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REDIAL PROJECT

National Synthesis Report – Belgium

(Draft)

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

by Jean-Baptiste Farcy

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)*

YES/NO

If yes: please elaborate further on:

- The type of jurisdiction concerned (civil, administrative, criminal, else?)
- The scope/extent of its competence (*e.g.* hearing immigration/detention cases only or not)

No, orders to leave the territory and detention orders (which is an accessory) are delivered by the Immigration Office which is working under the authority of the executive power. No involvement of the judiciary at this stage.

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

The lawfulness of the pre-removal detention measure is controlled by the judiciary. The detention order, like any other detention measure, is controlled by criminal courts: the Council Chamber in first instance and the Indictment Chamber of the Court of Appeal on appeal.

The Alien Litigation Council, an administrative authority, controls the legality of the removal order.

If the removal order is unlawful, so is the detention order. Thus, indirectly criminal courts (that have jurisdiction over the detention order) can control the legality of the removal order for its illegality means the TCN cannot be detained. However, only the Alien Litigation Council can annul the removal order.

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?

YES/NO

It is the same authority. The lawfulness of the detention order may be controlled both when the detention order is renewed or independently from the renewal order.

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

According to Article 71 of the Law on Aliens, the detainee can introduce a claim before the Council Chamber for the lawfulness of the detention to be controlled once every month. When the detention order is renewed, the Immigration Office has to seize the Council Chamber within five days. The detainee has to be released if the Immigration Office fails to do so. Otherwise, national law does not provide for an automatic judicial 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.

National law provides for two levels of jurisdiction, both before a criminal court.

Judicial review by the Council Chamber is based on the detainee's request (after the first judicial review, the detainee can submit is case once every month). The Chamber has to rule on the lawfulness of the detention within five days. An appeal of the Council Chamber decision can be introduced by the detainee before the Indictment Chamber within 24 hours.

The control exercised by both jurisdictions is the same. The only difference is that three judges, not one, sit in the Indictment Chamber. Also, Article 211*bis* of the Code of criminal procedure provides that on appeal unanimity is required if the decision is less favourable for the foreigner (i.e. when the Council Chamber ordered the release of the foreigner).

The control is only one of legality and is very formal. According to Article 72 of the Law on Aliens, criminal courts cannot decide on the opportunity (expediency) of the detention order. It is alleged that the opportunity of a detention is to be decided by the administration, not the judiciary. The Court of cassation confirmed this approach on 10 June 2015 (n° P.15.0716.F/2).[1] However, it is argued that the control of legality includes an assessment of the opportunity of a detention order, particularly given the principle of subsidiarity (see S. Sarolea, 'Cour de cassation et contrôle de la détention: en finir avec l'opposition indue entre opportunité et légalité', *Newsletter EDEM*, juin 2015). Indeed, the approach taken by the Court of cassation appears to be in contradiction with the Return Directive. As for now, the distinction between legality and expediency holds, because of the

[1] The Indictment Chamber first ruled that the detention order was disproportionate and that the administration should not have issued such order (Brussels (Indict. Chamber), 18 May 2015). However, that decision was overruled by the Court of cassation.

authority of the Court of cassation, but is arguably unjustified and should be abandoned (D. Vandermeersch, 'La détention préventive de la personne présumée innocente et la privation de liberté de l'étranger', *Rev. dr. pén. crim.*, 2015, p. 602).

If the detention is unlawful, the detainee must be released.

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)

The review of the lawfulness of the administrative decision includes monitoring the accuracy of the factual grounds on which it rests. More exactly, the lawfulness review involves the verification that the facts alleged by the administration actually took place and reflect reality. According to the Court of cassation, the judge examines whether the decision is based on reasoning without a manifest error of assessment or a factual error (10 June 2015, No. P.15.0716.F/1)

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

YES/NO

In general, courts limits the control to the arguments raised by the parties, with the exception of human rights considerations. Moreover, as said above, the control is very limited and mostly formal, based on the jurisprudence of the Court of cassation.

The limited scope of the control operated by criminal courts may also be explained by the fact that, unlike administrative courts, they do not have access to the whole file.

