REDIAL PROJECT

National Synthesis Report – Bulgaria

(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.

I. 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. Detention orders in Bulgaria are issued by an administrative authority.

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)

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

As far as the initial detention order is concerned, the control of its lawfulness is within the competence of the judicial authorities, upon appeal by the immigrant. The right to appeal can be exercised within 14 days from the date of detention.

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

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

As far as judicial review of **the length of detention** under Article 15 (3) RD is concerned, judicial review is automatic upon the elapse of a six-month period of detention. In the meantime, immigrants can ask the administrative authority to change or discontinue the detention measure and, if refused, appeal its decision in court.

Q4. Does your national legislation provide for one or two levels 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?)*

YES. The Bulgarian legislation provides for two levels of *judicial* review of immigration detention orders: the first level is the respective regional administrative court and the second level is the Supreme Administrative 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 courts belong to an administrative jurisdiction. The so-called administrative courts in Bulgaria hear cases on appeals against acts of state administrative authorities (public law cases). These cases could range, for example, from tax law to refugee law.

The first level administrative courts are city or regional administrative courts.

The second level administrative court is the Supreme Administrative Court (SAC). SAC has divisions that hear certain types of same cases. Thus the immigration detention cases are heard by the 7th division of SAC, while the cases of asylum seekers are heard by the 3rd division of SAC.

As stated above, with regard to the initial detention order, the TCN concerned has the right to submit an appeal against the detention order within 14 days from the moment of his/her factual detention (Article 46a, Para.1 of the Law on Foreign Nationals in the Republic of Bulgaria). The fact that the preclusive term for appeal does not run from the moment of serving the detention order, but from the moment of factual detention, affects access to information and access to judicial review by the TCN in practice.

Regarding judicial review of the *initial detention* order, the judgment of the first level court can be appealed within 14 days before SAC.

Regarding judicial review of the *extension of the length* of detention, the ruling of the first level court can be appealed within 7 days before SAC.

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 first level courts fully control the legal and factual elements of the case when reviewing the lawfulness of the detention measure.

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

YES

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

The first level court controls *ex officio* all the elements of the lawfulness irrespective of the arguments of the parties. This follows from the general provision of Article 168, Paras. 1 and 2 of the Bulgarian Code on Administrative Procedure. The first level jurisdictions reviews both the facts and the law.

The second level jurisdiction (cassation) reviews only the application of the law, it does not do fact-finding (Article 219 of the Code on Administrative Procedure). The second level jurisdiction shall examine only the cassation grounds stated in the cassation appeal.

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. *Mahdi*, C-146/14

***If yes**:*

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

Yes, the preliminary reference request was preceded by internal jurisprudential debates in Bulgaria. They concerned the issue whether the judicial authority has the competence to renew the detention order as a first-instance decision-maker (see, for example, Ruling of 12 July 2011 of the Supreme Administrative Court in case No. 8799/2011). Under the general legal system in Bulgaria the judicial authority acts as a decision-making body only when the procedure is not an adversarial one. However the Law on Foreign Nationals in the Republic of Bulgaria, in its Article 46a, Para.4, introduces an exception to the general system and stipulates that **it is the court, which following the elapse of the initial six months of detention, shall decide whether to renew or discontinue it**. This discussion has underlined the preliminary ruling request in the Mahdi case C‑146/14 PPU before the CJEU.

- 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)

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

Other effect of the preliminary ruling in the Mahdi case is that the CJEU stated that Article 15, Paras. 1 and 6 of Directive 2008/115 did not allow for a national regulation as the one in question, according to which renewal of detention could be done solely on the ground that the TCN has no identity documents. In contrast, according to Article 44, Para.6 of the Law on Foreign Nationals in the Republic of Bulgaria, an additional separate (autonomous) ground of detention is the fact that

the personal identity of the TCN is unknown. In spite of that, the national case law continues to be contradictory in this regard.

Another effect of the CJEU judgment in the Mahdi case is the pronouncement that the sole fact of refusing to sign a declaration for voluntary return by the TCN does not amount to a 'lack of cooperation' within the meaning of Article 15 (6) of the Return Directive.

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

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

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?)

