decisions is developing. For instance, more and more national courts start to: assess all aspects of facts and law in cases of pre-removal detention both in first orders or for prolongation of detention; carry out a careful assessment of the proportionality of the administrative detention measure; establish alternative measures for themselves; assess the lawfulness of both pre-removal detention and other connected return-related measures. These outcomes have been achieved under the impact of the principle of the primacy of EU law, *in casu* the RD, EU Charter and ECHR, and sometimes also due to the use of judicial interaction techniques, such as: the preliminary reference, the disapplication of national law, consistent interpretation, and referral to foreign domestic judgments.

[69] For instance, the judge who examines the legality of detention does not have the power to also examine the return measure beyond acknowledging its existence, even if the judge in charge of return is part of the same Court as is the case in Austria. A negative consequence of this separation of judicial competences is the fact that a TCN might be detained though the return decision is unlawful.

[70] Up until 2015, when the administrative court was set up, applications for judicial review, for *habeas corpus* and the appeals to these decisions were tried by the same court (the Supreme Court) in its different jurisdictional capacities.

Extending the review powers of national courts

As previously highlighted, in most EU countries, the judicial review of pre-removal detention was allocated to administrative courts, which have traditionally more limited powers of review than civil and criminal courts. This picture has considerably evolved due to the reinforcement of the judicial review function of the national courts, which can be explained by the influences of European law (*Return Directive*), and especially by the right to effective judicial review (*Article 47 EU Charter*) and effective legal protection (*Articles 6 and 13 ECHR*) as interpreted by the CJEU and ECtHR.

One of the landmark cases leading to the extension of review powers of national courts in pre-removal detention is the Mahdi case. According to AG Szpunar in *Mahdi*, "the judicial authority must be in a position to determine whether the grounds forming the basis of the detention decision are still valid and, as the case may be, whether the conditions for extending detention are fulfilled. In order to comply with Article 47 of the Charter, the national court must have unlimited jurisdiction with regard to the decision on the merits." Consequently the national courts must be able to decide on:

- an extension of detention;
- on replacement of detention by a less coercive measure or
- on the release of the person concerned.

Additionally, "the judicial authority must have power, if necessary, to require the administrative authority to provide it with all the material concerning each individual case and to require the third-country national concerned to submit his observations. […] Consequently it is for the **national court to assume unlimited jurisdiction with regard to the substance of the case**. Thus, as it may apply Article 15 of Directive 2008/115 directly it must, if necessary, disregard the provisions of national law which have the effect of preventing the assumption of unlimited jurisdiction."[71]

As a consequence, the administrative judge has taken on a new role in the institutional framework and is better equipped to intervene effectively in administrative decision-making, balancing various interests (public interest of effective expulsion and the protection of the rights of individuals).

Several forms of extension of judicial review powers can be identified in the national courts:

- Wider power of domestic judges to control the content of the administrative act following a legislative transfer of competences from the administrative to the criminal judge (**France**) or by the *ex officio* extension of power by administrative courts in the absence of legislative empowerment (**Bulgaria**, **Slovenia**);
- Increased judicial scrutiny of due diligence obligations of the administration (the **Czech Republic**);[72]

[71] Judgments in *Simmenthal* (C-106/77, EU:C:1978:49, paragraph 21) and *Solred* (C-347/96, EU:C:1998:87, paragraph 29). See also AG Szpunar in *Mahdi* (ibid.), points 73-79.

[72] **German Supreme Administrative Court** ruled that the detention request made by the authorities before a court must comprise explanations on the following aspects:

- the obligation to leave the country;
- the conditions for removal or forcible return;
- the necessity of the detention;
- the feasibility of deportation and for 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 in which the person concerned shall be deported. It is necessary to specify whether and in what timeframe returns in the country in question are usually possible. Concrete information is needed on the conduct of the process and an

- Replacing formal judicial control with a meaningful and in-depth judicial review of the evidence and substantial merits provided by the administration in their decisions on pre-removal detention (instances in **Lithuania**, Romania,[73] **Cyprus** and the **Czech Republic**, which have not reached, though, the level of generalised domestic practices). This practice has occurred under the impact of the RD requirement of individual assessment.

The jurisprudence of the ECtHR on Article 5(4) ECHR standards in immigration detention (*A.M. and others v. France*) has recently played a salient role in having the French legislature confer extended judicial review powers to the *Juge des libertés et de la détention.* In this case, the Strasbourg Court identified problems with the limited judicial control of the pre-removal detention of children in the French jurisdiction, which determined that the French legislature should amend the legislation in force before the summer of 2016 and should recognise the wider powers of judicial review over the legality of pre-removal detention on the part of French criminal judges: for more details on their concrete powers, see the REDIAL French Report on pre-removal detention. The ECtHR standards of prohibition of arbitrariness in cases of deprivation of liberty have been invoked by the **Czech Supreme Administrative Court**, explicitly rejecting 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. Following this 2011 judgment, the Czech administrative courts were no longer satisfied with the basic information that the police made some progress in removal arrangements. Instead, they require the 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 (REDIAL Czech Report on pre-removal detention, p. 17.)

Under the impact of the RD provisions and the judgment of their superior court (**Conseil d'Etat**), French courts have departed from a limited understanding of their powers. Before they dealt only with manifest errors committed by the administration or automatically endorsed the reasoning of the administration. They have now expanded their control to "errors of appreciation" committed by the administration (*CAA Nancy, 18.02.2013*).

The preliminary ruling delivered by the CJEU in the *Mahdi* case has also played a salient role in reshaping domestic procedural norms on the allocation of powers between the administrative authorities and national courts in the referring jurisdiction, but also in other domestic jurisdictions. One should keep in mind that the CJEU held in *Mahdi* that the judicial authority has the 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 proceedings. But it can also consider *ex officio* also other circumstances within the ambit of the individual assessment which national courts have the power to exercise.

On the basis of the *Mahdi* preliminary ruling, the **Bulgarian judiciary** disapplied the domestic law (*Law on Foreign Nationals in the Republic of Bulgaria, Article 46a, para. 4*) which says that judicial renewal of detention following the lapse 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 *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 (REDIAL Bulgarian Report on pre-removal detention).

(Contd.)

illustration as to which period is normally needed to execute the individual steps of removal under normal conditions.

[73] **Court of Appeal of Bucharest**, case no. 3312 / 04.12.2014.