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

No difference

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?

YES/ NO

Not that I know of.

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/NO

In the cases that we are aware of, national courts do not refer to CJEU judgments in relation to detention.

***If yes**:* which cases and which legal effect did they attribute to them? (*e.g.* do national courts refer to CJEU preliminary rulings when assessing the legality or proportionality of detention, or remedies to unlawful detention?)

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

YES/NO

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

YES. The police intervention prior to the detention of the third country national was in contradiction with Article 5 of the European Convention on Human Rights. The Indictment Chamber based its decision on the Conka v. Belgium case and because the arrest was irregular, the applicant had to be released.[2]

An infamous decision from the Indictment Chamber, known as the Diallo case, refers to Article 3 ECHR because the foreigner was injured following a dispute with the security personnel and no medical assistance was available in the country of origin. Since the removal was not possible, the foreigner had to be released.[3]

Also, Article 8 is also invoked to oppose the removal order, and indirectly the detention, on the basis of family ties in Belgium. The protection of the family life may be a justified ground to release the foreigner when the measure is disproportionate.[4]

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?

YES

If yes: please elaborate further on this issue

We know of one very recent case in which the Indictment Chamber declared the detention unlawful because the possibility of another less coercive measure was not examined, contrary to Article 15§1 of the Return Directive.[5] Even though the principle of less coercive measures is implemented in domestic law (Article 7 of the Law on Aliens of 15.12.1980), it is not usually applied in practice and Courts do not control the application of this provision as Courts usually reproduce the motivation given by the administrative authority without considering the possibility of less coercive measures. The recent decision of the Indictment Chamber thus reverses the usual judicial practice. This also goes in the sense of the most recent Court of cassation case-law.[6]

[2] Brussels (Indict. Chamber), 29 April 2016.

[3] Brussels (Indict. Chamber), 4 October 2013.

[4] For instance : Brussels (Indict. Chamber), 24 April 2015.

[5] Brussels (Indict. Chamber), 1 July 2016; Brussels (Indict. Chamber), 11 July 2014.

[6] Cass., 27 June 2012, n° P.12.1028.F. *Contra* : Cass., 16 May 2012, n° P.12.0749.F/4.

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?

Not that I know of

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

Article 72 of the Law of 15.12.1980 states that the lawfulness of both the detention decision and the removing decision is to be controlled by the competent judicial authority. Since the detention order is the accessory of the removal decision (it is a single administrative act), courts controlling the legality of the detention order may also control the legality of the return decision. We know cases in which it happened.[7] However, the removal decision can only be annulled by the Alien Litigation Council and not by the Council Chamber or the Indictment Chamber. As a result, these later courts may annul a detention order because it considers that the removal order is unlawful (for violation of human rights, for instance) but they cannot annul the return decision as such.

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

YES/NO

Courts reviewing the legality of the detention order usually assume that a reasonable prospect of removal exists. We are not aware of cases in which the lack of a reasonable prospect of removal served as a justification to release the applicant. Belgian authorities seem to have uneasy relations with their Algerian counterparts delaying the return procedure but this is not considered sufficient to rule that there is no reasonable prospect of removal.[8]

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*

[7] Brussels (Indict. Chamber), 24 April 2015.

[8] Brussels (Indict. Chamber), 13 May 2015.

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?*

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 possibility of removal is usually assessed in such an abstract way so as to limit its relevance in practice.

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.

This criteria is rarely used in practice as the initial detention period is generally motivated by the risk of absconding (see below) instead. The notion of 'avoiding or hampering the preparation of return or the removal process' is mostly used in cases where the third-country national refuses to board the plane in order to be sent back.

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/NO

The risk of absconding is assessed by domestic courts and is the main ground on which pre-removal detention is based. The assessment is usually based on the administrative path of the detainee. In this sense, a continued stay on the territory beyond the period foreseen in the order to leave the territory on a voluntary basis is used to justify detention. Moreover, a risk of absconding is deemed to exist when, *inter alia*, the applicant does not have an address in Belgium, or he/she refuses to disclose his/her true identity and/or nationality.[9]

[9] Brussels (Indict. Chamber), 2 December 2015; Brussels (Indict. Chamber), 12 June 2015.

