REDIAL PROJECT

National Synthesis Report – Austria

(Draft)

TEMPLATE FOR THE NATIONAL REPORTS ON THE THIRD PACKAGE OF THE RETURN DIRECTIVE – Articles 15 to 18 RD

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Please consider that the questions below do not represent an exhaustive list of issues raised by these provisions but mainly offer a starting point for research and greatly facilitate our subsequent comparative analysis. The jurisprudence to be considered should be primarily the one submitted by the national judge collaborating in the REDIAL Project. Any other jurisprudence which does not touch precisely on these issues might be included in your report, as long as it is relevant for the interpretation/implementation of Articles 15-18 of Chapter IV of the Return Directive. (See in this regard the REDIAL Annotated Return Directive covering both the ECtHR and CJEU relevant case law)

When applicable, please also refer to any relevant administrative practice or on-going legislative changes at national level relating to pre-removal detention.

1. Article 15 RD: detention

a. Competent authorities ordering and reviewing pre-removal detention

Q1. In your Member State, are judicial authorities involved at the initial stage of the detention measure? (*E.g. by endorsing a detention order or ordering pre-removal detention upon request of the administration)*

NO

The initial decision (administrative order, usually administrative order without further investigations, Mandatsbescheid) is rendered by the BFA (Federal Office for Immigration and Asylum), which is an administrative authority.[1]

Q2. Which authority is competent for controlling the lawfulness of a pre-removal detention measure?

Is it the same authority regardless of the length of the detention and/or the issuance of an explicit renewal order? Or does the judicial authority concerned control the lawfulness of detention only when a detention order is renewed?

[1] Bundesgesetz, mit dem die allgemeinen Bestimmungen über das Verfahren vor dem Bundesamt für Fremdenwesen und Asyl zur Gewährung von internationalem Schutz, Erteilung von Aufenthaltstiteln aus berücksichtigungswürdigen Gründen, Abschiebung, Duldung und zur Erlassung von aufenthaltsbeendenden Maßnahmen sowie zur Ausstellung von österreichischen Dokumenten für Fremde geregelt werden, Act on Procedures before the BFA (BFA-Verfahrensgesetz – BFA-VG), BGBl. I Nr. 87/2012, Amendments: BGBl. I Nr. 68/2013; BGBl. I Nr. 144/2013; BGBl. I Nr. 40/2014; BGBl. I Nr. 41/2015 (VfGH); BGBl. I Nr. 70/2015. In force since 1 January 2014.

Both options are possible. A complaint (a request for judicial control) against a decision to impose detention is possible. The complaint is decided by the Federal Administrative Court.[2] The complaint has to be filed with the BFA; according to the law, the Office would have to decide in a preliminary decision, which does not happen in practice. The BFA has to submit the complaint, the preliminary decision and the files to the Federal Administrative Court.

The lawfulness of detention has to be controlled *ex-officio* as well. The administrative authority (BFA) has to review the proportionality of detention every four weeks. The Federal Administrative Court[3] has to review the lawfulness if detention lasts longer than four months and then every four weeks.

Q3. Is the judicial review performed in accordance with Article 15 (3) RD automatic or upon applicant's request?

Both options are possible. The person may file a complaint and the lawfulness of detention has to be controlled *ex-officio* as well. The administrative authority (BFA) has to review the proportionality of detention every four weeks. The Federal Administrative Court has to review the lawfulness if detention lasts longer than four months and then every four weeks.

A complaint to the Court is possible from the beginning. As long as a complaint is pending there is no *ex-officio* review.

Q4. Does your national legislation provide for <u>one or two levels</u> of jurisdiction and under which modalities? (*E.g. a first review by an administrative authority followed by an administrative court and/or a civil or criminal court?)*

In any case, please elaborate further on the type of jurisdiction(s) involved, remedies available, the deadlines for appeal(s) set by law etc.

The national legislation provides for one level of regular jurisdiction by a Court, the Federal Administrative Court. The Federal Administrative Court has to decide about facts and law.

The persons concerned also have the possibility to file an extraordinary remedy, called revision, to the High Administrative Court[4] (Art. 133 (4) Austrian Constitution, B-VG, § 25a Act on the High Administrative Court[5]). The Federal Administrative Court has to decide whether such a revision is admissible. A revision has to be permitted if one of the reasons enumerated in § 25a Act on the High Administrative Court is fulfilled. The Federal Administrative Court has to allow a revision if a legal question has to be solved which has fundamental importance, especially because the decision deviates from previous jurisprudence of the High Administrative Court, if there is no such jurisprudence or because there is no consistent jurisprudence with regard to the legal question (Art. 133 (4) B-VG).