Under the impact of the RD and its case law, the **Cypriot** courts have extended their judicial review powers beyond the limits set out by the Constitution. The relevant constitutional provision provides that the Court in the judicial review process is empowered to examine whether a particular administrative act is contrary to any of the provisions of the Constitution or of any law or is made in excess or in abuse of the powers vested in the administrative authority. However, given that judicial review was the process designated by the law for controlling the lawfulness of detention under the RD, the courts have, in the majority of cases, gone further than merely examining the decision making process to check whether the facts of the case justified the decision taken. Another salient example of the extension of judicial control is given by the **Cypriot Supreme Court** in the case of the *habeas corpus* application of *Vilma Galivan Marcelino*.[74] The Court rejected the argument of the authorities about the lack of jurisdiction on the grounds that the case concerned the legality of detention (for which the judicial review procedure should be used) and not the duration of the detention (for which the *habeas corpus* procedure was used). The Court ruled that 'it is obvious that the two ways of reviewing the legality of detention, in private and public law, converge to a degree in the framework of the scope of application of the [Return] Directive, aiming in a unified manner, to the control of the legality of detention'.[75] The **Supreme Court** thus offered a ground-breaking example of bolstering judicial control for the purpose of unifying domestic judicial review in immigration detention cases.

5. Reasonable Prospect of Removal

The case law of the ECtHR[76] and the CJEU,[77] recognising the Reasonable Prospect of Removal (RPR) as a mandatory legality criterion that competent authorities should assess in all cases of pre-removal detention, has had a positive impact on the jurisprudence of several national courts (e.g. the **Czech** and **Bulgarian** courts). The application of the RPR as a requirement within the legality assessment of pre-removal detention should be furthermore appreciated in these Member States due to the fact that there is no express domestic legislation providing the RPR as a criterion for the legality check of detention measures. The **Czech Supreme Administrative Court** required the competent authorities, when deciding on the detention of a TCN, to consider whether the enforcement of administrative expulsion is at least possible.[78] The **Sofia City Administrative Court** applied the RPR legality criterion not only in the initial pre-removal detention order, as the domestic legislation so requires,[79] but also when reviewing the legality of the prolongation of detention.[80]

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[74] Cyprus, Supreme Court, Re. the application of *Vilma Galivan Marcelino*, Civil application no. 169/2012, 14 December 2012, available on: www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2012/1-201212-169-12.htm&qstring=%E1%F0%E5%EB%E1%F3%2A.

[75] Cyprus, Supreme Court, Re. the application of *Vilma Galivan Marcelino*, Civil application no. 169/2012, 14 December 2012, available on: www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2012/1-201212-169-12.htm&qstring=%E1%F0%E5%EB%E1%F3%2A. Under the new regime the option of the unified approach is lost because the administrative court is not at liberty to examine *habeas corpus* applications and the supreme court is no longer competent to examine applications for judicial review.

[76] *Amie and Others v. Bulgaria*, Appl. No. 58149/08, 12 February 2013, § 77, also referring to *Ali v. Switzerland*, Appl. No. 24881/94, Commission's report of 26 February 1997 (unpublished), § 41, and *A. and Others v. the United Kingdom*, op.cit., § 167. *Amie and Others v. Bulgaria*, the ECtHR has declared that "if the authorities are – as they surely must have been in the present case – aware of those difficulties, they should consider whether removal is a realistic prospect, and accordingly whether detention with a view to removal is from the outset, or continues to be, justified."

[77] In *Kadzoev*, the AG held that: "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." See also Case C-357 PPU, *Kadzoev*, op. cit., para. 65.

[78] *No. 1 As 12/2009-61 of 15 April 2009*, see REDIAL Czech Report on pre-removal detention

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

[80] Case No. 11595/2012.

The positive impact of the ECtHR and Return Directive on this domestic jurisprudence is limited though due to the divergence between the domestic courts from these two Member States (**Bulgaria** and the **Czech Republic**). The approach of the **Czech Supreme Administrative Court** was not equally shared by all lower administrative courts. While the **Bulgarian Supreme Administrative Court** did not share the approach of the **Sofia Administrative Court**.

German courts seem to follow a close application of these CJEU rules, carrying out a strict assessment of the Aliens Authorities arguments regarding the existence of a prospect of removal.[81] The **Courts of appeal in Germany** have frequently challenged a general assumption of a prospect of removal made by the Aliens Authorities if the Authorities have not provided specific facts on the different steps to be taken in order to carry out a deportation order and the potential barriers to a removal.[82] Similarly, the **German Federal Court of Justice** requires that the judicial decisions ordering or renewing detention must be corroborated with specific information about the course of procedures and the time-frame within which particular measures can be taken under normal circumstances.[83]

Following the relevant jurisprudence of the CJEU and the ECtHR a positive legislative change came in **Italy**. The Italian Aliens Law was amended at the end of 2014,[84] including the RPR as a criterion for the legality assessment of both the initial order of detention and of the prolongation of detention. The Italian supreme court (**Corte di Cassazione**) quashed the judgment of a Justice of Peace (Giudice di Pace) on the grounds of lack of a RPR due to the fact that the detained TCN was a stateless person.[85]

Under the impact of the RD and *Kadzoev* judgment and ECtHR jurisprudence, the **Supreme Administrative Court of Lithuania**, carried 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 of getting them in the near future, it considers detention unreasonable (e.g. *case No. A-3078-822/2016, judgment of 23 February 2016*). It also considers detention unreasonable when the absence of documents from the embassy is the only reason for the extension of detention period, such an extension has been held not to be proportionate and necessary (*case No. A-3219-858/2015, judgment of 22 July 2015*). Similarly, the lack of cooperation of the embassy of the country of origin of the detained person is a relevant factor for assuming that there is no reasonable prospect of removal, according to the **Slovakian** courts (see *Supreme Court, judgment 9 Sp 33/2013*).

In other cases, CJEU case law does not produce the required effect. For instance, in *Hazaka* (Syrian national), the applicant's request to be released from detention, since there was no realistic prospect for his removal, given the ongoing war in Syria, was rejected by the **Cypriot Supreme Court**. Relying on the CJEU ruling in the case of *Arslan*, the applicant argued that he ought to be released from detention because there is no presumption that he filed an asylum application for the sole reason of delaying or averting his return to his country of origin. The Court rejected the application on the grounds that the applicant was not covered by the Return Directive since his detention and deportation

[81] This jurisprudence has perhaps also developed following the express obligation provided in § 62(3) sentence 4 of the German Residence Act. This explicitly prescribes that the initial pre-removal detention will not be 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.

[82] Ibid.

[83] Bundesgerichtshof (Federal Court of Justice), 27. October 2011, V ZB 311/10.

[84] Law no. 161/2014.

[85] Decision no. 19201/2015.

resulted from his criminal conviction (travelling with a false passport).[86] The Czech Supreme Administrative Court seems to have a different approach, where the emphasis is on the public administration's requirement to provide reasons why the removal is still possible. The Supreme Administrative Court 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 Court 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 third-country national could be safe. Then the Court stressed that if the third-country national 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).

6. Duration of pre-removal detention

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. Following the *El Dridi* and *Kadzoev* judgments, the eighteen months maximum duration of the pre-removal detention has been widely shared at the domestic level, with national courts generally quashing administrative decisions which would exceed this maximum duration. This result is perhaps due also to the clarity of the CJEU ruling rejecting any grounds or possibility for exceeding the durations provided by Article 15 RD (see more on the concrete impact of El Dridi and Kadzoev in section II).