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

YES/NO

The risk of absconding is defined in Article 1, 1° of the Law on Aliens of 15.12.1980:

'the fact that a third-country national who is the subject of a removal procedure forms an actual and real risk to evade the authorities. To this end the Minister or his/her representative shall base himself/herself on objective and serious elements.'

The objective and serious elements are not defined within the law which is contradictory to Art. 3(7) RD. They are only defined in the explanatory memorandum on the Law of 19 January 2012 (Doc. parl., Chambre, Doc. 53, No 1825/001) 22 which lists several cases by way of example, considering that the risk of absconding can result from one or more factors such as:

1. Remaining on the territory beyond the period stipulated in the removal decision;

2. Making a false statement or providing false information regarding factors enabling identification or refusing to disclose true identity;

3. Using false or misleading information or false or falsified documents when applying for a residence permit (apart from the asylum procedure), or recourse to fraud or other illegal means to gain permission to reside in Belgium;

4. Failing repeatedly to respond to an invitation from the municipal administration to go in person and receive notice of the residence application decision;

5. If the person concerned has not respected the obligations, as imposed by Article 74/14, §2 of the law, with the purpose of reducing the risk of absconding;

6. If the person concerned has not respected an entry ban;

7. If the person concerned has changed his/her place of residence during the period that is granted to leave the territory, in application of Article 74/14, §1, without informing the Immigration Service thereof;

8. If the person concerned has given false declarations or false information with regard to elements permitting its identification or has refused to give its true identity;

9. If the person concerned, in the framework of an application for an authorisation to stay (other than an asylum procedure), has used false or misleading information or false or misleading documents, or has committed fraud or has used illegal means in order to be able to stay in the Kingdom;

10. If the person concerned has not replied several times to notification from the local administration, in the framework of the notification of the decision concerning its application to stay.

Attention should be brought to the fact that the risk of absconding was defined on the basis of Guideline No. 6 'Conditions under which detention may be ordered' of the 'Twenty guidelines on forced return' adopted by the Committee of Ministers of the Council of Europe of 4 May 2005.

The existence of a risk of absconding is based on the administrative path of the third-country national but criteria are interpreted in such a broad way that domestic courts usually confirm the risk of absconding. In practice, when more than one order to leave the territory have been delivered to the same person, it is considered that there is a risk of absconding. Also the absence of a known address in Belgium or the lack of identification documents are enough to consider that there is a risk of absconding.

We are not aware of statistics being used. An individual assessment is normally performed but it is almost always a formal assessment. For instance, the presumption that the third-country national

will not comply with the order to leave the territory is sufficient to justify detention.[10]

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?

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?

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?

YES/NO

In practice, considerations related to public order are used as grounds for detention, particularly in order to extend the detention. This practice seems to be confirmed by domestic courts notwithstanding its contradiction with the Kadzoev decision.[11] However, the Court of cassation ruled that the two grounds for detention enshrined in Article 15(1) of the RD are exhaustive and ought to be interpreted narrowly (No. P.14.0005.N/1, 21 January 2014). While it seems to be debated elsewhere in Europe, in Belgium the decision of the Court is clear

Also, as noted above, the risk of absconding is interpreted and applied broadly so as to encompass a wide range of situations. This means that in practice any detention can be justified by Courts even though the Court of cassation confirmed that Article 15(1) of the Return Directive ought to be interpreted narrowly.

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

YES/NO

Even though the principle of less coercive measures is implemented in domestic law (Article 7 of the Law on Aliens of 15.12.1980), it is not usually applied in practice and Courts do not control the application of this provision as Courts usually reproduce the motivation given by the administrative authority without considering the possibility of less coercive measures.

The said provision stipulates that third-country nationals can be under house arrest instead of being detained. However, it is never applied in practice.

Under Article 74/9 of the Law of 15 December 1980, families with children cannot normally be detained in the same place as adults. Families then stay in their personal house or in specific 'return houses' during the return procedure. This is the only alternative to detention that is actually

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

[11] Brussels (Indict. Chamber), 13 May 2015; Brussels (Indict. Chamber), 12 June 2015.

provided for in practice.