It is possible that the High Administrative Court renders a final decision on the merits if all facts are established. The High Administrative Court has to decide about the legality of the order, thus the Court has to decide about the law.

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[2] Bundesgesetz über das Verfahren der Verwaltungsgerichte, Act on Procedures before the Administrative Courts (Verwaltungsgerichtsverfahrensgesetz – VwGVG) BGBl. I Nr. 33/2013, as amended by BGBl. I Nr. 122/2013, in force since 1 January 2014.

[3] The Federal Administrative Court and Administrative Courts in the Federal States have been established in 2013 and judges were inaugurated in 2013, the work started on 1 January 2014. Before 2014 the competence to decide about detention orders was allocated to the Aliens Police. Independent Administrative Boards (or Senates, UVS – Unabhängige Verwaltungssenate) were responsible to decide about complaints filed against detention orders. As the reference to jurisprudence is still partly based on decisions taken before the establishment of the new judicial framework, it is necessary to mention the development here.

[4] High Administrative Court, Verwaltungsgerichtshof – VwGH.

[5] Verwaltungsgerichtshofgesetz – VwGGG, BGBl. Nr. 10/1985 in the version BGBl. I Nr. 194/1999, last amendment: BGBL. I Nr. 50/2016.

If the Federal Administrative Court does not allow a revision the person may file an extraordinary revision to the High Administrative Court.

It is also possible to file a complaint to the Constitutional Court if the person claims that a constitutional right has been violated (Art.144 B-VG).

Q5. In first instance, do national courts in your Member State *fully* control the legal and factual elements of the case when reviewing the lawfulness of a pre-removal detention measure? Or is the control limited to manifest error of assessment made by the ordering authority? (*E.g.* Mahdi, C-146/14)

There is a full control by the Federal Administrative Court.

Q6. Does the judge control *ex officio* all/some elements of lawfulness of the detention irrespective of the arguments of the parties?

YES/NO

According to § 22a Act on Procedures before the BFA the Federal Administrative Court has to decide about **all aspects of legality** of detention, if the person is still in detention at the time when the Court decides. The judge controls *ex officio* all elements of lawfulness irrespective of the arguments in case the person is still in detention.

This decision is a twofold one.

1. The judge has to decide whether detention is lawful (necessary and proportionate) at the time of the decision in order to establish, whether detention may be continued. This situation corresponds to the situation in force until 31 December 2013; the extent of judicial control is the same. The High Administrative Court held that the control is not limited and the previous Federal Administrative Senates were obliged to a full control of all aspects of legality of detention (see e.g. High Administrative Court, 2010/21/0292, 15.12.2011). The Federal Administrative Court also decided that the control is not limited and continued the practice to control all elements irrespective of the arguments raised (see for many BVwG, G307 2007974-1, 21.5.2014; so far there are no decisions by the High Administrative Court based on the new legal situation). The Federal Administrative Court quoted the CJEU's judgment *Mahdi*, C-146/14, 5.6.2014. According to the Austrian Court the judgment requires that a Court deciding on the prolongation of detention has to have the power to decide on all aspects of facts and law.

2. The judge also has to decide whether the initial detention was lawful. The Court decides about the legality of the initial decision only taking the arguments into account, which were raised by the applicant (see e.g. UVS-01/51/7614/2012, 16.1.2013). The Act on Procedures before the Administrative Courts limits the control to be exercised by the Courts to arguments raised in the complaint (see § 27 Act on Procedures before the Administrative Courts). If the person is no longer in detention, the judge only takes the arguments raised into account.

The applicant may only submit new facts and in the complaint, if the reasons enumerated in § 20 (1) Act on Procedures before the BFA are fulfilled. New facts and proofs may be submitted, if 1) the facts on which the decision was based changed considerably after the decision was made, 2) the procedure before the BFA was deficient, 3) the TNC did not have access to these proofs and did not have knowledge about the facts at the time when the procedure was pending before the BFA, 4) the person was not capable of submitting the facts. In practice applicants rarely submit new facts and proofs.