7. Prolongation of detention

Article 15 (6) RD clearly 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.

The CJEU preliminary ruling in the *Kadzoev* case confirmed the restrictive interpretation of Article 15(6) RD, notably excluding any other grounds, whether related to public order or judicial review as justifying the prolongation of pre-removal detention (para. 52) As mentioned by the REDIAL Research Report 2016/05 (p. 46), Member States still follow in their legislation or practice other grounds than those exhaustively provided by the RD. The incompatibility with the RD and its case law of such legislation and practice has been remedied to a certain extent by national courts. These have refrained from applying national provisions stipulating additional grounds than those provided by Article 15(6) RD or have struck down administrative decisions extending pre-removal detention on grounds other than those exhaustively provided by the RD.

One such remarkable judgment comes from the **Regional Court of Przemysl** from Poland, which had to assess, in appeal, the judgment of the first instance court accepting to prolong the pre-removal detention of a returnee within six months on the grounds of his submission of a complaint against the return decision before the court. In 2014, Polish legislation on immigration was amended for the purpose of remedying the lack of suspensive effects of challenges to return decisions. The Polish legislator introduced, on the same occasion, a new grounds for the prolongation of pre-removal

[86] Re the application of Antoan Hazaka, asylum seeker from Syria and now at the police detention centre in Menoyia with a *habeas corpus* writ, Case No. 110/2013, 19 July 2013, available on: http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2013/1-201307-110-2013..htm&qstring=Antoan%20and%20Hazaka.

detention, namely the submission of a complaint against the return decision before the court.[87] The Regional Court raised the issue of the compatibility of this new grounds for the extension of pre-removal detention provided by Article 403(5) of the 2013 Law on Foreigners with Article 15(6) RD. First the Court mentioned that the judicial review grounds is not expressly provided for by Article 15(6) RD, it then turned to the CJEU case law to understand whether additional grounds, in particular judicial review, could be interpreted as falling under the grounds provided by Article 15(6) RD. The Court underlined that in *Kadzoev*, the CJEU expressly rejected the legitimacy of such grounds as the basis for the prolongation of pre-removal detention (para. 52). Lodging a complaint against the return decision to the court cannot thus be considered a legitimate reason for prolonging pre-removal detention.

After finding a clear incompatibility between the national provisions and Article 15(6) RD as interpreted by the CJEU, the **Regional Court** turned first to the duties of the Member States when implementing EU law, and secondly to the duties of national courts as EU courts within the EU legal order. Article 2(2) TFEU was cited as establishing a clear obligation for the Member States in refraining from actions that would undermine the objectives of the EU and the *effet utile* of EU law. Finding a violation of Poland's obligations of the correct implementation of EU law, the Regional Court continued to assess its duties in cases of incompatibility of national legislation with the RD, when the Member State has failed to fulfil its obligations. Relying on the principle of the primacy of EU law (*Costa v. ENEL*) and the *International Handelgesselshaft*, as confirming the primacy of EU law even over national constitutional provisions, the Court held that Article 15(6) RD has precedence over provisions of national law which are incompatible. According to the preliminary CJEU ruling in the *Simmenthal* case, national courts are obliged to refrain from applying national provisions which are incompatible with EU law. The Court cited *El Dridi* as grounds for the direct effect of Article 15 RD, which *in casu* would require national courts to refrain from prolonging pre-removal detention on other grounds then those provided in paragraph 6. Since there were no legal grounds justifying the extension of detention, the Regional Court annulled the judgment of the first instance court.

The powers of national courts to assess the legality of an extension of pre-removal detention varies considerably among the Member States. While in Germany courts have full control and they have to carry out a new proportionality assessment, being required to quash a detention order or prolongation, *ex officio*, if the reasons for deprivation no longer exist (Sec. 426 (1) sent. 2), in other jurisdictions the judicial review powers in cases of prolongation of pre-removal detention were considerably limited to checking whether the administration filled boxes on standard forms. The preliminary reference procedure has helped national courts to extend judicial control over the facts and laws provided by the public administration and thus to bolster judicial control in order to ensure that the RD is correctly implemented. Relying on the *Mahdi* preliminary reference, Article 47 EU Charter, Article 15 RD, and Articles 5(4) and 13 ECHR, the **Bulgarian Supreme Administrative Court** contributed to setting a precedent whereby the judicial proceedings on the extension of pre-removal detention is convened in an open hearing with the participation of the detained TCN, disregarding the limitations of the national legislation (see *Kapinga*, No. 2724/2010, and *Tsiganov*, No. 14883/2010, cases).

Another ground-breaking national judgment leading to the enhancement of detainees procedural safeguards comes from the **Italian Supreme Court**. According to the national legislation, the presence of the detained third-country national at the proceedings deciding on the extension of his detention was not mandatory. This limitation was reversed by the Supreme Court on the basis of Article 3 on the *principle of equality* and Article 24 on *the right of the defence*, and RD. Although EU

[87] Article 403. 1. "A court of law, in its ruling ordering to place a foreigner in a guarded centre or in a detention centre for foreigners, shall indicate the period of stay in a guarded centre or in a detention centre for foreigners, but not more than 3 months. […] 5. If a foreigner has filed a complaint to the administrative court against the decision on imposing the return obligation with a request to stay the execution thereof, the period of stay in a guarded centre or in a detention centre for foreigners may be extended to 18 months, yet the court referred to in paragraph 7 may issue a decision on the case for a period of 6 months" (see Polish REDIAL Report on pre-removal detention, p. 5).

law did not necessarily play the central role, the judgment of the Supreme Court, relying on fundamental rights equally protected by both the national Constitution and EU law, ensured both objectives pursued by the RD, namely effective removal and respect of human rights (see case ICC, judgment No. 4544/2010).

In conclusion, it is important to underline the role of the lack of cooperation of the third-country national in the decision making on the prolongation of pre-removal detention. A majority of Member States rely on these grounds for the extension of pre-removal detention. However, not all of the public administrations and national courts carry out a careful proportionality assessment and an individual assessment to establish the causality relation between the lack of cooperation of the third country national and the non-removal during the initial period, a requirement set out by both the CJEU and ECtHR. A positive example, even if not necessarily due to the impact of EU or ECHR law, comes from the **German** courts. In the case of a lack to cooperation in the procurement of travel documents the competent authorities have to prove that any detention time has been fully used to organise the issuance of such documents. The refusal of the due participation of the TCN justifies an extension of detention beyond six months only if that refusal is the actual cause for the non-removal. Therefore, a potential refusal to cooperate has to be taken into account by the alien authorities in planning and organising the process of return, *Bundesgerichtshof, Decision of 13 October 2011, 5 ZB 126/11*.