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

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

YES/NO

Legally speaking yes but decision-making authorities do not consider alternatives measures and this is practice is not usually sanctioned by Courts. According to a well-established case law: 'No illegality can be inferred from the mere fact that the administrative authority imposes a detention measure, while other less coercive measures could be taken.' This point of view is largely shared by the Council and Indictment Chambers.

There are, however, rare decisions that consider the detention unlawful because no alternative was examined.[12] For instance, recently the Brussels Indictment Chamber declared the detention unlawful because the possibility of another less coercive measure was not examined, contrary to Article 15(1) of the Return Directive (on this, see: Sarolea, S., 'Le rappel du principe de subsidiarité. Note sous Bruxelles, Ch. mis. en acc., 1er juillet 2016', *Newsletter EDEM*, juin 2016). A similar decision was delivered by the Council Chamber of Brussels on 14 October 2016.

Also, it should be noted that the Court of Cassation has taken position: 'Article 7, al. 3, L. 15.12.1980 prescribes not to take detention measure unless failing to effectively implement other measures, less coercive but sufficient to remove the foreigner at the border' (n° P.12.1028.F, 27 June 2012). Surprisingly, the Council and Indictment Chambers continue to prefer an older judgment from the Court of Cassation (2009) which rejects the necessity to consider alternatives to detention. However in March 2016, the same jurisdiction ruled that when the Immigration Office states why the detention measure is justified, the Immigration Office does not have to explain why a less restrictive measure is insufficient ((16 March 2016, P.16.0281.F). Yet, I think the Immigration Office should only consider detention if no alternative measures are possible and should justify why not.

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*)

As said above, the Council and Indictment Chambers usually consider that Courts do not have to assess any alternative to detention. Anyway, there is no alternative to detention available apart from return houses for families with children. Yet, foreigners may sometimes propose an alternative to detention but Courts do not take it into consideration.

Furthermore, the control exercised by the Courts is limited to the legality of the decision. Courts cannot assess the opportunity of an alternative in comparison with another nor substitute their own appreciation to that of the administration.

[12] Brussels (Indict. Chamber), 1 July 2016; Brussels (Indict. Chamber), 11 July 2014.

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?

According to Article 7, third subparagraph of the Law of 15.12.1980, detention shall be possible only for the time strictly necessary to carry out the return of the TCN or to implement the decision of removal and shall not exceed a period of two months.

The initial detention order does not indicate any precise period of detention. The control by courts during that period is mostly formal. We are not aware of a decision which has a real analysis and precisely details the parameters that are to be taken into consideration. Courts usually examine whether the decision is correctly motivated. For detention periods beyond two months, Courts are supposed to verify that the necessary steps to remove the TCN were taken within seven working days following the detention of the TCN, that these steps have been pursued with due diligence and that it is still possible to carry out the removal of the TCN in an effective way within a reasonable time.

The length of detention is not defined on a case-by-case basis as time-periods are fixed by national law (Article 7 Law of 15.12.1980)

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.)

The initial detention lasts up to two months and starts from the date of the detention order issued by the Immigration Office.

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?

The control is limited to the taking by the Immigration Office of the necessary steps to proceed with the removal. The control is thus limited to a manifest error of assessment.

A failed attempt to proceed with the removal due to the resistance or the refusal of the detainee allows consideration as to whether the TCN is responsible for the extension of the detention period and that the removal is pursued with due diligence.

We do not have any knowledge of a decision considering that the removal is not pursued with due diligence. Again the control is mostly formal.

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*)

NO

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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)

The initial detention period cannot exceed two months. According to Article 7 of the Law on Aliens of 15.12.1980, the detention can be extended for another two months upon decision by the Minister or his/her representative when the necessary steps to remove the TCN were taken within 7 working days following the detention of the TCN and these steps are pursued with due diligence and it is still possible to carry out the removal of the TCN in an effective way within reasonable time. The maximum detention period is five months. The provision also states that in case of national security or public order considerations, the detention can be extended (beyond five months) on a monthly basis. In any case, the total detention period cannot exceed eight months.[13]

On the one hand, the eight months maximum detention period is enforced in practice. On the other hand, Article 15 (5) and (6) are not properly transposed into national law. In our view, the criteria set forth in Article 15(6) are exhaustive but this is not how that provision was transposed into domestic law.