The Court has to control the legality of detention after four months of detention *ex officio* and exercises full control and the BFA has to control the legality within the first four months. The Court and the BFA are obliged to decide about all aspects of legality.

Q7. Please elaborate on any differences in the control of lawfulness of detention between the first and the second levels of jurisdiction.

See also above the answer to Q4.

The Federal Administrative Court decides about all aspects of the legality of detention. The High Administrative Court has to decide about the legality of the order, thus the Court has to decide about the law.

b. Judicial Interactions with European and national Courts

Q1. Did national courts in your country request for (a) preliminary reference(s) from the CJEU in relation to detention in the context of the return procedures?

NO

If yes:

- Please elaborate further on the factual/legal context leading to this decision and indicate whether it was preceded by internal jurisprudential debates;

- Please elaborate further on the **follow-up** of the CJEU preliminary ruling at national level (interpretation by the requesting national court, impact on the constant jurisprudence developed in your country; also elaborate on whether there was an impact on the national legislation, or following the preliminary ruling; please refer to other effects of the preliminary rulings)

Q2. Did national courts specifically refer to CJEU rulings (or to the provisions of the Return Directive as interpreted by the Court) in their judgments on administrative detention?

YES. The Courts usually quote judgments. The Federal Administrative Court e.g. referred to the CJEU's judgment *Mahdi*, C-146/14, 5.6.2014. According to the Austrian Court, the judgment requires that a Court deciding on the prolongation of detention has to have the power to decide on all aspects of facts and law. See above the answer to Q6.

Q3. Did national courts refer to the ECHR or the EU Charter in relation to pre-removal detention?

YES

If yes: in which cases and for what purpose? (*E.g.* the right to liberty and security, the right to be heard etc.)

The Courts, especially the High Administrative Court referred to Art. 47 FRC. The Court did not directly quote the provision or interpret it, but referred to it with regard to legal aid and financial aid for the expenses for proceedings before the High Administrative Court.

Q4. Have national courts ever disregarded/departed from national legislation and or administrative practice on the basis the Return directive or/and the CJEU jurisprudence in order to ensure compliance with Article 15 RD?

NO

If yes: please elaborate further on this issue

Q5. Did national courts refer to foreign domestic judgments (European or not) that have dealt with similar issues regarding detention?

NO

If yes: please elaborate further on this issue

c. National case-law: major trends

Q1. Is detention under the Return Directive considered to be a measure impeding – depriving – of freedom of movement and/or the right to liberty?

Have the Highest Courts from your Member State already opined on this issue?

Detention is generally qualified as deprivation of the right to liberty. There is no specific case law.

Q2. Do national courts controlling the lawfulness of the **detention** in your Member State also control the lawfulness of the very **return** decision? E.g. Have there been decisions striking down detention measures due to the unlawfulness of the return decision?

YES

The same Court (but not necessarily the same judge) controls detention and lawfulness of the return decision.

If a complaint against the return decision is successful, the person has to be released immediately. Detention could however be based on another reason. Time limits have to be respected.

Q3. Do national courts reviewing the lawfulness of the detention order also assess whether a **reasonable prospect of removal** exists? (*E.g.* even from the outset when controlling the initial detention order, see *Kadzoev* para. 63-68)

Yes and no. The Courts do not explicitly refer to the notion reasonable prospect of removal. Jurisprudence quoted below reveals that aspects, which could be regarded as a prognosis on the reasonable prospect, are taken into account.

If yes: what legal or other considerations are interpreted by the courts as making the removal unlikely*?*

- *lack of due diligence;*
- *lack of resources (human and material);*
- *lack of transport capacities;*
- *conduct of the Member State of potential return (e.g. an embassy in a given MS refuses generally the cooperation in cases of forced return and accepts only voluntary returns or it does not confirm the nationality of the person concerned (Cf. ECtHR, Tabesh), lack of cooperation of third-countries' embassies;*
- *conduct of the TCN concerned, especially if the latter refuses the cooperation which is indispensable for the issuance of relevant documentation by the Member State of return (cf. ECtHR, Mikolenko);*
- *non-refoulement in a broad sense; best interest of the child; family life; the state of health of the third Member State national concerned and individual considerations in accordance with Article 5 RD;*

- *the lack of a readmission agreement or no immediate prospect of its conclusion*
- *Else?*

The Courts decided that the removal is unlikely because of the lack of due diligence of the authorities, the conduct of the state of potential return, lack of cooperation of third-countries' embassies and also conduct of the TCN concerned, especially if the latter refuses the cooperation which is indispensable for the issuance of relevant documentation by the state of return.