8. Re-detention

The *Kadzoev* preliminary ruling has had a salient impact on the jurisprudence of the **Supreme Administrative Court of Lithuania**. The Court quashed the judgment of the first instance court admitting the re-detention of a third-country national after the expiry of the eighteen months period of the initial detention. 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 the further detention of the applicant. 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. (*Su Hoang Van v. Foreigners Registration Centre case*)

Similar positive integration of CJEU rules can be found in the jurisprudence of the **Cypriot Supreme Court**. That court struck down the practice of the administration of re-detaining after the expiry of the initial eighteen month period of detention for similar reasons. In *Todorovic*,[88] where the immigration authorities issued a fresh detention order and re-arrested the applicant the moment he was released by the **Cypriot Supreme Court**, the Court stated that the fresh issue of the detention and deportation order amounted to a clear violation of the provisions of the law transposing the RD and a disrespect towards the court's verdict demanding his release. The Court pointed out that if the immigration authorities disputed the correctness of the court's decision to release the applicant, then they should have appealed that decision rather than have issued new orders against him.

9. Alternative measures to pre-removal detention

A landmark judgment clearly stating the obligation of the administration to consider alternative measures and giving precedence to the Return Directive against incompatible national provisions was delivered by the **Slovenian Administrative Court**. In its judgment (*I U 392/2015 of 6 March 2015)*, the Court found Article 81 Aliens Act in violation with Article 15(1) RD because the option of less coercive measure could be challenged only after the detention order was issued. The **Slovenian Administrative Court** imposed an obligation upon the police to verify, first, whether alternatives to detention might be carried out. The Court described in detail a checklist on how administrative

[88] Regarding the application of Zoran Todorovic and Re. the Republic of Cyprus through the Chief of Police and the Minister of the Interior, Case No. 2/2014, 7 February 2014.

authorities should proceed in 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 of the courts, and they may examine it without such a request addressed by the competent administrative authorities.[89] Lithuanian courts have also assigned other alternative measures than those requested by the authorities.[90]

Ground-breaking jurisprudential changes were also reported in Belgium. In 2016, the **Brussels Indictment Chamber** declared a detention measure to be unlawful because the possibility of other less coercive measures had not been examined, thus contradicting Article 15(1) of the Return Directive.[91] This approach is in line with the most recent judgment of the **Belgian Court of Cassation**.[92] Surprisingly though, the **Belgian Council** and **Indictment Chambers** continue to prefer an older judgment from the **Court of Cassation** (2009) which rejects the necessity of considering alternatives to detention.[93]

10. Access to legal aid

According to Article 13(3) RD, third-country nationals subject to return proceedings shall have the possibility of obtaining 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. Access to legal aid is not secured for detained third-country nationals in all stages of pre-removal detention in all Member States (e.g. Slovenia94). Then, even when there is legal aid, questions over access to lawyers and the quality of legal representation have been raised (see REDIAL Research Report 2016/05, p. 33-34).

In a ground-breaking judgment, the **Supreme Administrative Court of the Czech Republic (SAC)** quashed the judgments of both first and appeal courts on the basis of Article 13(3) RD requirements. The **SAC** pointed to the fact that, while transposing Article 13(3) RD into Czech law, the legislature failed to sufficiently ensure 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 the administrative authorities to ensure the TCNs legal aid. There is, therefore, no guarantee that every TCN subject to the return procedure would get legal aid in due time. This deficiency is worrying, especially in the case of third-country nationals detained in closed facilities.

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[89] Decision of the **Supreme Administrative Court of Lithuania** case No. N143-3565/2008 of 21 July 2008.

[90] See the REDIAL Lithuanian Report on pre-removal detention, p. 8.

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

[92] See Council Chamber (Brussels), 14 october 2016.

[93] REDIAL Belgian Report on pre-removal detention, p. 10.

[94] The Slovenian Administrative Court attempted to remedy this situation by relying on Article 6 EU Charter, Article 5 (4) ECHR, Article 15(2)(a) RD; the jurisprudence of the ECHR: cases *Louled Massoud v. Malta, Frasik v. Poland, Kadem v. Malta, Khudyakova v. Russia, Rokhlina v. Russia, Rehbock v. Slovenia, Akhadov v. Slovakia*, to sustain a constitutionality review of Article 79(a)(2) of the Aliens Act, which secured access to free legal aid only in relation to the removal order but not also in regard to detention measures. The Slovenian Constitutional Court rejected this claim, arguing that the purpose of Article 79(a) of the Aliens Act is not to guarantee the first speedy judicial review, but only an additional judicial control in case of extension for more than three months, which does not deprive the detainee of procedural safeguards of access to court. See case *No. I U 1201/2015-9*, judgment of 02 September 2015.

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 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*).

11. Impact of EU law, CJEU jurisprudence and ECHR on national jurisprudence – summary

Important changes in national legislation and practice have been prompted by vertical judicial interactions on the application of the RD and EU Charter:

- the amendment of criminal law to exclude criminal imprisonment for irregular third-country nationals for mere illegal entry or stay (impact of *El Dridi* and *Achughbabian*);
- bolstering judicial review powers of initial detention orders as well as prolongation of detention, and other connected return related measures (impact of *Mahdi*);
- limitation of arbitrariness in the application of legal rules, clearly delimitating asylum detention from return detention (impact of *Kadzoev* and *Arslan)*;
- elimination of public order as grounds for pre-removal detention; reduction of the detention period; (*Zh and O*)
- introducing the individual assessment of the necessity to detain; (*El Dridi and Mahdi*)
- introducing a requirement of clear, reasoned and written decision-making on the part of the administration; (principle of good administration and due diligence obligations set out by the ECtHR jurisprudence[95])
- limiting the grounds for the prolongation of pre-removal detention; (*Mahdi*)
- introducing the immediate release from detention after the exhaustion of the eighteen months period of detention; (*El Dridi*)
- precluding re-detention on the same grounds after the expiry of the eighteen months detention period.

Of course these effects are not evenly spread in all EU countries. As mentioned in this section and in more detail in the REDIAL Research Report 2016/05, there are still issues of incompatible national legislation or incorrect implementation, which means the divergent implementation of the Return Directive.

However, following the various instances of vertical judicial interactions between national courts and the CJEU (see *Section II*), several issue of non- or bad implementation have been remedied, at least to a certain extent. For instance, a list of standards regarding the interpretation and application of the abstract EU concept of the 'risk of absconding' as legal grounds for pre-removal detention was jurisprudentially developed by the CJEU. This has affected the practice of public administrations and national courts. These standards clarify, to a certain extent, the general definition of the 'risk of absconding' provided in Article 3(7) RD:

[95] Singh v. the Czech Republic, No. 60538/00, 25 January 2005; Mikolenko v. Estonia, No. 10664/05, 8 October 2009; M. and Others v. Bulgaria, No. 41416/08, 26 July 2011 and Longa Yonkeu v. Latvia, No. 57229/09, 15 November 2011.