The control exercised by the Courts is limited to a manifest error of assessment. Courts almost always confirm the extension of the detention as the control is very formal and the initial ground for detention is taken for granted.

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/NO

The detainee stays detained until the judicial decision is definitive. It includes first instance, appeal and cassation. This means that the TCN will not be released until the third level of jurisdiction (cassation), as long as there is one.

Potential delays are:

The appeal of the Council Chambers decisions to the Indictment Chamber has to be introduced within 24 hours.

The decision of the Indictment Chamber must be rendered within 15 days, otherwise the TCN is release.

The appeal to the Court of cassation must be introduced within 48 hours.

The decision of the Court of cassation must be rendered within 15 days, otherwise the TCN is release.

If the Court of cassation annuls the decision of the Indictment Chamber, the case must be referred back to another Indictment Chamber which must render its decision within 15 days, otherwise the TCN is released. (Article 72 Law of 15/12/1980)

If the maximum length of detention expires in the meantime, the TCN will be released.

There is no specific mechanism of compensation for a TCN illegally deprived of their liberty within a removal procedure. However, according to article 27 L.13/03/1973 relating to compensation for pre-trial detention, a right to compensation is open to any person who has been deprived of his liberty under terms that are inconsistent with the provisions of Article 5 ECHR. Therefore, if detention is considered illegal by the Council or Indictment Chambers, compensation should

[13] Brussels (Indict. Chamber), 13 May 2015.

theoretically be accessible. However, we do not know of such cases.

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.

There is no difference whether the detention is unlawful due to procedural flaws or substantial motives. Most decisions confirm the detention but when release occurs it is, *inter alia*, due to unlawful arrest or human rights violations.

Unlawful arrest seems to be a worrying trend under the current government.[14] However, as the national judge pointed out, this is one advantage of a judicial control by criminal courts because they are used to examine the legality of an arrest.

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

YES/NO

The question is not actually solved in domestic law. In principle, a third-country national should not be detained beyond the maximum time-limit provided by law (eight months in Belgium). If someone is released after eight months of detention, a new detention should not be allowed (this has however occurred in the past). The contrary would mean that the detention could potentially be unlimited. However, this situation is not foreseen in domestic law. Nor is the situation of someone released before the maximum time-limit and then re-detained.

A new detention order is however possible if the legal basis is different which means that detention can actually go beyond the maximum time-limit set by law. This occurs particularly when the TCN refuses to board the plane. The Court of cassation considers than in this case the detention order is a new measure, not extending the initial detention order (Cass., 21 August 2012, P.12.1394.F).

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

Each pre-removal detainee has a right to free legal aid. They have a right to primary legal aid – i.e. advice given by a lawyer – and secondary legal aid– i.e. representation before Courts. They have to apply for it, but it is an obligation for every lawyer to verify whether his client meets the conditions of legal aid.

[14] Brussels (Indict. Chamber), 29 April 2016; Brussels (Indict. Chamber), 22 December 2015, n° 4044.

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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, third-country nationals detained in view of their removal are staying in specific detention facilities run by the Immigration Office (See Royal Decree of 2 August 2002). These centres (called 'centres fermés') are tailored for the detention of third-country nationals who are subject to return procedures and have received an order to leave the territory, including failed asylum seekers.

Asylum seekers that introduce their claim at the border, before entering the territory, can also be detained in these specific centres (in practice, they are almost systematically detained). Under conditions (particularly in relation to public order), asylum seekers on the territory may be detained as well as asylum seekers waiting to be transferred to another Member State by application of the Dublin regulation can be detained in the same location.

There are five of these specific detention facilities in Belgium and can accommodate, in theory, up to 452 people. In 2016, more than 6.000 people have been detained. Even though the number of people detained declined since 2011, the figure rose by 11% in 2015.