- **El Dridi, C-61/11**: in relation to assessing the proportionality of detention and the feasibility of less coercive measures (paras. 31 and 32 in relation to para. 47 of the CJEU Judgment);

- **Sagor, C-430/11**, para.41: in relation to the individual approach in assessing the risk of absconding;

- **Arslan, C-534/11:** differentiation between the legal regimes of detention of irregular TCN under the Return Directive and detention of asylum seekers under the Reception Conditions Directive;

- Kadzoev, C-357/09: differentiation between the legal regimes of detention of irregular TCN under the Return Directive and detention of asylum seekers under the Reception Conditions Directive;

- Achughbabian, C- 329/11: the individual approach that requires taking into account the individual behaviour of the TCN;

- Mahdi, C-146/14: application of the grounds for extension of the length of detention and the concept of 'reasonable prospect of removal'.

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.)

With regard to the right to liberty (Article 5 ECHR): Tsonka v. Belgium, Kolevi v. Bulgaria (paras.176-177), Chahal v. UK, Quinn v. France, Kolompar v. Belgium, Saadi v. UK, Auad v. Bulgaria, Kim v. Russia, Amie v. Bulgaria, Raza v. Bulgaria, Khadzhiev v. Bulgaria, Suso Musa v. Malta.

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

A landmark achievement of the Bulgarian judiciary is the practical change brought in the Law on Foreign Nationals in the Republic of Bulgaria by leaving without application Article 46a, Para.4 in the part that says that judicial renewal of detention following the elapse of the first six months takes place in a closed hearing without the participation of the TCN. With few exceptions, the practice of convening an open hearing with the participation of the detained TCN has become almost stable case law in Bulgaria following the two precedent-setting judgments of the Supreme Administrative Court in the cases of Kapinga (Ruling of 27 May 2010 in case No. 2724/2010) and Tsiganov (Ruling of 08 February 2011 in case No. 14883/2010). In those cases the Supreme Administrative Court invoked *inter alia* Article 47 (the right to a public hearing in particular) of the Charter of Fundamental Rights of the European Union in relation to Article 15 of Directive 2008/115, as well as Article 5 (4) and Article 13 of the European Convention on Human Rights.

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?

Yes, the Supreme Administrative Court of the Republic of Bulgaria has explicitly stated that 'coercive accommodation' in a 'Special Home for Temporary Accommodation of Foreigners' (these are the terms under Bulgarian law for immigration detention and a detention centre respectively) 'affects one of the fundamental rights of every human being – the right to liberty, proclaimed in Article 30 (1) of the Bulgarian Constitution, Article 6 of the Charter of Fundamental Rights of the EU and Article 5 of the European Convention on Human Rights' (the case of Kapinga, Ruling of 27 May 2010 in case No. 2724/2010 before SAC).

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?

NO. Such control cannot happen in the case on the appeal against the detention order. The return decision shall be appealed separately in a separate court case.

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 and NO: With regard to initial detention, the criterion of a reasonable prospect of

removal is not explicitly stated in Article 44 (6) of the Law on Foreign Nationals in the Republic of Bulgaria. In comparison, it is explicitly stated in Article 44 (8) with regard to renewal of detention.

Therefore it depends on how the concrete judge will apply Article 15 of Directive 2008/115.

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

- *lack of due diligence;*
- *conduct of the country of potential return (e.g. an embassy 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);*

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 do not require clear information on its timetabling or probability to be corroborated with relevant statistics and/or previous experience in handling similar cases.

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.

Usually detention orders are grounded on a risk of absconding and no case law has been collected on the limb 'avoiding or hampering the preparation of return or the removal process'. In Bulgarian law and practice the meaning of avoiding the preparation of return or the removal process is interrelated with the concept of risk of absconding. Thus Article 44, Para.6 of the Law on Foreign Nationals in the Republic of Bulgaria (LFRB) states as a ground for detention only 'hampering of the removal process' or the risk of absconding. Then §1, point 4 of the Additional Provisions of the LFRB provides a legal definition of the term 'risk of absconding', which encompasses avoiding of the removal process.

In practice the discussion is focused on the illegal border crossing attempts (especially if the TCN tried to exit Bulgaria in order to continue his/her way to another country – e.g., Judgment of the Sofia City Administrative Court in case No.649/2014) or to the inability of the TCN to present identity documents and its consequences (see, e.g, the differing practice in this regard of the Sofia City Administrative Court, e.g., Ruling in case No.12187/2013, and the Haskovo Administrative Court, e.g., Ruling in case No.219/2013).