- EU terms which constitute derogation from a principle should be strictly interpreted; (*Zh. and O*, para. 42)
- Respect of FRs; (*Gaydarov*, *El Dridi*)
- Derogations from the application of the Return Directive cannot be determined unilaterally by each MS without any control by EU institutions; (*Zh and O*, para 48)
- Genuine and present risk; (*Zh and O*, para. 50)
- Consideration should go beyond the mere fact of an illegal stay; (*Mahdi*, para. 40)
- Principle of proportionality should be ensured; (*El Dridi*, para. 41)
- Any assessment relating to the risk of the person concerned absconding must be based on the individual examination of that person's case; (*Sagor*, para. 41, *Mahdi*, para. 70)
- No automatic prolongation based on lack of identity documents. (*Mahdi*, para. 72)

Mere illegal stay and entry, and lack of identity documents have not been taken, in certain Member States, as objective criteria justifying a risk of absconding. Additionally the individual assessment requirement is slowly enforced following the judgments of national supreme courts requiring a consistent application of this principle by both public administration and courts in cases of pre-removal detention. The role of national judges is of the utmost importance not only post-preliminary ruling, in its application at the national level, but also in the formulation of preliminary references. National courts can influence CJEU jurisprudence and determine particular directions of interpretation when drafting preliminary questions (see *El Dridi*, a similar attempt was made in the *Celaj* case).

A fundamental change introduced by the Return Directive together with the EU Charter is the fact that administrative authorities now have concrete due diligence obligations before and during pre-removal detention proceedings. Abstract reasoning or "ticking box" forms of justification for pre-removal detention is generally no longer accepted by national courts. National courts have used Articles 41[96] and 47 EU Charter, and Article 15 RD requirements of written administrative decisions and legal and factual motivation of pre-removal detention, as instruments forcing changes in administrative practice. The EU Charter, the RD and CJEU jurisprudence are slowly becoming standards of legality for national courts in the review of administrative decisions concerning immigration detention, even in jurisdictions that, generally, do not refer to European case law (e.g. **Germany**[97]).

A ground-breaking impact of the CJEU preliminary ruling in the *El Dridi* case on national jurisprudence, could be seen in the judgment of the Tribunal of Crotone (South Italy) in the case of *Aarrassi, Ababsa, Dhifalli*.[98] This concerned the protests of detained third-country nationals against their detention and conditions in the Crotone detention center. This case is worth mentioning due to its sensitive and politically difficult issue, which is still present in Italy, but also in the Member States: protests of third-country nationals against pre-removal detention lacking in standards of adequate motivation, transparency, taken after several years where the individuals resided in the country, and was placed in detention centres with difficult living conditions.

[96] Appearance of Article 41 EU Charter in the jurisprudence of national courts is slowly increasing, especially in immigration cases, where the public administration has a wide margin of discretion, but also, more recently, concrete due diligence obligations. Such a case is the one decided by the Supreme Administrative Court of Lithuania ,concerning the repeated detention of the person beyond the maximum of eighteen months. The Court established an obligation of due diligence for the public administration, derived also from Article 41 of the EU Charter, whereby they could not repeatedly detain a foreign national for lack of documents after the expiration of the eighteen-month period, when documents from the embassy of the person were not received for more than a year. No. A-3078-822/2016, judgment of 23 February 2016.

[97] See the *Decision of 18 February 2016 – V ZB 23/15.*

[98] Tribunal of Crotone, judgment of 12 December 2012.

These detained third-country nationals were prosecuted for the criminal offences of demolition of state property and resistance to police officers, punishable with a prison sentence of one year and eight months. The national court centered the legality assessment of the detainees actions and of the detention orders, around the requirement that EU law, as interpreted by the CJEU, should be respected. The Court recalled that Union law is an integral part of the domestic legal order and that, where national law is in conflict with Union law, as is the case with non- or badly transposed directives, Union law has supremacy over national law. Article 15 RD was invoked as a directly effective provision on the basis of which the legality of detention orders should be assessed. The Court then turned to the *El Dridi* judgment, which was interpreted as requiring national courts to carry out a 'least restrictive measure' test in relation to all detention orders adopted by the administration. The Court emphasised that not only must national law comply with Union law, the practices of the public administration must also comply with Union law. The Court annulled the detention orders on the grounds that they were not properly motivated since they did not provide reasons why "it was not possible to concretely apply less coercive measures", or "why a detention measure was the most suitable option to secure an effective removal". The Court also ruled out the arguments of the Court that one of the third-country nationals posed a danger, recalling that the "Directive provides for a detention measure only so as to assure the effective removal procedure and cannot be grounded on the alleged danger of the person concerned." (para. 5.7) The Court concluded that the detained third-country nationals acted in self-defence and ordered their immediate release if they were not being held for other – non immigration related – facts. (para. 7)

It seems that in most of the national jurisdictions, EU law and jurisprudence has had a more direct and tangible impact on the national administrative practice and jurisprudence on pre-removal detention than the ECHR and ECtHR jurisprudence. This is true, at least, when it comes to an individual assessment of the grounds for detention, time limits of detention periods, establishment of alternative measures, and the requirements for clear and reasoned decision-making.[99] However, in certain jurisdictions, the EU Charter is a lesser used instrument and though often invoked by lawyers representing detainees it is usually ignored by judges from certain jurisdictions (e.g. **Cyprus**), who prefer to use the more familiar route of the ECHR and its related case law. The ECHR seems to play a crucial role when the Return Directive is considered not applicable, for instance in situations of criminal imprisonment where there is also an expulsion order in addition to the prison sanction for other criminal offences. For instance, Articles 5 and 6 ECHR are invoked as grounds for the release of the third-country national, since the administration or/and the first instance court did not take into account all the circumstances of the case and that deportation cannot take place in a reasonable period of time or that authorities are not acting with due diligence (e.g. **Cyprus**[100]).

Another example of national courts relying on the ECHR rather than on EU instruments to secure the lawfulness of pre-removal detention is the judgment of the **Supreme Court of Italy** on the possibility of assessing the legality of the expulsion order within the legality assessment of the pre-removal order. Relying on Article 5 ECHR, the Supreme Court reached the conclusion that the *Giudice di Pace* should be able to review the lawfulness of the expulsion order, when validating pre-removal detention, at least as regards manifest errors such as violations over the principle of non-refoulement. This change in the practice of the Supreme Court has thus resulted in bolstering the judicial control powers of the *Giudice di Pace* on the basis of Article 5 ECHR (Supreme Court, no. 24415 of 30 November 2015).

In conclusion, the various EU legal instruments (Return Directive, EU Charter, general principles of EU law) as interpreted by the CJEU, and the ECHR as interpreted by the ECHR should be read and applied in a complementary manner, for the purpose of securing legality of detention measures and

[99] Conclusion based on the replies of the REDIAL national academics to the questions introduced in the REDIAL Template for assessing the implementation of Chapter IV Return Directive.