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/NO

Not relevant as irregular third-country nationals are detained in specific facilities.

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?

Rights and obligations of detained third-country nationals are spelled out in the Royal Decree of 2 August 2002. Even if the legal framework is set out at the national level, actual detention conditions may vary from one centre to another. Indeed, some of them used to be penitential centres and were built for different purposes. All centres are nonetheless highly secured and the rights and obligations of the detainee are clearly defined. Anyone failing to respect his/her obligations may be subject to disciplinary measures, including isolation room.

Upon arrival, a body search is carried out on the third-country national, digital prints are taken, he/she visits a doctor for a consultation. The third-country national is informed about his/her status and his/her rights. They also have the right to call someone to warn them of his detention.

During the detention, daily visits from the legal counsel of the detainee (they have a right to legal counselling), diplomatic representative from his/ country of origin are allowed. Family members are also allowed to come on a daily basis for at least an hour, yet at specific times. Other persons need to obtain an authorisation from the director of the centre before coming. Representatives from

designated institutions (see Article 44 of the Royal Decree) have a right to enter and visit the centre for the purpose of their mission.

An adapted room should be available for the exercise of one's belief.

Health care assistance is available in the centre (Article 52). Clothes are not normally provided for. Food is served three times a day. People can shower every day. Rooms are usually shared.

Organised activities seem to depend on the centre.

Social assistant are present in the centres but their role is to prepare the third-country nationals during the return procedure (Article 68). Their independence vis-à-vis the Immigration Office therefore raises question.

The Royal Decree does not have specific disposition on vulnerable people. One exception is the situation in which the mental or physical health of the detainee requires the detention to end, the doctor can write a notice to the director of the centre (if the director refuses to suspend the detention another doctor is to give an opinion).

In practice, great variations are known to exist between centres. Some have a prison-like atmosphere while others are more adapted. Activities and life in the centres are usually regulated by internal regulations ('règlement d'ordre intérieur') which limits the autonomy of the detainees and reinforces their feeling of humiliation. The situation in the centres is however difficult to know in details as only a limited number of people can access them. Even though the requirements of Article 16 of the Return Directive appear to be implemented in the Royal Decree, access to justice seem particularly difficult. The complaint system within the centres (Article 130) is often criticised for not being effective.

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)

Not that we know of. The Government has yet decided to increase the capacity of actual centres to more than 600 this year.

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

There need to be an individual complaint. As said above, a complaint mechanism is set up in each centre but its effectiveness is very limited.

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

National courts do not often rule on the conditions of detention and we do not know of such a case.

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?

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

YES/NO

There is one infamous case in which the Indictment Chamber rules that the removal of the foreigner would be in contradiction to Article 3 ECHR. The third-country national was badly injured following an altercation with security personnel and no medical assistance was available in the country of origin.[15]

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

[15] Brussels (Indict. Chamber), 4 October 2013.

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

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

YES. The Council of State (Conseil d'Etat) confirmed, on the basis of Article 17 of the Return Directive, that any detention of minors ought to take place in separate accommodation that meets families and children needs (CE, 28 April 2016, n° 234.577).

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. The European Court of Human Rights has delivered a series of cases against Belgium for unsatisfactory conditions of detention, particularly in cases involving minors, which national courts are bound to respect.

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.)

National courts refer to these provisions in different cases relating, inter alia, to the right to education, the right to family life (for instance, recognition of paternity) and the right to material assistance in order to ensure the protection of the child's rights. When the best interest of the child so requires, the removal order may not be executed immediately and the return is then delayed.

Also, the judgment from the Council of State cited above (CE, 28 April 2016, n° 234.577) refers to Article 8 of the ECHR to uphold the right to family life and annul a provision that allowed the retention of one family member as a sanction in case a family does not respect the conditions required when benefiting from alternative measures to detention.

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?

There is a number of decisions delivered by the Labour jurisdictions (Tribunaux du travail et Cours du travail) in relation to the material assistance that minors and families are entitled to (Royal Decree of 24 June 2004). In this context, the 'best interest of the child' appears to be taken into consideration consistently by domestic courts and given utmost importance. The best interest of the child implies that competent authorities have to assess how the rights and the interest of the child are affected by their decisions so as uphold the protection of the child's rights.