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 mere fact of an illegal stay or entry? (ECJ, *Achughbabian)*

YES

In the case of Ahmed, Judgment of 12 January 2012, the Supreme Administrative Court (SAC) held that 'the overall conduct of Mr. Ahmed – illegal entry into the country, the lack of an identity document or any document certifying, the declared purpose of residence, the omission of any other reasonable basis for residence in the country, the lack of contacts in the country, the lack of funds for maintenance, unavailability of medical insurance, in their totality represent facts that constitute reasonable suspicion of a risk of absconding'.

In the case of Shishich, Judgment of 5 August 2011, SAC held that 'the competent authorities did not prove the existence of facts to justify the conclusion (that a risk of absconding existed). The mere citation of the prerequisite does not prove its existence. The competent authorities did not regard that Mr. Shishich has lived in Bulgaria for more than fifteen years; that he has family relations; a child; social environment that knows him and supports him. All these facts do not support the authority's conclusion that there is a risk of absconding.'

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

YES

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?

§1, point 4v of the Additional Provisions of the Law on Foreign Nationals in the Republic of Bulgaria (LFRB) provides a legal definition of the term 'risk of absconding'. According to it, a risk of absconding of a person against whom there is a removal order exists '*when in the light of the facts one can make a reasonable assumption that the same person will try to deviate from the implementation of the imposed measures. Data in this regard may be the fact that the person cannot be found at the pointed address of residence, presence of previous infringements of the public order or previous convictions regardless of rehabilitation, the fact that he has not left the country within the given period for voluntary departure or he has clearly shown that he will not comply with the imposed measure, the fact that he has forged documents or has no documents at all, he submitted false information, he already absconded, he has not complied with the prohibition of entry, and others*.'

The consideration whether there is a risk of absconding goes beyond the mere fact of an illegal stay or entry. Precedent-setting in this regard has been Judgment of 05 August 2011 of the Supreme Administrative Court in case No. 13868/2010, Schishich. In this judgment SAC invoked *inter alia* Recital 6 and 13 of the Preamble of Directive 2008/115. The court made the conclusion that the consistent interpretation of the national law in relation to the EU law required the authorities to take into account also other facts such as the ones specified in Article 44, Para.2 LFRB, namely '*the authorities shall take into account the duration of the alien's residence in the Republic of Bulgaria, the categories of vulnerable persons, the existence of proceedings under the Law on Asylum and*

Refugees or proceedings for renewal of a residence permit or other authorization offering a right to stay, his family situation, and the existence of family, cultural and social ties with the country of origin.'

In spite of the above, statistics and evidence-collection research (e.g., www.hear.farbg.eu) show that detention is imposed as a measure of first resort in Bulgaria. According to the Ministry of Interior data, in 2015 there were 11 902 detained persons in the Bousmantsi and Lyubimets detention centres in Bulgaria. At the same time, for the same year 2015 the number of persons who were removed is 755[1].

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

Yes, another detention ground is the need to establish one's identity. According to Article 44, paragraph 6 of the LFRB, detention is imposed when the foreigner 'is unidentified, hampers enforcement of the order or there is a risk of absconding'. According to a recent analysis of 55 rulings of the Sofia City Administrative Court, related to the detention of migrants, '(t)he most common legal reason for issuing a detention order, according to the reviewed court decisions, was that the identity of the foreigner was not established'[2]. This detention ground under Article 44, paragraph 6 of the LFRB that the foreigner is not identified, is not a detention ground under Article 15, paragraph 1 of the EU Return Directive and thus contradicts the EU Directive. In spite of that, currently in Bulgaria there is a new draft law amending the LFRB that introduces an additional type of immigration detention lasting for up to 30 days, which purpose is 'to conduct the initial identification and establishment of identity and to assess the subsequent administrative measures that should be imposed or taken'.

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

YES

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

There is one alternative to detention envisaged in Bulgarian law – weekly regular reporting to the authorities. However, the alternative to detention is not discussed in the detention orders (see, e.g., evidence collection at www.hear.farbg.eu).

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

YES

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.*

In theory, yes. Article 44, Para. 5 of the Law on Foreign Nationals in the Republic of Bulgaria (LFRB) envisages weekly reporting to the authorities in the following way: '*When there are*

[1] Decision No. 812100-12241 of 16 May 2016 to provide access to public information, Ministry of the Interior of the Republic of Bulgaria

[2] Center for Legal Aid – Voice in Bulgaria, *Reasons for Detaining Migrants Easy to Find, Study of Court Decisions Shows*, 1 February 2016, Accessed on 17 June 2016 at http://detainedinbg.com/blog/2016/02/01/reasons-for-detaining-migrants-easy-to-find-study-of-court-decisions-shows/

obstacles for the foreigner to leave the country immediately or to enter another country, by order of the authority that issued the order for imposing compulsory administrative measure, the foreigner is obliged to appear weekly in the territorial structure of the Ministry of Interior at his residence in the manner determined by the rules implementing the law, unless the obstacles to the implementation of the deportation or expulsion, cease to exist and measures are scheduled for the forthcoming removal.'