Non-refoulement obligations have to be taken into account in the return proceedings. If the situation changes a stay of execution of the return decision may be requested and granted. The right to family life has to be taken into account in all proceedings. The state of health is taken into consideration as well.

Q3B. When considering the factors above, do the courts:

- Limit their assessment to an abstract or theoretical possibility of removal?

- Require clear information on its timetabling or probability to be corroborated with relevant statistics and/or previous experience in handling similar cases?

The Courts require clear information. There is no timetabling.

Q4. How do national courts controlling the lawfulness of pre-removal detention in your country assess the notion of **'avoiding or hampering the preparation of return or the removal process'?**

Please provide some concrete examples based on the case law collected.

Hampering the return or removal process may be revealed by a lack of cooperation with the authorities, e.g. by not reporting to the authorities, disclosing the place of living. (see for many UVS-01/51/1697/2013, 10 September 2013; UVS-01/51/4984/2013, 3 June 2013). A general lack of cooperation with the authorities justifies detention (UVS-01/20/4392/2013, 22 May 2013). Hampering the return procedure or the removal process includes: Violation of cooperation duties during the procedure or the removal process (see UVS-01/51/13223/2013). This also goes for obstructing a police officer in the course of his duty (see UVS-01/51/13223/2013). Also hunger strikes are qualified as a violation of cooperation duties (see for many UVS-01/46/158/2013, 21 February 2013). Any action by the TNC not to be removed, such as violent acts against the police or the authorities in general are considered as hampering the removal. Hampering the asylum procedure includes the fact that the person reported to the authorities about being homeless but did not contact the place, which was declared as the postal delivery address (see UVS-01/46/12212/2009). Furthermore, the person just mentioned that he lived with a girlfriend but neither specified the address or any details. He also travelled to Sweden illegally. These acts demonstrated that the person intended to abscond and hamper the return.

The Courts also referred to the fact, that a person showed considerable efforts to avoid contact with the authorities. The person also showed a lack of intention to leave the country voluntarily, the required cooperation could only be guaranteed by detaining the person (see UVS-01/51/13223/2013, 20 November 2013). If the person filed a subsequent application for asylum with the intention to avoid deportation, detention is justified (see UVS-01/46/5647/2013, 19 July 2013).

Q5. How do national courts controlling the lawfulness of pre-removal detention in your country assess the notion **'risk of absconding'?**

Does it go beyond the beyond the mere fact of an illegal stay or entry? (ECJ, *Achughbabian)*

YES

The Aliens Police Act refers to risk of absconding in § 76 (3). The definition was included by an amendment, which overtook the criteria previously elaborated by the jurisprudence. Before the amendment, Austrian law did not directly refer to the risk of absconding, but to the necessity to secure either the procedure or the intended measure (e.g. deportation). This necessity to secure is still a condition for detention. The legal terminology is 'Sicherungsbedarf', which might be translated as necessity to secure ... (see BVwG G301 2007798-1). A risk of absconding is given, if certain facts lead to the assumption that the person intends to evade the procedure or the intended measure or that the person will substantially hamper the deportation. § 76 (3) exemplifies certain situations, which might lead to assessing a risk of absconding. As mentioned these situations were already covered by previous jurisprudence.

§ 76 (3) enumerates certain facts and certain kinds of behaviour which may give an indication for a risk of absconding:

1.) If the person did not cooperate in the return procedure or if the person evaded or hampered the return or deportation;

2.) If the person entered Austria again despite a valid entry ban, residence ban or a valid deportation order;

3.) If an enforceable return decision has been issued or if the person already evaded either the asylum or the return proceedings;

4.) If the person is not protected against deportation during the status determination procedure because the applicant filed a subsequent application for international protection,

5.) If at the time when the person filed an application for international protection a return decision was already rendered, especially when the person was already in detention or confinement at the time when the application was lodged;

6.) If according to the facts, the interview or police records the responsibility according to the Dublin III-Regulation of another Member Sate seems to be given;

7.) If the person does not obey more lenient measures, which have been imposed;

8.) If ordinances, cooperation duties, the obligation to reside in a certain area or reporting obligations have been violated;

9.) The decree of social integration, such as family ties, employment, sufficient means and a designated place of residence.