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?

Article 24 of the EU Charter as well as Article 3 of the UN Convention on the rights of the child are mentioned by domestic courts. These provisions are implemented in national law in Article 74/13 of the Law on Aliens of 15.12.1980 which states that when adopting a removal order, the competent authority takes into account the best interest of the child and the family life.

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?

YES/NO

Not that we know of.

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?

YES/NO

I would say that the European Court of Human Rights has had a decisive impact on the detention of families and children. The current practice in Belgium is a result of the various condemnations against Belgium (Mubilanzila Mayeka and Kaniki Mitunga (2006), Muskhadzhiyeva and others (2010), Kanagaratnam and others (2011)).

Also, the best interest of the child reinforces the intensity of judicial control.

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

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.?

The scope of application of each kind of detention is clearly defined in the law and is regulated separately. As a result, the question does not arise before domestic courts.

However, one situation comes to mind here: that of a third-country national who is not only illegally staying on the territory but is also convicted of a criminal offence. Such situation has arrived before the Court of cassation which considered that the Return Directive does not apply by application of Article 2, paragraph 2, b) (5 November 2014, n° P.14.1271.F/3). As a result, the criminal sanction applicable to the criminal offence ought to be applied in addition to the criminal sanction for the irregular stay (Article 75 of the Law on Aliens of 15.12.1980). Yet, Article 2, §2, b) of the Return Directive has never been transposed into national law. On this point, national law seems to be in contradiction with the Achughbabian decision.

Also, in case an arrest warrant is lifted under the condition that the individual remains on the territory does not prevent the adoption of a removal order if that individual is illegally staying on the territory.[16]

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

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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.?

When controlling the lawfulness of the detention, national court are limited to a control of legality, excluding a control of opportunity. As a result, courts cannot substitute their appreciation to the decision of the Immigration office and are thus limited in their power to control the respect of the principle of subsidiarity. The implementation of the Return Directive has failed to solve this crucial adjudicative practice. Given the limited control powers of courts, the respect of the Return Directive is undermined.

Overall, the implementation of the Return Directive has had limited effect on the adjudicative practice related to pre-removal detention.

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?

NO

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.

Since the Return Directive has been transposed imperfectly, a number of issues remain: the control powers of courts is limited, the principle of subsidiarity is undermined, the notion of 'risk of absconding' is not clearly defined, and the maximum length of detention is problematic.

As said above, the judicial control is limited to the legality of the detention, excluding expediency, which prevents a correct application of the principle of subsidiarity. Anyway, alternatives to detention do not exist in Belgium, except to the benefit of minors and families, even though the principle of alternative to detention is enshrined in domestic law. Since people are either free or detained, detention is not actually a last resort measure as intended in the Return Directive.

Link to that first point, pre-removal detention is often considered lawful and the control of the grounds for detention is mostly formal. In very few case, is the detainee actually released. Given the limited control powers of courts, Article 15, §4 requiring that a reasonable prospect of removal does exist is never applied in practice. Therefore while freedom ought to be the principle and detention the exception within the Return Directive, the practice in Belgium is pretty much the opposite.

Also, objective criteria should be included in domestic law to define more precisely the existence of a risk of absconding. The lack of guidelines gives much leeway to the administration and courts to detain third-country nationals.

When a third-country national refuses to board the plane, a new detention order may be delivered on a different legal basis which means that in this case the detention period can practically be unlimited ('pratique du réquisitoire de réécroi'). More generally, the maximum period of detention in domestic law is not entirely in line with the Return Directive. Under domestic law, the detention cannot normally last longer than five months except for public order considerations, then the detention can last up to eight months. However, extending the detention on the basis of public order is not foreseen by the Directive, as opposed to a lack of cooperation by the TCN concerned and delays in obtaining the necessary documentation from third country. Yet, Article 15, §6 was not transposed in domestic law. Again here, the transposition of the Return Directive is unsatisfactory.