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*)

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)

The court requires the TCN to provide evidence with regard to meeting the requirements under Article 72 of the Implementing Rules of the LFRB for the application of the alternative to detention. The procedure for imposing weekly reporting is stipulated in the Implementing Rules of the LFRB, Article 72. In case the TCN does not dispose himself/herself with accommodation and means of existence in Bulgaria, another person has to provide those to him/her. The latter signs a declaration on the residence address of the alien and provides proof of sufficient means of subsistence for the TCN in an amount not less than the lowest social pension for the country.

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.)

The duration of initial detention is six months. It can be extended twice by six more months up to the maximum time limit of 18 months. The duration of detention starts to run from the date of placement in the detention centre for immigrants. There is no collected case law on the interpretation of the term 'as short as possible'.

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?

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.

In the case of Mr. Ebadi, who had been detained for 1 year and 14 days at the time of the court's decision, the court (SCAC, case No.11493/2015) found that the detention of Mr. Ebadi was unjustified as to the efforts made by the competent authorities and disproportionate as to the restriction of his rights, because for 12 months the competent authorities had not taken actions to establish the data necessary for his removal. The aim to expel the person could be achieved with a less coercive measure. Therefor the Court quashed the detention and imposed less coercive measure.

In the case of Mr. Syudits (SAC, case No.8041/2015) the court stated that 'the competent authority must prove concrete actions to organize deportation (removal). In the absence of evidence of any concrete actions (the only evidence presented to the Supreme Administrative Court – the verbal note

to the Embassy of the Islamic Republic of Afghanistan for common cooperation between two countries – has no relation to the removal of Mr. Syudits) the prerequisites of Article 15 Directive 2008/115 are not met.'

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

As immigration detention in Bulgaria so far has taken place on the basis of removal orders under the Return Directive and not under the Reception Conditions Directive (recast), the period when asylum proceedings are pending have been taken into account when calculating the length of detention.

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)

According to Article 44, Para.8 of the LFRB, 'Exceptionally, if the person refuses to cooperate with the competent authorities or there is a delay in obtaining the documents required for the removal or expulsion, the period of detention may be extended to up to 12 additional months.'

Usually both lack of cooperation by the TCN and delays in obtaining the necessary documentation from the third country are invoked in the decision for renewal of detention as interrelated grounds. See, e.g., the rulings of the Sofia City Administrative Court in cases No.12187/2013, 4514/2013, 6950/2013 and No.7928/2013.

In practice courts in Bulgaria do not carry out an assessment whether the circumstances under Article 15 (1) continue to exist, except for the cases, in which the TCN has changed the administrative status from an irregular migrant to an asylum seeker.

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

According to Article 46a, Para.5 of the LFRB, when the court repeals the contested detention order or issues a decision for release (upon review of the duration of detention), the TCN 'is released immediately'. However, as the court's decision might be appealed by the administrative authority before the second level of jurisdiction, the court might (be asked to) order preliminary execution of its judgment. For the latter, see, for example, the Ruling of 06 June 2014 of the Sofia City Administrative Court in the Mahdi case, case No.1535/2014 of the Sofia City Administrative Court and case C-146/2014 of the Court of Justice of the European Union.

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.

Not applicable.

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

YES

There is no explicit regulation of this issue in national law. In Bulgaria TCNs are released from detention without being given any leave to remain (unless they are asylum seekers) and there is no regularization mechanism either. Therefore upon consecutive administrative controls or checks they are vulnerable to re-detention. For example, this happened to the TCN in case No.3258/2011 before the Sofia City Administrative Court.

This has been one of the issues raised by the national court in the case of Mahdi, case C-146/2014 of the Court of Justice of the European Union. Following the CJEU judgment, the authorities started to provide released TCN with a paper stating the ground on which they have been released; However this paper is not a leave to remain.