The Courts take the behaviour of the person into account. Avoiding the preparation of return may be connected and is in practice connected to risk of absconding. Examples are: false statements in the asylum or aliens law procedure, previous attempts to avoid the preparation of return, previous attempts to abscond and thus hamper the return, violation of reporting obligations, no interest in the procedure documented by not attending a hearing, not appearing before the competent authority, use of various names and identity documents (UVS-01/45/4456/2011, 22 April 2011). Usually various reasons are mentioned in the decisions and the distinction is not always obvious.

See case law:

All elements related to the risk of absconding are taken into account to assess proportionality of detention. These are: Previous behaviour of the person, attempts to abscond, violation of registration obligations (see UVS-01/55/13313/2013, 27 November 2013), no activities to obtain a passport, false statements in the asylum procedure, no interest in the asylum proceedings (see UVS-01/55/13313/2013, 27 November 2013), violations of cooperation duties with the authorities, intensity of the violation of cooperation duties (UVS-01/51/13223/2013, 20 November .2013), violation of cooperation duties regarding the establishment of the identity. Hunger strikes are seen as a lack of cooperation with the authorities (UVS-01/20/4392/2013, 22 May 2013, UVS-01/46/158/2013, 21.2.2013). A risk of absconding also exists when the person 'evades' the

procedure or violates cooperation duties in the procedure (see UVS-01/46/4503/2011).

Criminal actions or convictions (see e.g. UVS-01/46/12212/2009, 7 January 2010, UVS-01/46/4503/2011, 13 May 2011, UVS-01/40/12094/2011, 28 December 2011, UVS-01/40/14999/2012, UVS-01/45/4456/2011, 22 April 2011, UVS-01/46/10271/2011, 13 September 2011).

Violations of obligations to stay in a certain district during the asylum procedure, which occurred months ago, do not justify detention (VwGH 2012/21/0110, 12 September 2013).

The decisions usually also mention that the person is not integrated in Austria, does not work in Austria and does not have family ties in Austria (see for many and with more details: UVS-01/55/13313/2013-20). This lack of integration is seen as an element of a higher risk of absconding.

In the early stages of the asylum procedure there is only a low risk of absconding and there would be a need for further investigations and a profound reasoning why detention was necessary and justified (see VwGH 2012/21/0110).

Q6. Does your Member State's legislation define objective criteria based on which the existence of a risk of absconding can be assumed?

The legislation defines criteria for the assessment.

If yes:

- Which ones?

- Even if provided by law, how individual situation and circumstances are taken into consideration by the judge when establishing whether there is a risk of absconding?

- Do statistics or previous experience with the same group of people speak clearly in favour of detention, without the need of an individual assessment being performed?

Yes, see above the answer to question Q5.

If not:

- Can the criterion of a risk of absconding still be invoked as a ground of detention? How do the courts interpret this notion?

- To what extent are individual situation and individual circumstances taken into consideration by the judge when establishing whether there is a risk of absconding?

- Are there on-going legislative initiatives for the amendment of the law on this issue?

See above the answer to question Q5.

Q7. Apart from these two grounds, does either your Member State's legislation, administrative practice or the relevant case law allow any other ground of detention?

The law allows detention for the following reasons (§ 76 Aliens Police Act):

Detention is possible in order to secure the return procedure, in order to secure the procedural order to remove the person (return decision), to secure the status determination procedure as far as the return decision or deportation is concerned or to secure the removal as such (carrying out the removal process).

Q8. Does your Member State's legislation (and/or practice) provide for alternatives to detention?

YES

§ 77 Aliens Police Act provides for the application of alternatives, called more lenient or less coercive measures. These measures have to be applied in **all cases** (not only if a particular ground for detention exists) if the authorities have good reasons to believe that the object and purpose of detention could be reached by the application of such measures.

If yes*: *what are the alternatives provided by national law? Does the administration consider additional alternatives?

Alternatives comprise reporting obligations, the obligation to reside in an especially allocated place of accommodation or financial deposits. Other measures would be possible as the list is not exhaustive. In practice only reporting obligations and residence allocations are applied.