[100] Cyprus, Supreme Court, Appeal jurisdiction, *Habibi Pour Ali Faysel v. Republic of Cyprus through the Chief of Police and the Minister of the Interior*, Civil appeal No. 236/15, 31 March 2016. See also Cypriot REDIAL Report.

rights protection at the national level. In *El Dridi*, the CJEU noted that the Return Directive was intended to take into account the ECHR and its case law. (para. 43). The higher standards of safeguards should be applied, whether provided by the EU and its case law (for instance, the necessity and proportionality tests are mandatory in cases of pre-removal detention under the RD, while the ECtHR does not set such requirements, see *Saadi v. UK*), or by the ECHR (e.g. prohibition of arbitrariness, in which the requirement of reasonable prospect of removal and due diligence[101] have been developed more in depth by the ECtHR under Article 5(1)(f) and 5(4) ECHR).

12. Instances of horizontal judicial interactions and their outcome – summary

Beyond traditional vertical judicial interactions (i.e. the preliminary reference procedure), national courts are slowly engaging in horizontal interactions with national courts from other Member States. They cite foreign judgments in support of their reasoning. Horizontal judicial interaction seem to occur especially in cases where the deciding court's judgment would have a direct impact on the national law (such as invalidating national provisions, or disapplying a national law) or generally on national jurisprudence (e.g. changing widespread judicial interpretations, or erroneous judgments of supreme courts).

According to the data submitted by the REDIAL national judges and academics, horizontal judicial interactions in the form of the citation of foreign domestic judgments have occurred in the field of return proceedings for the purpose of: 1) clarifying EU concepts and their application (usually when clarifying the requirements for the application of the 'risk of absconding'); or for the purpose of establishing whether national law or practice is in contrast with EU law.

As regards the first category of cases, examples came from supreme courts from **Cyprus** and the **Czech Republic**. In *Farak Nessim*[102] the **Cypriot Supreme Court** referred to two British decisions, *Walumba Lumba and Kadian Mighty v. Secretary of State for the Home Department* [2011] UKSC12 *and R (A) v. Secretary of State for the Home Department* [2007] EWCA Civ 804 in order to establish the criteria for determining whether there is a risk of absconding.

Another example concerning the clarification of the concept of 'risk of absconding' is the **Czech** case over detention based on risk of absconding in the absence of objective criteria set out by national legislation. Although also involving vertical judicial interaction, the judgment of the first instance court took a ground-breaking decision. The court decided to annul a detention measure in a Dublin transfer (the risk of absconding is a legitimate ground for detention under both return proceedings and the Dublin system) on the basis of a previous judgment of the **German Federal Civil Court** (*Decision of 26/06/2014 – V ZB 31/14 for Dublin cases)*. The Czech judge was in agreement with the German judges that for the risk of absconding to constitute legal grounds for immigration detention, the national legislation should have set out objective criteria in national law. In the absence of such a transposition, where the Member States have failed to ensure a correct implementation of EU secondary legislation, they cannot use the risk of absconding as legitimate grounds for detention.

As regards the second category of cases, an example came from the **Administrative Court of Slovenia**. This Court referred to the UK case law in its request I U 1201/2015 of 2 September 2015 for a constitutionality review of Article 79.a (2) of the Aliens Act. It referred to the judgment of the UK Court of Appeal in case no. C4/2015/2134 of 29 July 2015 to support its argument that detention of asylum seekers in accelerated procedures is unfair as it does not provide asylum seekers with effective access to legal aid.

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[101] See, for instance, the Opinion of AG Szpunar in the *Mahdi* case, which cited ECtHR case law on due diligence in order to establish the requirements under the RD (para. 90).

[102] Cyprus, Supreme Court, Re the application of Malak Shawki Farak Nessim, Civil application No. 66/2016, 24 August 2016, available on: http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2016/1-201608-66-16.htm&qstring=%EA%F1%E1%F4%E7%F3%2A%20and%202016.

In conclusion, these instances of horizontal judicial interactions, which came from both lower and supreme domestic courts, are examples of innovative legal thinking. Perhaps the limited horizontal judicial interaction so far is due to a limited access to foreign national jurisprudence and to the concern that applicable national law is not similar, though it is implementing the same Directive. By creating a national case law database of around 1000 cases on the implementation of the Return Directive, the REDIAL Project aims to help national judges to have wider access to foreign domestic courts' rulings for the purpose of offering inspiration on how to apply EU concepts and principles, or to solve legal or jurisprudential conflicts, as the cases above show.

IV. Main Outcomes of Judicial Dialogue on conditions of detention (Article 16 RD): a comparative analysis[*]

The underlying idea of Article 16 that provides for "appropriate" place and conditions, is that returnees, though staying irregularly in EU Member States, are not criminals and do not deserve to be treated like ordinary prisoners.[103] In this regard, Member States are required to guarantee sufficient places in "specialised detention facilities" as well as a certain number of concrete safeguards all through the detention process. This means ensuring emergency health care and essential treatment of illnesses, paying due consideration to the vulnerability of the person, providing relevant and concise information, allowing detainees to establish contact with legal representatives, family members and competent consular authorities etc. With regard to the *place* of detention, the "vertical dialogue" that took place between the CJEU and the **German** Federal Courts shows a judicial awareness that foreign nationals in the process of being expelled should be treated differently than people convicted of criminal offenses. Domestic courts seem now to closely monitor this requirement, otherwise releasing the applicants who are held in ordinary prisons and/or together with national or foreign prisoners. However, the impact of the CJUE rulings on other national courts appears rather limited: no case law has been found in other Member States on the compliance of the administrative practice with the Return Directive when it comes to clearly differentiating specialised facilities from criminal custody.

On the *material conditions* of detention, more landmark decisions have been uploaded on the REDIAL database,[104] though national courts overall rely on their own legal provisions (see for instance, the Spanish Constitutional Court, 17/2013, 31 January 2013). They neither interact with European judges (through references for a preliminary ruling), nor with other domestic courts dealing with similar issues. In practice, our synthesis reports show that judicial authorities rarely rule specifically on the question of whether concrete conditions are or have been respected in detention facilities; deficiencies and problems are mainly pointed out by independent monitoring authorities: ombudsmen, commissioners, higher administrative bodies etc. As for judicial control, national judges either have a limited territorial competence in assessing material conditions,[105] or have full material and territorial competence but seldom strike down administrative detention orders on this basis.[106] See, for instance, **Bulgaria**, where the **Supreme Administrative Court** ruled that unless detention measures themselves endangered the person's health, the detention order (or its extension) could not

[*] Géraldine Renaudiere is the author of sections IV and V.

[103] By contrast, foreign nationals who commit a criminal offence, including in the preparation and the carrying out of the removal process, can be detained in ordinary prisons, in accordance with national criminal law. However, from the moment the prison sentence comes to an end (when the person should normally be released), Member States are required to apply the rules provided by Article 15 RD if they intend to detain the foreign national for removal purposes. See EC, Return Handbook, 2015.

[104] To this day, 16 landmark judgments have been collected in database under Article 16 RD.