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

The Law on Legal Aid (LLA) does not envisage legal assistance at first instance administrative procedures, that is, in the administrative procedure when an immigration detention order is issued. Legal aid concerns only access to the court upon appeal, as well as representation in court. As of 19 March 2013 Article 22 of LLA provides that the legal aid in the form of legal advice and for preparation of documents for bringing the case to the court is provided free of charge to *inter alia* 'foreign nationals' against whom a coercive administrative measure (deportation, expulsion or entry ban) is imposed and foreign nationals in immigration detention, 'who do not have the means and wish to have legal assistance' (Article 22, Paragraph 9 of LLA).

However this is not ex officio or automatic legal aid. In order to access it, the person has to make an application and submit respective evidence with regard to his/her legal situation and lack of means. The application for legal assistance in accessing the court is made before the head of the National Bureau for Legal Aid. The application for representation in an initiated court case is made before the respective court. However, in spite of the amendments of 19 March 2013, as of today there is no practical application of this new right to legal aid. Access to it seems to be highly problematic.

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

Please elaborate further, including the practice in your Member State

The LFRB provides for immigration detention centres for TCN that are formally called 'Special Homes for Temporary Accommodation of Foreigners'. Only immigration detainees are detained there. They are under the auspices of the Migration Directorate at the Ministry of Interior.

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 applicable

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?

The material detention conditions are provided in an Ordinance on the Special Centres for Temporary Accommodation of Foreigners, adopted by the Minister of Interior. It provides for rules on external contacts with family members, visits from legal representatives, access to information, etc.

In a landmark judgment[3] of 7 January 2016 the Supreme Administrative Court repealed the regulation of solitary confinement in the above mentioned Ordinance adopted by the Minister of the Interior as unlawful. SAC noted that the regulation of the issue for the first time in an Ordinance adopted by the Minister and not in a law adopted by the Parliament contradicted the requirements of the Constitution of the Republic of Bulgaria.

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)

As far as detention centres for irregular migrants (unlike open centres for asylum seekers) are concerned, the issue has not arisen in practice and has not been explicitly regulated in law.

[3] Judgment No.164/07 January 2016 of the Supreme Administrative Court in case No.973/2015, available at http://www.sac.government.bg/court22.nsf/d038edcf49190344c2256b7600367606/0b4635e86e019a3dc2257f29003cf3a0?OpenDocument (last visited on 10 July 2016)

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

There is no case law in this regard. Usually detention conditions might be assessed as part of the judicial review of the lawfulness of the detention order in view of its proportionality in cases of vulnerable persons. For example, case C-8/2016 SCAC noted that according to the medical expert report heard in the case, 'the sanitary conditions in which currently the person is accommodated are incompatible with his health – there is a real risk of worsening of his diseases, and in the near future this might lead to respiratory and cardiac failure'. However the judge pointed out that it is not the very detention that was 'unfavourable' for the health of the detainee, but the concrete conditions in the room where he was placed. Therefore, the judge allowed the extension of the period of detention of the TCN.

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

To the knowledge of the researcher, there have not been such cases in Bulgaria.

There is a case, in which the court took into account the health condition of the TCN, along with the length of his detention, and found the extension of the length of detention to be incompatible with Article 5 c of the Return Directive (Judgment of SCAC in case No.2518/2015).

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?

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

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?

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.)

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 in this regard in the field of immigration detention.

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?

NO

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.?

In Bulgaria there is case law on the difference between detention of irregular migrants under the Return Directive and detention of asylum seekers under the recast Reception Conditions Directive. This case law is based on the consideration that the purpose of immigration detention under the Return Directive is removal, while asylum seekers have a right to remain on the territory. Therefore, upon submission of an application for asylum, the TCN can no longer be detained for the purpose of removal and must be released from detention. See, for example, cases No.9636/2011 and 2518/2015 before SCAC and cases No.13444/2011, 8069/2014 and 296/2015 before SAC.

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 transposition of the Return Directive has brought two major changes in Bulgaria:

1) Admissibility of judicial review of detention orders (previously detention orders were regarded as part of the implementation of removal and appeals against detention orders were regarded inadmissible);
2) A time limit of up to 18 months of the period of detention (previously there was no time limit).

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 CJEU judgment in the case of Mahdi has brought clarity on the competence of the court with regard to extension of the length of detention (see answer to Q.1. at page 3 above).

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.

The need to establish one's identity should not be a formal ground for detention. Article 44, paragraph 6 of the LFRB, which provides that detention is imposed when the foreigner 'is unidentified, hampers enforcement of the order or there is a risk of absconding' should be amended to be in line with Article 15, paragraph 1 of the EU Return Directive. According to the latter, the fact that the foreigner is not identified is not a detention ground.