The High Administrative Court decided that supervision by electronic tags is not admissible as an alternative to detention (see VwGH 2010/21/0410).

Q9. Are decision-making authorities obliged to consider **alternatives measures** before resorting to detention?

YES

The authorities have to assess every alternative measure. These measures have to be applied in all cases (not only if a particular ground for detention exists) if the authorities have **good reasons to believe that the object and purpose of detention could be reached by the application of such measures**.

***If yes:** please elaborate on whether they have to assess every available alternative to detention to justify their effectiveness or the lack thereof in a given case.*

Q10. How do national courts control whether the administrative authorities lawfully considered alternative measures before ordering detention measures? Is the review limited to manifest error of appreciation? Can they perform a wider control, including substituting their own discretion to that of decision-making authority based on the necessity of respecting the principle of proportionality? (ECJ, *Arslan, El Dridi*)

National courts control if alternatives have been considered and if the decision contains a justified reasoning why such alternatives have not been applied in practice. See e.g. BVwG W1192006567-1.

Describe briefly how the judge will in your Member State assess the proportionality of a detention (quote the main elements to be controlled on that basis)

Q11. How is the requirement **'as short as possible'** interpreted by national courts in your Member State? Are time-periods fixed by national law or is the length of detention (necessary for removing the TCN) determined in each particular case?

What is the duration of initial detention in your Member State? When does it start according to your national legislation? (*E.g*. date of the apprehension, date of the order, date of the actual placement in detention etc.)

§ 80 (2) Aliens Police Act limits detention for persons over 18 years with four months. Detention in return cases is mainly covered by § 83 (3) and (4). § 80 (3) Aliens Police Act limits detention pending deportation by reason of the same facts for six months within a period of 12 months. This limit only applies if the failure to deport the alien is not attributable to the conduct of the person. In

such cases, the TNC shall not be kept in detention pending deportation for a period exceeding ten months within a period of 18 months by reason of the same facts. This also goes for situations, where deportation is at risk because the person already evaded deportation previously. The time limits are upper time limits. The BFA does not specify a certain period for detention in the detention order. There is no relevant case law on the length of detention. The time limit is counted from the date of the detention order.

Q12. How do national courts control the **'due diligence'** of the competent authorities when carrying out the removal process? Do they perform a full or a limited control to manifest error of assessment?

Courts have a full control. The Courts e.g. inquire whether the authorities of the country of origin have already been contacted, if there have been further contacts after a certain time, if return certificates (UVS-01/20/1071072010, 25 November 2010) or travel documents have been asked for or else.

If the authorities contacted the representatives of the country of origin and asked for return certificates this is sufficient for a diligent performance. Only if concrete indications exist, that no such certificate will be issued detention may not be upheld (see (see UVS-01/45/10588/2013). If a copy of the travel document may be sent to the authorities of the country of origin (Gambia) it seems to be likely that a return certificate will be issued (UVS-01/46/10295/2013).

The likeliness that a return certificate will be issued by the authorities of the country of nationality (Ghana, UVS-01/46/10295/2013), likeliness of getting a travel document, contact of Austrian authorities to the authorities of the home country are taken into account. The contacts have to be conducted with due diligence. As long there is no clear indication that the state of origin (here Algeria) will not issue a travel document, detention is justified (UVS-01/45/13447/2013, 25 November 2013).

Please provide some concrete examples in which the Judge annulled or quashed a prior decision based on a lack of due diligence from the competent authorities.

Q13. Does the period when asylum proceedings are pending have any impact on calculating the length of detention? (See *Kadzoev* or *Arslan*)

Detention may be upheld for four weeks after the final decision in the asylum procedure. (§ 80 (5) Aliens Police Act). In cases where also the requirements of § 80 (4) 1.-3. are fulfilled, detention may be upheld within the normal time limits. § 80 (4) refers to cases where 1. the identity of the person has not yet been established; 2. because the permit for entry in or transit through a third country has not been issued; or 3. if the person made deportation impossible. If a complaint against a decision on the inadmissibility of the asylum claim (usually in Dublin cases, safe third country cases would be possible as well) is granted suspensive effect, concerning the order to leave the country, detention may be upheld until the final decision by the Federal Administrative Court is rendered. The time limit for detention is ten months within a period of 18 months.