[105] In **Spain**, each "Judge of control" is appointed to supervise the conditions of one particular "Centre of Internment" and does not rule in general terms (Instruction Judge nº 1 and Control Judge of the Internment Centre in Barcelona "Zona Franca", Dilgencias CIE 35/2014-3, on the obligation to provide clear information to the internees). See also the Spanish report on pre-removal detention.

[106] In **Slovenia**, the extent of the judicial control greatly varies according to the individual judge in charge.

be annulled on the sole fact that the room assigned to the detainee was not adapted to his or her physical or mental health: *SAC, C-8/2016*, see Bulgarian Report on pre-removal detention. High administrative courts in **Greece** and in the **Czech Republic** dismissed individual claims invoking material detention conditions contrary to Article 3 ECHR. While acknowledging that inadequate conditions may affect the lawfulness of a detention order,[107] the **Czech Supreme Administrative Court** still considers that aliens cannot expect an "average living standard" as in the Czech Republic or in 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*" (SAC, judgment of 21 January 2016, 2 Azs 300/2015).

Domestic courts' assessment of the appropriateness of detention conditions may differ among the Member States (supervising authority, scope of competence, extent of judicial control etc.) but this aspect remains an inherent part of the control of lawfulness that must be performed by *judicial* authorities with regard to detention orders and/or extension decisions.[108] As recalled by the CJEU in *Mahdi*, the competent court reviewing the legality of pre-removal detention must be able to: rule on all relevant matters of fact and of law (…), replace an initial detention order by an alternative, less coercive, measure and release the third-country national where that is justified.[109] This should be the case, for instance, when the person is held in inadequate detention facilities: inadequate with regard to his/her status, age, vulnerability. It should also be the case when the conditions of his/her placement do not comply with the Directive's requirements or the international standards.[110] With regard to families and minors, the Supreme Administrative Court in **Czech Republic**, explicitly relied on ECtHR relevant case law[111] to quash the judgment of a regional court, which had not sufficiently assessed the concrete condition of their detention. However, the SAC did not address the merits itself: SAC, No. 1 Azs 39/2015, 17 June 2015, see Czech report on pre-removal detention.

V. Main Outcomes of Judicial Dialogue on the detention of vulnerable migrants, namely families and minors (Article 17 RD): a comparative analysis

The Court of Justice has interpreted neither the provision on detention of minors and families, nor the possible "emergency" situations in the meaning of Article 18 RD. However, judicial interaction on this matter would have been useful to avoid some interpretation issues faced in the past by national courts dealing with minors accompanying TCNs, notably in **France** and **Czech Republic**.

While in **Austria**, **Germany** and **Cyprus** (since 2014) families with children are almost never detained nor held in specialised facilities, other countries' legislation provide for the possibility of placing children and families in separate accommodation from the detention centre in which adults are held.

In **France**, this physical separation led the Council of State to consider that minors were not properly deprived of their liberty (CE, n° 352232, 18 November 2011, see French report on pre-removal detention). On this basis, lower French courts declined jurisdiction to hear minors who challenged a detention order in the light of the "best interests of the child," arguing that the measure

[107] The Court here explicitly refers to ECtHR relevant case law; *SUSO MUSA v. MALTA*, Appl. No. 42337/12, 23 July 2013, §93; *POPOV v. FRANCE*, Appl. No. 39472/07 39474/07, 19 January 2012, §118.

[108] In the meaning of Article 15(2) and (4) RD.

[109] *In casu* the court had to deal with an application for an initial period of detention to be extended. CJEU, C-146/14 PPU, *Mahdi*, 5 June 2014.

[110] In this regard, Art. 16 RD should be read in conjunction with recital 17 stating that detainees must be treated in a 'humane and dignified manner' with respect for their fundamental rights and in compliance with international law.

[111] MUSKHADZHIYEVA ET AUTRES c. BELGIQUE, Appl. 41442/07, 19 January 2010 and POPOV v. FRANCE, Appl. 39472/07 39474/07, 19 January 2012.

impacted only the personal situation of the parents and not the children's situation: Administrative Tribunal of Toulouse, 21 February 2012, see French report on pre-removal detention. By contrast, when it comes to adults, the French authorities are required to pay particular attention to the foreigner's personal situation and resort to detention only as a last resort, for a short period, and after having examined whether any other credible alternative measures might exist: CAA Nancy, 14NC01763, 1st October 2015; CAA Bordeaux (1st Chamber), 15 November 2012.

The same was true in the **Czech Republic** until 2011, where Judges considered minors under fifteen only to be *accommodated* in separated premises of detention centres. This "legal fiction" led to children being unable to challenge their detention before the courts, deemed as formally non-detained free to go: see Czech Report on pre-removal detention, p. 25. On 30 September 2011 (in case No. 7 AS 103/2011) the Supreme Administrative Court departed from this case law. The Court noted that despite the lack of an official detention order, the minor had generally no other option than that of following his/her parents and staying with them in the detention centre. Hence, it stated that before issuing a detention order against the parent concerned, the administrative authority had to consider first and foremost the best interests of the child. In the Court's view, this right should be read in conjunction with the right to family life, as guaranteed by Article 8 ECHR.

Polish and **Lithuanian** courts also duly consider the best interest of the child when ordering and assessing the lawfulness of a placement, in respectively "guarded" and detention centers: Polish court in *Slubice*, order of 12 June 2014, II.1. Ko 1172/14; Supreme Administrative Court of Lithuania, *Nato Pavlenishvili v. State Border Guard Service*, 12 February 2015. In some cases, Judges consider detention as the best way to ensure the family's unity and protection. This reasoning can hardly be reconciled with the statement of the UN Special Rapporteur on the Human Rights about the administrative detention of children. Although not explicitly prohibited by the Return Directive, such a measure appears to be, says Mr. Crépeau, a violation of children rights in several ways. And further emphasised "detention for administrative purposes can never ever be in the best interest of a child".[112]

VI. Conclusions – main outcomes of judicial interactions in the field of pre-removal detention

Important changes in national legislation and practice (administrative and jurisprudence) have been prompted by vertical judicial interactions, *inter alia*: the amendment of criminal law to exclude criminal imprisonment for irregular TCNs for mere illegal entry or stay (impact of *El Dridi* and *Achughbabian*); bolstering judicial review powers of initial detention orders as well as of prolongation of detention, and other connected return related measures (impact of *Mahdi*); the limitation of arbitrariness in the application of legal rules, clearly delimitating asylum detention from return detention (impact of *Kadzoev* and *Arslan*); and reasoned decision-making by public administration (*Mahdi*). The role of national judges is of utmost importance in both the formulation of preliminary references and the implementation of preliminary rulings. National courts can influence CJEU jurisprudence and determine particular directions of interpretation when drafting preliminary questions, see *El Dridi*, a similar attempt was sought in the *Celaj* case. The preliminary rulings discussed in *Section II* have had a transnational impact on both referring and non-referring Member States. This is perhaps part of the added value of vertical judicial interaction in the form of preliminary ruling(s) compared to horizontal judicial interactions. Although the instances of horizontal judicial interaction, with courts citing foreign domestic courts, are fewer than vertical interactions, whether

[112] **François Crépeau** UN Special Rapporteur on Human Rights, Office of the United Nations High Commissioner for Human Rights, *Administrative Detention of Children is a Violation of Children's Rights*, UNICEF, 2015. The Working Group on Arbitrary Detention has also stated that, given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of an unaccompanied minor would comply with the requirements stipulated in the Convention on the Rights of the Child.

direct or indirect, they have triggered ground-breaking changes in practice and in legislation. See, for example, *the Czech case on the definition of the risk of absconding*.

The definition and application of the 'risk of absconding' as legal ground for pre-removal detention has been one of the areas of pre-removal detention with numerous judicial interactions. The main grounds on which Member States adopt pre-removal detention measures is the "risk of absconding". However, the RD provides a vague formulation of these grounds, leaving a considerable margin of interpretation to the Member States when defining objective criteria. Judging by the lack of uniform national legal instruments defining this notion, its wide definition and the variety of criteria used to define it, the objective of the RD – return detention an exceptional norm governed by precise rules written into national legislation – has not been achieved. The open-ended domestic provisions of several Member States and the provision of catch-all criteria such as illegal entry or stay raise concerns regarding the compatibility of national legislation with the Return Directive (Article 15). Furthermore the provision of objective criteria in legal instruments other than domestic laws could raise issues of conformity not only with Article 3(7) RD, but also with the ECHR-based requirement of legal certainty of domestic norms restricting the right to liberty.

Either due to the confusing definition of the notion in the RD, and/or the opposition of the Member States to changing their domestic practices and the allocation of powers between domestic judiciaries, the European legal and jurisprudential framework of pre-removal detention remains fragmented. The development of similar and consistent standards in the application of pre-removal detention based on the risk of absconding thus falls on the shoulders of national courts. In spite of different national competences and the willingness of national courts from EU Member States to control the discretionary power of the competent administrative authorities, the REDIAL project underlined a developing practice of standardization. This standardization concerned the scope and intensity of domestic judicial scrutiny of pre-removal detention among EU countries, thanks to vertical and horizontal judicial dialogue.

Vertical judicial interactions (between European supranational courts and domestic courts) and horizontal judicial interactions (among various national courts) have helped national courts to: clarify convoluted EU notions, such as 'the risk of absconding'; and bolster their judicial review power over the legality, necessity and proportionality of pre-removal detention. In terms of the long-term impact of the judicial interactions, they have contributed to re-shaping national legislation and jurisprudence in conflict with the Return Directive, the EU Charter and the ECHR; while re-drawing the division of powers between the judiciary and the administration on the adoption and control of pre-removal detention.

It seems that national courts are increasingly aware of their responsibility of European judges, and more inclined to use the *principles of individual assessment and proportionality* rather than automatically endorsing the decision of administrative authorities. Even when objective criteria (absconding history, violation of entry ban, failing to cooperate) are invoked by the administrative authorities, some national courts do not automatically endorse the administration justification, but perform an individual assessment and proportionality test on pre-removal detention (e.g. **Sweden**, **Lithuania**). However, these standards of review are not yet uniformly shared by national courts across the EU Member States, or even within the same Member State (e.g. **Bulgaria**, **Czech Republic**, **Hungary**). It should be noted that while the CJEU preliminary rulings seem to be generally followed in national judicial practice, the REDIAL Research Report 2016/05 and this Electronic Journal have shown that there are still persistent objectors among certain national courts, which do not fully endorse the mandatory principles of individual assessment, necessity and proportionality and rejection of prohibited objective criteria in cases of immigration detention.

In order to instil more clarity and coherence in the application of EU legal norms and rights, one possible solution would be first to remedy the negative consequences of domestic separation of judicial competences over the various stages of the return proceedings. For instance, return related decisions, pre-removal detention and entry bans usually fall under the competences of different

national courts, which have led in practice to unjust solution of return, due to the limited judicial powers, or lack of judicial cooperation, and a fragmented judicial review system that delays the effective return proceedings. The limited and fragmented judicial review powers cannot be entirely remedied by way of single positive judgments. The recommended solution should be a unification of the judicial competences over the entire return proceedings included in national legislation, where one category of jurisdiction should be competent to review both pre-removal detention and other return-related decisions. Furthermore the judicial review should follow the minimum standards provided by the CJEU in the *Mahdi* case. In the words of the AG Szpunar in *Mahdi*, which were endorsed by the CJEU, though in a shorter paragraph:

> "the judicial authority must be in a position to determine whether the grounds forming the basis of the detention decision are still valid and, as the case may be, whether the conditions for extending detention are fulfilled. In order to comply with Article 47 of the Charter, the national court must have unlimited jurisdiction with regard to the decision on the merits."

Consequently the national courts must be able to decide on:

- an extension of detention;
- on replacement of detention by a less coercive measure; or
- on the release of the person concerned.

Additionally, "the judicial authority must have power, if necessary, to require the administrative authority to provide it with all the material concerning each individual case and to require the third-country national concerned to submit his observations. […] Consequently it is for the **national court to assume unlimited jurisdiction with regard to the substance of the case**. Thus, as it may apply Article 15 of Directive 2008/115 directly it must, if necessary, disregard the provisions of national law which have the effect of preventing the assumption of unlimited jurisdiction."[113]

The judgments submitted by REDIAL judges and national academics reveal that, in spite of the persistent issues in the implementation of the RD and CJEU case law at national level (see the Conclusions of the REDIAL Research Report 2016/05), their effective implementation can be significantly enhanced with the help of national judges. Stirred by successful examples of judicial interactions, national courts have started to exercise a more extensive and careful assessment of the requirements of reasoned decision-making, necessity and proportionality in relation to pre-removal detention measures proposed or adopted by public administrations. It is thus important that national courts continue this process of coherent and effective implementation, where higher standards of human rights are respected. In the words of *Bostjan Zalar*, one of the REDIAL judges,[114] in order to reach such results the "significant 'moments' of horizontal judicial interactions" need to reach larger circles of judges. We hope the REDIAL database collecting over 1000 national judgments on the implementation of the RD, the European Synthesis Reports and Electronic Journals will facilitate such instances of horizontal judicial interaction enhancing effective return proceedings, as well as effective rights and remedies for third country nationals subject to such proceedings.

[113] Judgments in *Simmenthal* (106/77, EU:C:1978:49, paragraph 21) and *Solred* (C-347/96, EU:C:1998:87, paragraph 29). See also AG Szpunar in Mahdi (ibid.), points 73-79.

[114] See the presentation of Prof. Bostjan Zalar, Judge at the Administrative Court of the Republic of Slovenia and *ad hoc* judge at the European Court of Human Rights during the 2017 OMNIA Conference: "Beyond the crisis" The State of Immigration and Asylum Law and Policy in the EU Workshop 2: "Judicial Interactions in Control of Return and Asylum Detention".