Q14. In which circumstances may competent authorities decide to extend the initial period of detention (i.e. beyond 6 months according to RD)? Do they proceed with a new assessment of the grounds justifying detention (e.g. a continuing risk of absconding of the detainee)

See the answer to Q11 above. The authorities have to proceed with a new assessment of the grounds justifying detention after the maximum period of detention in the respective case elapsed.

Q15. In your Member State, when Judges declare the detention unlawful, does it lead to immediate release of the applicant? Is release from detention the only remedy provided by the law for unlawful detention?

YES

Detention however could be based on other reasons and a new procedural order.

Please elaborate further on possible differences whether 'unlawfulness' results from procedural flaws or substantial grounds. Please also indicate what are the most often cited grounds for deciding the unlawfulness of detention decision, and for striking down detention measures.

Q16. After being released, can the detainee be re-detained and under which circumstances?

YES. The person can be detained again based on other reasons. The time limits apply.

Q17. Please provide a short description of the system of legal aid for pre-removal detainees in your Member State.

Free legal aid is available for persons who are in pre-removal detention and also for persons who are apprehended according to the Aliens Police Act. The persons have to be informed about the availability of free legal aid by procedural order (Verfahrensanordnung). Legal counsellors do have to support applicants when they file a complaint. They also have to inform them about the prospects of success of a complaint.

2. Article 16 RD: conditions of detention

a. National jurisprudence: major trends

Q1. Does your national legislation provide for the use of specific detention facilities? (as foreseen as a general rule by the Return Directive – ECJ, *Bero, Bouzalmate*) Who are the persons detained in such facilities?

YES. Detention facilities are allocated to the Federal Police Directorates. Special facilities have been built or adapted in course of the transposition of the RD.

Please elaborate further, including the practice in your Member State

Q2. In case irregular third-countries nationals are detained in prisons, are they separated from ordinary prisoners as required by the RD? In all circumstances? (ECJ, *Pham*)

YES. Persons are detained in special facilities not in prison.

Q3. Which material conditions and particular safeguards are ensured during the detention period? (*e.g.* vulnerable people, hygiene and health care, clothing, external contacts with family members, visits from legal representatives, access to information, education, activities etc. – *Suso Musa v. Malta,* Appl. 42337/12, 23 July 2013; *Ahmed v. Malta,* Appl. 55352/12, 23 July 2013; *Popov v. France,* Appl. 39472/07 39474/07, 19 January 2012)

How is it applied in practice? Do issues concerning the correct implementation of Article 16 RD and respect of human rights have arisen in practice?

Not recently.

Q4. Can exceptional circumstances justify the use of extraordinary places and conditions of detention for irregular migrants? (See *e.g.* a refugee crisis, state of emergency etc. ECtHR, *Khlaifia v. Italy*, 16483/12)

NO

Q5. Do national courts assess of their own motion the lawfulness of the detention conditions or only following an individual application?

The Courts decide upon application. It is possible to file a complaint to the Federal Administrative Court and to challenge detention.

It is also possible to complain against detention conditions, which are described in the Ordinance on Detention Conditions (Anhalteordnung).[6] This kind of complaint is regulated by § 23 Ordinance on Detention Conditions. It is possible to submit oral or written information to the commander of the detention facility. It is however not a legal remedy as such. 'Complaints' against detention conditions are decided in an administrative procedure regulated by § 23 Ordinance on Detention Conditions.

The incapability of a person to be detained (mainly for medical reasons) has to be taken into account and the authorities have to make investigations about statements of a possible incapability (see VwGH 2010/21/0503).

Q6. In your Member State, have there been judgments striking down detention measures based on conditions of detention?

No. See the judgment above (answer to question Q5) about the duties to investigate the conditions.

b. Judicial Interactions with European and national Courts

Q1. Did national courts in your country request for (a) preliminary reference(s) from the CJEU in relation to the place and conditions of detention in the context of return?

NO

If yes:

- Please elaborate further on the factual/legal context leading to this decision and indicate whether it was preceded by internal jurisprudential debates;

- Please elaborate further on the **follow-up** of the CJEU preliminary ruling at national level (interpretation by the requesting national court, impact on the constant jurisprudence developed in your country etc.)

Q2. Did national courts specifically refer to CJEU rulings (or to the provisions of the Return Directive as interpreted by the Court) in their judgments on Article 16 RD?

NO

If yes: which cases and which legal effect did they attribute to them?

[6] Ordinance on Detention Conditions, Verordnung der Bundesministerin für Inneres über die Anhaltung von Menschen durch die Sicherheitsbehörden und Organe des öffentlichen Sicherheitsdienstes (Anhalteordnung – AnhO), BGBl. II Nr. 128/1999 as amended by BGBl. II Nr. 439/2005.

Q3. Did national courts refer to the ECHR or the EU Charter in relation to the conditions of detention?

NO

If yes: in which cases and for what purpose? (*E.g.* the right to liberty and security, the right of the child, right to family life etc.)

Q4. Have national courts ever disregarded/departed from national legislation and or administrative practice on the basis the Return directive or/and the CJEU jurisprudence in order to ensure compliance with Article 16 RD?

NO

If yes: please elaborate further on this issue

Q5. Did national courts refer to foreign domestic judgments (European or not) that have dealt with similar issues?

NO

If yes: please elaborate further on this issue

3. Article 17: detention of (unaccompanied) minors and families

Q1. Is there national jurisprudence on the implementation of Article 17 of the Return Directive?

NO

The legal situation does not allow detention of minors under 14. Minors between 14 and 18 may only be detained as a last resort, if alternatives are not sufficient to reach the aim.

Q2. Do national courts refer to the ECHR (Article 8); the EU Charter (Articles 7 and 24); Article 3 of the UN Convention on the Rights of Children in relation to the conditions of detention for families and minors?

YES/NO

Not in recent jurisprudence.

If yes: in which cases and for what purpose? (*E.g.* the right to liberty and security, the right of the child, right to family life etc.)

Q3. How is **'the best interest of the child'** interpreted by national courts in the context of detention of minors and families? Is it considered by the courts as a primary consideration?

In this regard, please mention whether Article 24 of the EU Charter is cited by national courts and if a direct legal effect is recognised to this Article?

There is no case law.

Q4. Have national courts ever disregarded/departed from national legislation and or administrative practice on the basis the Return directive or/and the CJEU jurisprudence in order to ensure compliance with Article 17 RD?

NO

If yes: please elaborate further on this issue

Q5. Did national courts refer to foreign domestic judgments (European or not) that have dealt with similar issues?

NO

If yes: please elaborate further on this issue

Q6. Do the courts (or any other competent authority) supervise and control places and detention for family and children more specifically than for other TCNs detained for the same purpose?

If so, please provide some concrete examples from the case law collected

YES

Minors between 14 and 16 may only be detained as a last resort, if alternatives are not sufficient to reach the aim. Minors under 14 may not be detained.

The legal situation would allow detention of families, but not detention of minors under 14. In practice, single adults with children and families with children are not detained.

In order to enforce deportation families may be confined in a special area in order to enforce deportation. This confinement takes place 24 hours before deportation. This kind of confinement is frequently used in practice.

4. Article 18: Emergency situations

Q1. Has the national legislation implementing Article 18 RD – or Article 18 as such – been activated in your Member State?

NO

If yes: what was the derogation from the requirement of speediness? How has *'unforeseen heavy burden on Member States' administrative or judicial staff'* been interpreted by the judiciary?

General remarks and transversal issues

Q1. Have national courts ever addressed/clarified the scope of application of pre-removal detention – in comparison with initial police custody, imprisonment under criminal law, detention in the context of asylum procedures etc.?

YES, Courts mentioned the distinction, which is defined in various laws, especially the Aliens Police Act (confinement or police custody and detention).

Q2. Had the implementation of the Return Directive brought any changes in adjudicating the issues relating to lawfulness of immigration detention, alternatives to detention, access to national courts, effective legal/judicial remedies and legal aid etc.?

The Austrian laws have been amended. The amendments were based on a variety of reasons, the transposition and implementation of the RD was only one of the reasons. The transposition was the reason for the amendment of § 76 (3) Aliens Police Act defining certain situations where a risk of absconding might exist.

Q3. Has the Return Directive and/or European jurisprudence impacted on the division of competences between the administration and national judiciaries? What about the relation between the different levels of the judiciaries?

The Return Directive has improved the situation and detention is less frequently used compared to the previous situation.

Q4. According to you, what are the remaining major issues in the judicial implementation of the Return Directive when it comes to detention? Consider, for instance, the effective return procedures; protection of human rights of TCNs subject to the Return Directive etc.